"Some Thoughts on Effective Briefs"

The Art of Persuasion: Written Advocacy

Regina – May 9, 2012

Saskatoon – May 10, 2012

Justice Robert G. Richards

Court of Appeal for Saskatchewan

I. INTRODUCTION

Historically, oral argument has been seen as the heart of the advocate's work. This perception is strongly reinforced by popular culture. Television programs and movies do not show lawyers revising and proofreading written submissions. They focus on courtrooms. Lawyers are portrayed as people who talk their way to victory.

The reality, of course, is quite different. Written argument is a critically important aspect of effective advocacy. It might not have the "sex appeal" which is associated with courtroom performances but its significance cannot be denied. In many situations, it is easier to win a case with a strong written argument and a weak oral submission than it is to win with things the other way around.

As a result, I am pleased to have the opportunity to offer some thoughts about effective written advocacy. My goal is to share something of what I learned the hard way both from my years in the trenches as a lawyer (a writer of briefs) and from my time as a judge (a reader of briefs).

I will attempt to deal generically with written submissions rather than with any specialized kind of writing project like, for example, a Court of Appeal factum, a pre-trial brief, or a submission to the Labour Relations Board. I will begin with a few points about the underpinnings of brief-writing and then offer some general thoughts about style and organization. Next, and as the focus of this paper, I will work through the sections of a typical brief and provide some comments about each section. My aim in all of this is to be as practical as possible.

For the sake of simplicity, I propose to use the word "brief" as a generic descriptor of written submissions and to use the word "judge" as a generic descriptor of the decision-maker to whom the written submission is addressed.

II. SOME BASIC POINTS

As indicated, let me start by making summary note of some basic considerations which should inform any brief-writing project. They are an eclectic mix but each of them warrants emphasis.

(a) The purpose of a brief is to *persuade* the judge. The entire brief-writing exercise should be aimed at this goal and it should always be front of mind. The most effective counsel deliberately measure every move against this yardstick.

(b) Briefs are a critically important aspect of effective advocacy. As noted, they are more influential than oral submissions in many situations. This is because they impact the judge's thinking before the hearing; they typically shape and focus the oral argument; and, they stay with the judge long after counsel have left the courtroom.

(c) Briefs are not projects to be wholly delegated to junior lawyers or students with the idea that senior counsel will sweep them up the day before argument, sort out the kinks and ride to victory. Precisely because they are so important, briefs warrant the careful involvement of the lawyer who will argue the case.

(d) In many ways, the most critical part of the brief-writing process happens *before* a lawyer picks up a pen or puts his or her hands on the keyboard. Good counsel *think*. They think hard about the problem they are trying to solve for their client. They look at it from all directions. They look at it creatively. They try to cast the issues in the way which is most advantageous to their client. They also think about how best to organize the facts and structure the argument. All of this should happen *before* the mechanical side of the writing process begins. Except perhaps in the most straightforward of proceedings, it is never wise to just jump in and start "writing."

(e) Good briefs anticipate the needs of the judge. They set out the issues and the facts clearly and accessibly and make them as easy to digest as possible. They do not overreach. They are drafted on an understanding that the judge is looking for a reasonable and just way to resolve the case. They offer a legally sound road map for getting to such a result.

(f) At the same time, a lawyer who writes a brief must understand the institutional role of the court or tribunal he or she is appearing before. This consideration is perhaps most important at the appellate level because appeal courts have a responsibility to advance and develop the law. Appellate judges often do not want to know simply what the law *is*. They also are interested in what the law *should be*. They will have at least some appetite for clarifying, modifying, shading or sometimes even changing the law as it is revealed in existing authorities.

(g) Use "point first" writing. I understand that Justice Laskin will be expanding on this idea in some depth. He has done excellent work in promoting and explaining this technique. Let me say only that it is an essential key to good brief-writing. A judge will understand the detail of a particular line of argument (or the brief as a whole) if he or she is first told *why* that detail is important.

(h) Editing is an important aspect of writing a good brief. Justice Brandeis once said, "There is no such thing as good writing. There is only good re-writing." This is largely true. There might be a few Mozarts who lay out a perfect brief 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.

