



“Going Fishing”

Advice for Successful Advocacy in the Court of Appeal

by the Honourable Chief Justice
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I. Introduction

This paper is for the lawyers who ply their trade in the Court of Appeal for Saskatchewan. My hope is that it will provide some useful insights into the art of appellate advocacy and will assist counsel in representing their clients as effectively as possible.

The most famous lines in the literature on advocacy are the ones used by American lawyer John W. Davis over 65 years ago. He compared a lawyer to a fly fisher. The lawyer’s challenge, according to Davis, is to devise arguments that attract and ultimately land judicial fish. He put it this way:

[I]n the argument of an appeal the advocate is angling, concisely and deliberately angling, for the judicial mind. Whatever tends to attract judicial favour to the advocate’s claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?¹

Prior to my appointment to the Court of Appeal, a significant part of my practice involved casting lines into appellate waters—sometimes I caught what I wanted; sometimes I definitely did not. For the last decade or so I have been one of the fish and have spent my time trying to decide what to bite and what to swim past. The discussion which follows is presented largely from this underwater perspective but I have also attempted to draw on my experience as counsel in order to pass on some of the lessons that I learned the hard way.

Much of what follows is framed in broad brush terms. But, of course, there is no such thing as an immutable rule in this field. Principles have to be adapted to the circumstances of individual cases. No two appeals are exactly the same. There is no substitute for good judgment and common sense.

I should also add that the comments and observations in this paper reflect my personal opinions. While they are presumably well-aligned with the views of my colleagues, what I have written was not prepared on behalf of the Court.

This paper is broken into a number of main sections. The first discusses the basic nature of appellate work and the perspective the Court brings to the adjudication of appeals. Subsequent sections explore the decision to appeal, applications for leave to appeal, the appeal book, the factum, books of authorities and, finally, oral argument. A more detailed sense of the ground I will cover can be gained by consulting the table of contents located at the beginning of the paper.

¹ John W. Davis, “The Argument of an Appeal” (1940) 26 ABAJ 895, at 895, reprinted (2001) 3 J App Pr & Pro 745.

II. The Big Picture

Before turning to the particulars of factums and oral arguments, it is important to put appellate advocacy into the proper context. Accordingly, I propose to begin with some comments about the nature of advocacy, the role of the Court of Appeal, and the appeal process from the Court's perspective.

A. The Nature of Advocacy

Appellate advocacy is about one thing and one thing only. It is about *persuasion*. The entire enterprise of an appellate lawyer, from selecting grounds of appeal at the front end of the process to the final words of oral argument at the other, is aimed solely at the objective of persuading the Court to accept his or her client's view of how the case should be resolved. The only reason for writing a factum and the only reason for making oral argument is to persuade.

"Persuasion" is communication aimed at eliciting a particular response from the person who receives the message being sent. Persuasion in the appellate context is particularly challenging because lawyers are entitled to resort to only a limited range of rhetorical options. They are foreclosed from using the tools employed by such famous persuaders as politicians, religious leaders and commercial advertisers. Appellate lawyers are hedged in by the law and therefore limited in the range of arguments they can advance. Similarly, they are hedged in by ethical obligations and the culture and traditions of the court room and the legal system more generally. Moreover, the members of the audience to be persuaded— the judges of the Court— are well-trained, reasonably bright and experienced. The challenge faced by counsel is self-evident.²

All of this might sound trite. It is trite. However, it is also fundamentally important. Good counsel never lose track of the need to persuade. They measure every move against that yardstick. Grounds of appeal are selected by reference to the likelihood they will move the Court in a particular direction. Arguments are marshaled and refined and polished to maximize their persuasive effect. The facts are framed and presented in the same way. And so on and so on. To paraphrase the now famous mantra of Bill Clinton's campaign workers in 1992, "It's about persuasion, stupid."

B. The Secrets of Persuasion

The ultimate persuasive force of a line of argument is largely a function of three considerations: credibility, conviction and content. It is useful to look briefly at each of these notions.³

1. Credibility

As Justice John Laskin has written, credibility is a "hidden persuader". It underlies and colours everything that counsel write and say. Credibility, of course, is about trust. Judges must be confident they can rely on the representations of counsel. If they lack that confidence, they will be very reluctant to travel the path counsel invites them to follow.

² The thoughts in this paragraph are borrowed from R.J. Aldisert, *Winning On Appeal*, 2d ed (Boulder, CO: NITA, 2003).

³ This insight, or at least part of it, comes from Justice John I. Laskin, "What persuades (or, What's going on inside the judge's mind)" (Summer 2004) 23 *Advocate's Soc J No.* 1, 4-9.

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I want to stress that credibility is not a characteristic possessed only by seasoned lawyers. Indeed, senior counsel sometimes lack credibility. In other words, credibility is by no means a function of longevity. Needless to say, a lawyer who appears regularly before the Court and consistently turns in a strong performance will build a reservoir of credibility. But, younger and inexperienced counsel can certainly wear the badge of credibility as well.

In order to establish and confirm credibility, good counsel consistently do a number of things:

- (a) They take reasonable positions on the substance of the appeal—wildly aggressive arguments and over-statements of the issues engender serious skepticism in the hearts of judges.
- (b) They do careful and complete research—it is very unnerving for a judge to realize counsel has overlooked a key case or a relevant statutory provision. My reaction to this sort of situation is along the lines of, “If the lawyer missed that, what else did he/she miss?”
- (c) They are scrupulously honest with the facts—nothing undercuts a lawyer’s credibility quicker than a misrepresentation (deliberate or not) of the record or the findings of a trial judge.
- (d) They are candid—credible counsel acknowledge difficulties and weaknesses in their cases. They do not try to paper over problems, hide them or trick the Court into overlooking them.
- (e) They are careful—a brief which contains small errors (citations, spelling, paragraph numbers, spacing and so forth) opens the door to doubt. Again, my reaction to those sorts of problems in a factum or an appeal book is a creeping question as to whether a lawyer who cannot get the little things right can be relied on to get the big things right.
- (f) They are well-prepared—not surprisingly, counsel who do not know the record, who have failed to study the authorities or who have not thought deeply enough about their case will quickly lose credibility during the course of argument.

I acknowledge, as well, that sometimes expertise can be a factor in credibility. The submissions of the lawyer who is an acknowledged expert in a particular area of the law will (if he or she is otherwise credible) tend to carry extra force. This, of course, is not to say that the Court will default to such a lawyer’s view of how a case should be resolved. It is only to say that judges can draw extra comfort from the representations of someone who has a recognized understanding of a particular area. This is especially so with respect to questions the Court might have about the practical implications of a particular position or the wider consequences of deciding a case one way as opposed to another.⁴

2. Conviction

The second major aspect of persuasion is conviction. By conviction I mean the strength of commitment a lawyer invests in his or her oral submissions. Counsel who present themselves in a way which indicates they believe in the correctness and justice of their client’s position are more persuasive than those who are tentative, uncertain or wavering. As former American president Lyndon Johnson once said, “What convinces is conviction. You simply have to believe in the argument you are advancing; if you don’t, you are as good as dead.”⁵ (To this I would only add that lawyers typically do not get to choose what side of the appeal they will represent and, as a result, they do not always have the luxury of believing, in their private heart of hearts, that truth and justice are on their side. Nonetheless, they must appear to believe that. There is a measure of theatre or performance in much of what an appellate advocate is called on to do).

One of my most surprising discoveries on going to the bench was that lawyers often lack conviction or, perhaps more accurately, *appear* to lack conviction. More frequently than one might think, the Court sees counsel who fold their tents on specific points and issues, or even the case as a whole, as soon as they feel resistance from

⁴ *Ibid.* at para 12.

⁵ As quoted by John Laskin, *ibid.*, at para 13.

the Court. This should not happen. Counsel cannot expect the Court to believe their pitch if they themselves seem uncommitted to it.

How does a lawyer show conviction? Certainly not by way of passionate histrionics. The keys in this regard involve the following matters:

- (a) Body language—good counsel typically stand tall and put their shoulders back. They avoid nervous habits. They look the members of the Court in the eye and carry themselves in an appropriately dignified manner.
- (b) Tone of voice—strong counsel speak with self-control and confidence. They find a tone or quality of voice which, without being shrill or hectoring, carries the message that they believe in what they are saying.
- (c) Volume—few things suggest a lack of conviction more than a failure to speak up. Good counsel speak clearly and loudly enough that their comments are easy to comprehend. It is often hard for a listener to place stock in an argument he or she must strain to hear.
- (d) Pace—good counsel speak at a measured pace. It is difficult to buy an argument delivered at rapid fire speed. Counsel who move too quickly are hard to follow and typically convey the sense that they are just trying to get finished rather than trying to carefully advance a position they believe in and which they think should be adopted by the Court.
- (e) Commitment—successful lawyers stick to their guns. They do not run up a white flag as soon as they encounter resistance or hostile questions from the Court. (At the same time, they also know how to identify an argument that is going nowhere and to move on.)

3. Content

The third and final dimension of persuasion is content. As is obvious, an argument which is doctrinally sound, logical and artfully married to the facts will be more persuasive than one which is not. More about this later.

C. Appeals from the Court's Perspective

In the prosecution of an appeal, it is always useful for counsel to periodically step back and ponder the case from the perspective of the Court. Persuasive arguments are sensitive to the needs and agendas of the audiences at which they are aimed. In the circumstances of the moment, the only audience that counts is made up of the members of the Court of Appeal. Counsel who do not attempt to understand how judges think will be less effective than they might be otherwise.

When a judge picks up the factums and begins to prepare for the argument of an appeal, he or she feels the weight of judicial office. Every judge is keenly aware of the obligation to understand the problem being presented to the Court and the challenge of resolving the appeal justly and in a manner which confirms or establishes sound legal principles. As a result, the argument (written or oral) which works best is the one which provides a reasonable, legally sound and just resolution of the case.

