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Special Report: Tax Litigation Demystified

Pooja Samtani* and Justin Kutyan**

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* Of Osler Hoskin & Harcourt LLP, Toronto (e-mail: psamtani@osler.com).

** Of Tax Law Services, Department of Justice, Ontario Regional Office (e-mail: justin.kutyan@justice.gc.ca).

INTRODUCTION

At the 61st annual conference, the Canadian Tax Foundation hosted a seminar that brought together three judges experienced in hearing tax cases and one counsel well known and respected for arguing them: Justice Marshall Rothstein of the Supreme Court of Canada; Chief Justice Gerald J. Rip and Justice Eric A. Bowie of the Tax Court of Canada; and Wilfrid Lefebvre, QC of Ogilvy Renault LLP (now Norton Rose OR LLP). The seminar, moderated by Cheryl Gibson of Fraser Milner Casgrain LLP, provided a forum for the panel members to share their perspectives on the techniques used in successful tax litigation. A broad array of topics was canvassed at the seminar, including preparation for trial, presentation of evidence, arguments at trial and appeal, the importance of factual findings, the art of reading a judge, and the differences between trial and appeal techniques. What follows is our attempt to distill these proceedings in a way that preserves the original observations of the participants, but also exposes recurring themes that emerged in the course of the seminar.[1]

TRIAL PREPARATION

Setting Up for the Contest

Any lawsuit starts long before its orchestrated performance in the courtroom. The vast majority of litigators know this, although the difficulty often arises in putting such knowledge into practice. To those less familiar with the litigation process, a useful first step might be to conceive of a legal proceeding as unfolding in the way a play would on stage. Just as in theatre, success in litigation similarly hinges on the strength of the script or the story of the case, no matter how complex or controversial its content. There are stories that are well told, that foreshadow their direction and ultimate destination, and that carry the audience along and shape its expectations. The force of such stories is obvious. There are other stories that, no matter how rich in potential, bounce along like a pinball, making their errant and random way from post to flipper and back again. Despite the merits, a satisfying conclusion to the latter kind of story is less likely and, if it occurs, produces a sense of relief rather than confidence in a job well done.

In all cases, it is critical to have some idea at the outset of how the story will unfold and to determine how best to respond to its strengths and weaknesses. Recognizing the importance of setting the story straight, Bowie J focused in the first segment of the seminar on the various pretrial steps that are characteristic of most

1 We are grateful to the seminar participants for their review of a draft of this report and their consent to its publication. We also acknowledge the contributions of Wilfrid Lefebvre, whose observations at the seminar have been incorporated into the report, although not specifically attributed to him. J. Scott Wilkie and Marie-Thérèse Boris provided valuable comments on earlier drafts of the report. Any opinions expressed are those of the authors and not those of Osler Hoskin & Harcourt LLP, the Department of Justice, the minister of national revenue, or the Canada Revenue Agency.

cases. He suggested that, in any lawsuit, be it a tax appeal or any other kind of dispute, the procedure can be likened to an iceberg: what unfolds in the courtroom often represents only a sixth of the entire process.

Effective courtroom presentation requires and, to a large extent, depends on, extensive behind-the-scenes preparation. When it comes to preparation, however, there are no hard-and-fast rules. Counsel must simply adopt a system and consistently follow it. Cases can be tried without a system, and in fact, many of them proceed in this way. In all such cases, the court might well arrive at the desired result of its own accord, but there is no substitute for counsel implementing a carefully considered strategy that best accommodates the peculiarities of a case.

One of the very first steps that Bowie J recommended counsel should take when confronted with a new matter is to analyze the case in detail and develop a cohesive and viable theory. This process requires counsel to scrutinize the facts of the case and to evaluate them in the context of an overall plan. Counsel would be well advised in these circumstances to prepare a brief or maintain a trial book, which outlines all of the facts that are necessary to succeed at trial. What is the story? What are its critical elements? Does the story make sense? Is it compelling? In other words, counsel should develop a theory well in advance that will (1) inform each phase of the litigation, (2) operate as the unifying force between the various phases, and (3) lay the foundation for success at trial.

Noting the difficulty of "straightening out" facts at the appellate level, Bowie J observed that if a litigant gets the facts wrong or fails to prove them properly at trial, the case is "probably dead in the water" at that point. We infer from his comments the importance of staging a trial with as much attention to the factual details as to the legal arguments that frame the case.

Pleading and Proving the Story

Once a litigant has catalogued the facts that it will be required to prove, the second step is to consider the methods that may be used to do so. This step, of course, has a number of dimensions and invokes more than preparing a list of potentially salient factual and legal factors. Pleadings that do not tell stories ask the reader to do far too much work in knitting the facts together into a coherent composition, and they are exposed to the risk that the reader's perception and that of the litigant will not be the same.

Bowie J focused here on the ways in which a litigant may establish its case by reference to the pleaded facts. He cautioned that "the worst way" for a litigant to prove facts is to call a witness to testify to those facts, given the potential for witnesses to go rogue. At the opposite end of the scale, "the best kind of facts" are those that are admitted. Accordingly, when a taxpayer or its counsel drafts the notice of appeal, every effort must be made to plead the facts in simple terms such that the pleading will attract admissions. If a pleading contains convoluted paragraphs that are difficult to understand, it will likely not secure admissions. Admissions not only narrow the range of disputable items—legal as well as factual—but also implicitly implement the litigant's strategies to impel the presentation with a certain force and direction.

