

Sample Factum - Annotated - by David Stratas, Heenan Blaikie, Toronto (416-643-6846). The endnotes show why the author did what he did at various places in his factum. They show that throughout the factum the author tried to think strategically and carefully about how to present his case. You might disagree with some of the author's judgment calls and persuasive techniques - in some endnotes the author himself states that, with the benefit of experience, he would have done some things differently today - but this annotated factum will acquaint you with some of the things you should consider in preparing a factum.

<COURT>
(Appeal from <COURT>)

BETWEEN:

<NAME OF APPLICANT>

Applicant

- and -

THE PROFESSIONAL CONDUCT COMMITTEE AND
THE DISCIPLINE COMMITTEE OF THE
<PROFESSIONAL GOVERNING BODY>

Respondents

APPLICANT'S MEMORANDUM OF ARGUMENT

PART I - STATEMENT OF FACTS

A. The Nature of this Motion'

1. This is a motion for an order preventing the Discipline Committee of the <Professional Governing Body> from conducting a hearing into charges against <Name of Applicant>,² a <name of profession>, until sixty days after this Court has rendered final judgment in this proceeding.³

2. <Name of Applicant> informed the Discipline Committee that he intended to apply for leave to this Court. The Discipline Committee replied that it would proceed with the hearing on <date (very soon after this factum was submitted)>, despite the fact this matter is before the Court. Thus, it has become necessary to bring this motion.⁴

3. It is respectfully submitted⁵ that the relief sought in this motion is appropriate in light of the importance of the issues at stake in this prospective appeal, the Discipline Committee's delay to date, the Discipline Committee's previous willingness to permit the lower courts to consider these important issues before the hearing and the irreparable harm which <Name of Applicant> and others will suffer if the hearing goes ahead in the next couple of weeks.⁶

4. For the reasons developed below, <Name of Applicant> denies that the Discipline Committee or the general public will suffer prejudice as a result of the granting of the relief sought.⁷ The Discipline Committee's delay to date belies any prejudice to the public interest. Even if there were such prejudice, it will be minimal: <Name of Applicant> undertakes to perfect the Appeal no later than five days after this Court grants leave to appeal and requests the earliest possible hearing date.⁸

B. The Facts Giving Rise to this Motion'

5. In this proceeding, <Name of Applicant> challenges the failure of the Discipline Committee to produce a report (the Report') of its expert, <Mr. Expert>, to <Name of Applicant> before the start of the hearing. <Mr. Expert> is the main witness for the prosecution at the hearing and will likely be the first witness.

6. In its Application for Leave to Appeal, <Name of Applicant> raises the following issues:

- (i) what are the pre-hearing disclosure obligations of the prosecutor in professional discipline proceedings or comparable administrative proceedings?
- (ii) does s. 7 of the Charter apply in professional discipline proceedings or comparable administrative proceedings?
- (iii) what are the circumstances in which an application for judicial review of an interlocutory order or interim ruling of a professional discipline body or comparable administrative tribunals will be considered premature?

7. A complete summary of the facts which gave rise to this proceeding are set out in <Name of Applicant>'s Application for Leave to Appeal.¹⁰ The following is a chronology of facts which are most relevant to the issues involved in this motion.

8. <Date>. The Professional Conduct Committee became aware, through media reports, of allegations pertaining to <matter>.¹¹

*Affidavit of <Ms. Deponent>, para. 5.*¹²

9. <Date (3 months from start)>.¹³ The Professional Conduct Committee advised <Applicant's organization> that an investigator would be retained.

Affidavit of <Ms. Deponent>, para. 6

10. <Date (5 months from start) to Date (6 months from start)>. <Mr. Expert> was formally notified of his retainer and began to prepare his preliminary report.

Affidavit of <Ms. Deponent>, paras. 6-7

11. <Date (8 months from start)>. The Professional Conduct Committee requested that <Mr. Expert> prepare a further report.

Affidavit of <Ms. Deponent>, para. 7

12. <Date (11 months from start)>. The Professional Conduct Committee considered <Mr. Expert>'s final report.¹⁴

Affidavit of <Ms. Deponent>, para. 7

13. <Date (12 months from start)>. The Professional Conduct Committee retained a second expert, who reported orally to the Professional Conduct Committee on <date (three and a half months later)>.

Affidavit of <Ms. Deponent>, para. 8

14. <Date (19 months from start)>. The Professional Conduct Committee laid charges against <Name of Applicant>.

Affidavit of <Ms. Deponent>, para. 9

15. <Date (20 months from start)>. Counsel for <Name of Applicant> requested production of the Report.

Affidavit of <Ms. Deponent>, para. 10

16. <Date (22 months from start)>. Counsel for <Name of Applicant> proposed that at its next assignment hearing on <date> the Discipline Committee should set a date for a motion for production of the Report.

Affidavit of <Ms. Deponent>, para. 11

17. <Date (22½ months from start)>. On the eve of the assignment hearing, counsel for the Professional Conduct Committee stated that a disclosure package would shortly be delivered. The setting of a date for the motion was put off to the next assignment hearing, then expected <two or three months later>.

