Court File No. A-000-09

FEDERAL COURT OF APPEAL

B E T W E E N:

ERNEST HEMINGWAY

Appellant

- and -

COUNT LEV NIKOLAYEVICH TOLSTOY

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

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PART I – FACTS

Overview

1. The respondent agrees with the appellant that, ordinarily, a memorandum of fact and law will be more persuasive if it is written in the style of Hemingway rather than that of – or at least that ascribed by Hemingway to – Tolstoy. However, the memorandum-writer should also be guided by Tolstoy's reflection that "[t]here is no greatness where there is no simplicity, goodness and truth."

2. The respondent also accepts that, with the exception of those expressed to apply solely to the appellant's memorandum, the many helpful suggestions in the appellant's memorandum apply equally in preparing the respondent's memorandum. Within that framework, this memorandum attempts to highlight some of the distinctive challenges, and approaches to consider, in preparing the respondent's memorandum in an appeal. It includes in parentheses some examples for illustration, taken or adapted in most instances from filed documents.

The respondent's overview

3. If anything, the overview may be even more important for the respondent than for the appellant. It provides an early opportunity to refocus the Court of Appeal on seeing the appeal from the respondent's perspective.

4. The respondent's overview can, for example:

- set out the main themes that the respondent will argue

  ("The application judge made no error of law in concluding that, properly interpreted, [the provision in issue] makes these benefits available only to entities that are public authorities in Canada. This interpretation accords with the words and the context of the provision and with the intention of Parliament.")

- put squarely in issue the correctness of a central premise of the appellant's memorandum

("The appellant suggests that the Supreme Court's decision marked a wholesale shift in the law of obviousness. This suggestion is incorrect.")

- remind the court of the applicable standard of review, which the appellant might have neglected to address

  ("The appellant seeks through these arguments to have the court reverse findings of fact and mixed fact and law, without meeting the requirement to demonstrate palpable and overriding error.")

- put up front a key fact or piece of evidence that the appellant has failed to mention

  ("While the appellant argues that, according to Hemingway, Tolstoy's writing contains much unnecessary detail, he fails to acknowledge that Hemingway himself described *War and Peace* as 'the best book I know,' and told an interviewer, '[N]obody's going to get me into any ring with Mr. Tolstoy unless I'm crazy or keep getting better.'")

5. The respondent's overview – like the appellant's for that matter – should avoid citations and definitions. They are almost always unnecessary; they can also distract from the message of the overview and disrupt its flow. Any that are truly necessary can ordinarily be inserted later in the memorandum.

The respondent's statement of facts should be free-standing

6. While the respondent's memorandum should be responsive to the appellant's, the respondent's memorandum, and especially the statement of facts, should be free-standing: it should be capable of being read alone, without reference to the appellant's memorandum. The judicial reader should not be burdened with having to refer to the appellant's memorandum to make sense of the respondent's.

> T.A. Cromwell, "Effective Written Advocacy in Factums", in *Effective Written Advocacy* (T.A. Cromwell ed. 2008) at 64

No requirement of paragraph-by-paragraph acceptance or rejection of the appellant's facts

7. Unlike some other courts' factum rules, Rule 70 contains no requirement that the respondent's memorandum contain a statement of agreement or disagreement with the appellant's summary of facts on a paragraph-by-paragraph basis. There is therefore no reason to include a paragraph along the lines of "The respondent accepts the facts set out in paragraphs 3, 6, 17(a) and 19 of the appellant's memorandum, but with respect to paragraph 21 …." A paragraph of this kind not only is not free-standing, but also has no persuasive value.

8. However, it is helpful for the respondent to tell the court – though by description rather than exclusively by paragraph number – if it agrees with certain portions of the appellant's statement of the facts, especially where the respondent

- will not be dealing with facts that the appellant has covered

  ("The appellant has accurately summarized in its memorandum the nature of the application in the Federal Court.")