Bowie J stressed the importance of pleading with the ultimate audience in mind. The pleadings are in most cases the only documents that a judge will have perused the night before trial. Counsel must accordingly draft the pleadings in very clear terms, using plain language, and should ensure that it is easy for the judge to realize what is admitted and what is not. Stated differently, pleadings should identify what the story is and how it will be told.

No story can be complete without the essential facts. Therefore, every pleading should clearly define the material facts and the issues in dispute between the parties. Material facts are those that, if established at trial, will demonstrate that the party pleading is entitled to win, assuming that it also has the law right. Pleadings should not include facts that are immaterial, the evidence by which facts must be proved, or conclusions of law.[2]

In passing, Bowie J spoke of the ongoing debate about the role and scope of assumptions in the reply. In his view, the pleading of assumptions should be minimized.[3] Although his view is not universally shared, his concern is that pleadings have become increasingly detailed and cumbersome. He acknowledged that there are some judges at the Tax Court of Canada who are of the view that an appellant would be at an advantage to have all of the assumptions, voluminous as they may be, included in the reply and addressed at trial.

Bowie J also stated that appellants should seriously consider filing an answer. It is another opportunity for the appellant to speak to the judge early in the process, and to articulate its position on the assumptions as well as the arguments outlined in the reply.

Disclosing the Boundaries and Discovering the Details

Once the pleadings are closed, the next step in the pretrial process involves the disclosure of documents and discovery. This step enables each party to know the case that it will be required to meet, to discover the facts on which the opposing party relies, to narrow or eliminate the issues in dispute, to obtain admissions that will facilitate the proof of matters in issue, and to avoid surprises at trial.[4] But there is more to discovery than this. There are strategic and argumentative forces inherently at play, which, among other things, affect how the case will be perceived by a dispassionate adjudicator. This is where the story starts to take shape, to proceed

2 *Foss v. The Queen*, 2007 TCC 201, at paragraph 6. See also *Zelinski v. The Queen*, 2001 CanLII 406, at paragraphs 4 and 5 (TCC).

3 In assessing the tax liability of a taxpayer, the minister of national revenue makes findings or assumptions of fact. When pleaded, such assumptions place on the taxpayer the initial burden of disproving the facts upon which the minister relied in raising the assessment. The Crown is obliged to set out in the reply the assumptions of fact that underpin the assessment. See, for example, *Canada v. Loewen*, 2004 FCA 146, at paragraphs 3 to 10.

4 *General Electric Capital Canada Inc. v. The Queen*, 2009 TCC 246, at paragraph 14. For a useful summary of the principles governing the scope of discovery, see *HSBC Bank Canada v. The Queen*, 2010 TCC 228, at paragraphs 13 to 15.

from the skeletal state to a more defined state. It is also the stage where nascent imperfections, or opportunities, are exposed.

Bowie J addressed the rules governing the disclosure of documents, namely, rules 81 and 82 of the Tax Court of Canada Rules (General Procedure).[5] Rule 81(1) requires a party to list those documents of which the party has knowledge and on which it may rely to establish or to assist in establishing any allegations of fact made by that party, or to rebut any factual allegation made by the opposing party. Rule 82(1) requires full disclosure by a party of all documents that are (or have been) in its possession, control, or power relevant to any matter in question between or among the parties.

In the absence of agreement, a party demanding full disclosure under rule 82 may be required to bring a motion compelling production. More often than not, Bowie J noted, in a complex case the moving party succeeds. Irrespective of the scope of disclosure, however, each party must review the documents identified in its list of documents and determine whether all are required at trial. According to Bowie J, extraneous pieces of evidence can have the effect of diverting "the attention of the court from the stuff that really matters."

Bowie J noted that lists of documents can, and often do, include claims for privilege;[6] however, he lamented the fact that litigants have been increasingly inclined, at least before the Tax Court, to make blanket claims for privilege (that is, to claim privilege over all solicitor-client correspondence). He pointed out that privilege must always be asserted on a document-by-document basis, and also referred to the decision of the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*.[7] He suggested that that case is worth reading for many reasons, but particularly because it draws a clear distinction for the first time between solicitor-client privilege and litigation privilege.

Privilege notwithstanding, it is important for counsel always to remember that documents are subject to scrutiny. When preparing documents for clients or otherwise, counsel should operate on the assumption that their work product may become public and should be cautious when using casual language. This is particularly the case for accountants and other non-lawyers who provide tax advice and whose work product would not ordinarily attract the protections of privilege.

In the context of oral discovery, counsel should obviously take advantage of the process to gain further access to information and documents. Taxpayers' counsel, in particular, will want copies of the T20 audit report and the T401 appeals report, along with any other internal memorandums. These documents outline some of the factual assumptions made by the minister of national revenue in raising the impugned assessment and can assist in fact gathering. Counsel should, however, refrain from requesting or relying on extrinsic material addressing the treatment of the

5 SOR/90-688a, as amended.

6 See rule 82(2)(b).

7 2006 SCC 39.

taxpayer by the Canada Revenue Agency (CRA) during the audit and appeals process. Such information is not generally relevant at trial in determining the merits.[8]

On the issue of relevance, it is appropriate for counsel to object to irrelevant questions, although in certain cases it may be advisable in the interests of facilitating disclosure to let the nominee answer on discovery. If the question is in fact irrelevant, the answer is less likely to have a substantive impact at trial. There are times, of course, when the issue of relevance can assume greater significance, as evidenced by the decision of the Federal Court of Appeal in *Canada v. Aventis Pharma Inc.*[9] In that case, the taxpayer pleaded certain facts in the notice of appeal that essentially mirrored those set out in the proposal letter (issued by the CRA prior to the assessment). The Crown agreed that those facts had been assumed by the minister, but then proceeded in the reply to deny the truth of those facts, thereby opening the door to further discovery. The taxpayer refused on discovery to answer any questions pertaining to that series of facts (on grounds of relevance), and the Crown brought a motion to compel answers to those questions. The Federal Court of Appeal held that, while the Crown was not bound by the assumptions relied on by the minister and was entitled to defend an assessment using one or several alternative bases, the Crown did not advance an alternative position in this case and therefore could not use the discovery process to develop an alternative basis.

