"Going Fishing"

Advice for Successful Advocacy in the Court of Appeal*

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***This is an updated version of a paper originally prepared in 2008**

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I. INTRODUCTION

[1] 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.

[2] The most famous lines in the literature on advocacy are the ones used by American lawyer John W. Davis over 80 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]

[3] During my 20-plus years at the bar, a significant part of my practice involved casting lines into appellate waters. I then spent nearly 20 years on the Court of Appeal as one of the fish who had to decide what to bite and what to swim past. This paper is presented largely from the 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.

[4] 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.

[5] 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 former colleagues, what I have written was not prepared on behalf of the Court.

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[1] John W. Davis, "*The Argument of an Appeal*" (1940), 26 ABAJ 895 at 895, reprinted (2001) 3 JA pp Pr & Pro 745.

[6] 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 in each section can be gained by consulting the table of contents located at the beginning of this paper.

II. THE BIG PICTURE

[7] 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

[8] 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 their 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.

[9] "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 thereby constrained with respect to the arguments they can advance. Similarly, they are hedged in by ethical obligations and the culture and traditions of the courtroom 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]

[10] 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

[11] 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

[12] As 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.

[13] 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.

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[2] The thoughts in this paragraph are borrowed from R.J. Aldisert, "*Winning an Appeal*" (Clark Boardman Callaghan, A Division of Thomson Legal Publishing, Inc., 1992).

[3] This insight, or at least part of it, comes from 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.

[14] 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 was typically along the lines of, "If the lawyer missed that, what *else* did they 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 even 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 was usually a creeping question as to whether a lawyer who could not get the little things right could 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.

[15] 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 they are 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 of the law. 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

[16] The second major aspect of persuasion is conviction. By conviction I mean the strength of commitment a lawyer invests in their oral submissions. Counsel who present themselves in a way that indicates they believe in the correctness and justness of their client's position are more persuasive than those who are tentative, uncertain or wavering. As 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 *act like* they believe that. There is a measure of theatre or performance in much of what an appellate advocate is called on to do).

[17] One of my most surprising discoveries on going to the bench was that lawyers often lacked conviction or, perhaps more accurately, *appeared* to lack conviction. More frequently than one might think, I saw counsel who folded their tents on specific points and issues, or even the case as a whole, as soon as they felt resistance from the Court. This should not happen. Counsel cannot expect the Court to believe their pitch if they themselves seem uncommitted to it.

[18] 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 assume a confident posture. Body language counts. They avoid nervous habits. They look the members of the Court in the eye and carry themselves in an appropriately dignified manner.

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[4] *Ibid*. at para 12.
[5] As quoted by John Laskin *ibid*. at para 13.

(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 they 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 that 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

[19] The third and final dimension of persuasion is content. As is obvious, an argument that is doctrinally sound, logical and tightly grounded in the facts will be more persuasive than one which is not. More about this later.

C. Appeals from the Court's Perspective

[20] 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 an appeal, the audience that counts is made up of the members of the Court of Appeal who are on the hearing panel. Counsel who do not attempt to understand how those judges think will be less effective than they might be otherwise.

[21] When a judge picks up the factums and begins to prepare for hearing the argument of an appeal, they feel the weight of their 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 that confirms or establishes sound legal principles. As a result, the argument (written or oral) that works best is the one that provides the most reasonable, legally sound and just resolution of the case.

[22] 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 resolving 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) they do not want to close off options for either themselves or their colleagues in future cases.[6]

[23] 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 an appeal. They try to pitch their client's position as being the fair and moderate ground to which the Court should migrate.

[24] 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*.

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

[25] 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 King's Bench level decision on a particular point as if it was a tablet from the Mount. "There are two King's Bench decisions which say XYZ" is not a compelling argument. Court of Appeal judges will want to know *why* the Court should follow those cases. They will want to know if the approach reflected in them is correct or whether it can be refined or improved.