Affidavit of <Ms. Deponent>, paras. 12-13

18. <Date (23 months from start)>. Counsel for <Name of Applicant> had to push again for timely disclosure.

Affidavit of <Ms. Deponent>, para. 14

19. <Date (23 months from start)>. Counsel for the Professional Conduct Committee gave some disclosure to counsel for <Name of Applicant> and promised a summary of anticipated evidence to be given by <Mr. Expert>.

Affidavit of <Ms. Deponent>, para. 15

20. <Date (24 months from start)>. Counsel for <Name of Applicant> again sought disclosure of the summary of anticipated evidence to be given by <Mr. Expert>.

Affidavit of <Ms. Deponent>, para. 16

21. <Date (24 months from start)>. The setting of a date for the motion for production of the Report was adjourned on consent to the next assignment hearing, which was <a month and a half later>.

Affidavit of <Ms. Deponent>, para. 16

22. <Date (25 months from start)>. Counsel for the Professional Conduct Committee made further disclosure.

Affidavit of <Ms. Deponent>, para. 17

23. <Date (25½ months from start)>. The Discipline Committee set <dates 2½ months later> as the dates for the hearing of the motion for production of the Report.

Affidavit of <Ms. Deponent>, para. 18

24. <Date (28 months from start)>. The Discipline Committee heard the motion for production of the Report and reserved its decision.

Affidavit of <Ms. Deponent>, para. 19

25. <Date (31 months from start)>. The Discipline Committee released its decision and refused production of the Report.¹⁵

Affidavit of <Ms. Deponent>, para. 20

26. <Date (31 months from start, one day after last para.)>¹⁶ Counsel for <Name of Applicant> advised that he would be seeking judicial review of that decision. This proceeding was commenced on <date (a couple of days later)>. On that date, counsel for <Name of Applicant> requested an adjournment of the hearing of the charges against <Name of Applicant> pending the determination of the judicial review proceedings.

Affidavit of <Ms. Deponent>, paras. 21-22

27. <Date (32 months from start)>. The Professional Conduct Committee refused to agree to an adjournment of the proceedings before the Discipline Committee.

Affidavit of <Ms. Deponent>, para. 24

28. <Date (32 months from start, one day after last para.)>. Counsel for <Name of Applicant> advised that it intended to bring a motion before the Discipline Committee for an adjournment of the hearing.

Affidavit of <Ms. Deponent>, para. 24

29. <Date (32½ months from start)>. The Discipline Committee advised that the motion for an adjournment would be heard on <date three weeks later>.

Affidavit of <Ms. Deponent>, para. 25

30. <Date (33 months from start)>. The Discipline Committee dismissed the motion by <Name of Applicant> for an adjournment until the determination of the judicial review proceedings but granted an adjournment until <date 3 months later> in light of the unavailability of senior counsel for <Name of Applicant>.

Affidavit of <Ms. Deponent>, para. 26

31. <Date (33½ months from start)>. The Discipline Committee scheduled twelve days of hearing in four separate blocks of three days each: <date (three months later)>; <date

(another three days, during the month after that)>; <date (another three days, during the month after that)>; <date (another three days, during the month after that)>.

Affidavit of <Ms. Deponent>, para. 27

32. <Date (33½ months from start)>. Counsel agreed to a schedule which would permit a hearing of the judicial review proceedings by the Divisional Court on <date (two months later)>.

Affidavit of <Ms. Deponent>, para. 28

33. <Date (35 months from start)>. The Discipline Committee granted an adjournment of the hearing days scheduled for <the first of four blocks of hearing dates> because of the unavailability of senior counsel for <Name of Applicant> due to a lengthy arbitration. On <date>, the hearing in the Divisional Court was adjourned at the request of counsel for the Discipline Committee, because of illness, until <one month later>. The hearing dates before the Discipline Committee scheduled for <the second block of the four blocks of dates> were also cancelled.

Affidavit of <Ms. Deponent>, para. 29

34. <Date (35½ months from start)>. The Discipline Committee confirmed the cancellation of the hearing dates for <the second block of hearing dates> and, of its own motion, cancelled the <third and fourth blocks too>.¹⁷

Affidavit of <Ms. Deponent>, para. 30

35. <Date (36 months from start)>. The Divisional Court heard the application for judicial review and dismissed it. By this time, the Discipline Committee had adjourned the hearing of the charges until the Divisional Court had determined the application for judicial review.

Affidavit of <Ms. Deponent>, para. 31

Judgment of the Ontario Court (General Division) (Divisional Court)
Endorsement of the Ontario Court (General Division) (Divisional Court)

36. <Date (37 months from start)>. The Discipline Committee set aside twenty-one days to hear the charges against <Name of Applicant>: <date (3 days in the 45th month from the start)>; <date (3 days in the 46th month from the start)>; <date (3 days in the 45 1/2th month from the start)>; <date (3 days in the 46 1/2th month from the start)>; <date (3 days in the 47

1/2th month from the start); <date (3 days in the 48th month from the start)> and <date (3 days in the 48 1/2th month from the start)>.

Affidavit of <Ms. Deponent>, para. 33

37. <Date (42 months from start)> The Court of Appeal for Ontario granted <Name of Applicant> leave to appeal.