(i) Proper legal research is a critical ingredient in effective brief-writing. Three points here: (a) there is a wealth of case law from *outside* of Saskatchewan that should not be overlooked; (b) counsel should take advantage of whatever assistance might be gained from secondary sources like textbooks and law review articles; and (c) any authority must be

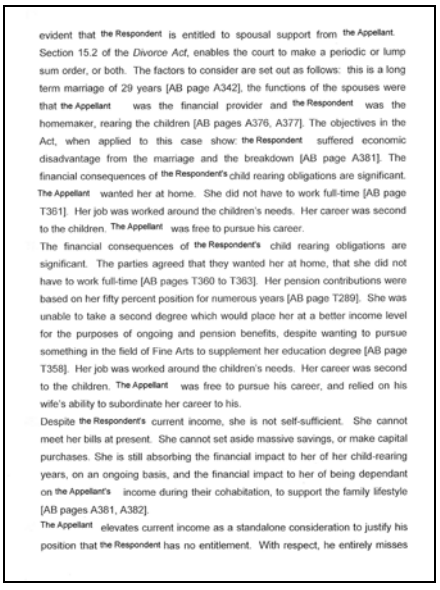
current – check every case to see if it might have been overturned or qualified.

III. SOME POINTS ABOUT STYLE AND ORGANIZATION

Before turning to the specific elements of a brief, I also want to stress some points about the overall style and organization of an effective written submission. There are eight of them. Again, it is an eclectic collection.

(a) A good brief is written concisely. This means that it gets to the point and deals with the issues as clearly, succinctly and economically as possible. "Concise" does not mean the same thing as "short." Some cases feature complex or multiple issues or rest on involved facts. Judges understand that a short brief will not do the trick in those circumstances. "Concise" does not mean "superficial" either. A good brief must be appropriately comprehensive and must deal with the issues at a proper level of depth and sophistication.

(b) The "white space" on pages is important. Briefs with narrow margins, cramped line spacing and/or no spaces between paragraphs are very difficult to digest. Compare the overall visual appeal and readability of these two pages:

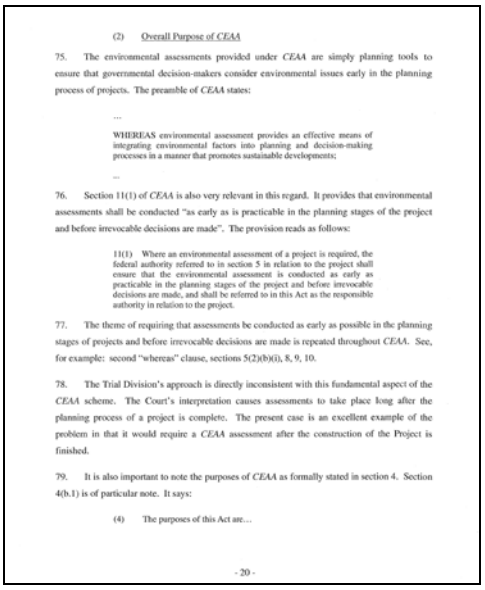


evident that the Respondent is entitled to spousal support from the Appellant. Section 15.2 of the *Divorce Act*, enables the court to make a periodic or lump sum order, or both. The factors to consider are set out as follows: this is a long term marriage of 29 years [AB page A342], the functions of the spouses were that the Appellant was the financial provider and the Respondent was the homemaker, rearing the children [AB pages A376, A377]. The objectives in the Act, when applied to this case show: the Respondent suffered economic disadvantage from the marriage and the breakdown [AB page A381]. The financial consequences of the Respondent's child rearing obligations are significant. The Appellant wanted her at home. She did not have to work full-time [AB page T361]. Her job was worked around the children's needs. Her career was second to the children. The Appellant was free to pursue his career.

The financial consequences of the Respondent's child rearing obligations are significant. The parties agreed that they wanted her at home, that she did not have to work full-time [AB pages T360 to T363]. Her pension contributions were based on her fifty percent position for numerous years [AB page T289]. She was unable to take a second degree which would place her at a better income level for the purposes of ongoing and pension benefits, despite wanting to pursue something in the field of Fine Arts to supplement her education degree [AB page T358]. Her job was worked around the children's needs. Her career was second to the children. The Appellant was free to pursue his career, and relied on his wife's ability to subordinate her career to his.