[26] 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 that the Court might choose to modify, revise or qualify the law. The Court of Appeal does more than simply apply existing authorities. It has a responsibility to shape and advance legal doctrine. This can sometimes prove helpful if counsel is able to take advantage of it.

[27] 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

[28] The Court is not infrequently required to deal with appeals of very limited merit. 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 20 and the proceedings will cost me $60,000, launch the appeal!" However, far more often I expect improvident appeals come before the Court because counsel do not pay adequate attention at the very outset of the proceedings to the sorts of arguments that might be available and/or fail to properly assess the merits of the arguments and to advise their clients accordingly. The typical client does not say, "Damn the torpedoes, full speed ahead!" They tend to accept advice as to the practical costs and benefits of pursuing an appeal and will agree with a recommendation not to appeal when it is presented in an appropriate manner.

[29] 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 a bit and promotes clearer and more objective thinking about the merits of an appeal.

[30] 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

[31] 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 Minister of National Revenue*.[7]

[32] On the civil side of the equation, s. 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 King'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.

[33] Section 7(2)(a) provides a general right of appeal in relation to decisions of the Court of King'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, s. 33.1 of *The Municipal Board Act*[9] provides for appeals from decisions of the Board directly to the Court of Appeal.

[34] Section 7(3) qualifies all of this, however, by providing that, notwithstanding the terms of ss. 7(2)(a) and (b), an enactment can negate or qualify a right of appeal which might otherwise be available. Thus, by way of example, 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 Small Claims Act, 2016*[10] and *The Saskatchewan Employment Act*.[11]

[35] A further qualification on the general right of appeal to the Court of Appeal is found in s. 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 King'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 King'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;
>
> (a) other cases, prescribed in the rules of court, that are in the nature of final decisions.

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

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[9] SS 1988–89, c M-23.2.
[10] SS 2016, c S-50.12, s 51.
[11] SS 2013, c S-15.1, s 4-9.

[37] 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

[38] 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.*[12]

[39] Counsel should 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 think that, if something is missed, it can be easily patched up later.

[40] 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. They should read and reread the decision with great care and, in so doing, develop a "long list" of arguable errors. This can include matters both large and small so as to avoid overlooking anything that 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 that might have promise.

[41] 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.

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[12] (1986), 49 Sask R 306 (CA).

[42] In *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*[13], 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.

[43] 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

[44] 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.

[45] 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 that bear on the proposition under consideration.

D. Confirming the Standards of Review

[46] Standards of review are extremely significant. In practical terms, many appeals turn on this consideration.

[47] The standard of review question is almost always top of mind for members of the Court. They are able to intervene in a case and give expression to their own views of what might be right, wrong or just, only to the extent that the applicable standard of review will allow. There is, by way

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[13] [1993] 1 SCR 319.

of illustration, a tremendous difference between an alleged error of pure fact on the part of a trial judge that can be overturned only if it involves a palpable and overriding error and, by way of contrast, an alleged error of law that can be approached on the basis of the correctness standard of review. Accordingly, in deciding what grounds of appeal to advance, counsel must give direct and realistic consideration to the standard of review applicable to each ground.

[48] 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*[14]), to custody and access (*Van de Perre v Edwards*[15]), to findings of fact (*Housen v Nikolaisen*[16]), to sentences in criminal matters (*R v Lacasse*[17]), and so on and so on. Some of the issues in this area are contested and still evolving.

[49] An 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 objective 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

[50] 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 to appeal. The points that remain on the table should all have reasonable merit. The idea of including grounds that can be used as cards to "throw away" during oral argument is misplaced. Judges do not play poker. They only want to see those arguments that counsel believe have a realistic chance of success.

[51] Counsel are often vexed by the question of how many issues to raise in a notice of appeal. Judges typically recommend strongly against raising too many grounds. In general terms, this is

[14] [1989] 6 WWR 193 (Sask CA).
[15] 2001 SCC 60 at para 12, [2001] 2 SCR 1014.
[16] 2002 SCC 33, [2002] 2 SCR 235.
[17] 2015 SCC 64, [2015] 3 SCR 1089.