Affidavit of <Ms. Deponent>, para. 34

*Order of the Court of Appeal for Ontario Granting Leave to Appeal
Endorsement of the Court of Appeal for Ontario Granting Leave to Appeal*

38. <Date (42 months from start)> The Court of Appeal for Ontario heard the appeal and reserved its judgment.

Affidavit of <Ms. Deponent>, para. 35

39. <Date (44 months from start)> The Court of Appeal for Ontario dismissed the appeal <name (well-respected Judge)> dissenting.¹⁸

Affidavit of <Ms. Deponent>, para. 35

*Order of the Court of Appeal for Ontario Dismissing the Appeal
Reasons for Judgment of the Court of Appeal for Ontario Dismissing the Appeal*

40. <Date (one day from previous para.)> <Name of Applicant> asked for an adjournment of the hearing pending disposition of <Name of Applicant>'s Application for Leave to Appeal.

Affidavit of <Ms. Deponent>, para. 36

41. <Date (45 months from start)> The Discipline Committee dismissed the request for an adjournment pending the disposition of the Application for Leave to Appeal.

Affidavit of <Ms. Deponent>, para. 36

42. <Date (very soon after the date in the previous paragraph)> <Name of Applicant> files this motion and the Application for Leave to Appeal.¹⁹

PART II - POINTS IN ISSUE

43. Should this Honourable Court grant an order preventing the Respondent Discipline Committee from conducting its hearing until sixty days after this Honourable Court

has rendered final judgment in this proceeding? The central issue here is whether the interest of <Applicant's name> in having this Court determine what his constitutional and other rights are in disciplinary proceedings against him outweighs the short delay caused to the disciplinary proceedings.²⁰

PART III - ARGUMENT

A. The Test for Obtaining a Stay

44. This Court has jurisdiction to grant the relief sought.²¹
R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at pp. 326-332; Book of Authorities, Tab 1.

<Section in statute>

<Provision of Rules>

45. This Court should grant the relief sought if:

(1) <Name of Applicant> has an arguable case;

(2) <Name of Applicant> would suffer irreparable harm if the stay was not granted; and

(3) the balance of convenience is in <Name of Applicant>'s favour.²²
Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; Book of Authorities, Tab 2

R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at p. 334; Book of Authorities, Tab 1

143471 Canada Inc. v. Quebec (Attorney General); *Tabach v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339; Book of Authorities, Tab 3²³

B. The Test Is Met In This Case²⁹

46. The issues in this proceeding are serious, <Name of Applicant> will suffer irreparable harm if the hearing proceeds and the balance of convenience lies with <Name of Applicant>, especially in light of the sedate pace²⁵ of the Respondents, their willingness to permit these proceedings to proceed in the courts below and the harm which <Name of Applicant> will suffer if the relief sought is not granted.²⁶ The Respondents will not be prejudiced by the short delay required for the determination of the Application for Leave to Appeal and, if leave is granted, the determination of the merits of the appeal itself.²⁷

47. <Name of Applicant> undertakes to take all necessary and possible steps to expedite the hearing of this Appeal, including perfecting this Appeal within five days from the date the Application for Leave to Appeal is granted by this Court.²⁸

(1) The Issues Raised By <Name of Applicant> Are Serious

48. The threshold that must be met in demonstrating that a case is arguable is whether there is a serious question to be tried as opposed to a frivolous or vexatious claim.²⁹ *R.J.R. - Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 335-337; Book of Authorities, Tab 1

49. <Name of Applicant> has raised serious issues in this proceeding (see para. 6, above, and in the Application for Leave to Appeal). The threshold for demonstrating a serious issue to be tried is low. Whether or not leave to appeal should be granted is clearly a serious issue, particularly in light of the powerful dissent of <name (well-respected Judge)> in the court below and the granting of leave to appeal by the <court below> (*per* <Names of strong panel of court below>). The granting of leave to appeal by other courts is an important factor in determining whether serious issues are present.³⁰

R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at p. 337; Book of Authorities, Tab 1³¹

(2) Absent a Order Restraining the Discipline Committee From Proceeding, <Name of Applicant> Will Suffer Irreparable Harm Which is Not Susceptible to Compensation in Damages

50. Irreparable harm is that harm which is not susceptible to compensation in damages.³²

51. <Name of Applicant> will suffer irreparable harm if this relief is not granted.³³

(a) he will incur substantial and considerable expenditure of time, effort, expense and resources in participating in the hearing of the charges against him and, on the current state of authorities, cannot gain full compensation for this;³⁴ *Affidavit of <Ms. Deponent>*, para. 37

(b) third parties, namely <fields of expertise>, will have to expend considerable time, effort and resources in participating in the hearing of the charges against <Name of Applicant> and will have to put aside other professional matters; *Affidavit of <Ms. Deponent>*, paras. 37-39

(c) similar expenditures of time, effort and resources will be involved by the Professional Conduct Committee and the Discipline Committee; *Affidavit of <Ms. Deponent>*, para. 38

