SOME FACTUM WRITING SUGGESTIONS

David Stratas, Heenan Blaikie LLP
Queen's University, Kingston, Ontario

Factum drafting is an art. It also has to respond to the practical needs of the particular problem you are addressing. As a result, there is no particular formula for writing a good factum. Different approaches can work well.

That being said, good factums do share common characteristics. In this note, I try to identify some of these.

Appended to this for educational purposes are some examples taken from real factums that have been publicly filed. These are not necessarily "perfect": in many cases, I would re-edit them. However, they illustrate some approaches that you might try.

Index

1. Get the "little things" right

"Little things" in factums are in fact big things. Getting the little detail right increases your credibility. Carelessness hurts your credibility:

(a) *No typographical errors.* Running the "spell check" program is no substitute for a careful proofread. To many trail council belief its fin, in principal, juts too ron a spell cheque programme.

(b) *No grammatical errors.* For example, subject-verb agreement are important.

(c) *Consistent formatting and usages.* If you indent your authorities, then always indent them; if you use *italics* for emphasis, then never use <u>underlining</u>; if you use an abbreviation like "para." in citations, then always use "para.", not "paragraph" or "parag."; if it's "Catzman J.A." then always use "Catzman J.A." and not "Mr. Justice Catzman" or "Justice Catzman"; if you are using the S.C.R.'s for citations, never use D.L.R.'s for a Supreme Court case.

(d) *Use gender neutral terms.* Use "Catzman J.A." or "Justice Catzman" rather than "Mr. Justice Catzman".

(e) *Cite cases properly.* Improper citations are inconvenient and suggest that the author is careless.

(f) *Use appropriate citations.* Use the official, bilingual reporters (F.C. and S.C.R.), especially in those courts. One important reason is that some of the judges are francophone and might prefer to read the French language version of the judgments.

(g) *Scrupulously follow the formatting rules and requirements in the rules of court, practice directions or administrative board rules.* For example, do not assume that the requirements in the Superior Court of Justice are the same as those in the Federal Court or the Ontario Court of Justice. Do not assume that the requirements in civil cases are the same as criminal cases.

2. Tips for writing a reader-friendly, helpful document

Do anything possible to make the factum reader-friendly and helpful:

(a) Consider adjusting your writing style to make the factum reader-friendly and helpful:

(i) *Point first.* In each section of your factum, state up front the point that you are trying to develop in the section. When you do this, your reader will be able to understand the significance of the detail you provide and make relevant connections and assessments.

(ii) *White space.* Use plenty of spacing to create "white space". A full page of narrowly spaced text is not reader-friendly.

(iii) *Brevity and simplicity.* Err on the side of writing short, simple sentences and short, simple paragraphs. Try to imitate a journalist writing a news story.

(iv) *Coherence and flow.* Each sentence should pick up on a word or an idea in the previous sentence. The reader should be able to glide effortlessly from sentence to sentence.

(v) *Use headings.* Use headings that exhort and give the reader an idea of what your submission will be. (For example, write "There was no contract because there was no offer and acceptance" rather than "The contract issue".) This helps to implement the "point first" principle.

(vi) *Logical Order.* Order the headings in a logical and persuasive order.

(vii) *Be clear, confident and direct.* Some suggestions:

- Unless there is a good reason to do otherwise, make the subjects of your verbs the agents of those actions (avoid "passive voice"). Compare "The Plaintiff said that the union gave the Defendant the property," (good) with "It was said by the Plaintiff that the Defendant was given the property by the union" (bad). The passive voice is longer, evasive (it hides the subject of the sentence) and less crisp and confident. Most factum-writers use tens of passives in their factums, which destroys their persuasiveness.

- As much as possible, keep subjects and verbs together. Compare "The New York Yankees lost the World Series because they did not have enough talent" (good) with "The New York Yankees, because they did not have enough talent, lost the World Series" (bad).

- Use specific verbs, adverbs and adjectives (avoid "nominalizations"). Compare "The New York Yankees decided to spend ten times more than any other team to acquire players" (good) with "The New York Yankees made a decision to spend ten times more than any other team to acquire players" (bad).

- Get rid of imprecise "waffle words". "Indicate" is an imprecise waffle word. People seldom "indicate" things — if they stated something, then say they stated something. If you cannot be more direct, analyze why. Is there a qualification that you should be expressing? Or are you being uncertain in your language because you have not nailed down the facts or law to a sufficient level of certainty? If so, do more work.

- Get rid of "throat clearing phrases" and other useless words from your writing: *e.g.*, "it appears that...", "it is the fact that...", "it is apparent that...", "generally it is the case that...". If it "appears", is "apparent", *etc.* then just say it without the useless verbiage.

- Avoid legalisms and unnecessary phrases — compare "The plaintiff spoke about the proposed strike before the vote" (good) with "The plaintiff spoke with respect to the proposed strike prior to the vote" (bad).

- Use transitional or orienting words at the beginning of sentences to signal to your reader where you are going. (Transitional words: "for example", "therefore", "however", "on the other hand", "further", "moreover", "thus", "consequently", "accordingly". Orienting words: "for the most part", "as a general rule", "historically".)

- Most of all, just get to the point. Avoid excessive verbiage. Short and direct approaches are helpful. Structure your argument as if you are driving on a freeway, trying to get from "A to B" directly, simply and promptly. Don't take your reader on off-ramps or onto the "shoulders" or fringes of an argument. Just because your research may have led you on curves and into dead-ends does not mean that you have to take your reader through them.

(b) Aside from adjusting your writing style, there are some specific things you can do to help the judges:

(i) *Brevity*. Judges have too much to read. They welcome short factums that deal concisely with the true issues in the case.

(ii) *Complete citations*. Never use "*supra*", "*infra*", "above", or "below" in citations. Doing that forces judges to flip elsewhere to find the citation. This can be frustrating for them, especially in long factums. Just repeat the citation.

(iii) *Cross-referencing in citations.* Give them the authority *and* where it is in your book of authorities or evidentiary record (*e.g.* "Book of Authorities, Tab 1" or "Application Record, Tab 1").

(iv) *Pinpoint citations.* Give them the page number of the authority you are relying upon. Make sure the relevant part is highlighted in your book of authorities.

(v) *Illustrations, diagrams and charts. Use* illustrations (see Appendix 1), diagrams (see Appendix 2) or charts (see Appendix 3) if that will make the point better — pictures are sometimes worth a thousand words.

(vi) *Legislative schedules.* The full text of every legislative provision mentioned in your factum must be in the back of your factum. All other provisions that might be helpful should also be in the back of your factum. Simply listing the provisions in the back of your factum, without setting out their text, is not helpful. Note that the Federal Court Rules require that the English and French versions of legislative provisions be in the back. There are similar requirements in the Supreme Court of Canada.

(vii) *Indices*. Consider using an index, particularly in longer factums.

(viii) *Jurisdiction.* Where jurisdiction to grant the relief sought is uncertain or the judge may not have encountered this sort of motion before, state what the jurisdiction is to grant the relief sought.

(ix) *Specify the relief*. Say *exactly* what you want in the "Relief Sought" section of the factum. You should be able to cut the wording from this part of your factum and paste it, without any changes, into the body of the order or judgment to be issued by the Court.

3. Tips for writing a persuasive document

The techniques one uses to persuade will vary from case to case. Different cases call for different approaches. Try some of the following:

(a) Do everything above.

(b) Be persuasive on three levels:

(i) convince judges that if they decide in your client's favour they will be legally correct;

(ii) convince them that if they decide in your client's favour they will have done the just thing; and

(iii) convince them that the factum and its author are credible.

Concerning (i) and (ii), you want to appeal to the head and the heart. You want to capture the legal high ground and the moral high ground. It may not be possible to capture the moral high ground in a case: your objective may have to be less ambitious. Your only option may be to keep your client out of the moral gutter or put the other side into it. You should be trying to maximize your client's legal high ground and your client's moral high ground.

Concerning (iii), you want the judges to believe that you have thought through the problem properly and are dealing with all of the central factual and legal issues in a direct, non-evasive, clinical way. In short, you want you and your factum to be believed.

(c) Use "point first writing" — in each section of your factum, say what your submission is and then build toward it, rather than building toward it and revealing the point at the end, like a mystery novel.

(d) Use persuasive headings — rather than "The Test for an Interlocutory Injunction", try "The Interlocutory Injunction Test is Met in This Case".

(e) Avoid words like "clearly", "absolutely", "it is obvious that", "egregiously", *etc.* They do not persuade. They jar and repel the reader.

(f) There is no need for formalism — *e.g.* "this Honourable Court", "it is submitted that", "it is respectfully submitted that...". You might consider using "it is respectfully submitted that" sparingly, simply to flag a central submission.

(g) Sometimes understatement of a point after a well-structured discussion of the law or facts is devastatingly persuasive. Similarly, sometimes leaving it to a judge to make connections is better than making them for him/her.

(h) At key points of the factum, try to choose a “sound bite” or nice turn of phrase that will encapsulate your argument. This may not be possible in all cases.

4. Introductions and overviews

An introduction or overview at the start of your factum is essential. It orients the reader and begins the task of persuading the reader on all three levels. Although various rules of procedure do not require you to write an introduction or overview, you should do it anyway. Some ideas for you to consider:

(a) At the beginning of your factum, in a succinct manner (*e.g.*, 2-5 paragraphs), write what the case is about and why you should win.

(b) You should accomplish three things in a good introduction:

- start to convince the judge that if he/she decides in your favour, the judge will be legally correct;
- start to convince the judge that if he/she decides in your favour, the judge will have done the right thing; and
- provide the judge with a "roadmap", telling him/her what your factum is going to deal with.

(c) consider writing overviews or introductions elsewhere in your factum, *e.g.* at the beginning of the discussion of the law, to orient the judge and give him/her some idea where you are going.

(d) Do everything set out in sections 1, 2 or 3, above. Writing style and word choice is particularly important in an introduction. Sample introductions are provided in Appendix 4.

5. The facts section

The facts section is easily the toughest part of the factum to write. It is also the most important because most cases are won on the facts. Some suggestions for you to consider:

(a) Assiduously develop the facts before the motion — write correspondence to set up the case; get all the information and documents from your client by conducting great interviews; use other means to get information (third parties, access to information legislation, records from other proceedings); write great affidavits; conduct great cross-examinations; *etc.*

(b) *Never* simply splice your client's affidavit into the facts section, making only a couple of minor changes — this is a wasted opportunity.

(c) Use complete and accurate evidentiary references; cross-reference to the books that the judge is using, *e.g.* the motion record, application record, *etc.*

(d) Consider using great "quotable quotes" with the evidence references to capture the colour, but don't overuse them. (Some guidance on the use of block quotes appears in Appendix 5, heading A.)