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 over-issue. 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 lest it 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.[18]

[52] That said, there is no magic number of issues that is too many. Much depends on context. Complex cases often yield more issues than straightforward ones. Some decisions subject to appeal involve more errors than others. I can say this however. Personally, I began to grind my teeth if I opened a factum and realized that the appellant was arguing that more than six or so errors had been made in the decision appealed from and that all could 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 or inconsequential ones.

[53] 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.

IV. THE APPLICATION FOR LEAVE TO APPEAL

[54] I do not propose to consider applications for leave in any depth. Rather, I will note only five points.

[55] 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

[18] Jackson, "*Advocacy Before The United States Supreme Court*," 37 Cornell LQ 1, 5 (1951).

for some summary conviction matters[19], 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.

[56] Second, counsel should remember that the points on which they obtain leave are the points they will have to live with on the appeal proper. This means it is essential to invest sufficient time 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.

[57] Third, by reason of s. 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.

[58] Fourth, it is not always obvious whether the lower court decision in issue is interlocutory such that, pursuant to s. 7 of *The Court of Appeal Act, 2000*, leave to appeal is required or whether the decision is final such that leave is not required. The appropriate approach to take in these kinds of situations is laid out in *Aecon Mining Construction Services, a division of Aecon Construction Group Inc. v K+S Potash Canada GP.*[20]

[59] Fifth, 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.

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[19] See: *The Court of Appeal Criminal Appeal Rules (Saskatchewan)*, ss 11.1–11.3.
[20] 2023 SKCA 102, 485 DLR (4th) 685.

V. THE APPEAL BOOK

[60] Rule 18 of *The Court of Appeal Rules* stipulates 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.

[61] Counsel should, however, take note of two basic points concerning the appeal book that often seem to be overlooked. The first is that the appeal book should include only those materials relevant to the resolution of the appeal. Rule 19 provides that only those parts of the transcript 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, the judges would much prefer to use their time focusing on the aspects of the appeal that may be dispositive of it. More generally, Rule 22(4) indicates that the "parties shall make every reasonable effort to exclude irrelevant material from the appeal book, avoid duplication and otherwise confine the contents to that which is necessary for the purposes of the appeal".

[62] The second point about appeal books that is worthy of emphasis concerns the table of contents. It should be laid out in sufficient detail so as to allow a reader who is unfamiliar with the materials to navigate through them as easily as possible. Counsel must use common sense in this regard. For example, the Court often sees tables of contents that 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.

[63] 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.

[64] 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.

[65] Second, counsel can and should provide the Court with supplementary material that is not strictly required by the *Rules* but that was of significance in the proceeding below, or that 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.

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

VI. THE FACTUM

[67] 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 their client.

A. The Importance of Factums

[68] 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 about lawyers do not depict them sitting at their desks noting up cases at 11 o’clock at night. Those programs focus on courtrooms and courtroom drama. Lawyers are portrayed as people who talk their way to victory.

[69] 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 courtroom.

[70] 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 courtroom. In the Court of Appeal, the appeal books, factums and other material are typically distributed to judges about a month in advance of the oral hearing. They are then reviewed carefully and, on the strength of them (and, sometimes, additional work done by the judges themselves), each judge forms a tentative working view of the case. A factum that is sufficiently convincing can take a judge a long way toward a decision without counsel ever opening their mouth.

[71] Second, factums typically dictate the shape 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.

[72] 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 judges, advocating particular results and lines of analysis long after counsel have left the courtroom and turned their minds to the next file.

[73] 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

[74] One of the things I was struck by during my tour of duty on the Court of Appeal was the frequency with which counsel failed to search out the full range of available authorities and resources in preparing their factums.

[75] 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 matter 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.

[76] *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.

