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Civil Litigation

Reconsidering written replies in appellate advocacy

By **Jacob R. W. Damstra**

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(June 20, 2023, 11:34 AM EDT) -- “To reply, or not to reply,” the perennial question many advocates know too well, from their first law school moot to their nth appearance at the Court of Appeal, now has another dimension — whether to seek permission to file a written reply.

A recent motion decision written by Justice Ian Nordheimer at the Court of Appeal for Ontario in *Goberdhan v. Knights of Columbus* 2023 ONCA 269, contributes to the debate on how to answer this question. In *Goberdhan*, Justice Nordheimer dismissed a request for leave to file a reply factum and rejected a call by Justice David Michael Brown in *Prism Resources Inc. v. Detour Gold Corp.* [2022] O.J. No. 30 to move towards an automatic right of written reply in civil and criminal appeals.

Prism Resources: Calling for a right of written reply on appeals

In *Prism Resources*, the appellant Detour Gold Corporation, brought an unopposed motion for leave to file a reply factum. Justice Brown granted the motion and took the opportunity to advocate for a change to the *Rules of Civil Procedure* to allow for an automatic right of written reply on appeals.

Written advocacy, Justice Brown wrote, “is the foundation upon which Ontario’s modern appellate advocacy process rests. Written advocacy is the main tool by which the parties educate a panel about the issues on an appeal and then attempt to persuade the panel to the party’s position.” Despite this “foundational role” of written advocacy, our rules fall short in Justice Brown’s view by failing to “complete the circle” and allow the appellant the right to file a reply factum. Instead, the rules compel appellants to bring a motion for leave to file a reply factum — such motions being costly and inefficient in Justice Brown’s view.

Justice Brown suggested that reply facta on appeals would permit:

- appellants to address an argument advanced in responding facta that was also made by the respondent but not dealt with by the lower court judge, thus not addressed in the appellant’s main factum;
- appellants by cross-appeal to respond to an argument set out in a respondent by cross-appeal’s factum that was not initially raised;
- appellants to clarify positions and present the panel with a more precise articulation of arguments for consideration prior to the oral hearing;
- appellate advocates to prepare for oral argument confident that their clients have had the opportunity to fully and directly join issue on the key matters in the written materials considered by the panel before the oral hearing;the Bench to prepare for oral argument confident that they fully understand how both sides join issue on the key matters and tailor their questions to counsel or the parties appropriately; and
- both appellate counsel and the Bench to immediately “get into the meat” of the key issues on appeal, making for a more efficient use of time in oral argument and increasing the likelihood of a “hot bench” that is fully prepared and ready to dive into the cores issues on an appeal.

Justice Brown also noted that, used effectively, the written reply would allow the appellant to clarify, correct, or answer unfounded criticisms in the respondent's factum that would otherwise need to be "dealt with in oral argument," diverting precious time during the hearing away from the heart of the matter.

Justice Brown's decision was silent, however, about the real risk that amending the rules to include an automatic *right* of reply will lead to a perceived need on counsel's part to *exercise* that right in every case — leading to an unnecessary increase in client costs in every appeal.

Goberdhan: Rejecting the call

Goberdhan involved an appeal from a decision dismissing the appellants' motion to stay a wrongful dismissal action in favour of arbitration. In its responding factum on the appeal, the respondent took the position that s. 7(b) of the *Arbitration Act*, 1991, S.O. 1991, c. 17 precluded an appeal from the motion judge's decision dismissing the request for a stay. In response, the appellants sought leave from the court to file a reply factum to address that jurisdictional question.

In his decision on the motion, Justice Ian Nordheimer noted the appellant's heavy reliance on Justice Brown's earlier decision in *Prism Resources* for the proposition that "there is a strong presumption that leave to file a reply factum should be granted."

Justice Nordheimer was unconvinced. He noted that there remained no right of reply in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, despite Justice Brown's call for an amendment to the Rules just over a year earlier. Justice Nordheimer continued: "I do not share my colleague's enthusiasm for imposing what is, in essence, a judicial amendment to the Rules" which would create an automatic right of written reply in all appeals.

The principal reason appellate courts provide for oral argument, Justice Nordheimer stated, was to allow the panel hearing the appeal to canvass any uncertainty or questions regarding the parties' positions. Oral argument also allows appellants to address any new issues or positions taken in a respondent's factum.

Notably, Justice Nordheimer emphasized the importance of effective written advocacy. He remarked that there is "no doubt that written submissions are very important on any appeal," but cautioned that there are limits of the usefulness of any advocacy, oral or written: "more does not always mean better."

Justice Nordheimer also observed that a problem caused by the routine filing of reply facta is the foreseeable corresponding requests from respondents to file "sur-reply" materials. At some point, Justice Nordheimer remarks, this back and forth must end, noting that he saw no compelling reason to depart from the traditional point at which the back and forth ends with one factum each for the appellant and the respondent.

Thus, unlike Justice Brown's view set out in the *Prism Resources* decision that reply facta would be welcome and appropriate in most cases, Justice Nordheimer concluded in *Goberdhan* that parties should only seek leave to file a reply factum in exceptional circumstances and noted that this was not one of those cases, dismissing the motion.

No doubt there will be more to say about the appropriate context (and content) for reply factums. Whether and when to seek leave to file a written reply factum on an appeal remains the subject of that perennial question and should be considered carefully in each case. The final word, it seems, is not yet written.

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