Appellate court judges are generally “minimalists” in the sense that they are in no rush to decide anything that does not need to be resolved in order to dispose of an appeal. They typically look for the narrowest way of deciding a case. This is so for several significant reasons: (a) they are keenly aware of the possibility of writing something which has unintended consequences, (b) they decide cases as panels and a restricted line of reasoning typically attracts consensus more easily than a broader line, (c) they want to avoid errors, legal or otherwise, and saying less rather than more generally improves the chances of getting things right, and (d) appeal judges do not want to close off options for either themselves or their colleagues in future cases.⁶

6 This paragraph borrows shamelessly from John Laskin, *ibid.*, at paras 32–35.

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All of this must be borne in mind by counsel. It means that, as a general matter, the Court will not be easily attracted to overly broad, aggressive or unduly categorical lines of argument. Counsel must remember that the appeal is not a version of final offer arbitration (the kind sometimes used in professional sports) where the decision-maker has to accept either the last position of one side or the other. Appeal court judges will typically look for just and reasonable middle ground. Good counsel understand all of this and do not ask the Court to take on more than is necessary to decide the appeal. They try to pitch their client's position as being the fair and moderate ground to which the Court should migrate.

At the same time, good counsel understand the institutional role of the Court of Appeal. It is the court of last resort in almost every case. As such, members of the Court have an obligation to ensure that, in an appropriate way, the law develops, advances and receives clarification. In short, appellate judges are interested not only in what the law is, they are also interested in what the law *should be*.

This has important implications. It means counsel should not look at the law as being static and incapable of change or qualification or nuanced application. It definitely means counsel should not point to a Queen's Bench level decision on a particular point as if it was a tablet from the Mount. "There are two Queen's Bench decisions which say XYZ" is not a compelling argument. I want to know *why* the Court of Appeal should follow those cases. I want to know if the approach reflected in them is correct or whether it can be refined or improved.

None of this is to say that the Court of Appeal sees itself as some sort of free-wheeling law reform commission. That is not my point. I only wish to suggest that, directly or indirectly, the members of the Court will always think about whether the legal status quo is "right". They may not be in a position to change it because of the doctrine of *stare decisis*, considerations grounded in judicial comity or otherwise. But, good counsel never lose track of the possibility of modifying, revising or qualifying the law. The Court of Appeal does more than simply apply existing authorities. It has a responsibility to shape and advance legal doctrine. This dynamic can sometimes prove helpful if counsel is able to take advantage of it.

With these general concepts in mind, it is time to delve into some of the nitty-gritty of appellate work. I will begin with the dynamics of the decision to take a matter to the Court of Appeal.

III. The Decision to Appeal or Seek Leave to Appeal

The Court is not infrequently required to deal with improvident appeals. By that, I mean appeals so lacking in merit they should not have been prosecuted. These sorts of appeals can sometimes be the result of instructions from a client who says, “I don’t care if my chances of success are one in ten and the proceedings will cost me \$40,000, launch the appeal!” However, far more often I expect improvident appeals are before the Court because counsel did not pay adequate attention at the very outset of the proceedings to the sorts of arguments which might be available and/or have failed to properly assess the merits of the arguments and to advise clients accordingly. The typical client does not say, “Damn the torpedoes, full speed ahead!” He or she tends to accept advice as to the practical costs and benefits of pursuing an appeal and will accept a recommendation not to appeal when it is presented in an appropriate manner.

Decisions to appeal or seek leave to appeal should be made with heads rather than hearts. Often the worst time to determine whether to appeal is immediately after the decision which would be the subject of the appeal has been rendered. It is useful to let a few days pass before making final decisions or recommendations to clients. This helps both client and counsel let the emotional impact of an unfavourable result fade away and promotes clearer and more objective thinking about the merits of an appeal.

There are a number of points that have to be resolved and borne in mind when pondering the prospect of an appeal. I will do no more than outline the main ones.

A. The Right of Appeal

The first consideration, obviously, is to confirm that there is in fact a right of appeal to the Court of Appeal. In this regard it is important to remember that all rights of appeal are statutory: there is no such thing as an inherent right of appeal. See: *Kourtessis v M.N.R.*⁷

On the civil side of the equation, section 7 of *The Court of Appeal Act, 2000*⁸ is of central importance. It reads as follows:

7(1) In this section and section 9, “enactment” means:

- (a) an Act;
- (b) an Act of the Parliament of Canada; or
- (c) a regulation made pursuant to an Act or an Act of the Parliament of Canada;

but does not include this Act.

(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:

- (a) of the Court of Queen’s Bench or a judge of that court; and
- (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment.

(3) If an enactment provides that there is no appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.

⁷ [1993] 2 SCR 53.

⁸ SS 2000, c C-42.1.

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Section 7(2)(a) provides a general right of appeal in relation to decisions of the Court of Queen’s Bench. Section 7(2)(b) on the other hand, simply recognizes that rights of appeal from any other court or tribunal exist only as conferred by separate enactments. Thus, for example, section 33.1 of *The Municipal Board Act*⁹ provides for appeals from decisions of the Board directly to the Court of Appeal.

Section 7(3) qualifies all of this, however, by providing that, notwithstanding the terms of sections 7(2)(a) and (b), an enactment can negate or qualify a right of appeal which might otherwise be available. Thus, by way of illustration, section 56 of *The Occupational Health and Safety Act, 1993*¹⁰ allows the decision of an adjudicator to be appealed to the Court of Queen’s Bench but specifically provides there is no further right of appeal. See also, by way of example: *The Water Appeal Board Act*.¹¹ Some statutes provide a right of appeal to the Court of Appeal but limit such appeals to questions of law or to questions of law with leave of a judge of the Court. See, for example: *The Saskatchewan Human Rights Code*¹² and *The Small Claims Act, 1997*.¹³

A further qualification on the general right of appeal to the Court of Appeal is found in section 8 of the *Act*. It requires that leave to appeal, granted by a judge of the Court, is a precondition to appealing interlocutory decisions of the Court of Queen’s Bench. Section 8 reads as follows:

- 8(1) Subject to subsection (2), no appeal lies to the court from an interlocutory decision of the Court of Queen’s Bench unless leave to appeal is granted by a judge or the court.
- (2) Leave to appeal an interlocutory decision is not required in the following cases:
 - (a) cases involving:
 - (i) the liberty of an individual;
 - (ii) the custody of a minor;
 - (iii) the granting or refusal of an injunction; or
 - (iv) the appointment of a receiver;
 - (b) other cases, prescribed in the rules of court, that are in the nature of final decisions.

Rights of appeal in the criminal law realm are governed by the provisions of the *Criminal Code*. The rights of a person convicted in an indictable matter are spelled out in section 675. The Crown’s rights of appeal in relation to indictable matters are found in section 676. The relevant provision for appeals in relation to summary conviction offences is section 839.

An examination of all of the subtleties and qualifications in relation to rights of appeal is beyond the scope of this paper. My purpose in flagging some of the main statutory provisions is only to underline that the issue of “jurisdiction” can be tricky. It must be pursued diligently at the very outset of the appeal process.

B. Identifying the Issues

The next step in deciding whether to appeal or seek leave to appeal is absolutely critical. It involves an identification of the issues on which an appeal might be based. This exercise needs to be undertaken with care and thoroughness. Although the Court does have the authority to vary the scope of an appeal by making an appropriate order *nunc pro tunc*, that power is used exceptionally and sparingly. See: *Budd v Pioneer Co-Operative Association Ltd.*¹⁴

⁹ SS 1988-89, c M-23.2.

¹⁰ SS 1993, c O-1.1.

¹¹ SS 1983-84, c W-4.01, s 26.

¹² SS 1979, c S-24.1.

¹³ SS 1997, c S-50.11.

¹⁴ (1986), 49 Sask R 306 (CA).

Counsel must proceed on the basis that the grounds on which leave is granted or the grounds included in the notice of appeal are the points on which the case will be resolved. It is dangerous for a lawyer to allow himself or herself to think that, if something is missed it can be patched up later.

The net should be cast broadly at the initial stages of the issue identification process. Starting with a cramped or pre-determined view of a case can create blind spots and lead to promising grounds of appeal being overlooked. Counsel should undertake a ruthlessly critical review of the decision in question. He or she should read and reread the decision with great care and, in so doing, develop a “long list” of arguable errors. This should include matters both large and small so as to avoid overlooking anything which might be helpful. A proper review of this sort will often involve the legal research required to determine whether a possible issue is, in fact, something which might have promise.

It is important to think long and hard about the most advantageous way to characterize the issues. A wise man once said that he was always happy to let others provide answers if he was allowed to ask the questions. This is absolutely true in appellate litigation. The way in which the issues are framed often drives the outcome of the appeal. Let me refer to but one example.

In *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*,¹⁵ a broadcaster was attempting to get its cameras into the Nova Scotia Legislative Assembly. It presented its case as purely a *Charter* “freedom of expression” affair. Various legislative bodies, including the Speakers of the Assemblies in Manitoba and Saskatchewan for whom I acted, characterized the case as being first and foremost about parliamentary privilege. This was a very different perspective and it shifted the foundations of the appeal. In the end, the Supreme Court agreed with the legislative bodies and ruled against the broadcaster.

The point is this: the identification and characterization of the issues in an appeal is tremendously important. The issues are the pivot point for the entire appellate exercise.

C. Evaluating the Record

Once the “long list” is developed, it is necessary to whittle it down, to separate the nuggets from the gravel. This requires counsel to do more than assess the abstract legal merit of each of the possible lines of attack. It is also essential to evaluate each point against the factual record.

The key point in relation to the record should be self-evident. The Court of Appeal decides real contests grounded in real facts. The most clever legal argument in the world will not succeed if there is no proper factual foundation on which it can be constructed. Accordingly, in assessing the merits of a possible ground of appeal, close attention must be paid to the findings of fact and evidence which bear on the proposition under consideration.

D. Confirming the Standards of Review

Standards of review are extremely significant. In practical terms, many appeals turn on this consideration. The standard of review question is almost always top of mind for members of the Court. We are able to intervene in a case and give expression to our own views of what might be right, wrong or just, only to the extent the applicable standard of review will allow. There is, by way of illustration, a tremendous difference between an alleged error of pure fact on the part of a trial judge which can be overturned only if it involves a palpable and overriding error and, by way of contrast, an alleged error of law which can be approached on the basis of a correctness standard. In deciding what grounds of appeal to advance, counsel must give direct and realistic consideration to the standard of review applicable to each ground.

¹⁵ [1993] 1 SCR 319.

