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

MEMORANDUM OF FACT AND LAW OF THE APPELLANT

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP
Barristers
Suite 2600
130 Adelaide Street West
Toronto, ON M5H 3P5

Tel: (416) 865-9500
Fax: (416) 865-9010

Ronald G. Slaght, Q.C.
Marguerite Ethier

Counsel advocating for the style of
Ernest Hemingway

1. Two Ontario Court of Appeal Judges have likened Tolstoy's War and Peace to a bad factum:

> In addition to being known for its length, the novel is distinguished by its incomprehensibility. … By the time the reader finishes Chapter 4, he or she is hopelessly confused about who is who, which villain is doing what, why he is doing it, and whether he has got the right victim. If you can duplicate this, you have the potential to write the Truly Bad Factum.

Reference: Justice Marvin Catzman and Justice Steven Goudge, *The Wrong Stuff - How to write a truly bad factum*, Chapter 5 in Effective Written Advocacy, Justice Thomas A. Cromwell, Ed., Canada Law Book, 2008.

2. Ernest Hemingway's opinion of factums is unknown. Of War and Peace, we know more. In his early writings, Hemingway described this tome as "the best book I know".

Reference: Ernest Hemingway, Letter to Archibald MacLeish, 1925, excerpted in Ernest Hemingway on Writing, Larry Phillips, Ed., Touchstone Books, 1984.

3. Nevertheless, Hemingway shunned Tolstoy's layered approach:

> I can write it like Tolstoi, and make the book seem larger, wiser, and all the rest of it. But then I remember that was what I always skipped in Tolstoi. … I don't like to write like God. It is only because you never do it, though, that the critics think you can't do it.

Reference: Ernest Hemingway, Letter to Maxwell Perkins, 1940, excerpted in Ernest Hemingway on Writing, Larry Phillips, Ed., Touchstone Books, 1984.

4. This is an appeal to advocates to write persuasive factums in the style of Hemingway, not Tolstoy.

OVERVIEW

5. The *Federal Courts Rules* do not require an Overview, but an Overview should always be included. Grab the court's attention. Make the court want to keep reading. Tell the story, in human terms, not in legalese. Occupy the moral high ground, whenever possible.

6. After that, and only then, briefly describe the issues on the appeal. What are the errors that were made below? The court needs to have in mind the legal issues while it wades through the ten pages of technical patent detail that you are about to provide.

PART I – THE FACTS

7. Rule 70(1) of the *Federal Courts Rules* requires only that the statement of fact be "concise". This is easier said than done:

> There is no better writing on war than there is in Tolstoy, but it is so huge and overwhelming that any amount of fights and battles can be chopped out of it and maintain all their truth and vigor and you feel no crime in the cutting.
>
> **Reference: Ernest Hemingway, Men at War, New York, Crown Publishers, 1942, at xvii, quoted in Hugh McLean, "In Quest of Tolstoy" at p. 204, Boston, Academic Studies Press, 2008.**

8. The facts section is an important element of persuasive advocacy. The court will read the appellant's factum first. By all means, characterize the facts of

the case in a manner that is most favourable to your side, but do not overstate or mis-state the facts. You will lose your credibility with the court, and provide the respondent with ammunition.

9. You are the appellant. Before tackling the facts, sort out what standard of review you must meet. Be cruel to yourself – no sugar coating. Then write the facts to meet that burden. This is also the time to jettison those grounds of appeal (see below) that cannot meet the test.

10. Where possible, use the findings of the trial judge for your recitation of the facts.

PART II – THE POINTS IN ISSUE

11. The points in issue should be drafted before anything else. You may have delivered a very broad notice of appeal. Not all grounds of appeal will be strong. A carefully drafted list of points in issue maximizes your opportunity to control and direct the question for the court's determination. This is your chance to establish the agenda.

12. The points in issue also provide structure to your factum and to your oral argument. They are the roadmap for the court on three occasions - on the first read of the factum, during your oral argument, and when the court is writing its judgment.