- will be using the appellant's (partial) summary as a jumping-off point for its own discussion of facts that it considers important

  ("The descriptions of the genesis of the deferral accounts at paragraphs 8 to 21 of X's factum and paragraphs 19 to 25 of Y's factum are generally accurate as far as they go, but do not fully reflect the underlying rationale for the accounts or the function that they served in the Commission's regulation of rates.")

Imposing the respondent's own structure on the facts

9. The respondent should feel free to approach the summary of the facts from its own perspective. The appellant might have taken a chronological approach in setting out the facts, while a thematic approach works better for the respondent's argument. Even if the appellant has adopted a thematic approach, the themes most helpful to the respondent's argument will typically be different. The respondent should consider using its own themes in structuring its summary of the facts.

Including all of the facts necessary for the respondent's argument

10. It is essential to give the Court of Appeal all of the facts that support the respondent's arguments about why the Court should not interfere with the decision under appeal. These will often be facts that the appellant wants to minimize or have the Court of Appeal ignore. They might not appear at all, or might not be given sufficient prominence, in the appellant's memorandum. The respondent will want to ensure that its summary both includes and highlights these facts.

11. For example, the appellant

- might not have dealt at all with, or set out key components of, the relevant statutory scheme

  ("Part III of the Act gives the Commission broad rate-setting powers. Section 24 provides, among other things, that "[t]he offering and provision of any telecommunications service by a Canadian carrier are subject to any conditions imposed by the Commission." Section 27(1) provides that all rates charged by a Canadian carrier must be just and reasonable. The Act then confers on the Commission wide latitude in setting just and reasonable rates.")

- might have omitted a potentially important part of the story

  ("Z goes on to state in paragraph 45 of its memorandum that '[i]t is beyond doubt that Parliament enacted the 1932 Act for the purpose of complying with Canada's obligations under the Paris Convention [the *Paris Convention for the Protection of Industrial Property*, revised at The Hague on November 6, 1925].' This statement is not entirely accurate. The general note included in the explanatory notes to the Bill that became the 1932 Act refers to two purposes, one of which appears to have nothing to do with the Convention.")

- might not have included a portion of the reasons below on which the respondent wants to rely

  ("The application judge went on to find that the legislative history of s. 9(1)(n)(iii), and its predecessor provisions in the *Unfair Competition Act*, buttressed her interpretation of the provision.")

Neutralizing the key facts that support the appellant's position

12. This is much easier said than done. But it is far better for the respondent to face up to and try to neutralize, qualify or undermine the relevance of the "bad" facts that the appellant has marshalled than to ignore them. The available techniques include attacking the relevance of the "bad" facts, leading with any "good" facts, expressly acknowledging the "bad" facts but adding some "good" ones, and juxtaposing the "good" and the "bad".

> D. Stratas, "Walking on Thin Ice: Exploiting Strengths and Managing Weaknesses", in *Effective Written Advocacy* (T.A. Cromwell ed. 2008) at 107-108

Making full use of the reasons of the court below

13. The respondent will almost always be able to find at least some help for its position in the reasons for the decision under appeal.

14. Particularly where the applicable standard of review calls for deference, the respondent should include in the summary of the facts a précis of – or where quotations are more compelling, brief quotations from – the portions of the reasons on which the respondent will rely in arguing that the judgment under appeal should stand.

15. It is especially important to set out findings of fact in the respondent's favour.

16. It is also important to set out portions of the reasons that show that the judge at first instance did what the trial, application or motion judge is supposed to do – that the judge weighed the evidence, considered the relevant law or had regard to the factors that properly bear on the exercise of a discretion.

Tabulating the evidence that supports a key finding

17. Where the appellant attacks a finding of fact, the respondent should consider setting out in list form the evidence that supports the finding. The respondent can return to or even repeat the list in the argument portion of the memorandum.

> J.I. Laskin, *Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums*, available online at http://www.ontariocourts.on.ca/coa/en/ps/speeches/forget.htm

PART II – POINTS IN ISSUE

18. The respondent should consider whether to accept and respond to the issues as framed in the appellant's memorandum, or to recast them from the respondent's perspective.