(d) all of the foregoing expenditures of time, effort and resources will be needless if this Court grants leave to appeal and allows <Name of Applicant>'s appeal. Irrecoverable expenditures of time, effort and resources have been recognized in the case law as constituting irreparable harm sufficient to justify a stay of administrative proceedings pending judicial review; *Re Island Telephone Company Limited* (1987), 206 A.P.R. 158 (P.E.I.C.A.) at 164; Book of Authorities, Tab 4
R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at p. 341; Book of Authorities, Tab 1

(e) <Name of Applicant>'s position is that his constitutional rights under s. 7 of the Charter are infringed by the failure of the Discipline Committee to disclose the Report -- the breach of a constitutional right constitutes irreparable harm; *R.J.R. - Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 342; Book of Authorities, Tab 1³⁵

143471 *Canada Inc. v. Québec (Attorney General)*; *Tabah v. Québec (Attorney General)*, [1994] 2 S.C.R. 339; Book of Authorities, Tab 3

- (f) the hearing of the charges is a source of considerable stress for <Name of Applicant> -- if the Discipline Committee proceeds with the hearing of the charges <in the very near future> and this Court ultimately grants leave to appeal and allows <Name of Applicant>'s appeal, a new hearing into the charges will be necessary and thus <Name of Applicant> will be forced to endure two hearings instead of just one. This damage is not compensable in damages;

Affidavit of <Ms. Deponent>, para. 39

- (g) there is a substantial risk that the reputation, goodwill and business of <Name of Applicant> and <the organization he is associated with>, will be irreparably and needlessly harmed by adverse publicity and stigmatization if the hearing proceeds and this Court ultimately grants leave to appeal and allows <Name of Applicant>'s appeal -- loss of reputation, goodwill and business are traditionally recognized as constituting irreparable harm;

Affidavit of <Ms. Deponent>, paras. 40-41

R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at p. 342 (irrevocable damage to business reputation is irrevocable harm); Book of Authorities, Tab 1*

- (h) <Mr. Expert>, as the main witness for the prosecution, will likely be called as the first witness at the hearing. Disclosure of the report of the expert, <Mr. Expert>, which is substantially the relief sought in this Honourable Court, will allow <Name of Applicant> to address, challenge and respond to any allegations made by <Mr. Expert> at the hearing. It follows that it is proper and just that the issue whether the report should be disclosed be determined before the calling of <Mr. Expert>.

Affidavit of <Ms. Deponent>, para. 41

(3) The Balance of Convenience Favours the Granting of the Relief Sought³⁷

52. This branch of the test is where the effects on the parties are weighed and balanced against each other. The public interest in favour of permitting the statutory authority to exercise its purported jurisdiction, if any, is taken into account on this branch of the test.³⁸

53. For a number of reasons, the balance of convenience favours the granting of the relief sought.

(a) <Name of Applicant> Will Suffer Irreparable Harm if a Stay is Not Granted³⁹

54. As mentioned above, not granting <Name of Applicant> the relief sought will cause irreparable harm to him and will cause hardship to third parties. This is an important factor to be considered in the balancing of interests involved under this branch of the test.

R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at pp. 342-343; Book of Authorities, Tab 1

(b) Delay Will be Minimized

55. In order to minimize delay and any prejudice to the Respondents or the general public, <Name of Applicant> has expedited the preparation and filing of the Application for Leave to Appeal and this motion.⁴⁰

56. <Name of Applicant> undertakes to take all necessary and possible steps to expedite the hearing of this Appeal, including perfecting this Appeal within five days of the granting of Leave to Appeal.⁴¹ Thus, harm to the public interest arising from delay is minimized or eliminated.

- (c) Delays by the Respondents Show That There is No Pressing Public Interest Supporting a Refusal of the Relief Sought

57. Delays by the Respondents show that there is no significant public interest against a short adjournment of the disciplinary hearing to facilitate this Court's consideration of the issues.

Barsaam v. Pope (1988), 34 Admin. L.R. 100 (N.W.T.S.C.) per de Weert J.; Book of Authorities, Tab 5

58. As summarized in paragraphs 8 to 42 above, the Respondents have frequently granted, consented to or permitted adjournments for a multitude of reasons.⁴³ Inexplicably, this time, they are not willing to adjourn to facilitate this Court's determination.

59. The Discipline Committee has proceeded at a sedate pace⁴³ -- for example, it took three months to decide <Name of Applicant>'s motion for production of the Report. The Discipline Committee voluntarily adjourned the hearing of the charges to permit the <first instance Court> to rule on the application for judicial review and did not attempt to commence its hearing while the matter was before the <first appeal Court>.

60. Further, as noted in paragraph 36,⁴⁴ above, when the Discipline Committee rescheduled the hearing of the charges, it scheduled a series of three day blocks of hearing time every several weeks, thus stretching the proposed twenty-one day hearing over several months. By not scheduling twenty-one consecutive days of hearing, the Discipline Committee concedes that there is no pressing need to proceed quickly.

61. As is apparent from paragraphs 21, 29-31 and 34-36, the Discipline Committee, on both occasions when it set dates for the hearing of the charges against <Name of Applicant> and also on the occasion when it set the date for <Name of Applicant>'s motion for production of the Report, took several weeks just to set those dates.