The standard of review question is not always easy to answer. Standards have been prescribed for matters ranging from interlocutory injunctions (*Sacred Heart Academy Corp. v Regina Roman Catholic Separate School Division No. 81*¹⁶), to custody and access (*Van de Perre v Edwards*¹⁷), to findings of fact (*Housen v Nikolaisen*¹⁸), to sentences in criminal matters (*R v C.A.M.*¹⁹), and so on and so on. Some of the issues in this area are contested and still evolving.

A review or investigation of standards of review generally, or of their most interesting and as yet unresolved features, is beyond the ambit of this paper. For present purposes, my real purpose is two-fold. First, to underline the significance of the standard of review in an appeal. Second, to highlight the potential complexity of this area and to encourage counsel to work through standard of review questions early and with considerable care.

E. Selecting the Grounds

Consideration of the various matters described above should ultimately yield a “short list” of grounds of appeal—grounds which will actually form the grounds of an appeal in a notice of appeal or the proposed grounds of appeal in an application for leave. The points which remain on the table should all have reasonable merit. The idea of including grounds which can be cards to “throw away” during oral argument is misplaced. Judges do not play poker. We only want to see those arguments counsel believe have a realistic chance of success and which they wish to see adjudicated.

Counsel are often vexed by the question of how many issues to raise in a notice of appeal. I certainly was when I was a lawyer. Judges typically recommend strongly against raising too many grounds. In general terms, this is sound advice. An appeal based on two or three or four points, by that fact alone, suggests that counsel is discerning and focused. When the list of grounds becomes too long, the overall structure of a submission is weakened and begins to collapse under its own weight. United States Supreme Court Justice Robert H. Jackson made the point in this way:

Legal contentions, like the currency, depreciate through overuse. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at a lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point less to prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.²⁰

That said, there is no magic number of issues that is too many. Much depends on context. Complex cases yield more issues than straightforward ones. Some decisions subject to appeal involve more errors than others. I can say this however. Personally, I begin to grind my teeth if I open a factum and realize that the appellant is arguing that more than six errors were made in the decision appealed from and that all can form the basis for allowing the appeal. An appellant only needs one successful argument to win. The best counsel roll up their sleeves and make the hard decisions about which issues to bring forward and which ones to leave on the cutting room floor. They do not dilute the force of strong submissions by submerging them in a brew of weak ones.

As noted earlier, once the grounds of appeal have been selected, they either find their way directly into the notice of appeal or, where leave is required, into an application for leave to appeal.

16 [1989] 6 WWR 193, 78 Sask R 7 (CA).

17 2001 SCC 60, [2001] 2 SCR 1014 at para 12.

18 2002 SCC 33, [2002] 2 SCR 235.

19 [1996] 1 SCR 500 at para 90.

20 Robert H. Jackson, “Advocacy Before the United States Supreme Court” (1951) 37 Cornell L Rev 1, 5.

IV. The Application for Leave to Appeal

I do not propose to consider applications for leave in any depth. Rather, I will note only four points.

First, as members of the criminal law bar know, the Court of Appeal considers leave applications with respect to criminal matters at the same time it hears the appeal proper. Except for some summary conviction matters, there is no separate proceeding to decide if leave should be granted. Leave applications in civil matters can be heard by either the full Court or by a judge sitting in Chambers. However, the practice is to bring such applications before a Chambers judge.

Second, counsel should remember that the points on which they obtain leave are the points they will have to live with. This means it is essential to invest enough time and thinking in the file at the very outset to ensure that *all* of the important issues have been identified and that they have been framed in the best way possible. A badly drafted ground of appeal can be a burden for the entire appellate proceeding.

Third, the application for leave is an “all of nothing” exercise in the sense that, if leave is not granted, the game is over. By reason of section 20(3) of *The Court of Appeal Act, 2000*, there is no way to appeal a decision either denying or granting leave to the Court proper. This means, particularly in cases where it is not clear whether leave will be granted, counsel must be very sure to put their best foot forward. It is a do or die proposition.

Fourth, when seeking leave, the best counsel always remember that leave is granted or denied by reference to *two* general considerations: (a) whether the appeal is of sufficient importance to warrant consideration by the Court; and (b) whether the appeal has sufficient merit to warrant the attention of the Court. There is sometimes a tendency to focus only on the latter point. This can be a mistake.

V. The Appeal Book

Rule 18 of *The Court of Appeal Rules* requires that an appeal book be filed in every civil appeal, unless otherwise ordered. The requirements for the content and layout of the appeal book are clearly spelled out in Rules 19 to 26 and I do not propose to review them because they speak for themselves.

Counsel should, however, take note of two basic points concerning the appeal book which often seem to be overlooked. The first flows from Rule 19. It requires that only those parts of the transcript which are relevant to the appeal should be included. This is not an optional requirement. The Rules oblige counsel to address themselves to this issue. The entire transcript should be included only if all parts of it are relevant to the appeal. The Court does not want to read hundreds of pages of transcript that have no bearing on the case before it. Not surprisingly, we would much prefer to use our time focusing on the aspects of the appeal that may be dispositive of it.

The second point about appeal books which is worthy of emphasis concerns the table of contents. It should be laid out in sufficient detail (and bookmarked in the electronic copy) to allow a reader unfamiliar with the materials to navigate through them as easily as possible. Counsel must use common sense in this regard. For example, we often see tables of contents which refer to “Affidavit of Jane Doe”, “Affidavit of John Doe” and so forth. This is not helpful if there are 20 exhibits to each affidavit. In order to provide proper assistance, a table of contents in a case of this sort should inform the reader where to find each of the exhibits. Thus, for example, it should also refer to “Exhibit A—Contract dated July 20, 2001”, “Exhibit B—Letter from Bill Doe dated July 30, 2001”, etc. A good appeal book is one that is user friendly.

In a criminal appeal, there is of course no appeal book. The supplementary material that must be filed is placed in the factum itself. However, a few brief comments about what is required may be helpful.

First, the material the appellant must file is set out in Rules 21 and 22 of the *Criminal Appeal Rules*. This generally includes things like a copy of the indictment or information, a copy of the judgment and the notice of appeal. Counsel must pay attention to the kind of criminal proceeding on which the appeal is based as the requirements differ for each type of appeal.

Second, counsel can and should provide the Court with supplementary material which is not strictly required by the *Rules* but which was of significance in the proceeding below, or which will be of significance on the appeal. This can include things such as endorsements, important pieces of evidence or letters from the accused. As always, it should be kept in mind that the ultimate goal is to be helpful to the Court and pave the way for the delivery of the decision being requested.

With this introductory ground covered, I turn now to a discussion of factums and factum writing.

VI. The Factum

Counsel should always bear in mind that, from the perspective of the Court, an appeal presents a problem to be solved. As noted above, the purpose of the factum is to convince the Court to deal with that problem in a particular way. It also serves to educate the Court because it introduces the issues, the facts and legal landscape. However, to re-emphasize, the factum is not a neutral and antiseptic collection of data. It is an instrument of persuasion. Counsel should craft and assess every aspect of a factum, from the table of contents at the beginning to the list of authorities at the end, with reference to the fundamental goal of convincing the Court to decide the case in favour of his or her client.

A. The Importance of Factums

The importance of factums is sometimes underestimated. This is because oral argument has historically been the aspect of the appeal where things really happen. This perception is reinforced by popular culture. After all, television shows do not depict lawyers sitting at their desks noting up cases at 11 o'clock at night. They focus on court rooms and court room drama. Lawyers are portrayed as people who talk their way to victory.

The reality is that the factum is a critically important aspect of effective advocacy. All things considered, it is likely easier to win an appeal with a strong written argument and a weak oral argument than it is to win an appeal with a weak factum and a strong oral submission. The truth is that more appeals are won by lawyers sitting on their backsides in the library or at the keyboard than are won by lawyers standing on their feet in the court room.

In order to properly appreciate this phenomenon, it is necessary to understand the role a factum plays in the Court's decision-making process. There are three points to note in this regard. First, the factums introduce the case to the Court long before counsel ever set foot in the court room. In the Court of Appeal, the appeal books, factums and other material are typically distributed to judges about two weeks in advance of the oral hearing. They are reviewed carefully and, on the strength of them (and, sometimes, additional work done by a judge himself or herself), each judge forms a tentative working view of the case. A factum which is sufficiently convincing can take a judge a long way toward a decision without counsel ever opening his or her mouth.

Second, factums typically dictate the shape and control the scope of the oral argument itself. By focusing and refining the issues and identifying points of contention in the appeal, they necessarily form a kind of road map for oral submissions. In most cases, oral argument is largely an elaboration or clarification of the submissions made in counsel's own factum and a response to the content of the factum filed by opposing counsel.

Third, factums stay with the Court after the case has been argued. They are a permanent record of counsel's submissions. When an appeal is reserved, the factum remains with the judge, advocating particular results and lines of analysis long after counsel have left the court room and turned their minds to the next file.

It can be seen, therefore, that factums are exceedingly important. Oral argument is very definitely not the only kind of advocacy that has an impact on the Court.

B. The Need for Proper Research

One of the things I have been struck by since taking my seat on the Court of Appeal is the frequency with which counsel fail to search out the full range of available authorities and resources in preparing their factums.

The first point to remember in this regard is that there is a wealth of case law from *outside* this jurisdiction. Counsel do their clients and the Court a significant disservice if they look only at what the Saskatchewan cases have said about a point in issue. Invaluable assistance can often be found in the case law from other jurisdictions. In this regard, it is important to remember that Saskatchewan statutes and Saskatchewan Rules of Court will almost always have a counterpart in other jurisdictions, particularly Canadian jurisdictions. It can take a little leg work to find those analogs but they often produce helpful results.

*Goertzen v Saskatchewan (Workers' Compensation Board)*²¹ makes the point very clearly. It involved a situation where the Workers' Compensation Board had placed an unusual interpretation on a provision of its governing legislation. As it turned out, the particular statutory phrase in issue was found in virtually every workers' compensation statute in the United States and, interestingly enough, the courts in almost 20 American jurisdictions had interpreted it in exactly the same way as had the Saskatchewan Board. It was a rather compelling argument to suggest that the Board's interpretation of its legislation must be reasonable when 20 jurisdictions just south of the 49th parallel had read it in precisely the same fashion.

I am obviously not suggesting that every case should involve a comprehensive examination of U.S. case law. But, I certainly am saying that the failure to look broadly enough at the existing authorities can be a very serious oversight.