PART III – ARGUMENT

Issue One: Standard of Review

13. The standard of review is a key aspect of any appeal - but a treatise is not necessary. The court knows its own jurisdiction. You can assume that the Federal Court of Appeal has passing familiarity with *Pushpanathan*, *Housen v. Nikolaisen* and *Dunsmuir*. Cite one or two cases. Not ten. The issue is not often what is the standard – but do you meet it.

Reference: The Honourable Justice Marshall Rothstein, *Some tips on oral advocacy*. www.davidstratas.com/queensu/Rothstein/html.

Issue Two: Context before details

14. Judges have written many papers on appellate advocacy. A common theme is "point-first" writing. Context before details: state your point before you delve into the nuance of the argument. The factum should not be a mystery novel.

Reference: The Honourable Justice John I. Laskin, *Forget the wind-up and make the pitch: Some suggestions for writing more persuasive factums*, (Summer 1999) 18 Advocates' Soc. J. No. 2, 3-12.

Issue Three: Credibility requires that you confront adversity

15. Your case is not perfect. You are, after all, the appellant. At least one intelligent person thinks you are wrong.

16. One of the most difficult jobs as an advocate (either at trial or on appeal) is to narrow the issues and leave arguments behind. If you don't win the appeal

on any of your three strongest grounds, you will certainly not win on the ten weakest.

17. Most advocates know what their strong arguments are, but we all hope that we might win the case on a fringe issue. Fringe issues seldom carry the day. Have the courage of your convictions. Discard the arguments and the grounds of appeal that have no chance of winning.

Reference: The Honourable Justice John I. Laskin, *Forget the wind-up and make the pitch: Some suggestions for writing more persuasive factums*, (Summer 1999) 18 Advocates' Soc. J. No. 2, 3-12.

18. You should know the weaknesses of your case. Deal with bad facts and bad authorities in your factum. Address them head on - don't wait and imagine that they won't arise at the hearing, or that you can deal with them on the fly. If you have an answer in your factum, your oral argument will be more focussed, and you might even have convinced the court of the correctness of your position.

19. The weakness in your case cannot be concealed from an appellate court. Even if your opponent misses the issue, the court will not. Ernest Hemingway understood this:

> If a man writes clearly enough, any one can see if he fakes. (...) True mysticism should not be confused with incompetence in writing which seeks to mystify where there is no mystery but is really only the necessity to fake to cover lack of knowledge or the inability to state clearly. Mysticism implies a mystery and there are many mysteries; but incompetence is not one of them; nor is overwritten journalism made literature by the injection of a false epic quality. Remember this too: all bad writers are in love with the epic.

Reference: Ernest Hemingway, Death in the Afternoon, Scribner, New York, p. 54.

Issue Four: Verbosity is not a virtue

20. Persuasive factums are concise factums. Strunk and White describe the best writing as concise:

> Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reasons that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.

Reference: William Strunk Jr. and E.B. White, The Elements of Style, 4th Edition, p. 23, Longman Books, 2000.

21. It is not necessary to tiptoe up to the page limit. If your factum is 15 pages long, the court will thank you for it. Justice Rothstein writes that in the Federal Court, two-thirds of factums are 28 - 30 pages long. The first thing he does when he picks up a factum is to see how many pages he has to read. If it is 30 pages long, he gets discouraged. If it is too dense, he counts lines to see if the 30 line/page rule has been adhered to. If the margins are narrow and the font small, he becomes "dejected and resentful". He states that judges who are fortunate enough to receive a short concise factum consider it an act of mercy.

Reference: The Honourable Justice Marshall Rothstein, *It's English, but what's your point? Writing factums that even a judge can understand*, Chapter 1 in Effective Written Advocacy, Justice Thomas A. Cromwell, Ed., Canada Law Book, 2008.

22. Resist the urge to fill the white space.

> My temptation is always to write too much. I keep it under control so as not to have to cut out crap and re-write. Guys who think they are geniuses because they have never learned how to say no to a typewriter are a common phenomenon. All you have to do is to get a phony style and you can write any amount of words.

Reference: Ernest Hemingway, Letter to Maxwell Perkins, 1940, excerpted in Ernest Hemingway on Writing, Larry Phillips, Ed. 1984 Touchstone Books.