[77] I am certainly not suggesting that every case should include 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.

[78] My second point with respect to research is that counsel should remember to take advantage of the assistance that 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

[21] 2002 SKCA 125, 227 Sask R 146.

those inquiries bypass potentially significant help in mounting their case. The best lawyers look beyond case law when conducting research.

[79] 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 was 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.

[80] 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

[81] 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.

[82] "Concise" does not necessarily mean "short". I suppose every judge would like all factums to be very brief. This would give them less to read and make their 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.

[83] "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.

[84] 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 the necessary arguments be made as clearly, succinctly and economically as possible.

[85] A well-written factum is one that lays things out 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 …”. Court of Appeal judges know counsel are respectful and 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 they 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.

[86] 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]

[87] 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.

[88] 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 they are reading a particular passage or how a point fits into the overall theory of the case. A good factum takes the reader’s hand and leads them surely, confidently and logically from the beginning of the case to its conclusion.

[89] 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 *George v A.G. Canada*,[23] the appellant filed a

[22] Cited by McLachlin C.J.C. (2001), 39 Alta L Rev 695 at para 21.
[23] 2007 SKCA 88, [2007] 9 WWR 226.

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. Less dramatically, and as provided by Rule 4(2) of *The Court of Appeal Rules*, non-compliance with the *Rules* can attract an order for costs.

D. "Point First" Writing

[90] 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. 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]

[91] 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 a 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."

[92] Similarly, if a drafter wants to refer to case law, they 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.

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[24] John I. Laskin, "*Why Are You Telling Me All This?*" in T.A. Cromwell, "*Effective Written Advocacy*" (The Cartwright Group Ltd., 2008) at 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.

[93] 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.

[94] The essential point is this. A judge reading a factum should never have to ask themself questions such as “Why am I reading this?”, “Why is this important?” or “How does this fit in?”

E. The Importance of Editing

[95] 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.

[96] If a lawyer finds it difficult to critique their own material, 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.

[97] 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.

[98] 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

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

[100] A bad table of contents does no more than list the main components of the factum as mandated by the *Rules*: Introduction, Jurisdiction and Standard of Review, Summary of Facts, Points in Issue, Argument and Relief. This kind of setup is not helpful. Judges, or opposing counsel, will often find themselves reading a section of the factum of one party and wanting to see what the other party or parties have to say about that particular point. Alternatively, a judge writing reasons will 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 that are not structured around adequate headings and subheadings, this can be quite frustrating.

[101] The better approach is to put detail into the table of contents. If, for example, the Summary of Facts has subparts, those subparts 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

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

(a) Briefly explaining the procedural history of the matter so a Court of Appeal judge knows how the case got before the Court.

(b) Revealing the essential facts of the case in order to give the judges a sense of the foundation on which the proceedings rest.

(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.

[103] 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, Points in Issue, Argument and Relief sections of the factum. It should very much anticipate and lead into them.

[104] 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.

[105] The Court 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 cover them again in the Summary of Facts and Argument sections of the factum. At a minimum, this creates a strange sense of déjà vu for the reader as they advance through the written argument. At worst, it creates needless and confusing duplication.

[106] I have attached, as Appendix B, an anonymized version of the Introduction section of a factum I wrote shortly before my appointment to the Court of Appeal. It is not necessarily a legal classic but it does illustrate how, even in a very complex case, it is possible to provide an introduction that, 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

[107] The Jurisdiction and Standard of Review sections of the factum require counsel to address the two issues that every judge is obliged to grapple with 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?

[108] There is 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 significant 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.

[109] It should be remembered, as well, that different issues in an appeal might attract different standards of review. This is not necessarily a one size fits all operation.