My second point with respect to research is that counsel should remember to take advantage of the assistance which is available in secondary sources like textbooks and academic writings found in law reviews and other publications. Thorough and adequate research involves checking those kinds of sources to see if they contain helpful material. Counsel who fail to make those inquiries overlook potentially significant help in mounting their case. The best lawyers look beyond case law when conducting research.

My third point, an obvious one, is a reminder to ensure that the case authorities being relied on are current. Never cite a case without checking to see if it has been overruled or qualified since it has been rendered. Failing to follow through on the judicial consideration of a case is one of the most surefire ways there is for counsel to embarrass themselves and undermine their credibility with the Court.

Fourth, when dealing with the Statutes of Canada (and some Saskatchewan statutes), counsel should not forget the French version. Sometimes the French language edition of a statute can be very useful in resolving ambiguity in the English version and *vice versa*.

C. A Note on Style

In terms of basic style, a good factum is concise, well-organized, clearly written and respectful of the Rules. Let me say a word about each of these notions.

“Concise” does not necessarily mean “short”. I suppose every judge would like all factums to be very brief. This would give us less to read and make our lives easier. However, appeals often involve complex or multiple issues or rest on involved facts. A short factum will not always do the trick. Judges understand that.

“Concise” does not mean “superficial” either. A good factum must be appropriately comprehensive and must deal with the issues at a sufficient level of depth and sophistication. Concision is about the economy with which the case is developed. It is not about the breadth or depth of the treatment of the issues.

²¹ 2002 SKCA 125, 227 Sask.R.146.

A “concise” factum gets to the point. It does not dwell on irrelevancies, either factual or legal. It uses words economically and avoids unnecessary verbiage. It definitely does not treat the 40-page maximum provided in the Rules as an effective minimum length. The call for conciseness is nothing more than a request that necessary points be made as clearly, succinctly and economically as possible.

A well-written factum is one which makes its points in a way that tends to the needs of readers and is alert to how readers absorb information. Several points warrant emphasis in this regard:

- (a) Use simple sentence structures and avoid long, rambling sentences like the plague.
- (b) Keep paragraphs short. Long paragraphs are extremely hard to digest.
- (c) Use headings and subheadings to mark the path of the argument.
- (d) Leave plenty of white space on each page.
- (e) Avoid grandiose verbiage. “It is respectfully submitted that the learned trial judge erred when he...” adds nothing to “The trial judge erred when he...”. We know counsel are respectful and we know they think all trial judges are learned.
- (f) Try not to use the passive voice if the active voice will work. “It was found that Smith lied” is much less compelling than “Smith lied”.
- (g) Hunt out and eliminate unnecessary words. Counsel should not write “She had adequate and sufficient reason to leave the marital home” if he or she can write “She had adequate reason to leave the marital home”. The best drafters make each word earn its right to remain on the page.

The list of potential writing sins is endless. Robert Leflar, with tongue in cheek, points out these additional problems:

- 1. Subjects and verb always has to agree.
- 2. Make each pronoun agree with their antecedent.
- 3. Just between you and I, case is important too.
- 4. Being bad grammar, the writer will not use dangling participles.
- 5. Parallel construction with coordinate conjunctions is not only an aid to clarity but also the mark of a good writer.
- 6. Join clauses good, like a conjunction should.
- 7. Don’t write run-on sentences, they are hard to read, you should punctuate.
- 8. Don’t use no double negatives. Not never.
- 9. Mixed metaphors are a pain in the neck and ought to be thrown out the window.
- 10. A truly good writer is always especially careful to practically eliminate the two-frequent use of adverbs.
- 11. In my opinion, I think that an author when he is writing something should not get accustomed to the habit of making use of too many redundant unnecessary words that he does not actually really need in order to put his message across to the reader of what he has written.
- 12. About them sentence fragments. Sometimes all right.
- 13. Try to not ever split infinitives.
- 14. It is important to use your apostrophes ‘s correctly.
- 15. Do not use a foreign term when there is an adequate English *quid pro quo*.²²

²² Cited by McLachlin C.J.C. (2001), 39 Alta L Rev 695 at para 21.

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I turn, then, to the organization of the factum. At a macro level, of course, organization is dictated by Rule 28 of the *Civil Rules* and Rule 20 of the *Criminal Rules*. They require that every factum contain an introduction, a jurisdiction and standard of review section, a statement of facts and so forth. But, the real proof of the organizational pudding lies one level down in the factum.

A good factum hangs together in the sense that it flows logically and builds strongly to conclusions. It reflects a clear, well thought out theory of the case and lays out clean, compelling lines of analysis. A reader should never be challenged to figure out why he or she is reading a particular passage or how a comment fits into the overall theory of the case. A good factum takes the reader’s hand and leads him or her surely, confidently and logically from the beginning of the case to the conclusion.

Finally, in terms of overall style, a good factum respects the Rules. It is printed using 12-point type. The margins are one and a half inches. It is organized under the prescribed headings. Line spacing is as per the specified requirements and so forth. Failure to comply with the Rules can have unhappy consequences. For example, in *Ochapowace Indian Band v Saskatchewan (Minister of Justice)*,²³ the appellant filed a factum well in excess of the 40-page maximum set out in the Rules and then filed a motion asking for relief from the Rules. The motion was denied and the appellant was obliged to substantially re-write his factum.

D. “Point First” Writing

Factums should be drafted using “point first” writing. The central notion of this approach is straightforward. It is that the detail of a submission is most easily understood and retained if the target audience is first provided with the reason why those details are being conveyed. Justice John Laskin explains the concept in these terms:

The rationale for the principle of context before details has its origin in the field of cognitive psychology. Cognitive psychologists who study how people read and how they absorb and retain what they have read, tell us that people absorb the significance of information and retain it better when they first know why it is relevant and how it fits; in other words when they have a context for it.²⁴

All of this is clearly correct. Suppose, for example, that counsel wants to make the point that Mr. Smith was in Calgary on the day of the murder. Rather than launching directly into the details of the relevant evidence and keeping its significance (the whereabouts of Mr. Smith) a secret to the end, it is much more effective to say:

“Mr. Smith was not in Regina on the day of the murder. Several witnesses confirmed he was in Calgary:

- (a) He was identified by a taxi driver who picked him up at the airport in Calgary.
- (b) The desk clerk at the XYZ hotel in Calgary remembered him checking in just before noon.
- (c) Ms. Jones recalled seeing him at the base of the Husky Tower about mid-afternoon.”

Similarly, if a drafter wants to refer to case law, he or she should not lay out a long catalogue of paragraphs starting with words like: “In *A. v B.*, the Ontario Court of Appeal said... In *C. v D.*, the Alberta Court of Appeal said...” and so forth. Begin with the proposition of law those cases are said to establish and then refer to them.

²³ 2007 SKCA 88, [2007] 9 WWR 226.

²⁴ John I. Laskin, “Why Are You Telling Me All This?” in T.A. Cromwell, *Effective Written Advocacy* (Toronto: Canada Law Book, 2008) at p. 39. Justice Laskin has written a number of excellent pieces on “point first” writing. Some of them are referenced in the suggested reading list found at the end of this paper.

As might be obvious, the “Introduction” section of the factum, as prescribed by the Rules, is an excellent example of point first or context first writing. Its fundamental purpose is to explain to the reader what to look for when going through the balance of the document and to provide a basis for helping the reader recognize what might be important and what might not be.

The bottom line is this. A judge reading a factum should never have to ask himself or herself questions such as “Why am I reading this?”, “Why is this important?” or “How does this fit in?”.

E. The Importance of Editing

Editing is one of the keys to writing a good factum. Excellent writers are ruthless critics of their own work. Counsel should press themselves hard. Did I frame the issues in the best possible fashion? Is this really the right way to start the Argument section? Should this paragraph (or perhaps half of it) be on page 7 instead of page 9? Do I need all that detail in the statement of facts? Is this word necessary? And so on and so on.

If a lawyer finds it difficult to critique his or her own work, it might be wise to ask another lawyer in the office to read the draft factum with a questioning eye. It is more pleasant to receive feedback about deficiencies in a work product from a colleague than to receive it from the Court.

There might be a few Mozarts who lay out a perfect factum on the first attempt. But most of us are like Beethoven. We have to sweat and struggle and revise and redraft to get things right. Remember that Beethoven was a pretty good composer too. No one should feel bad about being like him.

Having made these general comments about factum writing, it is now appropriate to turn to the specific content of factums. I will start at the beginning.

F. The Table of Contents

It might sound strange at first blush but there are definitely good and bad ways to draft a table of contents for a factum.

A bad table of contents does no more than list the main pieces of the factum as mandated by the Rules: Introduction, Jurisdiction and Standards of Review, Facts, Issues, Analysis and Relief Requested. This kind of setup is not helpful. A judge, or opposing counsel, will often find himself or herself reading a section of the factum of one party and want to see what the other party or parties have to say about that particular point. Alternatively, a judge might find himself or herself writing reasons and want to go directly to a specific piece of a factum. A highly generalized table of contents will not be useful in these kinds of situations. It will force the reader to page through the factum hunting for the appropriate section. Particularly in longer factums which are not structured around adequate headings and subheadings, this can be quite frustrating.

The better approach is to put detail into the table of contents (and the bookmarks in the electronic copy). If, for example, the Summary of Facts has subparts, they should be reflected in the table of contents. The same goes for the Argument Section. If there are several issues and/or sub-issues, it is good practice to track them in the table of contents. I have included at Appendix A, by way of illustration, a table of contents which contains a level of detail that provides genuine assistance to the reader.

G. The Introduction Section

Rule 28 of *The Court of Appeal Rules* and Rule 20 of *The Criminal Appeal Rules* require that every factum must begin with an “Introduction”. This part of the factum is not just a throw away. It is the gateway to all that follows. It should be very carefully drafted with a view to accomplishing several objectives:

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- (a) Briefly explaining the procedural history of the case so a Court of Appeal judge knows how it got before him or her.
- (b) Revealing the essential facts of the case in order to give the reader a sense of the foundation on which the appeal rests.
- (c) Identifying the key issue or issues on which the appeal will turn and characterizing them in an advantageous fashion.
- (d) Flagging how the appeal should be resolved.

In other words, the introduction should set the stage for the rest of the factum. It should not be disconnected from the Summary of Facts, Issues, Argument and Relief sections of the factum. It should very much anticipate and lead into them.