62. As noted in paragraph 36, above, on the most recent occasion when it set dates for the hearing of the charges against <Name of Applicant>, the Discipline Committee was prepared to delay the commencement of its hearing for several months.⁴⁵

(d) There is no Risk of Prejudice to the Public or to the Respondents⁴⁶

63. If the relief sought is granted, the public will not be exposed to any continuing risk. <Name of Applicant> and his firm strongly deny the allegations made in the charges. In addition, if the Professional Conduct Committee of the <Professional Governing Body> had concerns regarding the public interest, it would have asked the Discipline Committee under Professional Governing Body's By-law <No.> to suspend or limit <Name of Applicant>'s participation in <professional activities> pending disposition of the discipline proceeding. This has not happened: one can only assume that the Professional Conduct Committee does not consider that the circumstances of this case warrant such a request.⁴⁷

Affidavit of <Ms. Deponent>, paras. 42-44

For a text of the by-law, see Schedule A" hereto

64. Investigations by <another administrative tribunal> and inspections by <another committee of the Professional Governing Body> have failed to disclose any need for a formal investigation into or further review of the general <activity> policies, practices and procedures at <Name of Applicant>'s firm.

Affidavit of <Ms. Deponent>, paras. 45-47

65. Nevertheless, <Name of Applicant> is prepared to undertake that he will not participate in <activities> during the period of the stay requested in this motion.⁴⁸

Affidavit of <Ms. Deponent>, para. 48

66. Whatever rights the Respondents may have against <Name of Applicant> are unaffected by the granting of the relief sought -- there is no suggestion that relevant witnesses or documents will disappear before the Discipline Committee conducts its hearing.⁴⁹

67. Finally, if the relief sought is granted, the Respondents remain free to exercise their jurisdiction to commence proceedings against other individuals. The granting of the relief sought in this motion for an interim stay, which concerns the disclosure of a particular report to this particular Applicant in these particular proceedings, will have little precedential value in other stay motions involving different parties, different experts and different circumstances. Thus, this case is one of exemption" rather than suspension" as those terms are understood in the jurisprudence and so the public interest is of relatively low weight in this case.⁵⁰

R.J.R. - Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at pp. 346-347; Book of Authorities, Tab 1

143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General), [1994] 2 S.C.R. 339; Book of Authorities, Tab 3

(e) There is a Significant Public Interest in Favour of the Granting of the Relief Sought⁶⁸

68. <Name of Applicant> respectfully submits that there is a significant public interest in having the important questions raised in this prospective appeal determined by this Honourable Court. The Respondents and the general public will be benefitted by the resolution in these proceedings of all uncertainty surrounding the jurisdiction of the Discipline Committee to refuse disclosure as was done in this case. This in itself has been recognized as a determinative factor in granting a stay.

Re Island Telephone Company Limited (1987), 206 A.P.R. 158 (P.E.I.S.C.) at 164; Book of Authorities, Tab 4

69. Thus, <Name of Applicant> respectfully submits that there is no significant public interest against the granting of the relief sought. Rather, it is in the public interest that the relief sought be granted. The balance of convenience therefore lies with <Name of Applicant>.

70. <Name of Applicant> respectfully submits that all three branches of the legal test for the granting of an interim stay are met and so he is entitled to the relief sought.⁶⁹

PART IV - ORDER SOUGHT

71. <Name of Applicant> respectfully requests an order preventing the Discipline Committee of the <Professional Governing Body> from conducting a hearing into charges against <Name of Applicant> until sixty days after this Court has rendered final judgment in this proceeding.⁷⁰ <Name of Applicant> also requests the costs of this motion.

All of which is respectfully submitted, this <date>.

<Counsel's name>
Counsel for <Name of Applicant>
<address and phone number>⁷¹

<Following this page was a Schedule "A" listing the authorities cited in the factum and a Schedule "B" setting out the text of all legislation cited in the factum.>⁷²

ENDNOTES

¹ I like to include one or more overview paragraphs usually under the heading "The Nature of This Motion", right at the beginning of the "Facts" section of the factum. This gives the judge an idea of what the motion is about and what I am going to argue. As the judge reads the facts, the judge will be able to understand what is most relevant. As well, a good overview should begin the process of persuasion. In these overview paragraphs, I have already gone some way to signaling why my client's case is legally correct and the right thing to do.

² If your client is a human being and part of your case is the unfairness to him or her if the Court does not grant the relief sought, call your client by his or her name. Do not refer to him or her impersonally as "the Applicant".

³ The first paragraph of the overview section usually just explains what the particular motion or the proceeding is about.

⁴ Factum writers should always try to understand their audience. In this case, this motion was an unusual one. I brought it on an emergency basis. The first question an overworked judge will ask is, "Why are you here?" It is the first thing I want to answer. You will see that it is put in a way designed to make the other side look unfair. I am already fighting for the "moral high ground".

⁵ I use "respectfully submitted" very rarely and only to signal to the judge that he or she is reading an important, central submission.

⁶ Here, in just one sentence, is my whole case. The judge can now read the factum and understand why certain facts are relevant.