I. The Summary of Facts Section

[110] 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 corporations 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]

[111] As a result, counsel should strive to present the facts in a manner that, while scrupulously accurate, nonetheless 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 sought after 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]

[112] Preparing the statement of facts can involve a considerable amount of work. It can often be a challenge to sort out important points from unimportant ones and to distill a complex set of

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[25] See: John Laskin, *supra*, note 3, paras 37–40.
[26] R. Aldisert, *"Winning an Appeal" supra*, note 2 at 159.

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.

[113] Writing the facts is self-evidently a bit of a high wire act. Counsel must manage the tension that 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 requirement 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 point to the evidence that most helpfully supports the position being taken. Good counsel manage these tensions in a way that is fair and ethical but that nonetheless results in a recitation of the facts that leaves the impression their client should prevail.[27]

[114] Based on what I saw 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 compromise 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 and should be avoided. It is much better to use the parties names or to use terms like "the Company" and "the Union". Similarly, too many acronyms can make a factum difficult to follow. Make the story as easy to understand and digest as possible.

(c) Always cite the statement of facts to the record. A statement of facts that is underpinned by detailed references to the evidence and the trial decision is far more compelling than one that 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 transcripts and exhibits to find the evidence that sustains a point made in the statement of fact. Opposing counsel also appreciate

[27] These insights come from R. Aldisert, *ibid*. at 155.

knowing exactly where to find the underpinnings of the particulars 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. The real point, however, is that they suffered three broken ribs and a punctured lung. Clear away the factual underbrush. Focus on the *material* facts.

(e) Try to make the facts tell a compelling story. Use clear, vivid language and, if possible, 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 is not unethical to make it 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 recitation of the 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, a graph, a time line or a diagram can be very helpful.

[115] 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. 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 treatment of the facts.

[116] 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 may be appropriate 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 may need to 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 best to re-state the facts in their entirety, perhaps with an opening paragraph that 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

[117] 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 that good lawyers work out *after* drafting the Introduction, Jurisdiction and Standard of Review and Summary of 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 counsel actually do so, the "Points in Issue" part of the factum could be drafted as the *first* step of the writing process.

[118] The points in issue are the matters raised by the appellant in the notice of appeal. It is usually necessary, 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 statutory provision to be a reasonable limitation of rights. In the Points in Issue section of the factum, it will be useful to be more specific and to indicate, for instance, that the real points at stake are (a) whether the limitation of rights occasioned by the statute is the least restrictive way of achieving the statutory objective and (b) whether the requisite proportionality exists between the importance of the legislative objective and the nature of the infringement of rights.

[119] 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.

[120] If counsel acting for the respondent believes the appellant has misconceived the case, they should say so and then lay out the issues as they see 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 they simply fail to engage with respect to the appellant's arguments and, as a result, leave them unanswered.

K. The Argument Section

[121] 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.

[122] 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]

[123] 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.

[28] *Ibid*. at 145.

- Conclusion: Therefore, Mr. Smith's actions were not negligent.

[124] Not all factums need to 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.

[125] 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 forget the necessity of demonstrating a reviewable error in the ruling which is the subject of the proceedings.

[126] 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 that explains and summarizes what is to follow. For example, the opening paragraph of a section dealing with whether a King'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.

[127] This sort of approach provides context before detail. A judge reading what follows will know *why* they are reading it.

[128] 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 wording:

> 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.

[129] 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.

[130] 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*". As well, headings should be short and punchy if they are to effectively serve their purpose.

[131] There are a variety of other points that, 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 appeal.

(d) Avoid using long quotations. They are too easy to gloss over. Quotations can be very compelling and useful but they should be whittled 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 held that 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.

[132] 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 that 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 that 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 therefore feel comfortable leaving it intact.

L. The Relief Section

[133] The Relief section of the factum lays out the parties' bottom lines. It is self-evidently important. As 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?

[29] Thomas A. Cromwell, "*Effective Written Advocacy in Factums*" in T.A. Cromwell, "*Effective Written Advocacy*", *supra*, note 23 at 63.

Direct a new trial or hearing? It is important, of course, to ensure the Court has jurisdiction to grant the relief requested.