The Introduction section should not be long. A page or page and a half should be the maximum length. Counsel must strive to create a pithy big picture overview that identifies the controlling aspects of the case and begins to draw the reader toward the desired conclusion.

We frequently see factums where the introduction stretches to several pages and includes substantial factual and legal detail. This is not a good approach. A long overview obscures or defeats the real purpose of an “Introduction” and often leads to unnecessary repetition in that, after getting into the details in the Introduction, counsel also feels compelled to get into them again in the “Facts” and “Argument” sections of the factum. At a minimum, this creates a strange sense of déjà vu for the reader as he or she advances through the written argument. At worst, it creates needless and confusing duplication.

I have attached, as Appendix B, an anonymized version of the overview section of a factum I wrote shortly before my appointment. It is not a legal classic but it does illustrate how, even in a very complex case, it is possible to provide an introduction which, in brief compass, explains the nature of the case, flags the issues and begins to move the reader toward the desired result.

H. The Jurisdiction and Standard of Review Section

The Jurisdiction and Standard of Review section of the factum requires counsel to address, at the outset of the written submission, the two issues which every judge asks himself or herself at the front end of every case: Do I have the authority to hear this appeal?; How much deference am I required to show the judge or the decision-maker being appealed from?

There seems to be a tendency on the part of some counsel to see this part of the factum as no more than a box to be ticked off quickly on the way to the important stuff: the facts and the argument. This is often a mistake. The standard of review question, in particular, is important in every case. A lawyer drafting a factum should pause and think hard about it and, if the point is at all fuzzy, do the appropriate research to resolve it.

It should be remembered, as well, that each issue in an appeal might attract a different standard of review. This is not a one-size-fits-all operation.

I. The Summary of Facts Section

The summary of facts is a central part of the factum. In the end, every case is a contest involving real people and/or real companies or other organizations. Appeals might sometimes feature rather abstract debates about questions of law but counsel should rest assured that judges never lose sight of the impact their decisions will have on the litigants involved in the case at hand. Every judge wants to resolve an appeal in a way that is fair, just and reasonable. Fairness, justice and reasonableness are rooted in the facts.²⁵

²⁵ See: John Laskin, *supra*, note 3, paras 37–40.

As a result, counsel should strive to present the facts in a manner which, while scrupulously accurate, leads the Court in the desired direction. The facts section of the factum is not merely a place to dump a summary of the evidence. It should be seen as an opportunity to lay out the facts in a way that facilitates the desired disposition of the appeal. One author has usefully described the underlying purpose of the statement of facts in these terms:

The basic theory behind writing statement of facts is to make the case easy for the appellate judges to decide the advocate's way. This means preparing a statement of facts that is simple to follow and to accept as reliable. A statement of facts should read like an interesting story. It should adhere to a consistent theme, be written with vivid language, and have a cohesive organization. It is not, however, fiction. Thus, literary licence is unacceptable. A statement of facts should be an accurate reflection of the proceedings in the trial court. It should consist of even-handed advocacy. That means that both the good and the bad should appear. The aim is to have the appellate court rely on counsel's statement of facts not the opponent's. It must inspire, and be worthy of, the appellate courts trust.²⁶

Preparing the statement of facts can involve a great deal of work. It can often be a real challenge to sort out important points from unimportant ones and to distill a complex set of circumstances into a clear, clean and compelling story. However, because the outcomes of so many appeals are driven directly by the facts, this will be time well invested.

Writing the facts is self-evidently a bit of a high wire act. Counsel must manage the tension which arises along a number of vectors. First, the tension between being accurate on the one hand and, on the other hand, putting the best possible face on the case. Second, the tension between the obligation to outline all the relevant facts for the Court and the need to be as concise and to the point as possible. Third, the tension between the need to respect the findings of the trial judge (or other fact finder) and the need to put the best evidence forward. Good counsel manage these tensions in a way that is fair and ethical but which nonetheless results in a version of the facts that leaves the impression his or her client should prevail.²⁷

Based on what I have seen during my years on the Court, it may be useful to underline and emphasize the following specific points about this part of the factum:

- (a) The statement of facts must be completely accurate. Few things undercut the credibility of a submission quicker than an error in the presentation of the facts.
- (b) Find a way to describe the parties that makes the factum easy to follow. "Appellant" and "respondent" become confusing. It is much better to use the parties names or to use terms like "the Company" and "the Union". Similarly, too many acronyms can become confusing. Make the story as easy to understand and follow as possible.
- (c) Always cite the statement of facts to the record. A statement of facts which is underpinned by detailed references to the evidence and the trial decision is far more compelling than one which is simply a naked recitation of the background of the case. Moreover, when judges prepare for oral argument or write a decision, they would prefer not to have to wade through hundreds of pages of transcript or exhibits to find the evidence which sustains a point made in the statement of fact. Opposing counsel also appreciate knowing exactly where to find the underpinnings of the statement of facts.
- (d) Work hard to eliminate unnecessary detail. In a personal injury case, it might be mildly interesting to know that the appellant wore a blue denim shirt purchased from the Regina East Victoria Wal-Mart. The real point, however, is that the victim suffered three broken ribs and a punctured lung. Clear away the factual underbrush. Focus on the *material* facts.

²⁶ R.J. Aldisert, *Winning On Appeal*, *supra*, note 2 at p. 159.

²⁷ These insights come from R.J. Aldisert, *ibid.* at p. 155.

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- (e) Try to make the facts tell a compelling story. Use clear, vivid language and avoid a format that is no more than a witness by witness summary of the evidence. The statement of facts must be accurate but it need not be hopelessly boring. It is not unethical to make a case interesting.
- (f) Keep submissions out of the summary of facts. There is sometimes a temptation to let the argument aspect of the factum bleed into the statement of facts. This should be avoided.
- (g) Be fair. The summary of facts must be a summary of *all* of the relevant facts, not just the ones supportive of a particular side of the case. Any attempt to omit or misrepresent unhelpful facts is certain to backfire. That said, emphasize favourable facts and de-emphasize unfavourable ones.
- (h) Respect the findings of fact made by the trial judge or other fact finding agency. An appeal is not a trial *de novo*. There is a distinction between the “facts” found by the trial judge and the “evidence”. That distinction should be made clear.
- (i) Remember that there are ways other than the use of words to convey facts. In complicated cases, a chart, graph, time line or diagram can be very helpful.

Rule 28 of the *Civil Rules* says the respondent “shall state its position taken with respect to the appellant’s statement of facts and any facts it considers relevant”. This can be tricky. Judges typically will not appreciate the respondent’s counsel re-writing the facts simply for the sake of re-writing them or for the sake of putting a slightly more helpful gloss on them. However, in most cases, counsel will feel a strong temptation to do just that in order to gain whatever advantage might flow from the most sympathetic possible statement of the facts.

Determining the right approach with respect to this issue requires the exercise of judgment. If the appellant’s statement of facts is complete, accurate and balanced, it will be best for the respondent to simply accept it. If there are only one or two points omitted from the appellant’s statement or included in it but requiring correction, then the respondent normally need do no more than accept the appellant’s statement, subject to those specific points. However, if the respondent believes there are multiple problems in the appellant’s summary of facts or if the appellant has put too much “spin” on them, it is clearly appropriate to re-state the facts in their entirety, perhaps with an opening paragraph which says something like “The respondent accepts the broad outline of the summary of facts found in the appellant’s factum but believes that statement is incomplete in several respects. As a consequence, it is useful to restate the facts as follows...”.

J. The Points in Issue Section

The next part of the factum is the “Points in Issue” section. Although this is the fourth major piece of the document, as noted above, it is not something which good lawyers work out *after* drafting the Introduction, Jurisdiction and Standard of Review and Facts sections. The issues must be clearly and specifically understood at the very beginning of the drafting process so all pieces of the brief can be written to reflect and feed into their resolution. Although I expect few lawyers actually do so, the “Points in Issue” part of the factum could be drafted as the *first* step of the writing process.

The “Points in Issue” are the matters raised by the appellant in the notice of appeal. It is usually helpful, however, to break those points down into sub-issues, if they in fact involve sub-issues. For example, in a *Charter* case, the notice of appeal might say no more than that the trial judge erred in finding a particular statute to be a reasonable limitation of rights. In the “Issues” section of the factum, it may be useful to be more specific and to indicate, for example, that the real points at stake are (a) whether the limitation of rights occasioned by the statute was the least restrictive way of achieving the statutory objective and (b) whether the requisite proportionality existed between the importance of the legislative objective and the nature of the infringement of rights.

The appellant’s view of the questions at stake in an appeal will often be entirely valid and complete. In that situation, the respondent should simply adopt the appellant’s formulation of the points in issue and proceed to

deal with them. However, the respondent need not accept the appellant's formulation of the issues. A skillful lawyer representing a respondent will avoid the trap of allowing the appellant's theory of the case to become a straight-jacket. (This sort of problem will typically arise in cases where there is an open-ended right of appeal).

If counsel acting for the respondent believes the appellant has misconceived the case, he or she should say so and then lay out the issues as he or she sees fit. Similarly, if the respondent's counsel believes the Court needs to consider other issues in addition to those flagged by the appellant, that should be made clear as well. All of this said, it is nonetheless important for a lawyer acting for the respondent to avoid a situation where he or she simply fails to engage with respect to the appellant's arguments and, as a result, leaves them unanswered.

K. The Argument Section

The Argument section is the heart of every factum. It marries the law to the facts and demonstrates why a particular form of relief is justified.

Generally speaking, the propositions advanced in the argument section should be structured as syllogisms. In other words, they should involve a progression from major premise to minor premise to conclusion:

- Major Premise: All men are mortals.
- Minor Premise: Socrates is a man.
- Conclusion: Therefore, Socrates is mortal.²⁸

Cast in terms more familiar to the law, the train of logic looks like this:

- Major Premise: Proof of damage is an essential element of the tort of negligence.
- Minor Premise: Mr. Smith's actions resulted in no damage to Ms. Jones.
- Conclusion: Therefore, Mr. Smith's actions were not negligent.

Not all factums follow this line of reasoning. However, effective counsel remember that it is not enough to recite case after case stating legal principles. Similarly, they understand it is not enough to sympathetically review the evidence or the findings of fact. These two streams must be brought together in such a way as to demonstrate the logical inevitability of the desired conclusion.