(e) *Select* and *organize* the facts: choose a theme and develop it like you would if you were writing a novel or telling a story. You are trying to convince the judge that:

- the necessary factual elements for the relief sought are or are not there;
- ruling in your client's favour is the just thing to do.

Therefore select and organize the facts in a manner that will best bring those points out. What facts are most persuasive and how are they most persuasively arranged? The answer to this can be the most time-consuming part of factum-writing.

On the issue of selecting the facts for the facts sections, factums are not pleadings. You are not obligated to set out every last fact that might conceivably be relevant. Instead, reproduce only those that further your argument or rebut the arguments against you (subject to (f)-(h) below).

On the issue of organizing the facts, organizing them in chronological order is sometimes, but not always, the most persuasive way of organizing them. Think creatively: are there other ways of organizing the facts that will make you look legally right and make your client's position look morally right?

(f) Remember that "the facts" can sometimes constitute more than what appears in the evidentiary record. Significant evidentiary gaps in the other side's case, factual concessions you have made can also be properly considered "facts".

(g) Be scrupulously honest with the facts. Never misstate or exaggerate the facts.

(h) In particular, do not evade or misstate relevance facts against your position. Instead, introduce them and deal with them at some point in the most favourable manner possible (*e.g.* by minimizing their relevance, putting the best light possible on them by explaining them, juxtaposing them with facts that are better for your client, juxtaposing them with facts that are bad for the other side).

(i) Sometimes a bit of law in the facts section (or in the introduction before the facts section) helps the judge place things in their proper context. For example, if your case involves a judicial review regarding whether a decision was within a particular statute, reproduce the section after you identify the section and flag what the jurisdictional problem is.

(j) Do everything set out above in sections 1, 2, 3 and 4 (*e.g.* make use of headings, a good opening, introductory sentence after each heading, "point first writing", good writing style, *etc.*).

6. The argument or law section

Some ideas:

(a) At all times, comprehensive and flawless legal research is necessary.

(b) You are not writing an academic paper. State why you should win in a practical way. If the legal test is clear, just state it in a paragraph. If there are conflicting lines of authority, identify them quickly and then make your reasons about why one line is better than another line in a succinct, clear way (perhaps simply listing the reasons as a series of bullets in a paragraph).

(c) *Select* and *organize* your arguments. Making eight arguments, only three of which have any force, detracts from your credibility. Make only the best arguments.

In organizing arguments, try to begin and end with the stronger arguments. For example, if your arguments are ranked 1, 2, 3, 4 in strength, consider ordering them 1, 3, 4, 2. I often like to end a factum with a broad, compelling, positive reason why the relief should/should not be granted. However, sometimes arguments build on prior arguments and you will want to organize them in that manner.

If you are dealing with opposing arguments (whether you are a responding party or not), do so but only after you have set out your own version of the events, placing your "spin" on them. If you are a respondent, do not adopt or "buy into" the applicant's/appellant's structure, characterizations, *etc.* You must affirmatively set out *your* story, using your structure, adopting your own characterizations.

In dealing with the opposing side's factum, make it clear what you are responding to. Rather than writing, "With respect to paragraph 52 of the applicant's factum, the respondent states that...", write "In paragraph 52, the applicant incorrectly states that the *Smith* case is the governing authority." The former may cause the judge to go back to the Applicant's factum — you want him/her to stay in your factum all of the time.

Finally, in dealing with the other side's arguments, just deal with the big stuff. You do not have to reply to every last little misstatement or mischaracterization.

(d) Don't cite four authorities where one will do; you want to convey the impression that the proposition you are supporting is a "slam dunk" in your favour, not something you have to agonize over. Put the other three in your briefcase in case you need them at court.

(e) You do not need authorities for everything. Some points are so obvious, you run the risk of insulting the judge if you cite any authority or too much authority. Give the judge, particularly appellate judges, some credit for knowing the law.

(f) Choose authorities wisely. Often the best authority is a lower court case that is close on your facts, rather than a Supreme Court case.

(g) Consider using great "quotable quotes" from the case law, but use them only if they are short. Also, you do not need to identify in your citation who the judge was who wrote a decision. However, if it is a particularly good judge who has credibility in the area, mention the name.

(h) Hone in and allocate your scarce space on the issues that matter, never evade them. Don't waste time on the issues that do not matter.

(i) Do not repeat things you've said before. Simply cross-reference other parts of your factum, reminding the judge what was said before. For example, "As mentioned in paragraphs 52-54 above, the applicant has delayed in bringing this application."

(j) Be scrupulously honest in the use of authorities. Never misstate authorities, exaggerate what they say or ignore relevant and material authorities against your position.

(k) The "law" section of a factum is always an "argument" section. You should always apply the law to the facts. Do not worry about putting facts in this part of the factum or even introducing facts you have not already set out. Facts should be deployed where they are most persuasive.

(l) You have more to work with than just the facts and the law. Think of using analogies to make your point. As well, sometimes you can construct "strawmen" representing your client's case, and then rip it apart. All things being equal, analogies and the use of "strawmen" are most persuasive when deployed in oral argument. In jurisprudential cases (*i.e.* cases where the judge has to choose between conflicting lines of jurisprudence), what implications are associated with your argument? The other side's argument? Be careful not to overargue, *i.e.*, advance propositions that create dangerous implications that the judge will not want to accept.

(m) Use block quotes carefully. For guidance on this, see Appendix 5, heading A.

(n) Do everything set out in sections 1, 2 and 3, above (*e.g.* make use of headings, a good opening, introductory sentence after each heading, "point first writing", good writing style, *etc.*).

7. Strategic considerations

There are often other things that you should consider:

(a) What sort of proceeding are you in? For example, if you are seeking leave, you want to make the issues sound interesting, with wide significance. If you are resisting leave, you want to make the issues sound boring, with significance only to the particular parties.

(b) What are the limits on the jurisdiction of the court? In an appeal or a judicial review, what is the standard of review? Do not raise issues and arguments that the appeal or reviewing court cannot adopt. For example, appeal courts have only very limited jurisdiction to overturn findings of fact or adjust damages awards. (See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and also *R. v. Biniaris*, [2000] 1 S.C.R. 381 for verdicts in criminal cases).

(c) Is the appeal an "error correcting appeal" or a "jurisprudential appeal"? The former is likely to be dealt with by brief endorsement and your factum should be written knowing that the court will likely deal with the issue in that way (*i.e.*, usually shorter). The latter requires more extensive discussion of authorities (*i.e.*, usually longer).

(d) In an application for leave to appeal, what is the test for leave? It is a different test in different Courts at different stages.

(e) Are there factual, legal or procedural concessions you can make in your factum that will advance your argument and make your client look reasonable?

(f) Will there be oral submissions? if not, you might want your factum to be more detailed.

(g) How will the case be argued orally? Your factum should facilitate the oral argument.

8. Practical tips

Different people write factums in different ways. Here is what I do:

(a) Start writing the factum as soon as possible.

(b) Before you write, indeed before you assemble the facts, determine what you have to establish and how you are going to get there and, at a minimum do preliminary legal research to understand what will be the key issues upon which your particular matter will turn. If necessary, close your door and spend plenty of time thinking about this.

Your approach as a practical factum-writer comprises two seemingly contradictory tasks. You must master the detail *but* at the same time to rise above it, to paint an accurate general picture for the judge and not to lose the judge in the detail. Many lawyers never master much of the detail and, in their factums, seldom are able to rise above what little detail they have mastered. They are not aware of the trees and aren't trying to describe the forest.

(c) Be cognizant of "colour". It wins cases. Always consider how you can affect "colour" through letter-writing, calling certain types of evidence, *etc.*

(d) Finish the factum early — come back to it later with a fresh set of eyes.

(e) Edit, edit and edit. Then edit some more. And again for good measure. Your objective should be to persuade and to shorten (both are often the same thing).

(f) When editing, try to synthesize and compress your argument. For an example, see Appendix 5, heading B.

(g) Use another colleague who knows nothing about the case to proofread and comment on your draft before it is filed.

(h) Follow the Rules closely. Some court desks will reject non-conforming or late material.

9. Further reading

S. Armstrong and T. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (1992)

J.D. Arnup, "Advocacy" (1979), 13 L.S.U.S. Gazette 27

Michele M. Asprey, *Plain Language for Lawyers* (1991)

Robert W. Benson, "Plain English Comes to Court" (1986) 13 Litigation 21

N. Birkett, "The Art of Advocacy" (1947), 25 Can. Bar Rev. 1043

Patricia Bizzell and Bruce Herzberg, *The Rhetorical Tradition* (2d ed., 2001)

Bridges and Rickenbacker, *The Art of Persuasion*

Jordan B. Cherrick, "Issues, Facts and Appellate Strategy" (1990) 16 Litigation 15

Continuing Legal Education Society of British Columbia, "Better Writing for Lawyers" (1985) (conference materials)

T.A. Cromwell (ed.), *Preparation of Factums* (1996)

J.W. Davis, "The Argument of an Appeal" (1940), 26 A.B.L.J. 895

E.J. Devitt, "10 Tips for Preparing Better Briefs" (1986) 22:10 Trial 75

R. Dickerson, *The Fundamentals of Legal Drafting* (1965)

Flesch, *How to Write Plain English*

Michael R. Fontham, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2002)

Donald C. Freeman, "The Grammar of Clarity" (1988) (unpublished conference paper)

Daniel M. Friedman, "Winning on Appeal" (1983) 9 Litigation 15

Elizabeth Frost-Knappman, David S. Shrager and Scarlet Riley, *The Quotable Lawyer* (1998)

Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Court* (1999)

Bryan A. Garner, *The Elements of Legal Style* (2002)

Bryan A. Garner, "Rhetorical Figures in Law" and "An Approach to Legal Style" in *The Elements of Legal Style* (1991)

Ronald L. Goldfarb and James C. Raymond, *Clear Understandings: A Guide to Legal Writing* (1983)

Goldstein and Lieberman, *Lawyer's Guide to Writing Well*

Haggard, *The Lawyer's Book of Rules for Effective Legal Writing*

Constance Hale, *Sin and Syntax: How to create wickedly effective prose* (1999)

Brian Harris, *The Literature of the Law* (1998)

Richard Hyland, "A Defence of Legal Writing" (1986), 134 U. Penn. L.R. 599

L.P. Kaplan, "Writing that Persuades" (1984) 20:6 Trial 44

L.V. Katz and N.L. Felshman, "Lawyers' Language — Some Suggestions for Incorporating Techniques of Advocacy into the Appellate Brief" (1983), 9 J. of Contemporary Law 127

Richard Lanham, *Revising Prose* (4th ed., 1999)

Richard Lanham, *A Handlist of Rhetorical Terms* (2d ed., 1992)

Hon. Justice 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. 16

U. A. Lavery, "The Language of the Law" (1921), 7 A.B.J. 277, (1922), 8 A.B.J. 269

Donald H. Layh, "Plain English: Increasing the Power of Our Writing" (1992), 56 Sask. L. Rev. 1