[134] 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.

VII. BOOKS OF AUTHORITIES

[135] Books of authorities were once welcomed by the Court and seen as being a very helpful complement to the factums. However, they have been overtaken by technology and the fact that almost every legal resource is so readily available online.

[136] Rule 36 of the *Civil Rules* permits a party to serve a book of authorities at, or any time before, the hearing of an appeal. But, it has been displaced by Civil Practice Directive No. 2, which directs, that notwithstanding Rule 36, effective November 1, 2023, the Registrar will not accept books of authorities for filing. Criminal Practice Directive No. 5 is similar. These two practice directives should be read in conjunction with Civil and Criminal Practice Directives No. 3 – Electronic Filing, which require that any reference to a case or a statutory authority in a factum must be hyperlinked to an electronic version of that document, if it is available. Practically, of course, if a case or a statutory authority referred to in a factum is not available online, it is appropriate to include a copy, behind a tab, at the conclusion of the factum.

[137] I have covered the "written" or "electronic" side of the advocacy equation. I turn now to the appeal hearing itself.

VIII. ORAL ARGUMENT

[138] 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.

[139] Delivering an effective oral argument is not easy. Every lawyer who has appeared before the Court can identify with 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.[30]

[140] Oral argument is difficult, in large part because no two appeals are the same. Each one 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 their own strengths, weaknesses and idiosyncrasies. Every panel of the Court has a 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

[141] 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.

[142] 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 courtroom well prepared and familiar with the case. They do not begin from a standing start with the first words of the 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 taken steps to have become familiar with the record.

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[30] *Supra*, note 20 at 6.

[143] 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 their 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.

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

[145] 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 may 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 how 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.[31]

[31] Some of these points are made by R. Aldisert, *supra*, note 2 at 29 *et seq*.

[146] Counsel should see oral argument as an invaluable opportunity to engage directly with the members of the Court 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 Oliver Wendall Holmes said, we are seeking the "implements of decision". Oral argument is the place to deliver those implements.

[147] 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.

B. Preparation

[148] Preparation is the absolute key to effective oral advocacy. It involves several 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. If a new authority should present itself for the first time in the course of preparing for oral argument, or otherwise after the factum is filed, the best approach is to draw that authority to the attention of opposing counsel and, with their consent, then ask the Registrar to place it before

the Court. If consent is not forthcoming, the Registrar should nonetheless be advised, prior to oral argument, that leave to file the material with the Court will be sought when the appeal is argued.

(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.)

(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 skeptical judge. Where are the holes? What are the 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 their 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. 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 their 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). That process clarifies and refines thoughts and puts phrases, metaphors and the like into counsel's head that are usually more persuasive and well-crafted than what might be improvised on the spot during argument.

(g) Preparing a compendium – Rule 37.1 of *The Court of Appeal Rules* says that a party may provide a compendium that contains extracts from (a) any party's factum; (b) authorities referred to in any party's factum; and (c) material found in the appeal book, as well as an outline of oral argument that does not exceed two pages. A compendium can be a useful tool when the record before the Court is long and involved. However, compendia have to be used carefully. They can easily make a presentation more involved and more complex than might otherwise be the case.

C. The Style of the Argument

[149] Every lawyer must adopt a style that is comfortable and that works for them. 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.

[150] 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. It has no interest in embarrassing counsel or in making counsel feel inadequate.

[151] There are several general style points about good oral advocacy that warrant emphasis:

(a) Speak up. Counsel should make themselves heard and speak like they believe what they are saying. They should speak at a pace that 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) Stay away from 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 or pointing at the members of the Court.

(j) Remember that the judges can see the entire courtroom. Do not grimace at the submissions of opposing counsel, exchange knowing winks with clients and so forth.

(k) Try to strike a tone that is both respectful and confident.