Despite the Respondent's current income, she is not self-sufficient. She cannot meet her bills at present. She cannot set aside massive savings, or make capital purchases. She is still absorbing the financial impact to her of her child-rearing years, on an ongoing basis, and the financial impact to her of being dependant on the Appellant's income during their cohabitation, to support the family lifestyle [AB pages A381, A382].

The Appellant elevates current income as a standalone consideration to justify his position that the Respondent has no entitlement. With respect, he entirely misses



(2) Overall Purpose of *CEAA*

75. The environmental assessments provided under *CEAA* are simply planning tools to ensure that governmental decision-makers consider environmental issues early in the planning process of projects. The preamble of *CEAA* states:

> ...
>
> WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable developments;
>
> ...

76. Section 11(1) of *CEAA* is also very relevant in this regard. It provides that environmental assessments shall be conducted "as early as is practicable in the planning stages of the project and before irrevocable decisions are made". The provision reads as follows:

> 11(1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

77. The theme of requiring that assessments be conducted as early as possible in the planning stages of projects and before irrevocable decisions are made is repeated throughout *CEAA*. See, for example: second "whereas" clause, sections 5(2)(b)(i), 8, 9, 10.

78. The Trial Division's approach is directly inconsistent with this fundamental aspect of the *CEAA* scheme. The Court's interpretation causes assessments to take place long after the planning process of a project is complete. The present case is an excellent example of the problem in that it would require a *CEAA* assessment after the construction of the Project is finished.

79. It is also important to note the purposes of *CEAA* as formally stated in section 4. Section 4(b.1) is of particular note. It says:

> (4) The purposes of this Act are…

- 20 -

(c) Headings are extremely useful and should be used. They make briefs much easier to read and navigate. Properly employed, they also make the logic of the argument more transparent and hence more compelling.

Headings should be based on some sort of logical progression from *main* point or section to *sub*-point or section to *sub-sub*-point or section. That progression should be reflected in an appropriate numbering scheme. Here is an example:

I. Introduction
II. Factual Background
    A. The Accident
    B. Hospital Treatment
        1. The Surgery
        2. Post-Surgery Care
    C. Rehabilitation
III. Argument
…

Headings should be short and understandable at a glance. As a result, in my view, this is *not* a good heading:

> Did the learned trial judge err in awarding Ms. Smith retroactive spousal support from September 1, 2008 to July 31, 2010 because she did not apply for support until August 15, 2010?

It is not good because it is too wordy and lacks "punch." A better formulation of the same content is as follows:

> Spousal Support Should Not Have Been Awarded

(d) Proof-reading counts. Make sure the brief is not marred by spelling errors, grammatical mistakes, paragraph spacing problems, typos and the like. A judge who sees these sorts of small oversights immediately (consciously or not) begins to wonder if the lawyer can be trusted on the big issues. Little mistakes undermine credibility.

(e) Comply with the Rules. Before beginning to draft a brief, see if the court or tribunal involved has rules specifying format, length, organization and so forth. If it does, they should be scrupulously respected.

(f) Paragraphs should be relatively short and they should be numbered. Keeping them short makes for easier reading. Numbering helps the judge to take accurate notes and allows counsel to draw the judge's attention readily to particular features of the brief during argument.

(g) Avoid overly formalized and ritualized prose. For example, in a factum there is no need to continually repeat the phrase "It is respectfully submitted that the Learned Trial Judge erred when he… ." Judges know counsel are respectful and we know counsel think that all members of the judiciary are learned. Just say "The Trial Judge erred when he… ."

(h) Use "linking words" to lock down the flow of the argument and make it clear and compelling. Words and phrases like "for the following reasons," "first," "second," "as a result," "it follows that," and so forth, work to tie an argument together and give it a feel of logic, clarity and inevitability.