In this regard, the appellant's factum should not lose track of the need to show an error in the decision under appeal. An appeal is not an "in the air" debate or a *de novo* proceeding. The temptation to see it as such should be resisted and lawyers drafting appellants' factums should not lose sight of the need to demonstrate a reviewable error in the ruling which is the subject of the proceedings.

The Argument portion of the factum should, of course, be broken into separate sections corresponding to each of the issues being raised. It is best to begin each of those sections with an opening paragraph which explains and summarizes what is to follow. For example, the opening paragraph of a section dealing with whether a Queen's Bench Chambers judge employed the proper standard of review in setting aside a Labour Relations Board decision might read something like this:

The Board's decision was reviewable on the reasonableness standard. The Chambers judge purported to use that standard but in fact applied the correctness standard. As a result, his order must be set aside.

This sort of approach provides context before detail. A judge reading what follows will know *why* he or she is reading it.

²⁸ *Ibid.* at p. 145.

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After this sort of opening, the analysis should then progress through a clean and logical chain of reasoning and arrive at a conclusion. It is often helpful to end each section of the argument with a brief recapitulation of what has gone before. Thus, in the judicial review case referred to in the preceding paragraph, the argument might conclude with this sort of paragraph:

In the result, the order made by the Chambers judge cannot stand. It was not enough for him to refer to the reasonableness standard of review. He had an obligation to apply it as well.

Old time preachers were apparently taught to organize their sermons along these lines: (a) tell them what you are going to say, (b) tell them, (c) tell them what you told them. Used correctly, this approach can work very well in factums (and oral submissions). It is point first or context first writing with a twist.

The Argument section of the factum, in particular, should involve an appropriate use of headings and sub-headings. This helps to reveal the logical structure of the submission, makes it much easier for the reader to follow the flow of the argument and generally makes the factum look more appealing. Many counsel frame headings in the form of questions. An example of this style might be “Did the trial judge misinterpret s. 2 of *The Contributory Negligence Act*?” This sort of formulation lacks punch. It is always better, where possible, to frame headings in the positive. So, instead of asking in open-ended terms whether the trial judge erred with respect to a certain issue, it is better to frame the heading as follows: “The trial judge misinterpreted s. 2 of *The Contributory Negligence Act*”.

There are a variety of other points which, on the basis of my experience, warrant the special attention of counsel. They are noted below:

- (a) It is not necessary to cite multiple authorities for each proposition of law. For example, if there is a recent Supreme Court of Canada case directly on point, the matter is settled.
- (b) Counsel must take care not to overreach in relation to authorities. Make sure the cases cited actually stand for the proposition they are said to stand for.
- (c) Deal with the authorities that are problematic. Take them on fairly and directly and explain why they do not apply or control the outcome of the case.
- (d) Avoid using long quotations. They are too easy to gloss over. Quotations can be very compelling and useful but they should be wittled back as much as possible. Underline or italicize the key sentence or phrase in a quotation to be sure the reader picks up what is important.
- (e) Always introduce a quotation with a sentence or two explaining what it says and why it is significant. There is a big difference between “In *Dunsmuir v New Brunswick* the Supreme Court said this: ...” and “In *Dunsmuir v New Brunswick* the Supreme Court said the patent unreasonableness standard of review should no longer be employed. It said this: ...”.
- (f) Cite authorities overlooked by opposing counsel. Counsel have an obligation to refer the Court to all relevant authorities, regardless of whether they are “helpful” to their client’s side of the case. Taking the high road on these kinds of issues is a sure-fire way to win the respect of colleagues and the Court.

The Argument part of the respondent’s factum must, most fundamentally, *respond* to the submissions advanced by the appellant. It should not pass by the appellant’s arguments like a ship in the night. However, there is no doubt that drafting a good respondent’s factum requires considerable finesse. The respondent’s approach to the case should not be completely reactive. The best respondent factums offer both an effective defence to the appellant’s line of attack and set out a “positive” view of the case which confirms the validity of the decision under appeal. I do not mean by this to suggest that a respondent should re-argue the case as it was presented in the court or tribunal which rendered the decision in issue. My point is only that a good respondent’s factum leaves the reader with the sense, not only that the appellant is wrong, but that the decision under appeal is in fact correct and that the Court should feel comfortable leaving it intact.

L. The Relief Requested Section

The relief section of the factum lays out the parties' bottom lines. It is self-evidently important. As Justice Thomas Cromwell has said "If you do not ask for what you want, you are unlikely to get it".²⁹ The order sought by counsel should be clearly and completely described. What exactly does counsel want the Court to do? Allow the appeal? Dismiss the appeal? Allow the appeal and vary the decision appealed from? If so, in what particulars? Substitute a different order or verdict? Direct a new trial or hearing? It is important, of course, to ensure the Court has jurisdiction to grant the relief requested.

The relief section of the factum should also deal with costs. If there are reasons for the Court to depart one way or the other from the tariff, those reasons should be explained.

²⁹ T.A. Cromwell, "Effective Written Advocacy in Factums" in T.A. Cromwell, *Effective Written Advocacy, supra*, note 24 at p. 63.

VII. Books of Authorities

The Rules do not oblige counsel to submit a book of authorities. However, it is common practice to provide the Court with a bound volume containing the various materials referred to in the factum.

I think it fair to say that most members of the Court appreciate receiving a book of authorities even though, in light of electronic databases, authorities are easier to hunt down than they might have been historically. I certainly am grateful to find all the relevant authorities well-organized and in one spot. A book of authorities makes life easier and saves time both in preparing for the oral hearing and in writing a decision afterwards. Counsel need file only three copies—one for each of the judges on the panel.

The preferable practice is to coordinate with opposing counsel for the purpose of jointly producing a collection of authorities. Indeed, *Criminal Practice Directive No. 5* and *Civil Practice Directive No. 2* encourage counsel to do just that. Cooperation can result in a collection of material which is easier to use and handle for all concerned because it is not duplicative and overlapping. It is not difficult to pick up the phone or write a letter early on in the appeal for purposes of forging an agreement as to how to proceed with a joint book of authorities. There is no right way to do the required work. Sometimes one counsel will undertake to prepare a volume or volumes containing all of the authorities relied on by both sides. Alternatively, or failing cooperation from the other side, counsel for the respondents can produce a book which includes only those materials referenced in his or her factum that are not included in the appellant’s book of authorities. The bottom line remains the same: try to avoid unnecessary duplication.

That said, it is important to use some discretion and judgment in deciding what to include in a book of authorities. As well, counsel should be aware of, and comply with, the “Books of Authorities” Practice Directives. See: *Criminal Practice Directive No. 5* and *Civil Practice Directive No. 2*. Counsel might note the following points in particular:

- (a) It is frequently not necessary or useful to include every authority referenced in the factum. For example, unless standard of review is somehow a live issue in the context of a sentence appeal, a book of authorities need not include such well known precedents as *R v C.A.M.*³⁰ In fact, the *Practice Directives* each contain a list of familiar cases that need not be reproduced.
- (b) It might not be necessary or useful to include the full text of every authority. For example, if the factum refers to section 103 of *The Securities Act, 1988*,³¹ it might well be sufficient to include the relevant parts of section 2 (the definitions section) and Part XVI (the Part of the *Act* where section 103 appears). Similarly, if the factum refers to the *Oakes* test for assessing the validity of limitations on *Charter* rights, it will be sufficient to include only paragraphs 62 to 79 of that decision. The other 64 paragraphs of the case, dealing with a reverse onus clause under the *Narcotic Control Act*, will be entirely irrelevant. However, counsel should also avoid editing authorities down so much that the reader is driven to search for the full text in order to establish the context of the excerpt included in the book of authorities. Again, the *Practice Directives* speak to all of this.
- (c) Highlight the passage or passages in an authority that are of key importance. This can be done by way of underlining, highlighter pen or marginal sidebars. The point is that any approach of this sort will draw the attention of the reader directly to the features of the authority which advance the client’s cause. It also saves a judge time and ensures that he or she actually finds the passage counsel sees as being important.

³⁰ *Supra*, note 19.

³¹ SS 1988-89, c S-42.2.

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- (d) Use double-sided copying. There is no point killing trees and burdening lawyers and members of the Court alike with more paper than necessary.
- (e) Sometimes it will be necessary to include more than one level of decision in a case in order to make the book of authorities fully useful. For example, if the Supreme Court reverses the decision of a court of appeal for “the reasons of Justice XYZ, writing in dissent” but says nothing more, then a copy of the court of appeal’s decision will have to be included as well.
- (f) If there is more than one volume of authorities, a *full* table of contents for all volumes should be included in each volume. This avoids having to jump back and forth trying to locate a particular item in the materials. The table of contents, obviously, should indicate the volume and tab number at which any individual authority can be found.
- (g) Counsel should ensure that relevant statutory provisions and excerpts from secondary materials like law review articles are included in the book of authorities. The book of authorities should not be seen as a book of “court decisions”. It is most useful as a book of all pertinent authorities.

I have covered the “paper” side of the advocacy equation. It is now time to turn to the hearing itself.

VIII. Oral Argument

Oral argument is important. It is not just a bit of window dressing designed to placate counsel and make them feel like “real lawyers”. I have never, either as lawyer or judge, seen counsel make a genuine and *bona fide* pig’s ear into a silk purse. However, that said, oral submissions do regularly change the outcome of appeals. They are particularly significant in complex cases and cases which are evenly balanced in terms of potential results. To quote Joni Mitchell, I have “looked at life from both sides now” and, having done so, I completely reject the cynical view that oral argument has little or no effect on decision-making in the Court of Appeal for Saskatchewan.

Delivering an effective oral argument in the Court of Appeal is not easy. Every lawyer who has appeared before the Court can identify with Justice Robert Jackson’s famous reflections on his days as U.S. Solicitor General and his comments about the three arguments he presented in every case:

The order and progression of an argument are important to its ready comprehension, but in the Supreme Court these are not wholly within the lawyers control. It is difficult to please nine different minds, and it is common experience the questions upset the plan of argument before the lawyer has fairly started. I used to say that, as solicitor general, I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.³²

Oral argument is difficult, in large part because it is unpredictable. Each case has its own special wrinkles and content. A factually straightforward case with one issue is different than a factually complex case with multiple issues. Every lawyer on the opposing side has his or her strengths, weaknesses and idiosyncrasies. Every panel of the Court has its own unique chemistry in terms of how aggressive it might be in asking questions, encouraging counsel to move on to new points and so forth. Nonetheless, the business of delivering oral argument is the greatest source of exhilaration and satisfaction that appellate practice has to offer.