Terri LeClercq, *Expert Legal Writing* (1995)

Lenora Ledwon, *Law and Literature: Text and Theory* (1996)

Richard D. Lee, "Legal Opinions: Style, Structure and Organization" (1983) (unpublished conference paper)

K. Llewellyn, "A Lecture on Appellate Advocacy" (1962) 29 U. Chi. L. Rev. 627

Hon. Justice Beverley McLachlin, "Legal Writing: What Persuades?" (Speech to the Ontario Centre for Advocacy Training, November 14-15, 1997)

E. Meehan, "Supreme Court of Canada — Process & Advocacy" (1996) 75 Can. Bar. Rev. 81

D. Mellinkoff, *The Language of the Law* (1963)

D. Mellinkoff, *Legal Writing: Sense and Nonsense*

Janice Mucalov, "Writing for a Judge: Forget Everything You Learned in Law School" (August/Sept., 1993) National 8

Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (1969)

Paul M. Perrell, "Written Advocacy" (1993) 27 L.S.U.C. Gazette 5

Paul M. Perrell, *Written Advocacy* (1995)

Timothy Perrin, *Better Writing for Lawyers*

Richard A. Posner, "Rhetoric, Legal Advocacy and Legal Reasoning" in *Overcoming Law* (1995)

W. Probert, "Law and Persuasion: The Language Behaviour of Lawyers" (1959), 108 Univ. of Penn. L. Rev. 35

Norma Procopiow, *The Elements of Legal Prose* (1999)

M.B. Ray and J.J. Ramsfield, *Legal Writing: Getting it Right and Getting it Written* (1987)

James C. Raymond, *Writing (Is an Unnatural Act)* (1980)

Constance Rooke, *A Grammar Booklet for Lawyers* (1991)

Roy and Ramsfield, *Legal Writing: Getting it Right and Getting it Written*

H.B. Schermerhorn, "Cicero's Hints to Advocates" (1933), 19 Virginia Law Rev. 691

Robert Smith, *The Literate Lawyer*

Steven D. Stark, *Writing to Win* (1995)

William P. Statsky and R. John Wernet Jr., *Case Analysis and Fundamentals of Legal Writing* (1977)

Bill Stott, *Write to the Point*

William Strunk, Jr. and E.B. White, *The Elements of Style* (4th ed., 1998)

Cass Sustein, "On Analogical Reasoning" (1993) 106 Harvard Law Review 741
Albert Tate Jr., "The Art of Brief Writing: What a Judge Wants to Read" (1978) 4 Litigation 11

Weihofen, *Legal Writing Style*, 2nd ed.

James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*

J.M. Williams, *Style: Ten Lessons in Clarity and Grace* (1981)

J.M. Williams, *Style: Toward Clarity and Grace*

Woolever, *Untangling the Law: Strategies for Legal Writers*

R. Wydick, *Plain English for Lawyers* (4th ed. 1998)

Irving Younger, *Persuasive Writing*

Some Websites:

http://www.perseus.tufts.edu – On this site, you can access the following valuable works on rhetoric: Aristotle, *Rhetorica* and *The Nichomachean Ethics* and Plato, *Gorgias and Phaedrus*.

http://www.bartleby.com/141/index.html - Strunk's *Elements of Style* is available online!

http://owl.english.purdue.edu/ - Purdue University's Online Writing Lab

http://owl.english.purdue.edu/internet/owls/writing-labs.html - an enormous collection of links to online writing labs

http://iwca.syr.edu/IWCA/IWCAOWLS.html - even more links to online writing labs

Appendix 1 — Illustrations

Rather than pages and pages of description, sometimes a picture makes the point better. On the next page is an example of an illustration that was used in a factum. It addressed a key issue in the case: who was responsible for the delay.

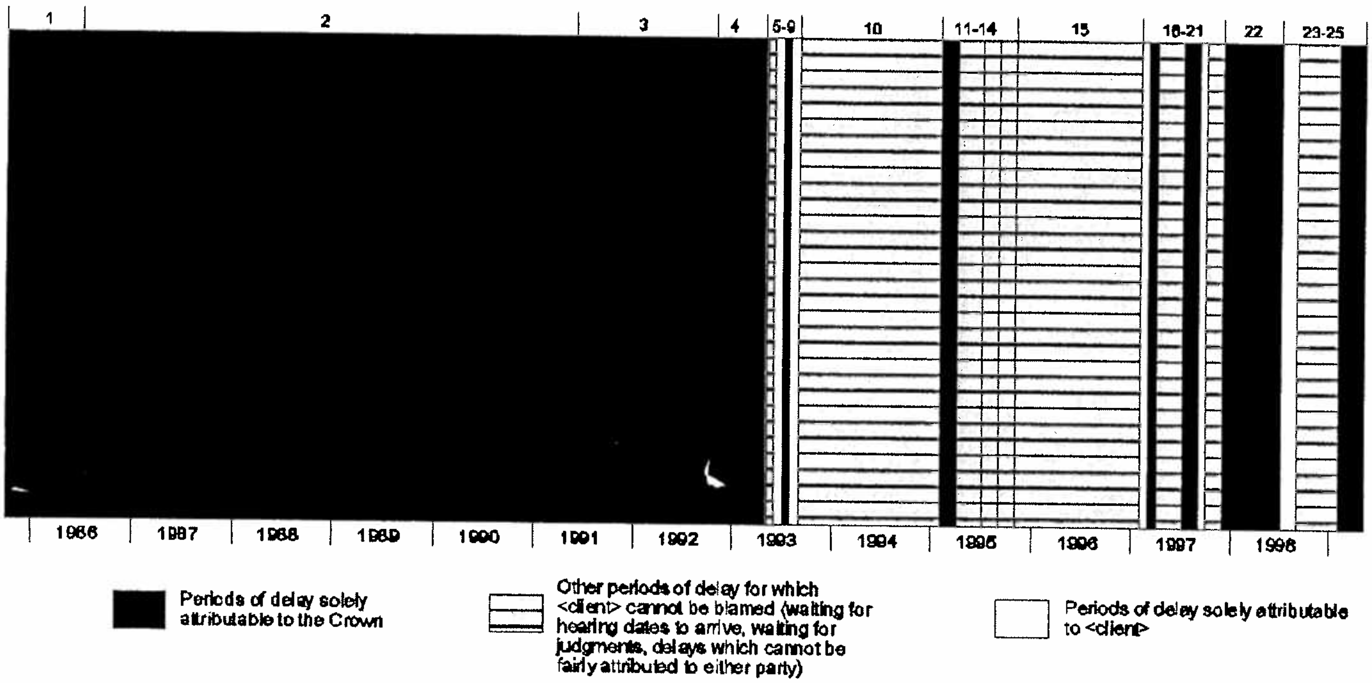
This illustration appeared in a factum, with a few pages following it explaining why each of the 25 separate periods (numbered along the top of the illustration) were assigned to a particular party.

The illustration makes the point far better than just using words.

Responsibility for Delay

There are 25 identifiable periods of delay since the Crown became involved. Who is responsible?

The rationale for the assignment of the periods of delay to parties appears on the following three pages.



Appendix 2 — Diagrams

Compare this excerpt from a factum, with the reworked excerpt on the next page. Sometimes a picture is worth a thousand words.

* * * * *

The Corporate Structure

3. Before November 21, 1994, 134982 Canada Inc. was owned 51.0% by Property Investments PLC and 49.0% by 158892 Canada Inc.

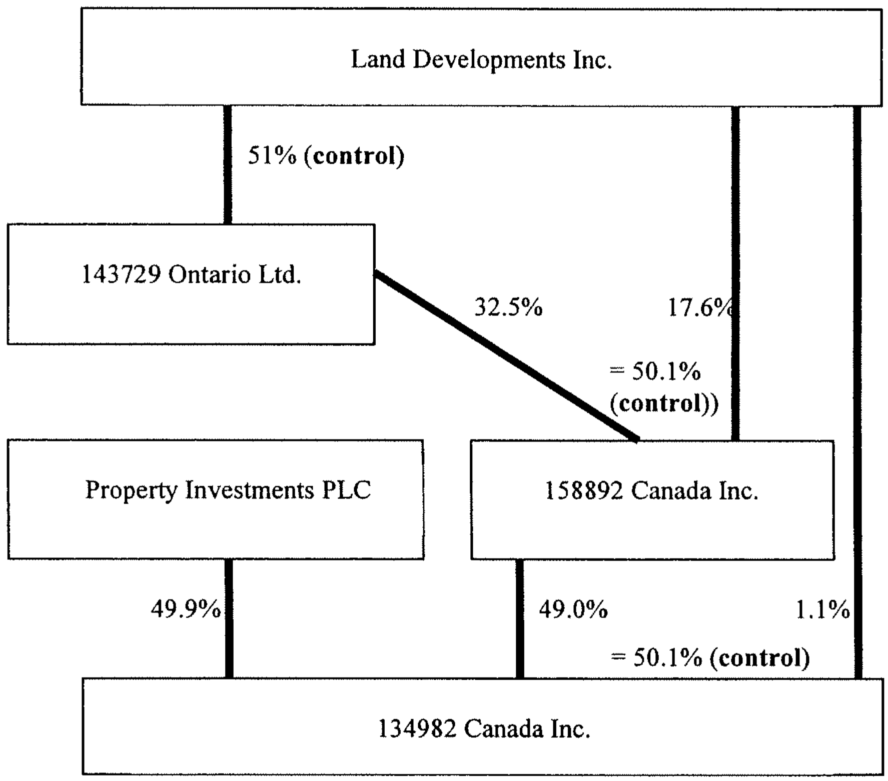
4. At all material times, 32.5% of the shares of 158892 Canada Inc. have been owned by 143729 Ontario Ltd., which in turn has been 51.0% owned by Land Developments Inc. At all material times Land Developments Inc. has owned 17.6% of 158892 Canada Inc.