Returning to the methods by which a party may prove the facts pleaded, Bowie J addressed the role of admissions obtained on discovery. In this regard, he recommended that counsel prepare a list of required admissions in advance and secure such admissions on discovery in a form that can be read in at trial. In addition, Bowie J suggested that counsel should formulate a list of the key documents that will likely be used as evidence at trial and should adopt a probing approach when questioning the opposing party on discovery with respect to those documents. According to Bowie J, there is always room on discovery for exploratory questions that will alert a party to the "kind of ammunition" in the arsenal of the opposing party.

Defining the Debate

Bowie J suggested that in almost every lawsuit, "there are at least some facts that are beyond doubt." Accordingly, if a matter proceeds to trial, the parties should prepare and file a statement of agreed facts ("the agreed statement"). The agreed statement should include references to specific documents that the parties agree are relevant and admissible, and if a document is referenced, it should be attached.

When preparing the agreed statement, each party should carefully consider the terms on which it is agreeing to make documents part of the trial record. A party may, for example, wish to include a disclaimer indicating that it has not agreed to the truth of every fact stated in every document that is annexed to the agreed statement

8 *Main Rehabilitation Co. v. Canada*, 2004 FCA 403.

9 2008 FCA 316.

(unless the contrary is true). The agreed statement should also include a disclaimer indicating that the parties have agreed to the facts for the purposes of the trial only, and that neither party is precluded from calling evidence as to additional facts so long as that evidence does not contradict the facts in the agreed statement.[10]

Bowie J noted that requests (or notices) to admit facts and documents represent another practical method for establishing facts.[11] This method is not used as frequently as it should be, but it is useful, particularly where it would be expensive for a party to introduce evidence (for example, commission evidence). However, Bowie J cautioned that a party that does not respond to a request to admit may very well find that it has to pay the costs if the other party is then compelled to call witnesses at trial.

Rehearsing for Trial

In the majority of cases, the parties will call witnesses to provide supporting testimony. In this aspect of preparing a case, trial lawyers may be likened to the directors of a play. Even though the opposing directors may have differing views about the conclusion of the play, each has a responsibility to ensure that the audience is engaged. The witnesses are, of course, the actors: they need to know their roles, and to be prepared for developments on stage—errant entrances and exits, ad libs, and the like—all within accepted ethical limits.

Having regard to these limits, Bowie J addressed the issue of witness preparation. He noted that, when preparing a witness, counsel cannot compel the witness to provide answers that counsel wants to hear; however, counsel can explain what he or she wants to achieve with that testimony. Counsel should therefore discuss the answers that the witness is in a position to provide and the inconsistencies that may arise in relation to the questions proposed to be asked. If the witness is likely to be cross-examined, it is also important to provide the witness with copies of the documents that will be tendered as evidence at trial, as well as the discovery transcript, and prepare the witness by conducting a mock cross-examination before trial.

Bowie J reiterated his view that the worst way for a party to prove facts at trial is to elicit the evidence through a witness. A party can, and should, prepare its witnesses well, but witnesses can go blank at trial, give evidence in court that comes as a surprise, and become "very forthcoming" during cross-examination. Accordingly, where possible, a party should minimize the need for viva voce evidence by using an agreed statement or request to admit.

10 See generally *Hammill v. Canada*, 2005 FCA 252. The court noted, at paragraph 31, "While the Court will not generally look behind a formal admission, the parties cannot by agreement dictate the outcome of a tax appeal. The Tax Court is not bound by an admission which is shown, through properly tendered evidence, to be contrary to the facts."

11 See rule 130.

Cutting Down on Clutter

As we observed earlier, a forceful case is one that carries the audience along toward a destination that can be foreseen and anticipated early in the proceedings, and which the audience can look forward to reaching. Direction, clarity, and a lack of clutter are critical. It is frustrating and unnerving for the presiding justice to be forced into the position of essentially having to divine the relevance of a document to the story or to be faced with multiple copies of a document that is clearly irrelevant.

According to Bowie J, it is not uncommon in the Tax Court for each party to introduce four volumes of documents that, when considered in combination, are 85 percent duplicative. This should be avoided. At some point after discovery and before the trial, the parties should collaborate and reduce the documents down to one volume, although there may be some documents that a party is not prepared to admit.

Calling a Truce Prior to Trial

Disputes can conclude in a variety of different ways, including through settlement. Given the costs and risks of litigation, a settlement represents just as respectable an outcome as a determination on the merits. Efforts should therefore always be made to settle cases.[12]

When considering settlement, counsel must determine as a preliminary measure whether there is a principled basis for settlement, since the CRA will generally not settle without such a basis.[13] Grounding a settlement in principle often requires a certain amount of strategizing, although some would suggest that if the litigants are keen on settling the case, it is always possible to find a principled basis.

