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Issue-Driven Legal Writing: Not Just for Judges

Electronic filing, remote discoveries and examinations, and video-conference hearings are some of the ways litigation has adapted to the current COVID-19 emergency. No doubt, some of these new developments will remain once the crisis is over. What is sure to persist, however, is the renewed focus on an old technology: the written word. How can judges and advocates adapt to a system where oral advocacy may no longer be the default mode?

The answer, according to Justice Lauwers in the recent appeal decision in *Welton v United Lands Corporation Limited*, is issue-driven legal writing. As he puts it:

> It makes good narrative sense to inform the reader by setting the context first, which involves telling the underlying story briefly. But the real marshalling of the facts according to their relevance and salience is only possible when the trial judge has identified the live issues. In short, factual determinations and descriptions should be issue-driven (para 59).

Issue-Driven Writing

Issue-driven legal writing is a departure from the traditional structure of a judicial decision. Instead of a two-part structure which details all the “Facts” and then applies all the “Law”, an issue-driven structure identifies each of the issues to be decided in the case and discusses them one at a time to arrive at the ultimate disposition. Each issue section interweaves the relevant facts and applicable law to drill down into the “deep” or key issue upon which the decision turns. This requires the legal thinking to happen off the page: trial judges should “identify the key issues; find the facts relevant to the issues; assess credibility and reliability where there is conflict; set out the chain of reasoning; make the decision; and then write the reasons to clearly communicate the decision.”

The “issue-driven” approach recommended by Justice Lauwers is demonstrated in his own decision in *Welton*. He begins with a single-paragraph overview, before turning to a six-paragraph “Factual Context” which sets out a brief chronology ending with the key event upon which the case turns.

Justice Lauwers then turns to the five issues on appeal. In each

section, he identifies the appellant's position, summarizes the relevant findings of the trial judge, sets out the guiding legal principles and tests, and then concludes with a decision on the issue. The entirety of the appellate decision (excluding the discussion on legal writing) is 55 paragraphs – the trial decision, on the other hand, ran 555 paragraphs.

Justice Lauwers is not alone in promoting the issue-driven approach. Caroline Mandell, former counsel to the judges of the Court of Appeal for Ontario and current litigation consultant and legal writing coach, notes that "Canadian judgment-writing programs teach the issue-driven structure and encourages judges to use it as the best route to clarity and conciseness".

Hearings in Writing

Now, more than ever, the most effective advocacy comes from clear and persuasive factums as the courts require hearings in writing during the current pandemic. Litigators should keep in mind that judges are looking for an issue-driven analysis when preparing their factums for the courts.

The Court of Appeal has jurisdiction to order that an appeal proceed in writing – even over the objection of one of the parties. *Welton* is just one of the recent cases which the Court has considered and decided solely on the basis of written submissions.

In the Superior Courts, the new default is for contested motions to be heard in writing. As of May 13, 2020, the Toronto Regional Practice Direction sets out at s C.1(4) that **all opposed short motions and applications** to a judge or master will be subject to review in writing before being scheduled. **These motions and applications will be resolved in writing unless the reviewing judge or master directs a different procedure**.

Writing an Issue-Driven Factum

Without the ability to re-frame submissions during oral argument and Q&A, the factum becomes an advocates' sole opportunity to get the issues right and persuade the judge. Written submissions can and should be adapted to the issue-driven judgment structure championed by Justice Lauwers. As Caroline Mandell puts it, the pitfalls of a fact-driven structure (repetitiveness, irrelevant detail, and opacity) apply "equally to factums".

The easiest way for the decision-maker to deliver an issue-driven decision (ideally in your favour) is to receive an issue-driven factum. During this time when courts and lawyers are re-considering old practices, advocates should consider

experimenting with an issue-driven approach to written submissions. Some things to consider when preparing for a hearing in writing:

- Set aside time to think through the issues and prepare an outline before you start drafting.
- Spend more time refining your overview. This is the judge's "road-map" to the key issues to be decided.
- Try shortening your facts section to set the stage with only a brief narrative background. Avoid the "data-dump", and save the relevant facts for the issues to which they apply.
- Structure your issues section logically, dealing with the threshold issues first.
- Don't exhaust yourself or the judge by including every possible relevant case – pick only the most compelling authorities.
- Use tables, charts, and decision-trees to make your point.
- Consider filing a brief and to-the-point reply factum if you are the appellant or moving party.