5. On November 21, 1994, Property Investments PLC sold 1.1% of its shares to Land Developments Inc.

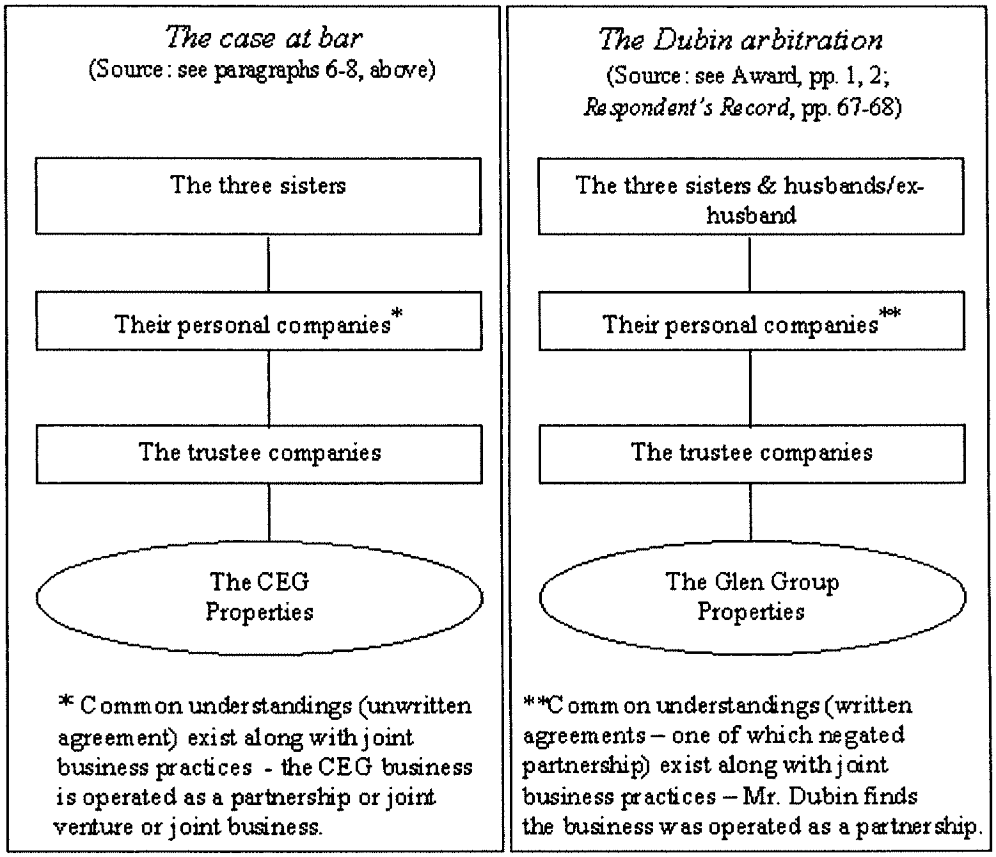
6. Therefore, at the present time, 134982 Canada Inc. is effectively controlled by Land Developments Inc.

The Corporate Structure

1. The following diagram illustrates the corporate structure. Land Developments Inc. effectively controls 134982 Canada Inc.:



Diagrams can also be used to show that your case is exactly like or very similar to an earlier case on point. Here is a diagram that was used in a factum to show that the facts of the case at bar were very similar to those of an earlier arbitration:



Appendix 3 — Charts

The purpose of this chart (reduced here to fit on one page) was to demonstrate that our case was on “aii ̃fours” with *Hunter v. Southam Inc.* and so the investigators should have gotten a search warrant. Charts, properly deployed in a factum, are persuasive. This chart is probably too complicated -- simpler charts are more persuasive -- but it may give you some ideas.

* * * * *

	Hunter v. Southam	Our case
Agency	Director of Investigation and Research.	Ontario Ministry of the Environment, Investigations and Enforcement Branch (IEB).
Governing Statute	*Combines Investigation Act.*	*Ontario Water Resources Act.*
Nature of Statute	Has been called “regulatory” in character: *Thomson Newspapers v. Canada*, [1990] 1 S.C.R. 425.	Has been called “regulatory” in character: *R. V. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299.
Investigatory Provision That Was in Question	Section 10, *CIA*.	Section 15, *OWRA*.
Person Who Authorizes the Investigatory Tool	The Restrictive Trade Practices Commission, which exercises investigatory functions. Not a judge.	Individual officer - self authorized. No scrutiny.
Purpose of Using the Investigatory Tool in the Case	Investigation into conspiracy offence under *CIA*.	Investigation into discharge of polluting material, *OWRA*.
Where and When Can Tool Be Used?	Must get a certificate from Commission when use of power contemplated. No requirement of reasonable and probable grounds in s. 10. Can be used anywhere.	On the Ministry's interpretation - at any time even without reasonable and probable grounds. Can be used anywhere.
Scope of Investigatory Tool	Documents named in warrant and found at place of search.	Broader: any documents that can be located by individual or company; also requires person to appear and give testimony against his/her will under threat of obstruction charge.
Type of Documents Sought	Documents belonging to Southam Inc. found in business premises relevant to competition offence of conspiracy occurring at a specific narrow time (*i.e.*, probably commercial documents)	Any documents held by the company or individual that serve to advance the prosecution of the case; also any documents relating to possible defences held by the company or an individual.
Offence Under Investigation	Conspiracy under *CIA*. Can also be prosecuted as conspiracy under *Criminal Code.*	ss. 30(1), 30(2) OWRA; jail terms are within the range of sanctions.
Result in Case	Evidence gathering without warrant invalid.	Same result must follow.

Here is another example for your consideration.

The following is a comparison of *S.P. Gupta v. President of India* and the case at bar:

	S.P. Gupta et al. v. President of India, **AIR 1982 Supreme Court 149 (Applicant's authorities, Tab 38)**	***Criminal Lawyers' Association v. Ontario (Ministry of the Solicitor General)*** **Ontario Superior Court of Justice (Divisional Court), court file no. 730/000**
Statutory provision(s) in issue	No express discretion in the *Indian Evidence Act* to recognize the public interest in disclosure and override secrecy: see s. 123 of the *Indian Evidence Act.*	No express discretion in the *Freedom of Information and Protection of Privacy Act* to recognize the public interest in disclosure and override secrecy in these circumstances: see ss. 14(2)(a), 19 and 23 of the Act
Constitutional guarantee of freedom of expression?	Yes. Articles 19(1)(a) and (2) of the Indian constitution.	Yes. Sections 1 and 2(b) of the *Charter.*
Right of access to information?	Yes. It is inherent in the art. 19 guarantee of freedom of expression: see para. 66 of the majority judgment of Bhagwati J. at p. 234. It is also inherent in the concept of "democracy": see paras. 63-66 of the majority judgment of Bhagwati J. at pp. 232-234.	The same result should follow. The CLA's submissions echo much of the reasoning in the majority judgment of Bhagwati J.

Appendix 4 — Some Sample Introductions

A. Appeal to the Federal Court of Appeal from a judgment on a motion[1]

(1) This proceeding

1. In this proceeding, <client> seeks a declaration that an Inquiry established under <section and name of statute> contravenes ss. 7 and 8 of the Charter of Rights and is invalid. The Federal Court Trial Division has stayed the Inquiry until it determines the issues in this proceeding.

(2) The problem giving rise to this appeal

2. On <date>, <client> moved to amend his Statement of Claim and consolidate his proceeding with that of <other person>. The Federal Court Trial Division granted the motion — but only on condition that the stay of the Inquiry be lifted. In this appeal, <client> requests that this condition be struck.

(3) The effect of the impugned condition

3. The lifting of the stay, permitted by the condition, means that the Inquiry will start. However, the Inquiry may be invalid and so it should never start.

---

[1] The objective here was simply to make the judgment on the motion appear extremely unfair and to cast the client's case in as positive a light as possible. The introduction concludes with any number of reasons that the court could seize upon in order to do justice in the case.

4. The Inquiry has been stayed, in part, because of the irreparable harm that would be caused to <client> if it starts. The condition, by starting the Inquiry, allows that irreparable harm to happen. This will happen through no fault of <client>.

(4) The appeal should be allowed

5. As will be developed in further detail below, <client> has prosecuted his Charter challenge with due dispatch. The Trial Division has acknowledged the "good faith" of <client> in prosecuting the challenge. The challenge is to be heard <a date later in the year>, which is the earliest time the Trial Division could make available to the parties. The challenge is of some force — this Court has already suggested that <section authorizing the Inquiry> "cries out" for Charter-based attack.

> <Trial Division judgment acknowledging client's good faith>
> <Earlier appeal in which the Court said the section "cries out" for attack>

6. As will be developed in further detail below, <client> submits that the Trial Division erred in the following respects:

(a) The Trial Division did not have jurisdiction under the *Federal Court Act* or the *Federal Court Rules* to impose the impugned condition.

(b) The Trial Division lifted the stay of the Inquiry without any motion before it asking for that relief. As a result, <client> was never given an opportunity to file evidence or to prepare proper submissions on the issue.

(c) There was no evidence showing a change of circumstances justifying the lifting of the stay.

(d) The Trial Division lifted the stay because two proceedings challenging the Inquiry were initially brought and the Respondents have suffered an "injustice" by having them now consolidated. <Client> initially brought two proceedings because it had to do so by virtue of requirements in the *Federal Court Act* and the *Federal Court Rules*. Consolidation causes no "injustice" to the Respondents and there was no evidence of "injustice" in any event.

(e) The impugned condition allows the Inquiry to proceed even though there have been many earlier decisions in this case, based on evidence, that the Inquiry should be stayed. Those decisions uniformly found that there was a serious issue to be tried in these proceedings, <client> would suffer irreparable harm if the Inquiry proceeded before the determination of these proceedings and the balance of convenience was in his favour.

(f) All of the considerations underlying the initial imposition of the stay of the Inquiry remain present. A stay of the Inquiry is still warranted.

B. Simple introduction[2]

1. The Appellant was charged with the offence of discharging or causing or permitting the discharge into the natural environment of a contaminant that caused or was likely to cause an adverse effect.

Environmental Protection Act, R.S.O. 1980, c. 141, as amended, s. 13(1).

---

2 I normally prefer to give more information in introductions than appears here. Nevertheless, even this simple introduction will allow the judge to read the statement of facts in the factum more intelligently because he or she will know what legal point is intended to be raised. This introduction is designed simply to flag the "bottom line" submission so the judge can make connections as he or she reads the facts.

2. Irwin J.P. found the Appellant guilty of the charge and imposed a fine of $5,000. The appeal should be allowed:

- there was no evidence before Irwin J.P. to support a finding beyond a reasonable doubt that the Appellant discharged the substance which resulted in the adverse effect or that the Appellant's operations caused the adverse effect; and

- Irwin J.P. misapprehended or improperly applied the legal principles applicable to the defence of due diligence.

C. Judicial Review Factum[3]

1. The Applicants submit this memorandum in support of two applications for judicial review:

- Court File No. 2683-95, which is an application for judicial review concerning an Interim Order (the "Interim Order"), purportedly made under s. 35 of the *Canadian Environmental Protection Act* ("CEPA"), prohibiting the export of PCB Waste issued by the Respondent Minister of the Environment on <date>;

- Court File No. 2681-95, which is an application for judicial review concerning the decision of the Governor-in-Council on <date> to approve the Interim Order (the "Approval").

---

[3] In judicial review applications, the judge probably wants to know as soon as possible what decision is being attacked, the statutory authority for the decision and the administrative law issue that is being raised.

The facts and law relevant to the two applications are identical and the two applications stand or fall together.

2. The Minister made the Interim Order without jurisdiction and for an improper purpose. The Order is void. In particular:

(a) s. 35 of CEPA requires that Ministerial-level consultation take place before the order is made. There was no such consultation in this case.