⁷ This is another instance of the factum-writer trying to understand the concerns of the reader. To this point in the factum, the judge has understood what the motion is about (stopping a hearing from going ahead), why I'm bringing the motion now and why the judge should stop the hearing. The next question which will be in the judge's mind is, "If I stop this hearing, will the public interest suffer?" This paragraph answers that question.

⁸ The cases on staying hearings pending court challenges told me that the key issue was the potential effect on the public interest caused by the delay in the hearing. To enhance my client's prospects on the motion, I wanted to undertake to finish all steps for the appeal within a short time. This minimized the delay and minimized the effect on the public interest. It also made me and my client look fair — again, this is an attempt to capture the "moral high ground". Concessions such as this, strategically deployed in a factum, can greatly improve a case.

⁹ Right after the overview section of the factum, I usually set out more "road mapping" before I get into the particular facts. Before explaining who did what to whom and when, I usually give more contextual detail to the reader, so the reader understands what's coming. In this factum, the necessary contextual detail is to explain what the proceeding is about. After all, I am asking the judge to stop the disciplinary hearing until the court challenge is done. I need to explain what the court challenge is about. Sometimes I include a little uncontroversial law at this point in the factum in order to provide the reader with more context. For example, in a judicial review, it is often helpful to acquaint the judge at this point with the legislative and regulatory framework surrounding the decision under review so that he or she can make connections and conclusions as he or she is reading the particular facts in the case.

¹⁰ I try to avoid putting unnecessary factual information into a factum. In this motion, it is not necessary to describe all of the factual detail underlying the main proceeding. In order to win the motion, I only need certain facts which show that the legal test for the relief sought is met. I want to set those facts out and not have them obscured by facts which are irrelevant to the motion. I don't always do this, but what I did here was to tell the

judge, in case he or she is curious, where he or she may find a summary of the facts relevant to the main proceeding.

11 In the overview paragraphs, I have signaled that the Respondents' delay is significant. I am trying to capture the "moral high ground". My central theme by which I hope to achieve that is to say to the Court, "They've delayed for years and now, all of a sudden, they are unwilling to adjourn the disciplinary hearing for a short time to allow you to decide the matter." This also relates to an important legal issue (see note 19). Accordingly, I have structured the facts to highlight the Respondents' delay. Note how each of the following paragraphs begins with bold and italicized type highlighting the date. This is an illustration of how style can be used to further your central theme.

12 I prefer references to case authorities and evidence to be in slightly smaller type, like a footnote. Some put their references in bold type. I find this distracting. The references are subsidiary to the point you are making in the larger text.

13 Note that I am just listing dates. I am not saying "three months later..." I want the judge to be making connections himself or herself on such things as how much time has elapsed. This is a technique of persuasion. Most people hold more firmly onto inferences and conclusions which they draw themselves. On the other hand, when inferences and conclusions are put to people, they often question them.

14 You will notice by this point that I am not being argumentative, by saying such things as, "The Committee took eleven months to retain an expert and consider his report and therefore it was dilatory". I am trusting the judge to gain that impression himself or herself. Again, inferences and conclusions are more strongly held when people arrive at them by themselves.

15 This date-by-date listing of the events gets tiresome after a while but that reaction helps the central theme I am trying to develop. There is a long history of tremendous delay by the Respondents. The central theme, that it is unfair for the Respondents all of a sudden to push the matter on for hearing after all of these instances of delay, is being hammered home. Another way of writing this factum, which would greatly reduce the number of pages (a good thing!) would be to attempt to summarize these facts in a more concise manner, rather than the date-by-date approach. Today, after discussions with judges and learning how important brevity is, I would probably adopt the shorter approach.

16 One point which emerges in the recounting of the facts is that every time "the ball is in our court", we react quickly. Again, words such as "just one day later" or "Mr. X, without delay, did Y" are not used. I want the judge himself or herself to draw the inference or conclusion that we have not been dilatory. That is more effective.

17 Again, the recounting of the facts is almost painful — it seems to go on and on. This is not normally the objective of a factum-writer. A factum, particularly in the facts section, should be as interesting as possible, ideally a real "page turner". The style here is intentional. At the time of writing, I wanted to convey an overwhelming impression that the delay has been consistent and massive, over a long period of time. But see n. 15 - I might adopt a different approach today.

18 If your client lost in the court below but got a dissenting judgment in its favour, mention that. Whether your client won or lost, if the judgment in your client's favour was written by a well-respected judge, mention the judge's name.

19 I selected the facts in this section in order to advance the central theme I had chosen. The facts section of this factum would have been different if I had chosen a different central theme. For example, I could have chosen this central theme: "If the relief sought is refused, my likeable client will be unfairly hurt." The facts would have been chosen and would have been structured to bring out facts which cast my client in a sympathetic light, the discipline changes in an unsympathetic light and the consequences for my client as drastic. I considered this theme

to be less persuasive to an objective judge. Such a judge might observe that defence lawyers often say their clients are terrific people, the charges are unfair and the consequences for their clients will be severe. The passage of time in this case, however, is indisputable, helps to capture the "moral high ground" (see note 11) and relates directly to a central legal issue: whether the granting of the relief sought will affect the public interest. How can the discipline committee say that there's a public interest in proceeding with their hearing quickly when they have delayed so long? The public interest must be low.