A. Oral Argument in Context

It is essential for counsel to appreciate where and how oral argument fits into the decision-making process of the Court. The lawyer who understands the basic landscape in this regard is off to a good start.

The first point to underscore is that, like almost all contemporary appellate courts, the Court of Appeal is “hot” in the sense that judges walk into the court room well prepared and familiar with the case. They do not begin from a standing start with the first words of appellant’s counsel. The typical judge in the typical case will have studied the factums, read the key authorities and the decision appealed from, and familiarized himself or herself with the record.

About thirty minutes before the beginning of oral argument, the panel hearing the appeal will meet to discuss the case. At this conference, each judge offers his or her tentative impressions of the appeal. This will usually involve a discussion about which arguments appear to be strongest and which appear to be weakest and why. Sometimes there is a conversation about which points in the appeal are unclear and/or which issues need to be more fully developed or explained by counsel. Problems in the record or the history of the proceedings might be flagged as being in need of clarification.

³² *Supra*, note 20 at p. 6.

The judges hearing a case normally walk directly from that meeting into the court room. In a sense, therefore, counsel are joining a conversation which is already underway. They are definitely not facing an audience which knows nothing about the case. Basic education is not normally one of the central purposes of oral argument.

The second key point for counsel to remember is that, from the perspective of the Court, oral argument advances three fundamental objectives:

- (a) It clarifies the issues. In light of the factums and with the benefit of some reflection, the positions of counsel can be drawn into sharp focus and the points in issue can be identified with precision.
- (b) It clarifies the record. Sometimes there are ambiguities in this regard. The Court might have questions about the pleadings, the procedural history of the case, the ruling appealed from, or the evidence. These need to be sorted out before the merits of the case can be adjudicated.
- (c) It tests the merit and soundness of the positions being advanced. Oral argument gives judges an opportunity to poke and prod at submissions in order to see how or if they hang together under fire. It also affords them the opportunity to see arguments bear up when attacked by opposing counsel. As one writer has said, oral argument is the “anvil” on which solid positions are hammered out and confirmed.³³

Counsel should see oral argument as an invaluable opportunity to look the members of the Court in the eye and lead them to the desired result in the case. Judges are searching for a clear, safe and solid path to a just resolution of the appeal. As Justice Oliver Wendall Holmes said, we are seeking the “implements of decision”. Oral argument is the place to deliver those implements.

The best counsel do not use oral argument to simply replough the ground covered in their factums. They see oral argument as an opportunity to focus and distill and sharpen and simplify the problem before the Court. They identify the key or “controlling” issues in the case and go after them. The factums provide general background and the platform for the overall education for the Court. Oral argument is the chance to zero in on what really counts.

B. Preparation

Preparation is the absolute key to effective oral advocacy. It involves several obvious elements:

- (a) Learning the record—In some cases with voluminous transcripts or exhibits, this can be a challenge. Nonetheless, it is essential. Counsel might need to develop an indexing or tab system (electronic or otherwise) that works for them. There is no right or wrong way to do this but it is essential that a lawyer be able to dip into the record on a moment’s notice should that be required. It is, of course, often possible to anticipate which aspects of the record will be important and, if necessary, develop a “cheat sheet” which will facilitate instant zeroing in on references needed to respond to questions or points made by the other side.
- (b) Studying the authorities—This obviously goes without saying. Counsel will need to be in a position to deal skillfully with the law that bears on the case. However, a sense of proportion is required. There is no point staying up half the night studying the fine points of genuinely obscure decisions. It is usually relatively easy to anticipate which cases will be important in an appeal and which will not. In areas of the law where the jurisprudence is evolving, counsel will want to be especially familiar with the most recent authorities.
- (c) Mapping out the argument—The key in this regard is considering the case from the perspective of the Court. Why was leave to appeal granted? What is the legal key to the case? Identify what is essential to the success of the case and resolve to deal with it. (More on this below.)

33 Some of these points are made by R.J. Aldisert, *supra*, note 2 at p. 29 *et seq.*

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- (d) Thinking through the hard questions—It is extremely helpful to look at the case through the eyes of opposing counsel and/or through the eyes of a hostile judge. Where are the holes? What are the meanest, toughest questions that can be asked? Once those are identified, counsel should work through the answers in detail. It can be very useful to develop a sheet which identifies a list of likely questions and sets out point form answers complete with appropriate references to case authorities and the record. This might form part of the materials taken to the podium.
- (e) Checking for currency—Nothing is more awkward for counsel than being blind-sided by a recent decision that escaped his or her attention. In a similar vein, it is useful to know if there are cases raising parallel issues which the court may have heard but not yet decided.
- (f) “Rehearsing” if necessary—Counsel, particularly less experienced counsel, should not hesitate to rehearse their arguments. A survey of leading American appellate lawyers revealed that the majority of them rehearsed their oral submissions and that resort to mock hearings and the like as a preparation tool was entirely common. I understand that such moot-type rehearsals are now not uncommon in Supreme Court of Canada cases as well. As one observer has noted, “No lawyer would dream of filing with the clerk the first rough draft of his brief. Why then present to the court the first draft of your oral argument?” This does not mean counsel can or should proceed on the basis that they will read a submission or that they should commit it to memory. Neither approach is effective. But for significant cases, and/or if time permits, it is useful to prepare something close to a full text of the oral submissions (knowing, of course, that questions will deflect the presentation away from it). The process clarifies and refines thoughts and puts phrases, metaphors and the like into counsel’s head which are usually more persuasive and well-crafted than what might be manufactured on the spot during argument.
- (g) Preparing a book of extracts—If the record before the Court is particularly long and involves a multi-volume appeal book, counsel might consider preparing a book of extracts to hand up to the Court at the beginning of oral submissions. Such a volume draws together all of the specific references in the record and the authorities that counsel intends to refer to during oral argument. Properly done, it can make oral argument flow much more smoothly and save the Court from managing through and around volumes of materials.

C. The Style of the Argument

Every lawyer must adopt a style which is comfortable and which works for him or her. Although all advocacy involves some element of “performance”, counsel should never try to assume a persona that does not fit. Only Johnnie Cochran should try to be Johnnie Cochran.

Less experienced lawyers can sometimes be over-awed by the Court of Appeal. They should not be. Oral argument should be seen as a respectful discussion among intellectual equals. With that mindset, counsel’s “style” will necessarily assume the proper tone. Always remember that the Court is earnestly seeking the best input possible so that it can deliver the best judgment possible.

There are several general style points about good oral advocacy which warrant emphasis:

- (a) Speak up. Counsel must make themselves heard and speak like they believe what they are saying. They must speak at a pace which allows the Court time to digest and understand their submissions.
- (b) Make eye contact. Lawyers should try to establish a human connection with the real people on the bench.
- (c) Speak to the full Court. Don’t limit submissions to the person sitting at the centre of the bench. Each judge gets one vote and a party only needs 50% plus one to win.
- (d) If at all possible, don’t lead off with a dubious or provocative contention that generates problems at the outset.

- (e) Don't stick inflexibly to a prepared speech when the judges express interest in other areas.
- (f) Avoid using hyperbole, overstatement or exaggeration.
- (g) Avoid using dry, monotonous speech without any variation in pitch, pace or volume.
- (h) Treat the judges with respect. Avoid flippancy or over familiarity. If a member of the Court starts talking, counsel should stop talking. Never try to "talk over" a judge. Always stand up when addressing the Court, even when answering a simple question.
- (i) Avoid distracting physical habits such as wandering around the podium, pointing at the members of the Court and so forth.
- (j) Remember that the judges can see the entire court room. Do not grimace at the submissions of opposing counsel, exchange knowing winks with clients and so forth.

Try to strike a tone which is both respectful and confident.

D. Delivering the Argument

There are two fundamental keys to delivering an effective oral argument. The first is having a clear sense of what needs to be accomplished to win the case. In other words, counsel must focus on the issue(s) and key facts that will be dispositive of the appeal. As noted, successful counsel identify the core idea of a case and go after it.

The second key is flexibility. Questions from the Court will normally preclude a set piece presentation. Good counsel are able to deal with questions and adjust course as circumstances dictate without losing their bearings.

A classically structured oral submission would involve an opening statement, a review of the facts, an identification of the issues and an argument which marries the facts and law. However, the current reality is the members of the Court of Appeal, like the members of most other appellate courts, are normally not prepared to listen passively while counsel walk through that format. The "classic" approach will almost always be quickly overtaken with questions and the discussion will be diverted into the Court's own agenda.

The first few minutes counsel are on their feet present a unique opportunity to set the agenda for the appeal. Therefore, a lawyer should attempt, at this opening stage, to get the Court focused on the heart or controlling idea of the case. He or she should also give the Court a brief overview or road map of the points that will be covered and the position that will be taken in relation to each of them. All of this should take only a brief time.

This sort of opening lets the Court know what counsel thinks is important and where he or she is heading. Importantly, it imposes structure and makes it easier for the lawyer to maintain some control of the way the hearing unfolds. If the Court knows where the argument is going, questions will be held until the appropriate spot and the judges will not have to fret about whether counsel will be dealing with this point or that or when or if counsel will be wrapping up.

I know that lawyers are sometimes reluctant to proceed on the assumption that the court is familiar with the facts. That reluctance is obviously understandable because the facts are often extremely important. However, in the Court of Appeal, an argument which includes a laborious review of the record will usually go nowhere. This can create a dilemma of sorts for counsel.

Nonetheless, it is always best to find a way to ensure that the Court is aware of any fact or facts which may be dispositive of, or critical to, the case. Taking the court to original material can be very effective. Justice Binnie wrote as follows in the first John Sopinka Advocacy Lecture:

Having handed in the Book of Extracts, however, many lawyers don't take the time to go through it. They will say, "Well, Tab 37—that's the contract. I won't take time to go

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to it now. I know you are going to read it in due course. I just want you to know that it is there." Bad mistake! If a particular extract of testimony contained in the middle of a dozen or more volumes of transcripts is essential to your success, or you think everything turns on a particular provision and the contract is buried in five volumes of exhibits, stop and read the extract to the court. This is "must have" information for the court conference that is to follow...

