Federal Court of Appeal		Cour d'appel fédérale

Date: 20100412

Docket: A-1-10

Citation: 2010 FCA 92

Present: **STRATAS J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

GENERAL ELECTRIC CAPITAL CANADA INC.

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 12, 2010.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

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[1] The appellant moves for an order permitting it to file a memorandum of fact and law that exceeds the thirty page limit set out in subrule 70(4) of the *Federal Court Rules*, S.O.R./98-106.

[2] The appellant wishes to file a memorandum that is fifty-five pages long. The respondent consents to the relief sought. Although this motion is proceeding on consent, this court must still consider whether to exercise its discretion in favour of granting this relief.

[3] The appellant submits that this appeal "raises important and complicated questions." The appellant also cites the length of the trial and the large number of witnesses in the court below. The appellant says that its factum, almost double the normal page limit, will "assist the Court" and "will allow for a shorter oral hearing than would otherwise be required."

[4] In this appeal, the appellant raises three grounds of appeal: errors of law, reviewable errors in the trial judge's fact-finding, and denials of procedural fairness. These alleged errors, the appellant says, have "many facets, all requiring explanation, examples and a summary of the law in the relevant area." Further, the appellant suggests that the alleged denials of procedural fairness must be illustrated using lengthy excerpts from trial transcripts.

[5] In considering the appellant's motion, I took into account a number of factors:

(a) Subrule 70(1) sets out the requirements for a memorandum of fact and law. It mentions the word "concise" three times. This suggests that leave to exceed the normal thirty page limit should be granted sparingly. "Special circumstances" must be present, along with specific demonstrations of need: *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2006 FC 937, 53 C.P.R.(4th) 187 at paragraphs 16-17 *per* Prothonotary Lafrenière.

(b) To get relief that is sparingly granted, the affidavit offered in support should engage in demonstration, not just assertion. The appellant's affidavit does mainly the latter,

not the former. For example, it simply asserts “complexity”, without providing any examples of complexity. It simply asserts that there are alleged procedural errors and reversible errors in fact-finding, offering sweeping generalities rather than specific examples. The same can be said for the notice of appeal and the written representations on this motion: absent are any illustrations or examples of particular alleged errors that might have given the Court a flavour of the complexity of the appeal. In essence, the material before the Court asserts the appellant’s opinion that a much longer memorandum is needed and invites the Court to ratify that opinion. But the Court’s role under subrule 70(4) is not ratification: it has to conduct an informed assessment of whether it should grant a sparingly-granted exception based on special circumstances that have been demonstrated to exist in the appeal.

(c) No doubt, significant weight should be given to the assessments of counsel for the moving party and the responding party, particularly where, as here, the appellate counsel are skilled and experienced. Nevertheless, this Court must be supplied with sufficient, particularized information so that it can properly and independently evaluate the complexity of the issues in the appeal, the need for an exception to the page limit, and just how great an exception should be permitted.

(d) Many appeals in this Court raise “important and complicated questions.” That alone does not necessarily justify a relaxation of the page limit. Memoranda well within the thirty page limit are almost always filed in appeals with important and complex

questions. These memoranda manage the complexity by carefully and strategically selecting and synthesizing the detail in the appeal, distilling everything to its very essence.

(e) The best commentators on the topic of written advocacy underscore the importance of brevity, achieved through selection, distillation and synthesis: see, for example, Justice John I. Laskin, “Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums” (1999) 18 Adv. Soc. J. No. 2, at pages 3-12 and Justice Marvin A. Catzman, “The Wrong Stuff: How to Lose Appeals in the Court of Appeal” (2000) 19 Adv. Soc. J. No. 1 at pages 1-5.

(f) A paramount principle that guides the Court’s discretion under subrule 70(4) is the need for procedural fairness: a party must be permitted to present its whole case effectively. I do accept that submissions about reversible errors in fact-finding and procedural errors often require more detailed development and exposition. In addition, based on the reasons for judgment of the trial judge, I do accept that the facts of this case seem to be significantly more intricate and complex than those of many other cases and that this Court would benefit from a longer memorandum. Therefore, a relaxation of the thirty page limit is warranted in this appeal. However, I am not persuaded at this time that fairness requires that the appellant be permitted to file a memorandum with a length almost double the normal page limit.

(g) The appellant pointed to the need to include lengthy quotations from transcripts. Lengthy quotations from transcripts to develop its submissions are not always necessary. The judges preparing for this appeal will engage in significant pre-hearing preparation and, in some cases, a transcript reference may be all that is needed. I also note that the appellant did not demonstrate that there was any great complexity concerning the law on procedural error and fact-finding error, the areas of law relevant to two of the three main grounds of appeal.

(h) In this motion, the appellant did not file a draft memorandum. When a party has prepared a draft memorandum longer than the thirty page limit and believes that it cannot fairly reduce its length further, it should file its draft memorandum as part of the affidavit supporting the motion: see *Pfizer Canada Inc.*, *supra*, at paragraph 19. The Court can examine the draft with a view to assessing whether it should grant an exception under subrule 70(4), and not with a view to assessing the merits of the appeal. Such an approach empowers the Court to make well-informed, concrete assessments. I note that this approach is standard practice in some other appellate courts: see, for example, Court of Appeal for Ontario, *Practice Direction Concerning Civil Appeals in the Court of Appeal*, October 7, 2003, paragraph 10.3(3).

[6] In light of the foregoing and based on the evidence placed before the Court, I conclude at this time that a relaxation of the thirty page limit is warranted, but not to the extent that the appellant

seeks. I shall permit the appellant to submit a memorandum up to forty pages in length, exclusive of the appendices required under rule 70. The appellant shall be permitted to serve and file its memorandum within twenty days of the date of the order.

[7] If the appellant finds it absolutely impossible to present its case effectively within that limit, I shall permit the appellant to reapply to this Court within those twenty days, but only upon evidence establishing that a longer memorandum is absolutely necessary in order to present its case fairly and effectively. Neither party has sought its costs of this motion and so none shall be awarded.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-1-10
STYLE OF CAUSE:	**Her Majesty the Queen v. General Electric Capital Canada Inc.**

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	April 12, 2010

WRITTEN REPRESENTATIONS BY:

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