

## Crib Notes on How to Write a Great Factum

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There are many helpful, and indeed “classic”<sup>1</sup>, articles on how to write a great factum. Having been asked by one of my clients to present on effective factum writing, I prepared these crib notes, based on these authorities, as well as my own time in the trenches.

### The Goal of a Well Written Factum

“Perhaps the greatest impact of the factum is that it provides the court with its first impression of the case and of you as counsel.”<sup>2</sup>

Appellate decisions are frequently reserved. A well written factum will lay the foundation for your legal argument when the judges review it prior to oral argument, provide a frame of reference during your oral argument, and document the argument you have made to refresh their memory when the judges deliberate their decision. A well written factum is therefore a significant part of appellate advocacy.

Perhaps The Honourable Mr. Justice J.E.L. Côté has said it best: “The importance of factums is colossal, almost impossible to overstate. Why? Because a factum:

- (a) chooses the issues;
- (b) gives judges their first impression of who should win; first impressions are very strong;
- (c) usually contains more information than 45 minutes’ speaking can;
- (d) influences whether the judges do any more research of their own;
- (e) follows an order which the judges cannot change or interrupt (the way they can disrupt oral argument);
- (f) influences whether the judges give an oral judgment or reserve decision; and
- (g) keeps speaking: it is far more accessible and memorable than oral argument, if the judges reserve decision.”<sup>3</sup>

In the event the judgment is reserved, “The factum should also give an overworked, tired, and stressed judge easy access to any parts of the [appeal] record that may be needed to deliberate.”<sup>4</sup>

The goal: to craft an argument persuading a judge to your client's point of view on an issue.<sup>5</sup>

As McLachlin CJ has stated, it must be "communication that convinces."<sup>6</sup>

Have a theory, begin at the beginning, and keep it simple.<sup>7</sup>

Above all you must consider the "readability" of the factum – write to persuade your audience, the appellate judge.<sup>8</sup>

The Rules of Court set out clear requirements for the essential parts of your factum. Be sure to review these in detail before you start to write your factum, and scrupulously adhere to the requirements.

### Overview

Be sure to include a concise overview statement describing the nature of the case and the issues– What is the appeal about? What is the key issue upon which the appeal turns?<sup>9</sup> Then explain why appellate intervention is required to right the error committed at the lower court. Your overview will provide a roadmap as to the rest of the factum.<sup>10</sup>

Tell the court why your client should win - "Occupy the moral high ground whenever possible."<sup>11</sup>

"If the facts are outlined in a way that can convince the court of the innate justice of your client's case, I think it is probably true to say that in many cases the battle is at least half won-the court can usually find a legal theory to support a decision that accords with the equities."<sup>12</sup>

Another approach suggests answering the following questions in your overview:

1. What happened here?
2. What do you say went wrong?
3. What can I, the judge, do about it? and
4. Why should I care?<sup>13</sup>

Don't be intimidated into thinking that your overview can be only one paragraph – take several paragraphs, or up to one page, in order to make a clear presentation to the appellate judges as to why you are before them.

### Statement of Facts

When you file your factum with the Court of Appeal it will be parceled out to the court's legal counsel and perhaps an appellate court clerk, or possibly both, for review for accuracy. So always be upfront, honest and accurate in your statement of the facts and your submissions. Bring out the facts that are helpful to your appeal and also those that hurt – do not try to conceal damaging facts.<sup>14</sup> Otherwise the appellate judge will receive your factum with a memo that outlines why it is incorrect/misleading/wrong. Do not lose your reputation as an honest lawyer with the appellate court.

"The main rule with respect to the facts is that you must be scrupulously fair and candid in presenting them. Misrepresenting the facts can not only ruin the case, it can ruin your reputation. The worst thing to have in an appellate court is a reputation for not being trusted with respect to stating the facts. Do not be put in the position with regard to anything you say where the court will ask, "Where do we find that in the record?"<sup>15</sup>

In your statement of facts, tell a story that shows the justice and logic of your position and persuades the court of the rightness of your client's cause. Don't fall into the trap of simply setting out your facts chronologically. Tell your story—your facts—around a theme that corresponds to the key issue or issues in the appeal.<sup>16</sup>

"...counsel should strive to present the facts in a manner that, while scrupulously accurate, leads the judge in the desired direction. The facts section of the brief is not merely a place to dump a summary of the evidence. It should be seen as an opportunity to lay out the story in a way that facilitates the desired disposition of the case."<sup>17</sup>

If certain facts are key to the appeal, make this clear in your factum – don't assume that the judge will know this without a flagging of the key facts.<sup>18</sup>

Be sure to carefully tie your statements of facts to the appeal record. This is laborious, but necessary, work to assist the court and establish your credibility.