Settlement discussions often occur on the eve of the trial. This is not ideal. The appropriate time to talk about settlement, Bowie J suggested, is following the completion of discovery. While there may be undertakings to be fulfilled, this outstanding pretrial step ought not to preclude the parties from having a meaningful discussion. This is because almost all of the key facts are established at this time and the parties are in a position to assess the merits of their case. At previous stages in the process, the CRA may have refused settlement offers, but Crown counsel will be in a better position after discovery to determine whether the facts are different from those relied on at the assessment stage.

The Tax Court rules provide that the court may, on its own initiative or at the request of a party, direct the parties to appear before a judge for a prehearing conference.[14] Bowie J noted that prehearing conferences (and settlement conferences)

12 See also the Tax Court of Canada Practice note 18, which outlines proposed amendments to rule 147 with respect to settlement offers.

13 See generally Daniel Sandler and Colin Campbell, "Catch-22: A Principled Basis for the Settlement of Tax Appeals" (2009) 57:4 *Canadian Tax Journal* 762-86.

14 Rule 126 and Practice Note no. 11. See also proposed rules 126.2 (trial management conference) and 126.3 (settlement conference).

can be very effective in helping parties to settle disputes. The presiding judge will be in a position to offer a candid view of the case in this context, providing the impetus for settlement.

Conference briefs, which are required to be submitted two weeks in advance of the conference, are not nearly brief enough. Bowie J stated that the brief should set out the theory of the case and that it should include the key facts along with relevant propositions of law. Photocopies of cases are not required, and the brief should not include extensive excerpts of discovery evidence. According to Bowie J, "[t]he purpose of the brief is not so much to persuade as it is to enlighten."

A Contest of Positions, Not Persons

In his closing remarks, Bowie J raised the issue of civility in practice. He stated that incivility should not be a part of the practice of law; there is simply no excuse for it. Moreover, if it becomes visible in court, there is a zero tolerance policy. Chief Justice Rip also commented on the issue, noting that the perceived lack of civility is "extremely troubling to the courts." He emphasized that lawyers are officers of the court and that civility is required throughout any court proceeding in which they are involved.

TRIAL

Preparing for the Performance

Rip J directed the discussion of trial presentation. In his view, preparation is of paramount importance. It should, however, take place outside the courtroom. He said that judges "love it when cases are well-prepared and when counsel know what they are doing." His comment brings to mind our analogy to staging a play. It is the effort that the actors and directors undertake in feeding and managing the expectations of the audience that conditions an enthusiastic reception.

Preparation affects the evidence as well as the arguments. It influences tactics and could determine the outcome. The presiding judge may have read the pleadings and formed an initial view as to the merits of the case, but it is possible—depending on how the trial unfolds—that this view may be negatively affected by poor preparation on the part of counsel.

Echoing the comments of Bowie J, Rip J suggested that counsel for both parties should communicate with each other well before trial, agree on certain facts, and prepare a joint book of relevant documents. These arrangements should not be made on the night before or the morning of the trial. The presiding judge will be prepared to commence the proceedings at the assigned time, and these discussions come too late if they are happening on the eve of the trial.

Opening Statements: Setting the Stage

Trial proceedings often commence with counsel making an opening statement. Rip J stated that such submissions are welcome. We suggest that they are critical in complex cases, and potentially helpful in even the simplest case. Opening statements

are like GPS devices or helpful recitals in a contract. They allow all participants in the process to worry less about making a wrong turn or being in the wrong place, and to focus on following the path laid out at the start.

Opening statements provide the presiding judge with an opportunity to better comprehend what the case is about, to gauge what facts are important, and to appreciate why the issue has arisen. They also offer counsel the opportunity to get reacquainted with the case. Pleadings may have been drafted months or even years before trial, and counsel may have lost sight of what the case is really about. Alternatively, counsel may be focused on taking the case in a certain direction, but the pleadings may be directed at some other goal. Opening statements thus allow counsel to gather forces and also answer questions from the court in the event that the pleadings are convoluted or otherwise not clearly drafted.

From the viewpoint of counsel, an opening statement is an important phase of the trial. It offers counsel for the taxpayer the first opportunity to discuss the case with the presiding judge and create a favourable first impression. To that point in the process, the judge will have seen only the pleadings, whereas counsel will have lived with the case for much longer. It is important, however, for counsel to be as objective as possible at this stage. The opening statement is not the forum for counsel to argue the case. Counsel should also guard against overstating the case. If counsel successfully pitches the case in moderate terms at the outset, he or she increases the chances of later establishing a better case in relative terms. Specifically, for Crown counsel, it was recommended that counsel should listen carefully to the opening statement made by the taxpayer and consider whether, by the end of the trial, that statement has been complied with. If not, the inconsistencies can be incorporated into the closing argument made for the Crown.

The opening statement should be clear and concise. It should highlight the disputed issues, the nature of the assessment, the relevant provisions of the legislation, the facts surrounding the assessment, and the taxpayer's reasons for believing that the assessment is unfounded. The opening statement should also refer to any witnesses that are likely to be called, the evidence that the witnesses are likely to give, and the purpose for such evidence being tendered.

Rip J was clear that counsel should not, in the opening statement or at any other stage of the process, belittle the case of his or her opponent. He was also asked to provide his views regarding the timing of opening statements by the Crown. He stated that his preference in a short trial is to hear opening statements from both parties at the outset. If the trial is of some length, he prefers to hear the opening statement of the Crown when it opens its case.