The point remains, however, that (as a general rule) all appeal courts seem to recoil from arguments which *begin* with a formal review of the facts. As a result, it is usually most advantageous to deal with the essential facts in the course of canvassing the legal issues and developing submissions, i.e., to incorporate references to the facts including specific quotations or references to the record, in the "argument" part of the presentation.

The "argument" part of an oral submission must deal with both factual and legal questions. Legal concepts must be advanced. They must also be tied to the facts of the case. In most appeals the emphasis should be on legal principles rather than on the fine points of specific case authorities.

The best presentation is one which is clear, straightforward and to the point. Side trips into complex factual matters and long readings from authorities should be avoided. Identify what is important and zero in on it. It is counterproductive to drown the Court in unnecessary detail. The best counsel make the complex seem simple. The worst counsel make the simple seem complex.

The ability to succeed in oral argument is significantly related to the ability to handle questions from the bench. Good counsel are able to deal effectively with a question and return to the main stream of their argument without stumbling. The best lawyers are able to rearrange, completely if necessary, prepared submissions in order to deal with questions. Flexibility and fast foot work are essential. A number of points should be noted about responding to questions:

- (a) Questions should be welcomed. They allow counsel to deal directly with the concerns of the Court. Every experienced lawyer would agree that there is nothing more disconcerting than addressing a panel of sphinxes with no sense of whether the submissions being made are so obvious as to be tedious or so far off the mark as to be unworthy of reaction. Questions may interrupt the flow of prepared argument or may be tough to deal with but they are the doorway into the mind of the Court. It is much better that the door be open than closed.
- (b) Answer questions when they are asked. It is never wise to respond to a question by saying "I will come to that point later". If a question is truly posed at an inopportune time in the development of the argument, the best way to deal with it is to state the answer briefly and say that it will be covered more fully before closing. That promise must be kept. If the question is central to the case, the better course is usually for counsel to completely rearrange the planned line of argument and deal with whatever relates to the question fully and immediately. If a substantial portion of the prepared submissions can be woven into the reply, they will not have to be repeated later.
- (c) Give a direct response. Counsel should listen carefully to the question and provide a direct, non-evasive answer. Replies should be as concise as circumstances allow.
- (d) Know when to make a concession. Judges sometimes invite counsel to make a concession on a particular point and then use the concession to undercut the submission. Accordingly, when asked to concede a point, counsel must proceed with care. At the same time, it is off-putting in the extreme when counsel adopt a strategy of refusing any and all concessions. If a lawyer has thought hard enough about the case, he or she will be able to discern when a point can be given up and when it is important to stand firm.
- (e) Keep the full panel in mind. There is a natural tendency to respond to a question in a fashion which will please the judge who asked it. That may be fine. However, counsel should always remember that there are other judges on the panel. Pleasing one of them may alienate the others. Answers to questions should be formulated with that reality in mind. Do not assume

that a judge asking questions or pushing a particular point of view is necessarily speaking for the full panel.

- (f) There are different kinds of interventions from the bench and not all of them warrant the same sort of response or attention. In this regard, I can do no better than quote from a paper prepared by an experienced American appellate advocate which describes various categories of questions:

Questions that go to the heart of the case. As previously noted, some Justices ask questions which go to the central issue in the case. The answer to such a question may well determine the vote of the Justice asking the question and also may affect the judgment of other Justices who share the same point of view. Obviously, counsel should spend the most time with this category of questions. These critical questions also can be used as a springboard for development of related substantive points that counsel intends to cover during the argument.

Background questions. Many questions during argument simply require a clarification of some record fact. Other questions manifest curiosity about matters such as relevant geography, the identity of the judges below, and of the votes cast by the judges below. Counsel should give a quick and accurate answer to such questions and move on without delay.

Fencing or debating questions. The Justices sometimes engage in extended debates for counsel, which may or may not relate to central matters in the case. Of course, counsel cannot cut off such debates, despite his belief that the matter is tangential. Nonetheless, one must avoid getting bogged down too long on a peripheral point. It is essential in this instance to give the best possible answer, and find a tactful way to get back to the main points.

Humorous questions or observations. Counsel should enjoy the remark and then get back to business. While it is not uncommon for the Court to offer a humorous observation or question, attorneys ordinarily should refrain from introducing humorous observations of their own. As often as not, attempts at humor fall flat, and in all instances are a waste of counsel's limited argument time.

Irrelevant questions. It is not uncommon for counsel to hear questions which he believes are related only remotely to the dispositive issues in the case. In fact, however, the matter of relevance is personal and relative, and one should never display irritation over questions that appear to be beside the point. Counsel should give a polite answer and avoid any withering glance or trace of sarcasm. He should give a brief response and then explain why the present case raises a "somewhat different issue."

Hostile questions. Counsel should assume from the very beginning that some of the Justices will present hostile and unfriendly questions, manifesting their disagreement with his position. This is no occasion to be unnerved or disappointed. Hostility frequently is a sign of frustration that the questioner is in the minority. Counsel should remember that, while one or more Justices may seem dissatisfied with his positions or answers, a majority of the Court may well be on his side. In dealing with hostile questions, counsel should give a polite but firm response and get back to his main contentions.³⁴

It is important for counsel to have a sense of the clock during oral argument. Be courteous and do not use more time than the case warrants. As the presentation unfolds, it may well be necessary to adjust course by skipping minor points or by abbreviating the planned presentation.

³⁴ Stephen M. Shapiro, "Oral Argument in the Supreme Court of the United States", (1984) 33 Cath U L Rev 529 at 542.

An oral submission should end on a strong note. This is normally best achieved by way of a very brief and pithy recapitulation of the submissions which have just been made and a reference to the relief being sought. Effective advocates do not just “fade away” at the end of their argument by saying things like “Well, I guess there’s really no more for me to add...”

E. The Respondent’s Argument

Most of what pertains to an oral submission on behalf of the appellant also pertains to submissions made on behalf of a respondent. However, there are some crucial differences.

Counsel for the respondent must prepare in detail for his or her submissions but should do so fully aware that it may be necessary to adapt or even abandon the prepared approach by reason of what develops on the appellant’s side of the case and the reaction of the Court to it. The respondent’s argument should be a combination of principal submission, a rebuttal of the appellant’s position and a response to questions posed by the Court to the appellant. To some significant degree, it must be constructed on the move and in response to how the Court has reacted to the appellant’s submissions. A respondent’s argument should *respond* to what has gone before.

When acting for a respondent, I found it helpful to annotate my prepared outline of argument with the key points made by the appellant’s counsel during his or her submissions and with the questions asked by the Court. By marking up my original notes in this way, it was generally possible to weave submissions on those issues into the overall presentation that I had originally mapped out. This helps to avoid a presentation which is overly disjointed, i.e., one which starts or ends with self-contained comments on the appellant’s submissions and does not blend those comments into the overall flow of the argument.

F. Reply

The appellant’s opportunity to reply should be used (if there is in fact a need to reply) but it should be used carefully. The panel hearing the appeal will typically move directly from the courtroom to a conversation about how the case should be decided. As counsel for an appellant, a lawyer will generally prefer that the last voice the Court hears before retiring to confer is his or her own.

Replies should be used to respond to either arguments made by the respondent but not dealt with by counsel for the appellant in his or her principle submission, or to respond to questions asked by the Court during the respondent’s argument. A well-done reply can be very effective. It should be short and to the point. Counsel should resist the inclination to comment on a long list of matters. Choose a very few key points and make them well.

IX. Concluding Thoughts

It is important to remember that great advocates are not born. They learn their trade just like other professionals. Moreover, it is also important to remember that the very best lawyers never stop looking for ways to improve. There is always better fishing gear to buy, new casting techniques to master and more elegant flies to construct.

Fortunately, there are an increasing number of excellent papers and publications dealing with appellate advocacy. Counsel who wish to dig more deeply into the subject might wish to consult some or all of the materials listed in Appendix C.

Happy fishing.

X. Appendices

Appendix A

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Appendix B

I. Introduction

1. This appeal is grounded in the various environmental assessment processes mandated under federal law. It concerns a uranium mine and mill development known as the Green Lake Project (the “Project”) which is operated by the Appellant, World Mineral Inc.
2. Construction of the Project began in 1994. Each phase of the development was licenced by the Appellant Atomic Energy Control Board (“AECB”) through its staged licencing process. The mill has been producing yellowcake (a uranium concentrate), since 1999 under licences issued by the AECB and its successor the Canadian Nuclear Safety Commission (“CNSC”).
3. The Project underwent a thorough environmental assessment pursuant to the *Environmental Assessment Review Process Guidelines Order* (“EARPGO”) prior to its construction. The environmental assessment considered both short and long term impacts in relation to the construction, operation, decommissioning and post-decommissioning of the Project. The Project was also reviewed extensively and carefully from an environmental perspective by the AECB through its licencing process.
4. *The Canadian Environmental Assessment Act* (“CEAA”) came into force in 1995. In the Trial Division, the Respondent Environmental Co-op (the “Co-op”) argued that the Project should have undergone yet another environmental assessment, this time pursuant to CEAA, before the AECB issued a particular licence in 1999. In the court below, Campbell J. agreed.
5. World Mineral says that Campbell J. erred in several respects and that this appeal can be allowed on any or all of the following grounds:
 - (a) The Project was exempt from CEAA review by virtue of the grandfathering provisions in section 74 of CEAA.
 - (b) The Project is not a “project” within the meaning of CEAA and, as a result, that Act did not apply.
 - (c) *The Exclusion List Regulations* operated to make an environmental assessment pursuant to CEAA unnecessary.
 - (d) The Co-op’s application should be dismissed because of the delay in commencing its application.
 - (e) Even if the Co-op’s arguments are meritorious, it should not be granted any relief because another environmental assessment would be duplicative and would serve no useful purpose.
6. The Green Lake Project has operated safely and as designed. This case is not about any substantive environmental protection issue. It concerns only the question of whether, having been reviewed under EARPGO and by the AECB, the Project should also have undergone an environmental review pursuant to CEAA before the AECB issued the licence in question.

Appendix C

Further Resources

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