IV. THE BRIEF: SECTION BY SECTION

A. The Cover

A brief should have a cover and, ideally, it should be bound. This makes it look complete and professional. A cover also serves to conveniently set out useful information which allows the judge (or other counsel) to work as efficiently as possible. Remember, the brief will not be the only one on the file. Make it easy for a judge to find it as he or she ploughs through the mountain of paper on his or her desk.

Sometimes the requirement of a cover page and its contents are specified in the rules governing the operations of a court (See, for example: Rule 29 of *The Court of Appeal Rules*). If so, it is easy to design the cover. If the contents of the cover are not specified,

they should include (a) the full style of cause including the name of the court, the names of the parties (and their role in the proceedings), and the court file number; (b) a clear label or banner identifying both the nature of the submission (its subject matter) and the party submitting it; and (c) the name of the lawyer/firm submitting the brief.

B. 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.

A bad table of contents does no more than list the main pieces of the brief. For example, it might refer only to: Introduction, Facts, Issues, Analysis and Relief Requested. In cases which are at all complex, this kind of setup is unlikely to be helpful. This is because a judge will often find himself or herself reading a section of one party's brief and wanting to see what the other party has to say about that particular point. Alternatively, a judge might find himself or herself writing reasons and wanting to go directly to a specific piece of a brief. In either situation, a highly generalized table of contents will not be useful. It will force the judge to page through the brief hunting for the appropriate section. Particularly in longer briefs, this can be frustrating.

The better approach is to put detail into the table of contents. That detail, of course, should track the headings and sub-headings found in the body of the brief. If, for example, the Facts section 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, they should be built into the table of contents.

But, a word of caution here. A table of contents should be clean, concise and accessible. Loading too much detail, or too many words, into the text of a table of contents can be self-defeating. This is an example of what, in my view, a "Goldie Locks" table of contents looks like – not too much detail; not too little detail; just the right amount:

TABLE OF CONTENTS

C. The "Introduction" or "Overview" Section

Every brief should begin with an "Introduction" or "Overview" section. This part of the document is not just a throw away. It is the gateway to all that follows. A judge picking up a brief will (frequently) know absolutely nothing about the file. The brief should help him or her understand off the top what the case is about, what he or she has to decide and how the author of the brief wants the matter resolved. The brief should explain to the judge, right from the beginning, why he or she is reading it.

As a result, the Introduction should be very carefully drafted with a view to accomplishing several objectives:

- Briefly explaining the procedural dimensions of the case so the judge knows how it got before him or her.

- Revealing the essential facts in order to give the judge a sense of the foundation on which the proceeding rests.

- Identifying the key issue or issues on which the judge's decision will turn and characterizing them in an advantageous fashion.

- Flagging how the proceeding should be resolved.

In other words, the Introduction should set the stage for the rest of the brief. It should not be disconnected from the Facts, Issues, Argument and Relief sections. 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. Good counsel strive to create a pithy big picture overview which identifies the controlling aspects of the case and begins to draw the judge toward the desired conclusion. In the Court of Appeal, 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 feel compelled to get into them again in the Facts and/or Argument sections of the factum. At a minimum, this creates a weird sense of déjà vu for the judge as he or she advances through the argument. At worst, it creates needless and confusing duplication.

I have reproduced below the overview section of a factum in a somewhat involved environmental case. It is not necessarily a legal classic but it does illustrate something of how, even in a complex matter, 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 judge toward the desired result.

I. INTRODUCTION

1. This appeal concerns a uranium mine and mill development known as the Harbour Lake Project (the "Project"). It is operated by the Appellant, Minecorp.

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 (the "Commission").

3. The Project underwent a thorough environmental assessment pursuant to the *Environmental Assessment Review Process Guidelines Order* (the "*Guidelines*") 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* (the "*Act*") came into force in 1995. In the Trial Division, the Respondent Inter-Church Uranium Committee Educational Co-operative ("Inter-Church") argued that the Project should have undergone yet another environmental assessment, this time pursuant to the *Act*, before the AECB issued a particular licence in 1999. Smith J. agreed.

5. Minecorp says Smith 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 review under the *Act* by virtue of the grandfathering provisions in section 74 of the *Act*.

(b) The Project is not a "project" within the meaning of the *Act* and, as a result, that *Act* did not apply.