Eliciting the Story

Most, if not all, of the relevant facts are set out in the pleadings. Evidence must be tendered to support pleaded facts that are not otherwise admitted, particularly if those facts lead directly to the relief sought. A party should ensure well before trial that it has the evidence (viva voce or documentary) to prove the necessary facts and that the evidence agrees with the pleadings.

Rip J was in agreement with Bowie J regarding the preparation of witnesses. At trial, if the witness responds to questions posed by his own lawyer with, "I don't know what you mean and I can't understand what you are saying," the presiding judge is no further ahead. Counsel should accordingly question the witnesses who are likely to be called and conduct mock cross-examinations in advance of the trial. Examining counsel should listen carefully to the answers that are given during the preparation phase, thereby reducing the potential for surprises at trial.

If a matter comes to trial several years after the events in question, the witness may by that time have constructed in his own mind a particular theory of the case and may dogmatically believe in the merits of the appeal, shutting out all evidence that is contrary to his position. In advancing his own perspective at trial, such a witness will not be lying per se, but the facts (objectively considered) may not support that perspective. Counsel should review the evidence with the witness prior to trial rather than risk seeing the witness being "ripped into at trial."

It is not necessary for the Crown to call the CRA's auditor as a witness at trial. According to Rip J, such evidence typically "adds nothing." To the contrary, Crown counsel may be left to explain personality conflicts that have nothing to do with the merits of the appeal. Rip J also cautioned that Crown counsel should not regard assumptions as the Holy Grail. He suggested that there may be a time in the near future "when the assumptions will lose their sense of entitlement."

At trial, counsel should take the witness through all of the material facts during the examination-in-chief. Counterintuitive as it may seem, this is the most difficult phase in a trial. It is important in this regard to remember that the burden on the taxpayer is no different from the burden on a plaintiff in a regular civil proceeding. As with any other case, it is one thing to allege a fact in a pleading and another thing to convince a judge that the fact is supported by the evidence. The taxpayer must be in a position to prove on a balance of probabilities each of the pleaded facts.

Rip J has heard cases where the evidence given in chief conflicted with the facts pleaded. According to him, "these are gaps which are fatal." When leading evidence, counsel should never lose sight of the legislative provisions in issue and the requirements of those provisions. Otherwise, counsel may end up leading evidence that is irrelevant.

During the examination-in-chief, the role of counsel is to direct and control the presentation. Despite the extent of preparation, counsel will never know exactly how a witness will perform on the stand. That said, it is up to counsel to bring out the personality of the witness and the information required. The witness should always direct his or her testimony to the judge. If there are facts that are detrimental to the case, counsel should deal with them up front.

Cross-examination should not consist of a rehash of the evidence given in chief. Rip J suggested that reiteration of such evidence should be avoided at all costs, unless credibility is in issue. It does nothing to improve the cross-examination and, in fact, may strengthen the case in chief. Before cross-examining a witness, counsel should ask himself or herself, "What do I want to get out of this witness?" and "What can I reasonably expect to get out of this witness?" These are two different inquiries.

At times, it may appear to a judge from the cross-examination that the examining lawyer is suspicious of the witness. This is unnecessary. Rip J noted that Crown counsel in particular have a tendency to believe their client is infallible. It is important, however, to remember that the taxpayer may be right in certain cases.

Given that there are no jury trials at the Tax Court, counsel should give the presiding judge the benefit of knowing which questions are proper. Counsel should object if opposing counsel is leading irrelevant questions; otherwise, "objections are a waste." Counsel should not object if he or she does not have a good reason. To do otherwise is "annoying for the judge."

Saying It Right in Submissions

Oral argument typically encapsulates the climax of a case. This is particularly true for the Tax Court, where, in the vast majority of cases, judgment is rendered from the bench. Written submissions serve an important role, however, and can be particularly effective in more complex cases where judgment is likely to be reserved. In such cases, counsel can continue, long after the trial is over, to persuade the court as to the merits of the case.

Stressing the need for brevity in written submissions, Rip J reviewed the following comments in *Unicity Taxi Ltd. v. Manitoba Taxicab Board*:

> Before closing these reasons, I must state two concerns. The first is that Unicity has perceived that the elucidation of its case requires well over 100 pages of written argument and some 65 case citations (as well as some texts). Given that initial momentum, it is not surprising that the natural or fabricated complexities of the case generated a total of nearly 230 pages of written argument, well over 100 case citations and an arm-numbing weight of more than 33 kilograms of material. Irrespective of the merits, a review of all the circumstances and a careful reading of all the cases has satisfied me that Unicity has sought to relieve poverty of fact by wealth of law. Unicity's counsel have showered a confetti of cases on a few frail facts. Advocacy is the mastery of cogency and a measure of good advocacy is the ability of counsel to distinguish volume from weight and length from depth. Too often the errant knight-at-law mistakes caterpillars for dragons: something of that sort has happened here, with little issues being dragged out and savaged by citation. However, despite the length of Unicity's argument and its profligate strewing of precedent, I found no need on the facts of this case to refer to more than a half-dozen or so authorities which bear reasonably on the real issues.
>
> My second concern is related to my first. Inadequacy or frailty of fact is one thing. Absence of fact is another. In litigation, law without fact is lunch without food. In several instances, which I have referred to, propositions of law have been invoked and discussed in detail without there being any real foundation in fact to warrant any citation or analysis of cases. As a result, the application has at times taken on the air of an academic Moot Court and much time, energy and money has been squandered that could have been better used in a more worthy cause.[15]

15 (1992), 80 Man. R (2d) 241, at paragraphs 61 and 62 (QB) per Scollin J. See also *Univar Canada Ltd. v. The Queen*, 2005 TCC 723, at paragraphs 7 to 14.