Short, sharp quotations from the transcript to support your statement of facts or argument can be very effective.<sup>19</sup>

Make sure your statement of facts refers only to those facts necessary for the court to deal with the issue(s)-cut out the facts that are not needed.<sup>20</sup>

Where possible use the findings of the court below for your recitation of the facts.<sup>21</sup>

“Generally, unless counsel is seeking to reverse a finding of fact, the statement of facts should be based either on a finding of the trial judge or on facts that are not in dispute. When setting out a finding of fact, state what the trial judge found to be the fact and give reference to the reasons for judgment. You may go on to state that his finding of fact is supported by the evidence and give a reference to the evidence. On the occasions when it is necessary to deal with disputed facts, both versions should be summarized.”<sup>22</sup>

For respondents: “Determining the right approach [regarding drafting the respondent’s statement of facts] requires the exercise of judgment. If the [appellant’s] statement of facts is complete, accurate and balanced, it will be best for the [respondent] simply to accept it. If only one or two points are omitted from the statement (or included in it but requiring correction), the [respondent] normally need do no more than accept the statement, subject to those specific points. But if the [respondent] believes that there are multiple problems in the summary of the facts or if the [appellant] has put too much “spin” on them, it is clearly appropriate to restate the facts in their entirety, perhaps with an opening paragraph such as this: “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 this way...”<sup>23</sup>

An effective respondent’s factum will set out the findings of the lower court judge that the respondent seeks to uphold and then will list the evidence that supports each finding.<sup>24</sup>

### Grounds of Appeal

Make sure that you clearly identify the issue(s) in the case.

Never have more than two, or at the most three, grounds of appeal.<sup>25</sup> Resist the urgings of your client to nitpick multiple grounds of appeal – ideally pick one hill you are prepared to die on, and that’s it.

“If counsel acting for the [respondent] believes the other side has misconceived the case, counsel should say so and then lay out the issues as he or she sees it. Similarly, if the [respondent’s] counsel believes the court needs to consider issues not flagged by the other side, this should be made clear as well.”<sup>26</sup>

“If you act for the respondent, there are times when you may need to identify separately and address an issue that your opponent’s factum has not itself explicitly identified as a discrete issue but that is sprinkled throughout his or her factum.”<sup>27</sup>

### Standard of Review

The role of the appellate court is not to retry the case, but rather to look for error in the lower court.<sup>28</sup> Spend some time on this section of your factum, and make sure that you can clear the bar to achieve appellate intervention.

### Argument

Be clear, concise and organized, building a logical argument.

A lean, tight factum which logically builds your argument will take you much further than trying to throw in everything plus the kitchen sink, thereby losing coherence. “Less is more.”

Clearly think out the key points you wish to make, and make one point per numbered paragraph.

Use the “point – first” writing style– lead with the point you wish to make, and then provide the details. “[S]tate your point or proposition before you develop or discuss it... give the context before discussing the details.” “Whenever you are about to dump detail on the reader, give the reader the point of the detail first.”<sup>29</sup>

When you’ve made your point, move onto the next numbered paragraph. One point per paragraph.<sup>30</sup> Let your points build in a sequential, logical argument.

Always lead with your best point.

Underscore your key points with the use of subheadings throughout your argument.

Don't use the hundred-dollar word when the five-dollar word will do.

Write very simply and directly. Write more like the way you speak—with shorter sentences. "Spoken English uses strong verbs and short simple words."<sup>31</sup>

Never overstate your case— choose accuracy and balance over hyperbole and exaggeration.<sup>32</sup>

Make sure that the cases cited clearly stand for the legal principles they are cited for.

If you are relying on a well-known legal principle, just cite the leading authority for the principle, and do not pepper your factum with additional supporting authorities. If it is a landmark Supreme Court of Canada case you may want to also cite the case in which your appellate court adopted the principle. A long list of authorities is usually very irritating to a judge.<sup>33</sup>

You can generally limit your authorities to the most recent case on the subject, either from your appellate court or from the Supreme Court of Canada; a case close on the facts; a "leading" old case; or a case in which the point is discussed by a well-respected jurist.<sup>34</sup>

When you produce your Book of Authorities, just produce the headnote and the relevant highlighted passage articulating the well-known principle.