23. Even Ernest Hemingway had to edit. He described the process in a letter to F. Scott Fitzgerald as "I write one page of masterpiece to ninety one pages of shit. I try to put the shit in the wastebasket".

Reference: Ernest Hemingway, Letter to F. Scott Fitzgerald, 1934, excerpted in Ernest Hemingway on Writing, Larry Phillips, Ed. 1984 Touchstone Books.

24. In appellate factum writing, there are many reasons to edit. Edit for what is not there, as well as for what is there. It is practical to edit the factum for different purposes at different times, in approximately this order:

- Does it clearly identify the errors that require appellate intervention?
- Is it concise and persuasive?
- Does it include too many issues - have you culled the weaklings?
- Is it credible?
- Does it anticipate and neutralize the respondent's arguments?
- Does it correctly cite the evidence, and the law?

- Have the cases been updated, and does it bring any binding adverse authority to the attention of the court?
- Does it ask for relief including costs?

25. It should take as much time to edit your factum as to write it. In a recent speech, Justice Rothstein described preparing a very short speech. It took him one hour to write, and 12 hours to edit. (The status of his wastebasket is unknown). Factums are similar.

Reference: The Honourable Justice Marshall Rothstein, *Some tips on oral Advocacy from Justice Rothstein.* www.davidstratas.com/queensu/Rothstein/html.

Issue Five: Powerpoint is not necessarily a good thing

26. Intellectual property cases present special challenges for written advocacy. Complicated technical concepts need to be made accessible to the court. Concepts and technical information can be very effectively organized with diagrams and charts - but, a picture is not always worth a thousand words.

27. By relentlessly formatting an argument into bulleted slides, seven words per line, seven lines per slide, the advocate can lose the opportunity for interaction and intimacy with the judge. Perhaps the only thing worse than "I'll answer that question after the lunch break" is "I'll show you that slide after the lunch break".

28. Powerpoint can be a trap for the unwary. Powerpoint is "strangely adept at disguising the fragile foundations of a proposal... with the visual distraction of a dancing pie chart, a speaker can quickly move past the laughable flaw in his argument".

Reference: **Ian Parker, *Absolute Powerpoint: Can a software package edit our thoughts?* The New Yorker, May 28, 2001 pp. 76-87**

PART IV – ORDER SOUGHT

29. Writing a conclusion should be easy if the Overview was good, and your factum stayed true to its theme. Answer the points in issue in the conclusion. Be sure that the court has the jurisdiction to grant the relief you are requesting.

Reference: **Eugene Meehan, Q.C., *Ten Tactical Techniques to Stay on Track*, OBA Annual Institute, Civil Litigation Section, January 29, 2004. Mr. Meehan's article contains an excellent bibliography on written advocacy.**

30. In the words of the late Justice Marvin Catzman:

> And conclude your factum as you would a Russian novel. Leave the court guessing whether, where, and how it ends. Never disclose who should win, who should lose, or what should happen and to whom. Who cares? So you lose this appeal. Big deal. It's the future that counts.

Reference: **The Honourable Justice Marvin Catzman, Losing Tip #9: *Make Your Factum Read Like War and Peace*, in Ethos, Pathos and Logos: The Best of the Advocates' Society Journal 1982-2004, at p. 297.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of April, 2009.

Ronald G. Slaght, Q.C.

Marguerite Ethier

PART V – LIST OF AUTHORITIES TO BE REFERRED TO

31. In a jurisprudential appeal, a long list of authorities is typical, and often necessary. The same is not true of an error-correction appeal. Do you really need 50 authorities in the appeal of a PMNOC proceeding? A crate of authorities will not intimidate the court into believing the merits of your position. You probably won't even refer to most of them. Exercise restraint.

32. A compendium, which is now required in most appellate courts (but not in the Federal Court of Appeal), is an essential tool for allowing the judges to manage the paper and to focus on your argument. Prepare the compendium as you write your factum. Give it to the court in advance of the argument, not when you arrive to argue. Your time in court should not be spent waiting for three frustrated judges to find and turn up page 4012 of Appeal Book Volume 42.

Reference: **The Honourable Justice Marshall Rothstein, *Winning Appellate Advocacy: Persuasive Presentations*, (2007) 32 Man. L. J. 163-73**