Suffice it to say, when it comes to written submissions, less is often more. Counsel are therefore welcome to submit concise notes of argument, but should be careful not to argue ad nauseam or cite cases that have nothing to do with the facts that have been proved. Counsel should refer as needed to the testimony of witnesses (along with any relevant exhibits), and if copies of supporting case authorities are being provided, counsel should remember to highlight passages of interest. Only the most important cases should be included in the book of authorities and not every single case that counsel considers to be of some relevance.

On the issue of oral advocacy, Rip J emphasized the need for counsel to remain attuned to the body language of the presiding judge. Is the judge impatient? Does the judge appear confused or annoyed? Is the judge looking up at the ceiling? The judge may be asking questions for clarification or playing devil's advocate. It is important for counsel to appreciate the difference.

Rip J also stated that he does not favour submissions of counsel prefaced by phrases like "I think." The presiding judge is not generally interested in what counsel thinks. He or she is interested in the facts and the law. It is preferable for counsel to say, "This is our position." Rip J gave an example of a judge who turned his back to counsel when he was uninterested, and another example of a judge who would take out his hearing aid to make a point. Counsel should avoid being the cause of such situations.

Pointers for Perfection

Rip J could not emphasize too strongly "how important it is to get the facts right at trial." Such facts must withstand scrutiny when reviewed by the Federal Court of Appeal. Rip J also reiterated the need for counsel to carefully review the documents on the record, to prepare witnesses, and to research the law, all prior to trial. When cross-examining a witness at trial, counsel should not ask questions that have already been asked and should stop once the witness has provided the desired response. When making submissions, counsel should not be obsequious or condescending. Counsel should be direct yet polite, and should speak up. From these comments, we infer the obvious: the courtroom is where the play is performed, not where the script is written. Courts serve as critics, rarely actors, and never authors.

APPEALS

Getting the Facts Right at Trial

Rothstein J has a unique perspective on appellate court matters, having previously served on the Federal Court of Appeal and, more recently, on the Supreme Court bench. He began his remarks by noting that at the Supreme Court, counsel are restricted to working with the record created at trial and at the appellate level. Like Bowie and Rip JJ, he stressed the importance of getting the facts right at trial. We surmise, however, that the limits of what the Supreme Court can consider are not necessarily a restriction on the force with which a case can be presented. As was emphasized throughout the seminar, the thrust of an appeal has to be the care, clarity, and completeness with which the story is framed, written, and told.

Counsel may believe that at the Supreme Court, the presiding judges are no longer concerned with the specific facts; that the court is interested only in big, broad principles; that counsel can invite the court to draw inferences from the facts; and that the court will eventually deliver justice. That is not the case. The court will make every effort to arrive at a just result, and the presiding judges are concerned with broad principles, but not with principles that are unlinked from the facts. Counsel must stay grounded in the facts and inferences from the facts, unless the trial judge made a palpable and overriding error.

Rothstein J noted that arguments founded on the existence of palpable and overriding errors are rarely successful, notwithstanding that there are times when "appellate courts go astray." In this regard, he cited the decision of the Supreme Court in *Canada v. McLarty*.[16] That case considered, among other things, whether the taxpayer in purchasing an interest in proprietary seismic data had dealt at arm's length with the vendor. The Tax Court found that the taxpayer did deal at arm's length with the vendor; however, the Federal Court of Appeal placed a different emphasis on the facts and concluded to the contrary. Although the Crown made some compelling arguments at the Court of Appeal based on the evidence, including, in particular, evidence that the taxpayer had exercised minimal oversight in the context of his dealings with the vendor, the Court of Appeal made no finding of palpable and overriding error. The Supreme Court reverted to findings made by the trial judge and held that the Court of Appeal had erred in overturning the Tax Court on its finding of the facts.

Counsel must be successful in persuading the Tax Court to make the required factual findings. A party will find itself in deep trouble at the Court of Appeal and Supreme Court if it has not secured the required findings at the Tax Court.

Why Is a Good Factum Important?

Justice Rothstein offered a few reasons in support of good factum writing. First, the factum gives the judges an initial, and perhaps lasting, impression of the appeal. Stated differently, the story on appeal can be understood with the benefit of the critics' evaluation of opening night. Second, many judges may be influenced by the factum that is the easiest to understand, on the basis of the perception that it must therefore be correct. This is not a surprising observation; the force of any argument and the credibility of its exponent are improved by the ability to say more by saying less, and without obstructions attributable to jargon or an inadequate digest of key considerations. Third, there is normally no transcript of the oral argument at the Federal Court of Appeal. Accordingly, when a judgment is reserved, the judges refer to the facta extensively. Finally, judges are impressed by well-conceived arguments and an apparent mastery of factual and legal complexity. In other words, the reputation of counsel can be affected by the quality of their facta.

16 2008 SCC 26; rev'g. 2006 FCA 152 (FCA); rev'g. 2005 TCC 55 (TCC).