(c) The *Exclusion List Regulations* operated to make an environmental assessment pursuant to the *Act* unnecessary.

(d) Inter-Church's application should be dismissed because of the delay in commencing its application.

(e) Even if Inter-Church'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 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 the *Guidelines* and by the AECB, the Project should also have undergone yet another environmental review pursuant to the *Act* before the AECB issued the licence in question.

D. The "Facts" Section

The statement of facts is a central part of the brief. In the end, every case is a contest involving real people and/or real companies or other organizations. Every judge wants to

resolve a dispute in a way which is fair, just and reasonable. Fairness, justice and reasonableness are rooted in the facts.

As a result, counsel should strive to present the facts in a manner which, while scrupulously accurate, leads the judge in the desired direction. The facts section of the brief is not merely a place to dump a summary of the evidence. It should be seen as an opportunity to lay out the story in a way that facilitates the desired disposition of the case.

Preparing the statement of facts can be time consuming. This is because 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 presentation. However, because the outcomes of so many cases are driven directly by the facts, this will almost always be time well invested.

Writing the facts is often 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, 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, at least in an appellate court, 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. (See: R. Aldisert, *Winning on Appeal* (Clark Bordman Callaghan, A Division of Thomson Legal Publishing, Inc., 1992) at p. 155)

Several points concerning the statement of facts are worthy of emphasis:

(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) Try to make the facts tell a compelling story. Use clear, vivid language. The recitation of facts must be accurate but it need not be hopelessly boring. It is not unethical to try to make a case interesting.

(c) Avoid a format which is no more than a witness by witness summary of the evidence. Sometimes even a chronological approach to the facts is not the wisest one. They might be better organized by issue or claim.

(d) If the statement of facts is at all long, use headings to break it up and make it more digestible. Here is an example of how this can be done:

II. FACTS AND BACKGROUND

A. Minecorp

7. As noted, Minecorp is the operator of the Habour Lake Project. The owners of the Project are Minecorp (70%), Red Mines Ltd. (22.5%) and Mining (Canada) Co. Ltd. (7.5%).

8. The original proponent of the Project was South Limited. In 1993 South Limited was acquired by Minecorp's parent company. It was eventually amalgamated into Minecorp.

B. The Harbour Lake Site

9. The Harbour Lake site is in northern Saskatchewan approximately 12 kilometres from the existing Beaver Lake mine and about 600 kilometres north of the town of Law Ronge.

10. Mineralization was discovered at Harbour Lake (the Harbour Lake North deposit) in 1979. Further exploration revealed the Harbour Lake South deposit, the A, B and C deposits and the BELL deposit in the immediate area.

C. Brief Description of the Project

11. The Harbour Lake Project comprises mine and mill operations and associated support facilities and infrastructure.

12. Mining operations were conducted by first stripping overburden and then removing waste rock. That was followed by the mining of ore zones. A specially designed one storage pad was constructed near the pit created by the extraction of the BELL ore body.

…

(e) It is *not* necessary to include the full detail of the facts in the Facts section of the brief. Indeed, this can often be a bad idea. For example, imagine that a case involves, among other things, the interpretation of a contract. It

might be much more effective, in the Facts, to simply refer to the terms of the contract in general terms and to hold off quoting its relevant clauses until the Argument section. This, after all, is where the action will be and where it will be necessary to examine the particular wording of the clauses in issue.

(f) Find a way to describe the parties which makes the brief easy to follow. "Appellant" and "respondent" or "plaintiff" and "defendant" quickly become very confusing to a judge who is new to the scene and has not spent months or years on the inside of the proceedings. It is much better to use the parties names ("Mr. Smith" or "Mega Corp.") or to use terms like "the Company" and "the Union."

(g) Similarly, acronyms easily become confusing. Remember, the judge does not live in the (often) specialized world of the lawyers where the acronyms in question are familiar coinage. Common acronyms like "RCMP" are obviously fine but counsel will understand a judge's dread on reading something like this fictional passage:

> The Farm Land Protection Agency (the "FLPA") and the Water Management and Flood Control Board (the "WMFCB") both have some measure of jurisdiction under the *Resource Management and Environmental Stewardship Act* (the "*RMESA*"). The question in this case is whether the WMFCB's authority under the *RMESA* supercedes the jurisdiction of the FLPA.