(b) s. 35 of CEPA provides that an Interim Order can only be made if there is a significant and imminent danger to human life or health. There was no such danger in this case. Indeed, the expert staff of the Respondent Minister of the Environment advised her that there was no such danger but she issued the Interim Order anyway.

(c) there was no other source of jurisdiction for the making of the order.

(d) the Minister took into account irrelevant considerations and acted for an improper purpose. Rather than making the Interim Order for health or environmental purposes, the Minister made it in order to bestow an economic advantage on certain facilities in Canada owned by <companies> and to stop competition from facilities in the United States.

D. Written submissions at the end of trial.[4]

(a) The charge

1. <Client> has been charged with the offence of violating a control order contrary to s. 146(1a) of the *Environmental Protection Act*, R.S.O. 1980, c. 141, as amended. The Crown alleges that <client> did not comply with a control order, dated May 4, 1983. The control order requires that <client> take such steps as are necessary to ensure that the emission of sulphur dioxide into the natural environment does not result in an hourly average ground level concentration in excess of 0.50 ppm.

(b) <Client's> defence

2. <Client> defends this charge on the following bases:

- <Client> could not have foreseen or prevented the incident on October 23, 1990.

- <Client> took "such steps as are necessary" to ensure that its emissions did not cause hourly ground level concentrations of sulphur dioxide to exceed 0.50 ppm (an "exceedance"). Accordingly, the Crown has failed to prove the charge beyond a reasonable doubt.
  <Client> exercised due diligence throughout.

---

[4] Written submissions after a lengthy trial are very tricky to write. The problem is that there is usually a tremendous amount of detail for you to organize and you may be dealing with a trial judge who is lost in the detail and perhaps impatient. Therefore, in addition to the normal objectives of capturing the moral high ground and showing why legally your client should win, a good introduction to lengthy written submissions should simplify the case for the judge by providing order to the chaos. As well, it is often a good idea to give a roadmap through the various witnesses' evidence, highlighting fatal gaps in your opponent's case and identifying where your witnesses have not been rebutted. The last paragraph in this introduction tries to do this. Introductions to lengthy written submissions have more ambitious objectives than, say, a factum submitted in a standard weekly court motion and so they can be longer. They should still be tightly written and crisp and should make the judge feel that it is very easy for him or her to find in your client's favour.

(c) Previous judicial findings that are persuasive

3. Mr. <B.> testified that <client's> pollution control system and the personnel operating the system on <date of the offence> were the same as on <earlier date>. An incident on <that earlier date> was commented upon by His Honour Judge <Name>in a previous trial and some of his findings concerning <client's> system and its personnel are persuasive in this case:

> "The company had "up-to-the-minute", for lack of a better description, information concerning atmospheric conditions that might have affected ground level concentrations.
>
> "The system employed by <client> was one that was in place, with the approval of the M.O.E., and, on he evidence is apparently as good a system as is available.
>
> "The personnel who operated the system [<names of personnel, same as in this case>] were experienced, knowledgeable and competent, and, I find, properly employed these attribuutes in the operation of the system.
>
> "Given all of the circumstances to which I have referred, I cannot see how the company could reasonably have been expected to prevent this occurrence."

(d) The inherent error and uncertainty associated with the sciences of meteorology and dispersion modelling mean that "there are bound to be a certain number of exceedances"

4. Forecasting the weather, determining what effect future weather might have on emissions discharged hours earlier and judging what level of smelter production is permissible in light of numerous and complex factors are difficult tasks which are based on imprecise sciences. This must be borne in mind when assessing whether <client> operated its pollution control system effectively on <date>. To review the judgments made by the operator of the system in the "heat of the moment" with the benefit of hindsight and to hold him accountable for events that could not reasonably be

anticipated is to apply a standard of perfection that the sciences of meteorology and dispersion modelling themselves cannot meet.

5. Indeed, even if the science of meteorology were exact enough to expect 100% accurate weather predictions, the Ministry of the Environment ("MOE") concedes that uncertainties associated with dispersion modelling will mean that "there are bound to be a certain number of exceedances".

> Exhibit 23, Ministry of the Environment, *Short Range Short-Term Fumigation Model for the <client's smokestack>* (November, 1980), p. 18; Book of Supporting Documentation, Tab 3:
>
> "The success of this type of emission control depends upon (a) the ability to forecast meteorological variables and (b) the validity of the model used to predict the concentration. We will confine our discussion to point (b).
>
> .....
>
> "What we want to emphasize is that even if we could forecast meteorological variables accurately, we cannot have a perfect emission reduction program. *There are bound to be a certain number of exceedances of the air quality standard.*" [our emphasis]

(e) The events of <date> were rare and complex and could not have been predicted in advance

6. From a meteorological standpoint, <date> was a "very complicated situation" that is difficult, even with the benefit of hindsight, to explain. (Only a brief explanation is contained in these opening paragraphs. The full explanation is set out in paragraphs 66 to 78 below.) There was a complete and unexpected opening in the clouds that occurred only in the area around <client>. As well, the wind conditions were also unusual, with two different types of "blowback" occurring. The evidence suggests that this was the first time during the met room operator's nineteen years operating the system that such an extensive blowback occurred. The uncontradicted expert evidence was that the operator of the system could not have predicted the break-up of the cloud cover, the "recirculating, stagnating wind" or the "full pattern of recirculation of the winds that actually happened on that day".

Evidence of <Defence Expert>, pp.482, 483, 505, 556: "very complicated situation", "complex day", "complexity of the situation", impossible to predict weather conditions on the day, "very complex shifting wind situation"

Evidence of <operator of client's system>:

- p.338: unanticipated break in the clouds only over <client>.
- p.339: "very hard to predict", "...we basically cannot predict this type of blowback situation"
- p.406: "They're [blowbacks] very difficult to predict and they happen very infrequently. The chances of coming back over the same area are quite slim, but they can happen, yes."
- p.470: "I could not predict the cloud opening up at, at nine o'clock on for a period of time. And the winds were so light and variable I could not predict that this blowback gas would come back into the area."
- p.479: "I've never had a day like this. This is the first day I've had such an extensive blowback in my whole 19 years"

7. Despite the fact that the meteorological conditions on <date> were unusual, the operator of <client's> pollution control system, <name>, made defensible predictions and reasonable recommendations regarding the proper level of smelter production. (See paras. 48 to 65 below.)

8. The conduct of <name of operator> did not cause any exceedance. The expert evidence establishes that the high monitor readings were primarily caused by emissions that were produced during the very early hours of <date>. Had these emissions remained outside the area, as was expected, the high monitor readings would not have occurred. As well, had it remained cloudy (as was expected and as it did at the airport and all neighbouring meteorological stations) the high monitor readings would not have occurred. Instead, an unexpected double blowback and the unexpected opening in the sky brought the early emissions back into the area and to ground and recirculated them

throughout the area. These events could not have been foreseen. All reasonable steps based on available information were taken and due diligence was exercised.

> Evidence of <operator>, pp. 342-343 (no steps that he could have taken to prevent or minimize the high ground level concentrations on <date>)
>
> Evidence of <operator>:
>
> - p. 342: "The, all the weather indications, my observations, the weather forecasts, the actual weather hourly sequences and weather maps all indicated that at five o'clock in the morning I would have cloudy conditions through the day."
>
> Evidence of <defence expert>:
>
> - p.507: "On the basis of this analysis, short of cutback at five a.m. in the morning, he [<name of operator>] could not have prevented it [the high monitor readings]"
> - p.505: "at the time of the five a.m. forecast, no, there was no indication either of [cloud] breakup or, or of the recirculating, stagnating wind [the double blowback].... I don't see a forecaster being able to predict the, the full pattern of recirculation of the winds that actually happened on that day."
> - p.560: "He was not aware and he, I don't believe, could have been aware of the recirculating pattern in the mixed layer, so he couldn't have known that the gas would actually circle around and stay around in the airshed for that long."

(f) The Evidence Adduced By the Parties

9. The Crown produced only two witnesses, <Mr. T.> on the issue of the MOE monitor results and <Dr. B.> as an expert witness on the issue of plume dispersion modelling. The Crown had the opportunity to adduce eyewitness evidence (e.g. from <Mr. T.> who was there on the day, from MOE abatement personnel in <city> or from residents of <city>) on critical issues such as plume shape and plume direction, but chose not to do so. The observations of <client's> personnel are the only eyewitness evidence before the Court. Further, only the defence's expert, <Dr. W.> provided an explanation regarding when the emissions that caused the high monitor readings were emitted and in what proportion they contributed to the high monitor readings. The Crown's expert, <Dr. B.>, stated that this would be very difficult and chose not to do it.

The Crown offered no evidence in reply to <Dr. W.>. Thus, eyewitness evidence of <client's> personnel and <client's> expert evidence on critical issues in this case stand alone and unrebutted.

Evidence of <Dr. B.>, p. 186

E. Other Introductions

(a) Sample moving party's introduction: major motion, application or end of trial submission[5]

1. The Defendant, the Manufacturers Life Insurance Company ("Manulife"), is a corporation with $123.5 billion of assets under management as of December 31, 2000. It is owned by its shareholders. But that is only a recent development.

2. From 1958 to 1999, Manulife was a successful mutual insurance company. It was not owned by shareholders. It was owned by participating policyholders. Under Canadian law, these policyholders had certain rights as owners. They had a right to elect directors and vote on major matters affecting the company. They had a right to a say in the affairs in their company. They had a right to any surplus held by the company upon wind-up or dissolution. They were not shareholders, but for all intents and purposes they were.

3. In the 1990's, the financial world was changing. Competition intensified. Traditional boundaries between insurance companies and other financial entities like banks and trust companies were under attack, as each sector wanted to engage in

[5] I tend to offer longer introductions in longer submissions, in effect offering a headnote of the submission. This introduction appeared in a factum on a motion to certify a complicated proceeding as a class action. This introduction concentrates more on the factual story of the case and less on the legal issues concerning certification in order to try to capture the "moral high ground". Sometimes people are encouraged to "tell a good story" when beginning submissions in a case and this is probably a good example of the technique. This certification motion was before a judge experienced in certification motions and so the author felt it unnecessary to write an introduction that acquainted the judge with the particular legal issues involved.

acquisitions and pursue financial businesses other than their traditional businesses. To achieve these objectives, easy access to capital was required.

4. Mutual insurance companies were poorly positioned in this changing world. Mutual companies did not have common shares. Access to capital for them was harder than it was for public stock companies. So mutual insurance companies began to lobby and discuss with government the power to "demutualize" or convert themselves into stock companies. Many of these discussions concerned fairness to policyholders who were going to be replaced as owners by stockholders. Manulife was aware of these discussions and in fact took part in many of them. In 1991, the government allowed demutualization for small mutual companies. In June 1996, the government formally announced in a White Paper a policy of demutualization for all other mutual companies. Legislation was expected after a period of consultation.