20 "Points in issue" is a relatively unimportant portion of the factum, probably included only because the Rules mandate it. Nevertheless, it does provide an opportunity to state the central issue in the case in your client's terms. By the time the judge reads this, the judge will understand just how much the Respondents have delayed and how quickly I have acted every time the ball is in "my court". It is now time to introduce the judge to the central task of weighing the effects on my client against the short delay. Having read those facts, I hope that the judge is convinced that the short delay counts for very little. Frankly, at this point in my factums, I hope that I have already convinced the judge that my client *must* win. If I have done my job in a factum to this point, then the remainder of the factum should show the judge how it easily he or she can reach that right result.

21 My habit is to include a comment concerning jurisdiction somewhere in the factum. Judges are often concerned about whether they have the power to grant the relief you are seeking. When the relief is a little unusual and it is possible that the judge has never been faced with such a motion before, I often address jurisdiction in a single paragraph, as I have done here. Where the jurisdictional basis is obvious or should be obvious, I usually will include a reference right after the first paragraph in the factum which acquaints the judge with the nature of the motion, such as: "Section 65.1, *Supreme Court Act*, R.S.C. 1985, c. S-26; Rule 27 of the *Supreme Court Rules* (the jurisdictional basis for this motion)".

22 The legal test which will govern your case should be stated up front. This will be the "road map" for your legal discussion. That discussion should follow the test. In this paragraph, I stated the test as an abstract proposition, divorced from the facts of the case. This is not usually the best approach. Usually the best approach is just to state the test concretely using the facts of your case. For example, rather than writing, "The test is as follows..." write, "<Applicant's name> is entitled to the relief sought because he has raised a serious issue to be tried, he will suffer irreparable harm if the relief is not granted and the balance of convenience lies in his favour." I have done this in the next paragraph. If I were to edit this today, I would try to collapse paras. 45 and 46 into one paragraph.

23 Try to limit yourself to two or three authorities maximum supporting any proposition. In this case, I chose the first Supreme Court case with the fullest discussion of the test (*Metropolitan Stores*) and the most recent Supreme Court case on point which had some similarity on the facts to my client's case (the numbered company case).

24 Where possible, headings should exhort. They should clearly signal to the judge what your point in this section of your factum is going to be.

25 "Sedate pace" is a concise, carefully chosen "sound bite" designed to leave an impression with the judge. It is deliberate understatement. The understatement is more persuasive. I would have been justified on these facts to write, "...in light of the egregious and scandalous delay of the Respondents," but I chose not to do so. "Sedate pace" prompts many readers to smile and evokes strong agreement. "Egregious and scandalous delay" is jarring and raises questions in the judge's mind about whether I am overstating the case and whether I am credible. The fact is that I don't need "egregious and scandalous delay" to win, so why say it?

26 Although some Rules suggest that this portion of the factum should consist of points of law "without argument", abstract statements of law without any application to the facts of the case do not really acquaint the judge with your case. I have always interpreted the words "without argument" as meaning "without irrational or unsupported argument" and I have always included argument such as this in my facta. I have never received a

complaint or been met with an allegation of non-compliance with the Rules. Most judges find reasoned argument based on evidence in the case to be helpful.

17 In effect, this is another overview paragraph at the beginning of the law section. I don't need to do it, but I was concerned that the somewhat lengthy factual recital might have caused the judge to forget what my point is. I thought it useful at this stage to reacquaint him or her with it.

18 It is true that this is somewhat repetitive of an earlier paragraph. But it is such a good concession and makes my position look so fair and reasonable, I had to repeat it.

19 Where possible, statements of law should be simple, "bottom line" and practical in approach. Just state the proposition, cite the reference and move on.

20 Because the test for "serious issue to be tried" is so easy to meet, it is not necessary to spend valuable time on this. Just state briefly why you meet it, using your most powerful points, and move on. Spending more time on this non-contentious issue might actually make the judge think that there is a real difficult issue to be resolved here.

21 I could have cited plenty of cases on serious issue to be tried. But why do so?

22 It is not necessary to cite authority for very trite propositions. Every judge knows that irreparable harm is harm which cannot be quantified in damages. Give the judge some credit for knowing the law. At the hearing, however, you might wish to have a general textbook, or excerpts therefrom, concerning this point in case an issue arises.

23 In this paragraph, I have made a strong proposition and have listed all of the reasons why the proposition is true. This format is a useful, persuasive and concise way of setting out all the reasons why you should win on a certain point.

24 Even though this is the "legal argument" section of the factum, you should be applying the law to the facts of your case. Accordingly, there is nothing wrong with putting evidence citations in this portion of your factum.

25 If this were an important point and if one of these cases had a nice "quotable quote", I might well have included a brief block quotation after the citation of the case. An alternate way is to put a short snippet in quotation marks within parentheses immediately after the citation of the case ("... it could look like this").

26 Sometimes, as here, it is useful to describe what a case is about using parentheses after the case citation.

27 This was the most contentious issue in the case, the issue upon which the case would probably turn. The factum, naturally, spends the most time on this point.