19. The latter approach may be better where, for example, the appellant's statement of the issues ignores the standard of review or does not address alternate grounds for upholding the judgment under appeal.

> ("The issues in this appeal from the respondent's perspective, and the respondent's position on these issues, are as follows:
>
> (1) *What is the applicable standard of review in this appeal?*
>
> This appeal turns on findings of fact or findings of mixed fact and law. The applicable standard is the deferential standard of palpable and overriding error.
>
> (2) …..")

20. Recasting the issues may sometimes be not just better, but essential. The appellant may have the better case on the issues as the appellant has framed them. The respondent's only chance to uphold the judgment under appeal may be to raise a different issue; for example, that the error is not fatal under the applicable standard of review, that there is another, legally defensible basis for coming to the same conclusion, or that the appeal is moot or out of time.

21. When the respondent recasts the issues, the issues as recast should nonetheless cover and respond to all of the issues set out by the appellant. It is helpful to be explicit about how the appellant's issues have been recast, so that the Court of Appeal can follow the respondent's argument and is not left guessing at the respondent's position on the issues that the appellant has identified.

22. If a point raised as an issue in the appellant's memorandum is truly not in issue, the respondent should say so in the "points in issue" portion of the memorandum. This will be appropriate where, for example,

- the respondent accepts the standard of review posited by the appellant

  ("The respondent accepts that the standard of review in this appeal is correctness. The remaining issues are whether ….")

- the respondent's position is that the court below committed a harmless error

  ("The respondent accepts that the application judge erred by …. The issue in this appeal is whether, in view of her many other findings, this error was an overriding error, one that justifies setting aside her order. It was not.")

PART III – SUBMISSIONS

Dealing with the standard of review

23. In many appeals the standard of review is the respondent's best ally. Unless the standard of review is truly not in issue, the respondent should begin its submissions by addressing it, ordinarily briefly. There is in most cases no more reason for the respondent to strain the court's patience by writing a treatise on standard of review – a point that arises in every case – than there is for the appellant.

24. If, however, there is a genuine dispute about what standard of review applies, it may be necessary to deal with the point at greater length. This may entail characterizing – or, if appropriate, recharacterizing – the errors that the appellant alleges in a manner that attracts a more deferential standard.

> ("While the appellant argues that the motion judge exceeded her jurisdiction, so that her decision is reviewable on the correctness standard, the appellants' real complaint is with the manner in which she exercised a discretion. This Court may therefore interfere with her decision only if ….")

The respondent's editing checklist

25. The editing process described in paragraphs 23 to 25 of the appellant's memorandum is just as vital for the respondent's. A checklist for editing the respondent's memorandum that corresponds to the list set out in paragraph 24 of the appellant's memorandum would include the following questions:

- Does the memorandum squarely address each of the errors alleged by the appellant?
- Does it include all of the facts and law necessary to support each of the respondent's counter-arguments?
- Does it include, on the other hand, any facts, citations or arguments that are unnecessary, and that should therefore be edited out?
- Does it include, even within the facts and law necessary to support each of the counter-arguments, any words that are unnecessary, and that should therefore be edited out?
- Are the various parts of the memorandum congruent: do the overview, facts and argument match up?

PART IV – ORDER SOUGHT

26. In most cases this part of the respondent's memorandum is straightforward: the primary relief sought will be an order dismissing the appeal. Rule 70(1)(d) requires a concise statement of any order sought concerning costs.

A concluding note

27. Like any good writing, good factum-writing, whether for the appellant or the respondent, is not easy. To borrow from the appellant's own words, "For a long time now I have tried simply to write the best I can. Sometimes I have good luck and write better than I can."

> E. Hemingway, Interview with George Plimpton, *The Paris Review* #18 (Spring 1958), available online at http://www.switchfoot.com/lcp/index.php?theIssue=2&theSection=words&theSubSection=interview

28. May this session help bring luck in drafting factums on appeal.

April 30, 2009

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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