5. Meanwhile, Manulife decided to get rid of some of its smaller businesses in order to devote its energies elsewhere throughout the world. By 1996, Manulife had transferred away all of its Caribbean businesses, except for its Barbados business. In May 1996, Manulife took steps to finish this job. It entered into an agreement with a Barbadian company, Life of Barbados, to transfer all of the policies of insurance to it. Life of Barbados was not a mutual company. The consent of the Barbados policyholders whose policies were transferred was neither sought nor given. The agreement closed on December 31, 1996.

6. Manulife now says that its unilateral transfer of the Barbados policies to a third party had the legal effect of extinguishing the policyholders' ownership rights in Manulife, leaving the policyholders without any legal entitlement to compensation. In saying this, Manulife is asserting that a mutual insurance company like itself could extinguish the ownership rights of any of its policyholders, without their consent or even over their objection, by unilaterally transferring their insurance policies to third parties. In saying this, Manulife is asserting that it had the capacity to act unilaterally to get rid of any of its owners at any time without their consent – even though those owners are not

in default in any way. In this era of concern about corporate practices, Manulife's position is dubious.

7. Manulife could have transferred the Barbados policies to Life of Barbados and could have preserved the Barbados policyholders' ownership rights in Manulife without any additional cost or material risk to it. Manulife knew how to do this and had done it before: it had transferred its U.S. and Hong Kong businesses by structuring the transactions in such a way as to preserve the rights of its U.S. and Hong Kong policyholders. Those transactions were approved by the board of directors of Manulife. But the Barbados transaction was different. The agreement transferring the Barbados policies (and, according to Manulife, extinguishing the Barbados policyholders' ownership rights) was not placed before the board of directors for its consideration. The board never had the opportunity to ensure that its Barbados owners were given the same standards of protection that its U.S. and Hong Kong owners received. The reason: the corporate secretary regarded the Barbados transaction as a "de minimis transaction."

8. The 8,048 Barbados policyholders, whose ownership rights were purportedly extinguished by the Barbados transaction, and specifically the agreement transferring the policies, were not parties to the agreement. The agreement did not tell them that their ownership rights were going to be extinguished, nor did it tell them that that would happen without compensation. The 8,048 Barbados policyholders did not consent to any of this, nor were they ever given an opportunity to do so.

9. The Barbados transaction was contingent on "public interest" regulatory approvals in Barbados and in Canada. In Barbados, the notices of the approval application, the notices of the hearing and the publicly filed "Nature of the Agreement" did not alert the policyholders to the fact that Manulife intended their rights to be extinguished. The approval process required that there be an independent actuarial opinion. But the most important portion of one independent actuary's report dealing with the value of ownership rights was written by Manulife, not the actuary. Another

independent actuary was retained by the Barbados regulator (the Supervisor of Insurance) but that actuary was lobbied by Manulife to change its report and this was done without notice to any of the policyholders, including those who had filed their objections to the transaction. That actuary's report was never disclosed to the policyholders and objectors.

10. The Barbados Supervisor of Insurance met privately with Manulife before the public approval hearing, disclosed to Manulife his views in advance of the hearing and received submissions from Manulife. The Supervisor also met privately with Manulife after the public hearing and received submissions. The real business did not take place at the public hearing. It took place behind a closed door – with the Barbados policyholders outside the door.

11. At the public hearing in Barbados, Manulife's representative did not disclose information that would have significantly increased the value of the policyholders' ownership interests in the eyes of the Supervisor. Manulife's representative did not disclose how Manulife protected its U.S. and Hong Kong policyholders when those businesses were transferred. He did not disclose Manulife's work on demutualization, the progress of the government toward demutualization, the fact that because of the Sunset Clause the government had to pass legislation soon on this issue, or the fact that the government had recently issued a White Paper announcing a policy in favour of legislation permitting large insurance companies like Manulife to demutualize. Instead, Manulife's representative did his best to give the Supervisor and those at the public hearing the impression that the possibility of demutualization was remote and that the policyholders should receive little or nothing for their ownership rights. That was what he did publicly; privately, around the same time, he told Manulife to work on demutualization.

12. Based on the foregoing, the Barbados Supervisor of Insurance granted his "public interest" approval to the transaction. In Canada, the Canadian Minister of Finance relied heavily on that approval in assessing whether the transaction was in the

public interest. In making his decision, the Minister did not invite submissions from the policyholders and did not hold a public hearing. He received submissions and information only from Manulife. He also granted "public interest" approval to the transaction.

13. Slightly over a year after the transaction closed, the Manulife board of directors announced that Manulife would demutualize as soon as the law permitting it came into force. Manulife's policyholders, including those in the U.S. and Hong Kong whose rights were preserved in the transfer of their businesses, benefited greatly when their ownership interests were bought out in the demutualization.

14. According to Manulife, the Barbados policyholders were no longer policyholders when Manulife demutualized. According to Manulife, their ownership rights were extinguished when Manulife unilaterally decided to transfer the Barbados business and the transfer was approved. The Barbados policyholders did not obtain the substantial benefits of demutualization that the other policyholders received.

15. Therefore, the plaintiffs and the proposed class, all of whom are Barbados policyholders, must now embark on the uncertain and expensive course of class action litigation against Manulife in order to obtain compensation for their ownership rights. The plaintiffs assert two causes of action, negligence and breach of fiduciary duty, against Manulife for failing to protect the ownership rights of the Barbados policyholders. In this motion, the plaintiffs seek the certification of this proceeding as a class action under the Class Proceedings Act, 1992. The test for certification is met.

(b) Sample responding party's introduction: major motion, application or end of trial submission

1. In this action, the plaintiffs allege that Manulife negligently and in breach of its fiduciary duty disregarded the ownership interests of the 8,043 policyholders in

Barbados when it transferred its insurance business in the Barbados to a third party, Life of Barbados. The facts are fully set out in the plaintiff's factum submitted in support of its motion for certification.

2. Manulife's transfer of its Barbados insurance business to Life of Barbados required the "public interest" regulatory approval of the Barbados Supervisor of Insurance under the *Insurance Act* (Barbados). Looking at a broad array of factors, the Supervisor ruled that the transfer (or "Scheme" as it is known in the Barbados *Insurance Act*) was in the public interest and he approved it. The *Insurance Act* (Barbados) provides that when the Supervisor approves the "Scheme", it is "binding" on all concerned. None of the policyholders appealed the approval.

3. In this action, the plaintiffs accept that the "Scheme" or transaction is binding in the sense that it cannot be set aside. They accept that Manulife's Barbados insurance business was validly transferred to Life of Barbados. They do not seek the rescission or quashing of the May 30, 1996 agreement that transferred the business from Manulife to Life of Barbados. They do not allege that the Supervisor's approval is void.

4. The plaintiffs' claims in this action essentially involve two series of questions, neither of which calls into question the validity of the Supervisor's approval in Barbados or the binding nature of the transfer:

(a) What was the effect of the transfer? Did the transfer have the legal effect of extinguishing the class members' ownership interests in Manulife? Did the transfer have the legal effect of extinguishing the causes of action of breach of fiduciary duty and negligence?

(b) Assuming the transfer did not extinguish the causes of action of breach of fiduciary duty and negligence, did the defendant breach its fiduciary duty or duty of care to the class members by disregarding and failing to protect the class members' ownership interests?

5. Manulife now seeks to strike out the plaintiffs' action. Having completed its "*de minimis* transaction", which it says extinguished the ownership rights of the 8,043 Barbados policyholders, and having engaged in questionable tactics to obtain the approval of the Barbados Supervisor of Insurance - an approval that merely makes the "*de minimis* transaction" permanent and irreversible - Manulife says that the action is "frivolous, vexatious and an abuse of process". Manulife says that the action is nothing more than a relitigation of issues determined by the Barbados Supervisor of Insurance.

6. The private law questions that the plaintiffs raise in this proceeding, set out in paragraph 4, above, have not been determined by the Barbados Supervisor of Insurance, a public law official. He did not have the jurisdiction to do so and he did not do so. Manulife is a Canadian corporation resident in Canada whose powers, obligations and responsibilities are governed by Canadian common law and the *Insurance Companies Act* (Canada). The policyholders are individuals residing in various countries who held participating policies of Manulife and who, as a result, had ownership rights and other rights under Canadian common law and the *Insurance Companies Act* (Canada). The *Insurance Act* (Barbados) does not remit these Canadian private law issues to the Supervisor of Insurance for adjudication. Canadian courts, which have exclusive jurisdiction over these subject-matters, would not recognize and enforce a decision on these Canadian private law matters by a non-judicial, administrative, public law official in the Barbados – especially where, as in this case, those summary, administrative proceedings smack of fundamental unfairness and Manulife had some role in that unfairness.

7. As will be seen below, in order to succeed in its motion, Manulife must establish that it is "plain and obvious" and "beyond doubt" that six separate propositions (set out in paragraph 19, below) are well-founded. For the reasons set out below, *none* of these propositions are well-founded. Manulife's motion to strike out this proceeding should be dismissed.

(c) Sample introduction in a factum dealing with cross-applications or cross-motions

1. Cartree Enterprises Limited submits this factum in response to Gartree Investments Limited's application under the *Partition Act* for the forced partition and sale of certain properties. The properties, jointly and equally owned by the three parties in this proceeding, are the main asset of the three parties' joint business, a business which is ongoing and viable.

2. Cartree also submits this factum in support of a counter-application it has brought. In this counter-application, Cartree proposes a remedy other than forced partition and sale – a remedy that is less draconian, a remedy that would preserve the viable joint business and a remedy that is consistent with the fact that the business has been operated as a partnership or as a joint business. In its counter-application, Cartree seeks an order that Gartree's interest in these properties be valued and bought out by Cartree and Elgtree at better than fair market value – a full 10% over fair market value without any minority discount. Since the sort of forced, public sale under the *Partition Act* is avoided, there would be no need to pay a real estate commission or other expenses. This savings would add a further 5% above fair market value to Gartree. What reason would Gartree have to refuse this?

3. The reason is that Gartree's application is the latest salvo in a long-running family feud. Each of the three corporate parties in this proceeding is owned by one of three sisters in the family. The sister who owns Gartree (and that sister's particular family) is on one side of the feud. On the other side are the two other sisters (and their particular families) and their companies, Cartree and Elgtree.

4. The bitter nature of the feud explains Gartree's position in this case. Gartree wants to be taken out of the parties' joint business. But rather than accepting a valuation and buy out of its interest in the properties by the other two parties at *significantly greater than fair market value*, Gartree prefers to have the properties exposed to a forced sale, which shall result in injury to the viable joint business which

the two other parties wish to continue to operate. As will be seen below, there is also evidence that Gartree intends, through the forced sale under the *Partition Act*, to cause the other two parties to suffer a significant "tax hit".