In the question-and-answer portion of the seminar, Rothstein J particularized some of his views concerning the significance of written argument and leave applications. With respect to oral argument at the appellate level, he reflected on whether counsel should closely follow the factum or whether the court prefers a reformulation of the arguments. He observed that each party is afforded only one hour to argue at the Supreme Court. Counsel must therefore prepare to argue for approximately 30 to 40 minutes and save the remaining time for questions. Counsel should not just recite the arguments made in the factum, but instead should summarize the crucial points. Counsel for the respondent should remain flexible and, before launching into argument, should answer the key points made by the appellant that appeared to be convincing to the judges.

Point First Writing

Justice John Laskin of the Ontario Court of Appeal has commented on the art of writing persuasive facta and has emphasized the importance of point first writing.[17] Rothstein J agrees that point first writing is a critical component of any good factum. Point first writing means that counsel states the proposition first and then develops it. Counsel may think that the judge needs to understand how an argument develops, or that the judge will not appreciate the point until he or she is familiar with the relevant facts, or that an "anticipated conclusion will make the ultimate conclusion repetitive." Rothstein J advised counsel to abandon those concerns and put the conclusion up front. There is a good reason for this.

We can take note of the fact that no one, not even a judge, reads every word. Judges read, like the rest of us, by instantaneous prediction and confirmation. They look for direction in how arguments are crafted, how evident and connected they are, and what direction they appear to take. Point first writing provides prediction, which is then confirmed by the details that follow. It is especially important in complex tax appeals, where, as Rothstein J acknowledged, "it is easy for the judge to get lost." Judges should therefore be kept in familiar territory, and counsel should ensure this by first outlining what the judge can expect and then by developing the point (that is, providing the context before the details).

Being Simple and Concise

Rothstein J made some observations about the importance of being simple and concise. In this regard, he stated that "anyone can provide information," but the job of counsel is to persuade, and that persuasion is affected by the manner in which

17 See, for example, John I. Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (1999) 18:2 *The Advocates' Society Journal* 3-12; John I. Laskin, "What Persuades (or What's Going on Inside the Judge's Mind)" (2004) 23:1 *The Advocates' Society Journal* 4-9; and John I. Laskin, "How To Write a Persuasive Factum: A Judge's View," in David W. Chodikoff and James L. Horvath, eds., *Advocacy and Taxation in Canada* (Toronto: Irwin Law, 2004), chapter 1. See also *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 92.

information is organized and presented. Judges do not like to read facta that are tedious and hard to understand.

Writing concisely does not mean writing superficially. It means being brief but comprehensive. Judges never complain that a factum is too short. The judge who is fortunate enough to be the recipient of a short, concise factum will consider it "an act of mercy." It will give him or her confidence that in preparing the factum, counsel has thought carefully about what has been written, and that can only be positive for counsel in the appeal.

Rothstein J also spoke of the need to identify the issue early on in the process. Being immersed in the case, and having done the research and read all the materials, counsel is best positioned to know the subtleties of the case. In contrast, the judge knows nothing. He or she wants to know quickly what the appeal is about, especially the key issue on which the appeal turns.

Toning It Down and Playing It Smart

When counsel argues orally, it is important to remember that judges are skeptics. According to Rothstein J, drama may be acceptable, but only in popular courtroom dramas like the television series *Law and Order*. In real life, counsel should avoid succumbing to emotion.

Rothstein J gave an example of a case in which each side argued that it had the moral high ground, but the judge later said in his decision that the moral ground in the case before him was "largely unoccupied." Stated differently, it simply does not assist the case when counsel for the taxpayer expresses "righteous indignation at the minister's shoddy treatment," or when counsel for the Crown expresses "outrage at a blatant tax-avoidance scheme."

Counsel should pay close attention to the bench. The presiding judges will have read the facta and spoken with their law clerks. They may have formed an initial view as to the merits of the case and may be looking to confirm this view. If hostile questions are being asked, the judges may be trying to reinforce a negative view. We suggest, equally, that judges may be attempting to displace insecurity about the correctness of a view otherwise held or, possibly, to draw out of counsel, as forcefully and clearly as possible, the essence of the case to be met. If the judges are silent, this may mean either that they agree and want counsel to sit down, or that the appeal is so bereft of merit that asking questions would just be a waste of time. Counsel should be constantly alert to indications that the judges are, or are not, engaged. If the judges are not writing when counsel is arguing, counsel can surmise that the bench is otherwise preoccupied.

Rothstein J urged counsel to use a roadmap and advise the court, in point form, of the arguments that will be made. Having finished a point, counsel should expressly say so. Counsel should also use a linear approach and not dive into the middle of the argument or make implicit assumptions about what the judges understand. There are some judges at the Federal Court of Appeal who are tax experts, and it may be appropriate when appearing before these judges to make certain assumptions about the depth of their knowledge; but this is not necessarily the case at the Supreme

Court. Indeed, at the Supreme Court, counsel must be as explicit as possible when presenting legal arguments. Counsel should take the judges to the relevant provisions, explain why the provisions are significant, and walk the judges through the argument step by step. Rothstein J suggested that, in complex cases, diagrams can be useful if they are simple.

Engaging the Judges

Oral argument provides counsel with an important opportunity to engage the judges and to answer questions. In the course of oral argument at the appellate level, counsel can reinforce what the judge is thinking if he or she has a favourable view, or change that view if it is unfavourable. If it reasonably appears to counsel that the judge is hostile, a polite but determined response is required. If counsel must disagree, he or she can do it with a clear explanation. We note, however, that to do these things, counsel must be just as interested in and concerned about the judges' views of the case as in his or her own view. It cannot be helpful to seem to be saying, "Regardless of how you see it, I want to say it this way." Indeed, in some cases, the bench may hint at a method by which the case can best be presented; counsel needs to be nimble as well as prepared.