"Avoid quotations, except for a few essential lines from very important legislation. Most readers just skip quotations, especially ones more than four lines long. Research confirms that. Substance mummified in long quotes is very outmoded ..."<sup>35</sup>

Directly address the weaknesses in your case— show the judges "a way around or over or through them"<sup>36</sup>.

The appellant's factum should anticipate and expressly deal with any major arguments that can be anticipated from the respondent. "You do not want some adverse light bulb to suddenly go on for the

judge while reading the respondent's factum, only then having been twigged to a major argument that your factum neither anticipated nor answered."<sup>37</sup>

Take care to distinguish any cases that are against you, and do not give into the temptation to bury them. "Taking the high road on these kinds of issues is guaranteed to win the respect of one's colleagues and the courts."<sup>38</sup>

"Deal with difficult authorities. Take them on fairly and directly, and explain why they do not apply or control the outcome of the case."<sup>39</sup>

If you are writing the responding factum:

- spend considerable time on the appropriate assessment of the standard of review – can you lessen the appellate courts ability to intervene? Should judicial deference be shown because, for example, the appeal is from a discretionary judgment or order?;
- remind the appellate court of the lower court judge's advantage in hearing and seeing the witnesses;
- demonstrate that the lower court judge either interpreted the applicable law correctly, or if he or she did not, that the result would be identical if applied to the particular facts at hand, that is, an interpretive error would not have affected the result; and
- remind the appellate court of the desire for judicial finality.<sup>40</sup>

The respondents factum should be "self – contained or free – standing". The judge should be able to read it on its own, without having to refer to the appellant's factum.<sup>41</sup>

If your opponent has made any concessions in their factum, be sure to highlight this in your factum, perhaps in your overview. Don't assume that these important concessions will have caught the court's attention. Include any concessions on the facts that are important to your case, perhaps under the heading "Undisputed Facts", and any major points that your opponent's factum has not disputed.<sup>42</sup>

"Counsel for a respondent assume that they cannot work on their factum until they see the appellant's factum. That is untrue, even dangerous. Do not let your own thoughts and ideas fade for weeks, then read the opposing appellant's factum, thus letting him overwrite or shape your ideas about the issues."<sup>43</sup>

Answer each one of your opponent's arguments, so that the judge does not conclude you do not have a good answer to the point.<sup>44</sup>

### Relief sought

Take some time to carefully think about what relief you are seeking – what would you like the appeal court to do to right the wrong?

Deal expressly with costs. "If there are reasons for the judge to depart one way or the other from the tariff or the regular practice of the court, these reasons should be explained."<sup>45</sup> But take care not to seek heightened costs unless there is a cogent reason to do so.

### Final Steps

Be sure to give your factum a heavy edit, and take care to proofread a hard copy, so that you can spot those pesky typos.

Edit for accurate case citations, typing errors, grammar and punctuation. Edit for tone, for sentence and paragraph length, for proper headings, for clarity and organization and to eliminate wordiness and jargon.<sup>46</sup>

Edit to cut – "Read with a pencil" – you can always make your factum more concise.<sup>47</sup>

**Another view on editing:** "...It is practical to edit the factum for different purposes at different times, in approximately this order:

- Does it clearly identify the errors that require appellate intervention?
- Is it concise and persuasive?
- Does it include too many issues - have you culled the weaklings?
- Is it credible?
- Does it anticipate and neutralize the respondent's arguments?
- Does it correctly cite the evidence and the law?
- Have the cases been updated, and does it bring any binding adverse authority to the attention of the court?
- Does it ask for relief including costs?"<sup>48</sup>

There are helpful documents on the courts website which will remind you of the necessary formatting etc. required for your factum – before you file your factum double check that you have met all these requirements, (for example, have you included your estimate as to how long your oral argument will be?).