28 Some counsel might try to obscure the fact that the "public interest" element is a negative factor, working against the granting of the relief sought. Some might not even mention this element in their factum at all! This is a big mistake. It is better to recognize the case against you and deal with it effectively rather than try to ignore it. You never want to give the judge the impression that you are trying to obscure or avoid things against you. As well, if you ignore or obscure points against you, skilled factum writers responding to you can exploit that and leave your credibility in tatters.

29 The headings in this section have been put in a particular order for a particular reason. I wanted to begin with the particular facts of this case and then slowly broaden the consideration to more general matters. I also

wanted to end with a positive, non-defensive point — why granting the relief sought is a good thing (as opposed to why it is not a bad thing).

30 This is a form of "concession". By bringing on the motion quickly, my ability to argue that we are doing everything we can to minimize delay and thus to minimize harm to the public interest is enhanced.

31 I am repeating the concession again. This is perhaps repetitive, but it is an effective concession and should be deployed in the discussion of "minimizing the harm to the public interest" even if it has been mentioned before.

32 This is an example of deliberately underarguing the point. There is no need to hammer the judge over the head with plenty of argumentation here. The judge has read the facts in the factum. The facts have been effectively presented. The argument has already been made implicitly. Trust the judge to be able to make connections and draw proper inferences and conclusions. This is a more effective manner of proceeding.

33 I am using the same phrase used earlier. It is an effective "sound bite" and can be repeated a couple of times in the factum without wearing its effectiveness out.

34 Cross-referencing to other parts of your factum is useful to the judge and is far better than repeating in detail things already said.

35 This paragraph and the paragraphs immediately preceding it, which summarize some facts, are arguably unnecessary. By this point in the factum, the judge probably understands the "sedate pace" point and the facts underlying it. In my judgment, it was necessary just to give a gentle reminder at this point of some of the worst parts of the "sedate pace" to close the case.

36 When writing a factum, there are important judgment calls to be made. Perhaps the most important judgment call is whether to anticipate an argument against your client's case and deal with it up front. It is clearly a mistake to anticipate all conceivable arguments and deal with them. You may be alerting the court to arguments which the other side had no plans to raise. However, where, as here, you are aware that there is a serious and obvious argument against your position about which the judge and the other side will be concerned, you should deal with it. An important skill is to address arguments against your client's position in a style which evokes confidence in your position. You do not want to give the impression that you are squirming or uncomfortable. You do not want to sound defensive. Wherever possible, try to rebut the opposing argument by putting your position positively. I have attempted to do this here.

37 Factum-writers should recognize that the evidence available to you in a case is not limited just to what you see in the evidentiary record before the court. Very powerful points can be made based on what is *not* in the evidentiary record before the court. This paragraph is a good example of making good use of what is not in the evidentiary record.

38 This is another key concession offered up in order to get the relief sought. If the person facing the disciplinary charges is not going to do any work, there is less need for the disciplinary hearing to go ahead right away.

39 Again, I am making use of what is not in the evidentiary record.

40 There is no need for a complicated academic exposition of the law relating to "suspension" and "exemption". Such an exposition would only give the judge the incorrect impression that there is something complicated and uncertain here. Wherever it is possible to do so (i.e. where the law permits you to do so), you want to give the judge the impression that legal issues are "slam dunks" in your client's favour.

⁵¹ I like ending a factum with a positive point in favour of granting the relief sought, rather than a defensive point.

⁵² This is an Applicant's factum. If I were drafting the factum in response, it would look very similar to this factum. Respondents must put their cases affirmatively. Tell the court why your client should win. Write your own summary of facts, setting out your characterizations and establishing your central theme. Respondents should reply to what Applicants have said, but only in a subsidiary way after they have established why they should win. To do otherwise, to reply only to what the other side has done without putting the Respondents' case affirmatively, is to be defensive in tone and to concede that the Applicants have correctly identified the central themes and their characterizations are accurate. Respondents have their own story to tell and must tell it. When Respondents reply to specific matters in the Applicants' facta, they should avoid writing, "With respect to paragraph X in the Applicant's Factum, the Respondent submits that...". This causes the judge to turn up the Applicant's factum to see what the Respondent is writing about. Instead, write, "The Applicant, in para. 25, states that the public interest is of low weight. In fact, the public interest is of high weight for the following reasons...". Respondents' facta should be as self-contained as possible.

⁵³ It is imperative that the relief sought be set out here with specificity. Many counsel leave the Court guessing about what exactly they want. You should put here exactly what you want to appear in the order of the Court.

⁵⁴ Note the length of the factum. It does its job in 17 pages. The Ontario Rules of Court limit you to 30 pages. That does not mean that you have to use all 30 pages. Judges sometimes have to read and digest several facta in one evening for hearings the next day. They really appreciate short facta. Short, well-polished facta are often more focussed and more persuasive.

⁵⁵ Schedules should be complete and accurate. The full text of every provision mentioned in your factum should be in Schedule "B". It is better that French and English versions be provided. This is mandatory under the new Federal Court Rules. In cases where many statutory provisions are reproduced, I often include an index to the provisions at the beginning of Schedule "B".