Rothstein J gave an example of a case where he wanted to ask counsel for the appellant some questions. The lawyer said, "I have closed my case." Rothstein J responded, "Are you refusing to answer questions?" The lawyer maintained, "I have closed my case." Suffice it to say, the appellant lost the case.

Judges at the Federal Court of Appeal typically sit in panels of three. It is important to remember that answers given in response to the questions of one judge may be picked up by another judge. Sometimes judges will preface their questions with an extended preamble. Counsel should state the question back to the judge and clarify that he or she has understood what is being asked. Counsel should not answer if he or she does not understand the question.

Rothstein J stated that supporting lawyers should pay attention when senior counsel is arguing the case. It is appropriate for them to provide senior counsel with a note or two, or to give senior counsel a hint as to the answers.

Ten Percent Inspiration, Ninety Percent Preparation

Rothstein J concluded his remarks by offering some general observations about experience and preparation. He noted that some lawyers have innate ability and are "good" counsel, but the rest (indeed, the vast majority) need experience and preparation. According to Rothstein J, 90 percent of counsel will go through a few rough times, after which they will "learn how to roll with the rhythm of the courtroom."

Apart from preparation, it was noted there are three additional aspects to any trial: logic, equity, and law. Counsel should bear in mind that trials are not won or lost on the law alone. The trial process also involves logic and equity. Counsel should consider whether the result sought is offensive in terms of the equities and should evaluate the case from a commonsense perspective.

This is one of those inspired observations that speak volumes. It strikes us that these tenets—logic, equity, and law—should inform the litigation process from the moment of first impression through each of the pretrial steps. At every stage, counsel should look for ways to insinuate logic and fairness into the process, be it in the way that the pleadings are struck, the form in which questions are asked and answered on discovery, or the manner in which a case is presented at trial.

It is not surprising to consider that logic and fairness matter, even if a case is influenced by complex law, and that its resolution with respect to these considerations will be influential when the work of a judge is reviewed on appeal. As a strategic matter, counsel must be astute to supply the required legal framework, but should also articulate an outcome that reflects these other features—again, so that the result is both defensible and successfully defended on further review.

On the issue of equity, Rothstein J was asked to offer some observations on the general anti-avoidance rule (GAAR),[18] and specifically to comment on the fact that in some cases the application of GAAR seems almost impressionistic (unlike the seemingly more scientific approach offered by the Supreme Court in *Canada Trustco Mortgage Co. v. Canada*).[19] In response, Rothstein J stated that while judges bring their own experiences to the work that they do, they are still required to "discipline" themselves with the statute and common law. In other words, judges have to find abuse (or ground the misuse or abuse analysis) by construing the provisions of the Act. Rothstein J stated that GAAR is a remedy of last resort, and it is therefore inaccurate to suggest that "a judge can do whatever he or she wants with the GAAR."

Secrets to Seeking Leave

Rothstein J was asked for his advice on preparing a successful leave application. The process of appealing a decision of the Federal Court of Appeal to the Supreme Court is twofold. It is first necessary for the party seeking to challenge the decision to file an application for leave to appeal; then, provided that the application is granted, the appeal will be heard. In a tax case, the test for obtaining leave at the Supreme Court is to demonstrate, among other things, that the issue under appeal is of public importance. The quantum of tax at stake is not the test.

Rothstein J advised that the facts in a leave application should be kept as simple as possible. The court is not likely to grant leave if the judges are left with the view that the decision of the Federal Court of Appeal is based on the particular facts of the case. The applicant should concentrate on demonstrating that the issue is one of public importance. A leave application is likely to be successful if the issue under appeal concerns the scope of a particular provision of the Act or the interpretation of a prior important case, since judges of the Supreme Court are principally concerned about the outer limits of a decision. There are often implications that may

18 Section 245 of the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act").

19 2005 SCC 54.

not have been anticipated when a prior decision was written. If a provision is not operating in a commonsense way, or the applicant can demonstrate that conflicting views exist between the trial and appellate courts (or that there is a disagreement between the appellate judges), the applicant may succeed in getting the attention of the Supreme Court. Rothstein J added that if the applicant can establish that there are reasonable arguments on both sides (that is, that the appeal engages an issue over which reasonable minds can differ), there is a greater likelihood that the applicant will be successful. On a final note, Rothstein J suggested in jest that the responding party in a tax case should not strongly resist the application for leave, so that there might be a few more tax cases heard by the Supreme Court.

CONCLUDING COMMENTS

It is evident from comments made throughout the seminar that the pursuit of a dispute through the judicial process is as much an art as a science. How a case is presented, and how compelling a judge considers its proposed conclusion, depends entirely on the impression that is created along the way. Is the story coherent? Has it been thoughtfully told? Is the outcome fair? Have the interests, concerns, and insecurities of the audience been anticipated? In short, every case has a plot within it, but the challenge lies in transposing the script to the stage. Indeed, it seems inescapable to conclude that, even for seasoned litigators who have a natural affinity for the law and presence in the courtroom, preparation is essential and consumes most of the dispute process. We see this process as requiring the parties to craft and present a persuasive case that others would be interested in, engaged by, and enthused about. Counsel thus needs to consider at the outset how the case might best unfold and be guided by this perspective at every stage.