(h) Always cite the statement of facts to the record. A statement of facts which is underpinned by detailed references to the evidence is far more compelling than one which is simply a naked story. If possible, cite to the page and line of the transcript, the paragraph of the affidavit and so forth. Judges preparing for oral argument, or writing a decision, will appreciate not having to wade through pages and pages of transcript or exhibits to find the evidence which sustains a factual assertion made in the brief. If

the facts support a lawyer's cause, he or she should make sure that they are as easy as possible for the judge to unearth and confirm.

(i) Work hard to eliminate unnecessary detail. For example, in a personal injury case, it might be mildly interesting to know that the appellant wore a blue denim shirt. 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.

(j) Keep submissions out of the facts. There is sometimes a temptation to let the "argument" aspect of the brief bleed into the statement of facts. This should be avoided.

(k) 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.

(l) In the appellate context, acknowledge 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." This distinction should be made clear.

(m) 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.

(n) Avoid "editorializing" and "moralizing." If a lawyer writes "Mr. Jones had $2.5 million of cocaine in his trunk," he or she does not need to go on and say "Many honest, hard-working people do not earn $2.5 million in a lifetime." The judge knows that.

On the assumption that the plaintiff/applicant/appellant files first, the respondent/defendant's approach to the facts can sometimes be tricky. Judges typically will not appreciate counsel re-writing the facts simply for the sake of re-writing them. On the other hand, 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 them.

Determining the right approach with respect to this issue requires the exercise of judgment. If the plaintiff/applicant/appellant's statement of facts is complete, accurate and balanced, it will be best for the defendant/respondent to simply accept it. If there are only one or two points omitted from the statement (or included in it but requiring correction), then the defendant/respondent normally need do no more than accept the statement, subject to those specific points. But, if the defendant/respondent believes there are multiple problems in the summary of facts or if the plaintiff/applicant/appellant has put too much "spin" on the 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 … ."

The defendant/respondent's statement of facts should be self contained. It should not say "In relation to para. 29 of the Applicant's brief, the Respondent says… ." This puts the judge in the position of having to flip back and forth between two documents in order to follow the submission. It is better to summarize para. 29, or quote it in full, and then deal with it.

E. The "Issues" Section

Many briefs contain a separate section which lists the issues raised by the proceeding. Indeed, Rule 28(1) of *The Court of Appeal Rules* requires that a factum must be organized along these lines.

Specific requirements of this sort aside, it is not particularly important whether the issues are identified in a separate section of the brief dedicated exclusively to them. They might also be set out in the Introduction or the Argument section. The important thing is that they are identified and identified clearly.

The plaintiff/applicant/appellant's formulation of the issues will often be entirely valid and complete. In that situation, the defendant/respondent should simply adopt the plaintiff/applicant/appellant's approach and proceed accordingly. However, the defendant/respondent need not accept the other side's formulation of the issues. A skillful lawyer representing a respondent/defendant will avoid the trap of allowing the other side's theory of the case to become a straight-jacket.

If counsel acting for the respondent/defendant believes the other side 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 defendant/respondent's counsel believes the court needs to consider issues in addition to those flagged by the other side, that should be made clear as well.

F. The "Argument" Section

The Argument section is the heart of every brief. 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. (See: R. Aldisert, *Winning on Appeal* at p. 145) 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.

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

- Major Premise: 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.

Effective counsel always 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.

The Argument portion of the brief should be broken into separate pieces corresponding to each of the issues being raised. In proceeding from there, it is useful to remember the wisdom of old-time preachers. In organizing a sermon, they were supposedly taught to follow this model: (a) tell them what you are going to say, (b) tell them, (c) tell them what you told them. Used correctly, this approach works extremely well in briefs (and in oral submissions for that matter). It is point first writing with an added twist.

As a result, it is best to begin each section of the argument with an opening paragraph which explains and summarizes what is to follow. This provides context before detail. A judge reading that part of the brief will then know *why* he or she is reading it. In the language of the country preacher: "Tell them what you are going to say."