[152] It may also be useful here to offer a word or two of advice about oral argument presented by way of video link. First, counsel who elect to proceed in this way should ensure that they are well set up so as to avoid technical problems and disruptions. Issues of that sort can easily get in the way of an effective presentation. The Court has a document entitled "Video Hearing Tips" that is very helpful in this regard. It is on the Court's website. As for oral submissions themselves, the same principles apply as when making submissions face-to-face. However, in video appearances, it can sometimes be difficult for counsel to sense or understand when a judge would like to interject or ask a question. Accordingly, counsel should be especially alert to the body language of the

judges as revealed on the screen and should be careful to avoid speaking in a way that is so devoid of pauses that it blocks out opportunities for intervention by the Court.

D. Delivering the Argument

[153] 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.

[154] 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.

[155] 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 reality is that the members of the Court of Appeal, like the members of most other appellate courts, are normally not inclined 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 sense of what is important.

[156] 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 the outset, to get the Court focused on the heart or controlling idea of the case. They 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.

[157] This sort of opening lets the Court know what counsel thinks is significant and where they are heading. Importantly, it imposes structure and makes it easier for the lawyer to maintain some control over the way in which the hearing will unfold. 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.

[158] I know that lawyers are sometimes reluctant to proceed on the assumption that the court is familiar with the facts. That reluctance is understandable because the facts are often extremely important. However, in the Court of Appeal, an argument that includes a laborious review of the record will usually not impress.

[159] That said, 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 especially important to, the case. Taking the Court to the underlying material can be very effective. Ian Binnie explained 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 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…

[160] The point remains, however, that (as a general rule) most appeal courts recoil from arguments that *begin* with a formal review of the facts. As a result, it is usually 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.

[161] 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.

[162] The best presentation is one that 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.

[163] 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 judicial 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 tackle 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 and it looks like the Court is of that mind, 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.

(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, they 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.[32]

[164] I have found that inexperienced lawyers, in particular, often lose sleep in advance of an appeal over the prospect of being asked a question to which they simply do not know the answer and to which they are simply unable to respond. That concern is, I suppose, understandable but the possibility of such a thing happening can be dramatically reduced (hopefully to zero) by, first, diligently reviewing the record and the authorities, and, second, by thinking through the hard questions using the approach described in paragraph 148(d), above. If the Court does pose a question that counsel for whatever reason is unable to deal with at all, they might consider (a) explaining, if such is the case, that the answer does not matter because the issue does not arise on the facts of the appeal or because the appeal has to be resolved in the same way regardless of the answer, (b) if making submissions for the appellant, gaining some time to think or to consult the authorities or the record by indicating that it would be helpful to be able to take the question under advisement and deal with it in reply, or (c) if the answer to the question is critical to the resolution of the case, and counsel is truly at sea, asking for leave to file a brief written submission on the point on some extremely tight timeline, for example, by the end of the next day.

[165] 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.

[166] Finally, 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 …" and then sitting down.

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[32] Stephen M. Shapiro, "*Oral Argument in the Supreme Court of the United States*",33 Cath U L Rev 529 (1984).

E. The Respondent's Argument

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

[168] Counsel for the respondent must prepare in detail for their 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 an answer 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.

[169] When acting for a respondent, I found it helpful to annotate my prepared outline of argument with both the key points made by the appellant's counsel during their 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 approach helps to avoid a presentation that is overly disjointed, *i.e.* one that 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

[170] 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.

[171] Replies should be used to respond to either arguments made by the respondent but not dealt with by counsel for the appellant in their principal 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

[172] It is important to remember that great advocates are not born. They learn their trade just like other professionals. Moreover, 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.

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

[174] Happy fishing.

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 mine and mill development known as the Green Hills 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, Smith J. agreed.

[5] World Mineral says that 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 *CEAA* review by virtue of the grandfathering provisions in s. 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 Hills 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

(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 SCLR (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 M. Shapiro, *"Oral Argument in the Supreme Court of the United States"* 33 Cath U L Rev 529 (1984);

(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.