5. The valuation and buy out of Gartree's interest by the two other parties at 10% greater than fair market value without minority discount is *more than fair* and, as will be seen below, this has been confirmed by unanswered expert valuation evidence. If the counter-application is granted, Gartree's departure from the parties' joint business will take place on terms that are more than fair, without unnecessary injury to the other two parties or their ongoing, viable joint business. Accordingly, Cartree's counter-application for a valuation and buy out on these terms that are more than fair should be granted and Gartree's application for forced partition and sale of the properties should be dismissed.

F. Example of a Legal Overview Paragraph[6]

7. In order for this Tribunal to have jurisdiction over the respondents, two requirements must both be satisfied:

- the applicants must be able to serve the respondents and make them subject to the jurisdiction of this Tribunal — in other words, this Tribunal must have personal jurisdiction over the respondents; and

- this Tribunal must have jurisdiction over the subject-matter of the applicant's application — in other words, substantive jurisdiction.

---

6 I often include an overview paragraph at the start of the legal section of the factum. This is often in addition to an introduction at the beginning of the factum. In this example, the overview paragraph was particularly important because there were many arguments that were being run and we wanted the reader to keep them straight in his or her mind. These paragraphs appeared under the heading "Introduction" at the start of the "Law" part of the factum.

Competition Law of Canada, § 13.06 (Updated as of July, 1997)

8. This Tribunal lacks personal jurisdiction over the respondents <parties' names>, which are both non-Canadian entities with no presence whatsoever in Canada. It also lacks substantive jurisdiction over this application.

9. In particular:

(1) This Tribunal does not have, and cannot obtain, jurisdiction over the person of <parties> as they are outside of Canada and the Act does not provide for service beyond the jurisdiction (see paragraphs 38-44, below).

(2) The substantive jurisdiction of this Tribunal is limited to what is set out in the Act (see paragraphs 13-15, below). The purported basis for the application is s. 75 of the Act. This Application is outside s. 75 of the Act, and thus this Tribunal cannot determine it, for the following reasons:

(a) section 75 of the Act, properly interpreted, empowers this Tribunal to grant relief only against persons present in Canada in respect of acts in Canada (see paragraphs 16-17, below); the respondents are outside Canada;

(b) clear statutory language is required to extend section 75 to acts of foreign parties committed abroad (see paragraphs 18-27, below); all of the respondents' alleged acts took place outside Canada;

(c) section 75 of the Act applies only to "suppliers" and none of the respondents are "suppliers"; accordingly this Tribunal does not have substantive jurisdiction to make an Order under s. 75 of the Act (see paragraphs 28-30, below);

(d) there is no "product" within the meaning of s. 75 of the Act and so this Tribunal does not have substantive jurisdiction to make an Order under s. 75 of the Act (see paragraphs 31-33, below); and

(e) at its highest, the applicant's claim for relief falls within s. 32 of the Act, not s. 75 of the Act, and so it can only be determined by the Federal Court, not this Tribunal (see paragraphs 34-37, below).

G. Example of an Overview in a Respondent's Factum[7]

1. The Respondent obtained information that many hundreds of members, friends and associates of a known outlaw motorcycle gang, the Paradise Riders, were to gather on four weekends on a small property in the middle of the quiet rural hamlet of Caesarea, population 700. The Respondent had ample information about this outlaw motorcycle gang, its tendency to engage in serious crime and its connections with other outlaw motorcycle gangs, including the Hell's Angels. In addition to the public safety and public order concerns posed by this, the Respondent had legitimate highway safety concerns such as vehicle fitness, licencing and insurance.

2. Therefore, the Respondent established road checks near Caesarea. At these road checks, the Respondent stopped members, friends and associates of this outlaw motorcycle gang. The stops lasted only 3 to 20 minutes and entailed

[7] These paragraphs are introductory paragraphs in a Respondent's Factum in an appeal. Respondents have their own story to tell. Your introduction should alert the reader to the themes which the Respondent intends to develop, themes which may be different than what the Appellant has developed. Like all introductions, the Respondent's introduction should try to capture the moral high ground and set out, briefly, why ruling in the Respondent's favour is appropriate. An introduction in a Respondent's Factum should leave the judge thinking that the Appellants have not told the whole story and that there is good reason to doubt the correctness of their case.

investigation of licence and insurance, a CPIC check and a visual vehicle inspection. The trial judge found that the stops, based in part as they were on highway safety concerns, were authorized by the *Highway Traffic Act*. There were no interrogations or broader investigations.

3. Three members of this outlaw motorcycle gang now complain that they were improperly singled out and that these limited stops were detentions in a "temporary, but very real 'police state'", under practices which are "institutionalized in authoritarian and totalitarian states", in order to be "identified and subjected to police dominance".[8] They submit that the detentions infringed their rights under s. 9 of the Charter.

4. This Court has already constitutionally upheld vehicle stops, verifications of licence and insurance, vehicle inspections and CPIC checks. It has upheld such activities even when conducted on a random basis. In this case, however, the stops were not random: the Respondent stopped the Paradise Riders for good, verifiable reasons. The trial judge found as a fact that the Respondent had rationally-based, substantial concerns about highway safety and potential breaches of the peace associated with the arrival of the Paradise Riders which had "a very significant potential for violence and disruption". Accordingly, the Respondent took reasonable steps, authorized by statute and common law, in order to achieve those important purposes without unnecessarily or unreasonably interfering with civil liberties. There is no s. 9 Charter breach.

[8] One technique which a Respondent can employ, even in an introduction, is to identify and single out overstatement in an Appellant's factum. This can impair the overall credibility of the Appellant's submissions and enhance the credibility of your submissions.

H. A Legal Overview in a Respondent's Factum[9]

A. The Appellants' Submissions

38. The Appellants submit that the Respondent's road stops infringed s. 9 of the Charter because they were not authorized by any legislative provision or any common law power. They assert that this case involves persons, "deemed of lesser worth by the police", who were detained in a "temporary, but very real 'police state'", under practices which are "institutionalized in authoritarian and totalitarian states", in order to be "identified and subjected to police dominance". Those persons are said to have been singled out based upon "nefarious 'profiling'" based on "suspected group stereotypes", "guilt by association" and "disreputable reputation". The detentions "raise the spectre of unrestrained police conduct", conduct which is "such as would be seen in a police state", based on "police stereotypes based on race or method of dress", leading to unspecified "nefarious consequences". They warn the Court that if it dismisses the appeal, it will "embark down a path that could easily descend into greater and greater abuses", such as targeting on the basis of race, and the distinction between "a totalitarian society and a state subject to the rule of law" will be ignored. The Appellants, referring to a dictionary and not the jurisprudence of this Court, define "arbitrary" in s. 9 of the Charter as meaning "despotic", the synonyms of which are said to be "totalitarian, tyrannical and dictatorial".

---

9 In complex factums, I often like to provide an overview of the parties' arguments at the beginning of the "argument" part of the factum. This gives me the opportunity to identify the weaknesses in the Appellant's Factum, including overstatements and errors, while permitting me to make my client's position appear reasonable. One technique is to reduce the Appellant's arguments to a "strawman" (without being inaccurate about it) and then tear apart the "strawman". This particular series of paragraphs appeared at the start of the "argument" section of the Respondent's factum, after a very clinical and detailed description of the facts with ample evidentiary references. The colourful and extreme language set out in para. 38 was plucked from various portions of the Appellant's Factum. The Appellant's language set out in para. 38 by looks over-wrought and inaccurate, especially after the clinical and not-so-extreme but very well-supported Statement of Facts which the judge has just read in the Respondent's Factum. I felt this was a useful way to try to diminish the credence of the Appellant's submissions.

39. The Appellants rarely refer to or cite the actual evidence in the record. Instead, as is seen above, they prefer to leap to characterizations which are not based on the evidence and to present dark and ominous scenarios, both with some measure of overstatement. The Appellants' analysis of s. 9 of the Charter does not go much beyond taking the characterizations and scenarios which they have fashioned and then comparing them with supposed practices in totalitarian, tyrannical and dictatorial regimes and police states. As far as the legal analysis is concerned, the Appellants dismiss in just one single sentence the possibility that the Respondent's actions were authorized by the *Police Services Act* and the common law. As far as s. 9 of the Charter is concerned, the Appellants fleetingly refer to only two decisions of this Court concerning s. 9 of the Charter and three pre-1991 decisions of this Court concerning s. 8 of the Charter. Except for attempting to distinguish two lower court s. 9 authorities which are hostile to their position and which were relied upon by the Court below, they fail to mention any s. 9 authorities. Finally, the Appellants fail to address how this Court should balance the important needs of public safety, public order, peacekeeping and highway safety on the one hand with the vital constitutional rights of individuals on the other hand — perhaps because they only deal with the latter and never acknowledge the existence of the former.

B. The Respondent's submissions: an introduction

40. The Respondent submits that the road stops in this case did not infringe s. 9 of the Charter. The road stops were authorized by s. 216(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, were conducted for good reason, and were limited in scope and duration. As such, they were not "arbitrary" within the meaning of this Court's jurisprudence under s. 9 of the Charter.

41. Further, the Respondent submits that the road stops were authorized by the common law powers or ancillary powers of police to keep the peace and preserve

public safety. These powers have been codified in s. 42 of the *Police Services Act*, R.S.O. 1990, c. P.15.

42. In this case, the road stops were based on a rationally-based concern, founded upon a wealth of evidence and experience, that there was a risk of material harm to public safety and public order posed by the gathering of hundreds of members, friends and associates of the Paradise Riders, an outlaw motorcycle gang, in the small town of Caesarea. The Respondent was also concerned about highway safety, prevention of crime and intelligence gathering. The road stops took place in two particular locations of concern on four particular weekends. The road stops were brief and businesslike and succeeded in their objectives with a minimum of interference with civil liberties.

43. The Respondent's conduct in this case is even more defensible than the police conduct unanimously upheld by the Supreme Court in *R. v. Wilson*, [1990] 1 S.C.R. 1291.[10] In that case, a police officer acting under the authority of the *Highway Traffic Act*, stopped an individual who was driving from a hotel shortly after bar closing time. The police officer had no reason to believe the driver was doing anything wrong other than his general experience that those driving from hotels shortly after bar closing time sometimes are impaired. The stop was not part of a comprehensive program, but rather was a random stop made on the spot by a single officer. The Court in *Wilson* unanimously upheld the stop. There was sufficient articulable cause — *i.e.*, sufficient reason, based on evidence and experience — to take proactive measures under the authority of the *Highway Traffic Act* in the interests of public safety and public order, to stop the driver.