After this sort of opening, the analysis should then progress through a clean and logical chain of reasoning and arrive at a conclusion, *i.e.* "tell them," to reference the preacher's manual. It should conclude with a very pithy recapitulation of what has gone before. In other words, "tell them what you told them." Here is an example of this sort of approach in operation. Again, it is not perfect, but it gives a good sense of the technique:

> **E. The *Exclusion List Regulations* Apply**
>
> 101. Minecorp further submits that the *Exclusion List Regulations* precluded an environmental assessment in the situation presented by this case.
>
> 102. Section 7(1) of the *Act* provides that an environmental assessment of a project is not required where the project is described in an exclusion list. The relevant part of the *Exclusion List Regulations* says this:
>
> …
>
> 103. Thus, in order for a project to be exempted from assessment, the following criteria must be met:

> (a) there must be a proposed operation of an existing physical work;
>
> (b) the operation must be the same as an operation for which an environmental assessment has previously been conducted under either the *Act* or the *Guidelines*;
>
> (c) the environmental effects have been determined to be insignificant, taking into account the implementation of mitigation measures, if any; and
>
> (d) the mitigation measures and follow-up program, if any, have been substantially implemented.
>
> 104. Each of those requirements has been satisfied on the facts of this case.
>
> 105. First, …
>
> 106. Second, …
>
> 107. Third, …
>
> 108. Fourth, …
>
> …
>
> 115. As a result, it can be seen that the Trial Judge's assessment of the situation was incorrect. The *Exclusion List Regulations* applied and they precluded an environmental assessment.

There are a variety of other points about the Argument section of a brief which warrant special mention:

(a) It is not necessary to cite multiple authorities for each proposition of law. 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. Over-reading or misstating the effect of authorities is a sure-fire way for a lawyer to undermine his or her credibility and weaken his or her argument.

(c) Deal with problematic authorities. Take them on fairly and directly and explain why they do not apply or control the outcome of the case. So, for example, the brief might say:

> The Crown relies heavily on this Court's decision in *R. v. McKenzie*, 2011 SKCA 64. However, that case is readily distinguishable in three ways. First…

(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 judge picks up what is important.

(e) Always introduce a quotation with a sentence or two explaining what it says and why it is significant. Compare these two approaches:

The Court of Appeal cannot simply re-weigh the facts or re-assess the evidence and substitute its own view of the proper answer to the s. 24(2) question. The Supreme Court explained this as follows in *R. v. Grant*, 2009 SCC 32:

> [86] In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.
>
> [emphasis added]

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(f) Cite authorities overlooked by the opposing side. Counsel have an obligation to refer the judge to all relevant authorities, regardless of whether they are "helpful" to his or her client's side of the case. Taking the high road on these kinds of issues is a guaranteed way to win the respect of colleagues and the courts.

(g) If the case involves an area of law which is especially arcane or off the beaten track, a good brief will educate the judge from the ground up. Counsel should not make the mistake of thinking that because, for example, property tax issues are familiar territory to them, property tax issues are familiar territory to the judge. Give the judge a "property tax for dummies" presentation at the front end of the argument so that he or she can see the issues in their proper context. That done, move on to the detail and subtlety of the particular points at stake in the case.

As for the Argument section of the defendant/respondent's brief, it must *respond* to the submissions advanced by the plaintiff/applicant/appellant. It should not pass by the other side's arguments like a ship in the night. As a result, drafting a good defendant/respondent's brief requires some finesse. The approach must not be completely reactive. For example, in the appellate context, the best respondent factums contain both an effective attack on the appellant's line of argument *and* set out a "positive" view of the case which confirms the validity of the decision under appeal.

In a somewhat similar vein, a lawyer drafting a plaintiff/applicant/appellant's brief should not close his or her eyes to what is likely to appear in the defendant/respondent's brief. An appropriately handled pre-emptive strike can be very effective.

G. The Relief Requested Section

The Relief Requested section of the brief lays out the bottom line. It is self-evidently important. The order sought should be clearly and completely described. What *exactly* does counsel want the judge to do? If possible, counsel should give the judge something he or she can copy directly into the bottom line of a decision.