END

- 1 The Honourable Mr. Justice Marvin Catzman, "The wrong stuff: How to lose appeals in the Court of Appeal" (2000), 19 *Advocates' Soc J* No 1, 1-5; M. David Lepofsky, "The unsung art of written advocacy: Strategies, tips and a call for unorthodoxy" (2004), 23 *Advocates' Soc J* No 1, 10-27; The Honourable Mr. Justice John I. Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (1999), 18 *Advocates' Soc J* No. 2, 3-12
- 2 Mr. Justice John Sopinka, "Appellate Advocacy" (1992), 11 *Advocates' Soc J* No 1, 16-20
- 3 The Honourable J.E.L. Côté, "Factums" (Prepared for the Legal Education Society of Alberta, Court of Appeal Practice, and presented October 8 and 14, 2015) at page 1
- 4 M. David Lepofsky, *supra* at para 73
- 5 The Honourable Justice David M. Brown, "How to Lose an Appeal in the Court of Appeal: The Next Generation" (2017), 36 *Adv J* No 2, 19-20
- 6 The Right Honourable Beverley McLachlin, "Legal Writing: Some Tools" (2001), 39 *Alta L Rev* 695-702 at para 29
- 7 The Honourable John I. Laskin, "The Right Stuff: Marvin Catzman and legal writing" (2008), 26 *Advocates' Soc J* No 4, 19-22 at para 12
- 8 The Honourable Mr. Justice John I. Laskin, *supra* at note 1
- 9 *Ibid* at page 2
- 10 *Ibid* at page 3
- 11 Ronald G. Slaght, Q.C., Marguerite Ethier and John B. Laskin, "Writing the Persuasive Factum" (2010), 28 *Advocates' J* No 4, 16-23 at para 5
- 12 The Honourable Mr. Justice Sydney L. Robins, "Appellate advocacy" (1997), 16 *Advocates' Soc J* No 3, 11-15
- 13 M. David Lepofsky, *supra* at para 158
- 14 *Ibid* at para 160
- 15 Mr. Justice John Sopinka, *supra* at page 2
- 16 The Honourable Mr. Justice John I. Laskin, *supra* at note 1 at page 4
- 17 The Honourable Robert G. Richards, "Writing effective briefs" (2012), 31 *Advocates' Soc J* No 3, 3-12 at para 19
- 18 M. David Lepofsky, *supra* at para 107
- 19 The Honourable Mr. Justice John I. Laskin, *supra* at note 1 at page 4
- 20 *Ibid* at page 8
- 21 Ronald G. Slaght, Q.C., Marguerite Ethier and John B. Laskin, *supra* at para 10
- 22 Mr. Justice John Sopinka, *supra* at pages 2,3
- 23 The Honourable Robert G. Richards, *supra* at para 25
- 24 The Honourable John I. 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 2, 16-22 at page 4
- 25 The Honourable Mr. Justice John I. Laskin, *supra* at note 1 at page 8
- 26 The Honourable Robert G. Richards, *supra* at para 29
- 27 *Ibid* at para 111
- 28 The Honourable Mr. Justice John I. Laskin, *supra* at note 1 at page 5

29 *Ibid* at page 3

30 *Ibid* at page 9

31 The Honourable J.E.L. Côté, *supra*, at page 3

32 The Honourable Justice David M. Brown, “How to Lose an Appeal in the Court of Appeal: The Next Generation” (2017), 36 *Adv J No 2*, 19-20 at para 14

33 The Honourable Mr. Justice John I. Laskin, *supra* at note 1 at page 7

34 *Ibid* at pages 7,8

35 The Honourable J.E.L. Côté, *supra*, at page 9

36 Stephen Grant, “Family Law Appellate Advocacy” (2006), 25 *Advocates’ Soc J No 1*, 11-16, para 44

37 M. David Lepofsky, *supra* at para 161

38 The Honourable Robert G. Richards, *supra* at para 37

39 *Ibid*.

40 Stephen Grant, “Family Law Appellate Advocacy” (2006), 25 *Advocates’ Soc J No 1*, 11-16, paras 27-32

41 The Honourable John I. Laskin, *supra* at note 1 at page 6

42 M. David Lepofsky, *supra* at paras 91, 92 and 101

43 The Honourable J.E.L. Côté, *supra*, at page 11

44 *Ibid* at para 139

45 The Honourable Robert G. Richards, *supra* at para 41

46 The Honourable John I. Laskin, *supra* at note 1 at page 12

47 *Ibid* at page 12

48 Ronald G. Slaght, Q.C., Marguerite Ethier and John B. Laskin, *supra* at para 24