44. In the case at bar, statutory authority for the roadcheck stops exists under the *Highway Traffic Act*. Further, as mentioned in paragraphs 6-22 and 26-27, above,

---

10 In an introduction to a complex factum, particularly a Respondent's factum, I often like to "marry" my case to another case, in an effort to suggest that ruling against my client will be jurisprudentially difficult.

the Record of this case contains much more than the sort of general experience which gave rise to the apprehension of risk to public harm and public safety in *Wilson*. The Record of the case at bar is comprised of voluminous evidence, expert analysis and specific experience supporting an apprehension of significant risk and this was recognized by the trial judge, whose findings of fact are binding. Further, in *Wilson*, there were no specific circumstances such as erratic driving of the automobile that would give rise to a specific apprehension of harm. However, in the case at bar, the Respondent knew in advance that hundreds of members, friends and associates of the Paradise Riders, a known outlaw motorcycle gang, were going to converge upon tiny Caesarea, giving rise to a very specific apprehension of harm. The case at bar is even stronger than *Wilson*.

Appendix 5 — Some other practical tips

A. Block quotations

Some factum-writers like to put block quotations in their factums. This accomplishes some legitimate purposes. It shows the judge that the principle being advanced in the factum is based on the actual words of the judgments themselves: nothing is being made up. Further, a particularly good quotation can express a principle better than you feel you could ever express it. However, there are different ways of presenting quotations.

The following is one approach that some factum-writers adopt :

14. Sopinka J. stated in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75 :

> These principles apply *a fortiori* to proceedings before the Parole Board in which the subject has already been tried, convicted and sentenced. As stated by the Supreme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471 (1972), at p. 489:
>
> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. <u>It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.</u>
>
> Like the basic structure and function of the Parole Board, the language of the Board's enabling statute makes it clear that the Board lacks the ability or jurisdiction to exclude relevant evidence. The language of the *Corrections and Conditional Release Act* confers on the Board a broad inclusionary mandate. <u>Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case". No mention is made of any power to apply exclusionary rules of evidence. Indeed, such a provision would conflict with its duty to consider "all available information that is relevant".</u> (our emphasis)

Most readers skip over a block quotation when it is presented in this way. Some will read only the part that has been emphasized.

Perhaps a bigger problem is that this approach is not particularly helpful for your audience, the judge. The judge is thrown into the block quotation without any idea what he or she is about to read. The writer is implicitly saying, in an unhelpful way, "here's a quotation, you gather from this whatever you think is relevant".

Here is another approach:

14. According to Sopinka J. in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75, an administrative tribunal, such as the NPB, may consider hearsay:

> These principles apply *a fortiori* to proceedings before the Parole Board in which the subject has already been tried, convicted and sentenced. As stated by the Supreme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471 (1972), at p. 489:
>
> We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. <u>It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.</u>
>
> Like the basic structure and function of the Parole Board, the language of the Board's enabling statute makes it clear that the Board lacks the ability or jurisdiction to exclude relevant evidence. The language of the *Corrections and Conditional Release Act* confers on the Board a broad inclusionary mandate. <u>Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case". No mention is made of any power to apply exclusionary rules of evidence. Indeed, such a provision would conflict with its duty to consider "all available information that is relevant".</u> (our emphasis)

This is better. At least the writer is telling the judge what significance should be drawn from the block quotation (the administrative tribunal can consider hearsay). The judge is still being thrown into a long quotation but at least he or she has been helpfully told what will be found in the quotation.

Here is another approach:

14. According to Sopinka J. in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75, an administrative tribunal, such as the NPB, may consider hearsay where the statute confers "a broad inclusionary mandate" and the power to take into account "all available information that is relevant to a case".

Instead of using a long quotation, this approach uses only the fragments of the quotation that are relevant. The judge does not have to scan a longer quotation to find the relevant parts - you have done that work for the judge. The purposes of using quotations - showing that the principle is actually based on words in judgments or using nicely-chosen words of a judge - are still met, but the writer is being more concise and helpful.

A final approach is to make use of citations that are more descriptive:

14. The NPB may consider hearsay.

> *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75 *per* Sopinka J. (hearsay admitted because the statute conferred "a broad inclusionary mandate" and a power to take into account "all available information that is relevant to a case")

This is very compact, confident and persuasive. The purposes for using quotations are still being fulfilled.

B. Compressing an argument: getting to the point

Here is an excerpt from a fictional factum written by a federal Crown attorney:

> 23. Canada submits that although the police gathered the evidence contrary to s. 8 of the Charter, the evidence was properly admitted under s. 24(2) of the Charter. In *R. v. Collins*, the Supreme Court held that a three-fold test must be followed in order to assess whether evidence that has been obtained in a manner that violates the Charter should be excluded. Under that test, the Court looks at whether the admission of the evidence would affect trial fairness. The Court also looks at whether the Charter violation was serious. Finally the Court looks at whether the admission of the evidence in all of the circumstances of the case would bring the administration of justice into disrepute.
>
> (case)
>
> 24. Courts have held that trial fairness is affected by whether the evidence is real evidence that exists without the participation of the accused or whether it has been conscripted from the accused.
>
> (case)

(case)

(case)

25. Courts have held that the more serious the Charter violation, the more likely the evidence will be excluded.

(case)

(case)

(case)

26. Finally, Court have held that the seriousness of the offence with which the accused has been charged is a relevant factor tending to favour the admission of the evidence into the proceeding.

(case)

(case)

(case)

27. The accused submits that the admission of the evidence would affect trial evidence because the napkin that the accused used to blow his nose and that was used to obtain the DNA results was conscripted from him.

28. The accused submits that the Charter violation in this case – forcibly taking the napkin from the accused's hands – is a serious one.

29. The accused also submits that the alleged offence, manslaughter, is not as serious as first degree murder and there have been manslaughter cases whether evidence has been excluded under s. 24(2).

30. The Crown submits that the evidence is real evidence. The accused was not told to blow his nose so it was not conscripted from him. The accused was in the process of throwing the used napkin into the waste basket (*i.e.*, abandoning it) and so the napkin is more properly characterized as real evidence.

31. The Crown submits that the Charter breach was not serious. The Crown merely intercepted the napkin while the accused was in the process of throwing it away. This is far from a seizure from someone who was unwilling to part with possession.

32. Finally, the Crown submits that the administration of justice would be brought into disrepute if this evidence were excluded, as this was a cruel killing of a 70 year old man. Therefore, the Crown submits that the evidence should have been admitted into the proceedings.

This passage is satisfactory. It is quite clear. However, you will notice that the reader must remember the three-fold legal test in paragraphs 24, 25 and 26 in order to understand the significance of the accused's submissions in paragraphs 27, 28 and 29 and the Crown's submissions in paragraphs 30, 31 and 32. This is easy if the judge is very familiar with the test. If the judge is not familiar with the test or if the test is more complicated, then this approach might be unsatisfactory.

There is a different way of setting out this information. Rather than following the structure of deploying the test in an academic or abstract way and then applying the test to the facts, try getting right to the point. Here is the above passage, reworked in this way:

> 23. Canada submits that although the police gathered the evidence contrary to s. 8 of the Charter, the evidence was properly admitted under s. 24(2) of the Charter, following the three-fold test in *R. v. Collins*:
>
> - *Will admission affect trial fairness?* The accused submits that trial fairness is affected because the napkin was conscripted from the accused and was not pre-existing, real fairness. This is an incorrect characterization of the napkin. The accused was not told to blow his nose so it was not conscripted from him. The accused was in the process of throwing the used napkin into the waste basket (*i.e.*, abandoning it) and so the napkin is more properly characterized as real evidence.
>
>   (case)
>
> - *Was the Charter violation serious?* The accused submits that the napkin was forcibly taken from his hand. This is incorrect. The police merely intercepted the napkin while the accused was in the process of throwing it away. This is far from a seizure from someone who was unwilling to part with possession.
>
>   (case)
>
> - *Effects on the administration of justice*? The accused submits that this is just a manslaughter case, not a murder case, so exclusion would not bring the administration of justice into disrepute. The Crown disagrees. This was a cruel killing of a 70 year old man.
>
>   (case)

This passage conveys the same information, in a shorter, more direct way. It requires much less work on the part of the judge in order to understand the point. It is probably more persuasive.

C. Dealing with uncertain case law

Some writers have the habit of summarizing the case law in their factums in a manner that is completely accurate but helpful.

Remember that your job is to synthesize the case law, not to throw it in the judges' faces and ask them to figure it out. This is especially important where the case law is uncertain. You can synthesize the case law and express it clearly and concisely and still be completely accurate.

Here is an example of an approach that does not work. It simply throws the case law (fictitious, just for illustration purposes) in the judges' faces and asks them to figure it out:

12. The case of *Smith v. Smith* (1999), 2 R.F.L. (3d) 324 (Que. C.A.) is highly relevant to this case. In that case, the Court of Appeal considered whether a document was covered by solicitor-client privilege. A lawyer was retained to conduct an interview of various witnesses, assess liability and then give a legal opinion. The lawyer performed these tasks, wrote his opinion and delivered it. In the opinion was a summary of what the witnesses told him. The opposing side argued at discovery that he should obtain the letter with all legal advice excluded. His aim was just to get the summary of what the witnesses had said. The Court ruled that the summaries of what the witnesses had said were so inextricably bound up with the legal advice that they should be excluded. The test was whether there was a "substantial connection between the advice given and the facts set out in the advice".

> 13. The case of *Jones v. Jones* (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) is also relevant. In that case, a lawyer summarized the contents of a number of documents in her opinion to her client. The documents later disappeared in a fire. The opposing side argued that the summaries should be produced. The Court ruled that the summaries were "significantly bound up with the legal content of the opinion and should not be produced".
>
> 14. Finally, in *Brown v. Brown* (2001), 4 R.F.L. (3d) 451 (Man. C.A.), the Manitoba Court of Appeal considered a reporting letter written by a lawyer to a client. The reporting letter set out a number of facts, some of which were relevant to the conclusions in the letter and some of which the other side thought were not relevant. The other side produced portions of the letter setting out the facts. The Court declined to rule on the issue of relevance, holding that it was not necessary. It held that all of the facts should not be produced, stating that "it is enough that there be some overlap between the facts set out and the privileged opinion component of the letter".

> 15. Therefore, the test to be applied in this case is whether there is some overlap or some substantial connection between the facts set out and the privileged "legal opinion" part of the letter.

Compare this version, which synthesizes the essential information and makes use of what I call "explanatory citations" in order to describe what the cases say:

> 12. There is no obligation to produce purely factual portions of an opinion letter if there is substantial connection between those portions and the advice portion of the letter, or even just some connection.
>
> *Smith v. Smith* (1999), 2 R.F.L. (3d) 324 (Que. C.A.) ("substantial connection between the advice given and the facts set out in the advice", so no production ordered)
>
> *Jones v. Jones* (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) (summaries were "significantly bound up with the legal content of the opinion", so no production ordered)
>
> *Brown v. Brown* (2001), 4 R.F.L. (3d) 451 (Man. C.A.) ("some overlap between the facts set out and the privileged opinion component of the letter", so no production ordered)