The Relief Requested section of the brief should also deal with costs. If there are reasons for the judge to depart one way or the other from the tariff or from the regular practice of the court, those reasons should be explained.

H. Appendices

It can sometimes be helpful to attach particularly important or useful materials directly to a brief. Putting things like key statutory provisions or a few controlling case authorities readily at hand in this way can make the judge's task a bit more manageable.

If this is done, the materials should be noted individually in the table of contents (with tab or page references) so they are easy to find. Including 30 pages of appendices without any sort of navigation tool risks frustrating the judge almost as much as it holds out the prospect of enlightening him or her.

I. Books of Authorities

A book of authorities, of course, stands independently of a brief. However, since the two documents often go hand in hand, I will offer a thought or two about them.

Most judges 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 resources well-organized and in one spot. This is because a book of authorities makes life more efficient and saves time both in preparing for the oral hearing and in writing a decision afterwards.

That said, it is important to use some discretion in deciding what to put in a book of authorities and how to present the materials included in it.

(a) It is frequently not necessary or useful to include *every* authority referenced in the brief. For example, unless the 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. M. (C.A.)*.

(b) It might not be necessary or useful to include the full text of every authority. If the brief refers to s. 103 of *The Securities Act, 1988*, it might

well be sufficient to include the relevant parts of s. 2 (the definitions section) and Part XVI (the Part of the *Act* where s. 103 appears). Similarly, if a brief raises issues about 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 judge is driven to search for the full text in order to establish the context of the excerpt included in the book.

(c) It is an excellent idea to highlight the key passage or passages in an authority. This can be done by way of underline, highlighter pen or marginal sidebar. Any approach of this sort will draw the attention of the judge directly to the features of the authority which advance the cause. It saves a judge time and helps ensure that he or she actually finds the passage counsel sees as being important.

(d) Use double-sided copying. There is no point killing trees and burdening other lawyers and the judge with more paper than necessary.

(e) 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.

V. A CONCLUDING THOUGHT

It is important to remember that great brief-writers are not born. They learn their craft just like other professionals learn any other skill. This, of course, is very good news. It means that every lawyer can continually improve his or her game through study, experience and hard work.

Counsel who wish to dig more deeply into the challenge of effective written advocacy should know that there are some excellent resource materials at their disposal. For example, in the appellate world in which I work, the following list represents only some of what is available. I have benefitted from several of these pieces over the years:

(a) Thomas Cromwell (compiler), *Effective Written Advocacy*, (The Cartwright Group Ltd., 2008);

(b) Ruggero Aldisert, *Winning on Appeal* (Clark Bordman Callaghan, A Division of Thomson Legal Publishing, Inc. 1992);

(c) John Laskin, *"What Persuades (or, What's Going on Inside the Judge's Mind)"*, (Summer, 2004) 23 Advocate's Soc. J. No. 1, 4-9;

(d) Robert G. Richards, *"Some Thoughts on Appellate Advocacy in Constitutional Cases"*, (2006), 34 S.C.L.R. (2d) 19;

(e) Justice Ian Binnie, *"Random thoughts about Charter Advocacy"* (County of Carlton Law Association, 1998);

(f) Robert H. Jackson, *"Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations"* (American Bar Association Journal, November, 1951);

(g) Justice John I. Laskin, *"Forget the Wind-up and Make a Pitch: Some Suggestions for Writing More Persuasive Factums"* (18 Advocates Soc. J. No. 2, 3-12);

(h) Justice George Finlayson, *"Appellate Advocacy in an Abbreviated Setting"*, (18 Advocates Soc. J. No. 2-22-25);

(i) Stephen Shapiro, *"Oral Argument in the Supreme Court of the United States"* (www.appellate.net/articles/oralargsc.asp);

(j) Justice Ian Binnie, "*A Survivor's Guide to Advocacy in the Supreme Court of Canada*" (1999) 18 Advocates' Soc. J. No. 13; "*In Praise of Oral Advocacy*" (2003) 21 Advocates' Soc. J. No. 3.; and

(k) Justice John Laskin, "*A View from the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now*" (1998) 17 Advocates' Soc. J. No. 16.