Table of Contents

Foreword ..... *iii*
Preface ..... *vii*
Biographical Notes on Contributors ..... *ix*

Chapter 1 It's English, But What's Your Point? Writing Factums That Even a Judge Can Understand
Mr. Justice Marshall Rothstein 1

1. Introduction 2
   (1) One Size Does Not Fit All 2
2. How to Write a Good Factum 3
   (1) Six Reasons Why a Good Factum Is Important 3
   (2) Be Concise 3
   (3) Suggestions 5
      (a) Identify the Issue 5
      (b) The Overview Statement 7
      (c) Use Point First Style 8
      (d) The Facts 9
      (e) Argument 10
         (i) Standard of Review 10
         (ii) Joining the Issue 10
         (iii) Why is Background Necessary? 11
         (iv) Citations 11
         (v) Writing the Argument 12
      (f) The Respondent's Factum: Self-contained 12
      (g) The Use of Language 12
      (h) Editing: No Amount is Too Much 13
3. Conclusion 14

Chapter 2 Creating a Clear Organization: Why Logic Is Not Enough
Stephen V. Armstrong 15

1. Introduction 15
   (1) Provide a Context Before the Details 18
      (a) Making Readers Smart Throughout 20
      (b) Making Readers Fully Smart 24
   (2) Make the Structure Explicit 28
   (3) Break Your Prose into Pieces 32
2. Conclusion 34

Chapter 3 Why Are You Telling Me All This?
John I. Laskin 37

1. An Anecdote and a Principle 37
2. The Widespread Application of the Principle of Context Before Details 41
   (1) The Overview 41
   (2) Summary of the Facts 43
   (3) Argument 45
   (4) Headings 46
   (5) Quotes 47
3. Concluding Comments 49
   (1) Checking for Context 49
   (2) How Much Context? 50
   (3) Point Delayed 52

Chapter 4 Effective Written Advocacy in Factums
Thomas A. Cromwell 53

1. Introduction 53
2. The Factum: Purpose and Audience 54
3. The Type of Case 56
4. Writing Style 57
5. Some Common Stylistic Faults 58
6. Particular Parts of the Factum 59
   (1) The Introduction 59
   (2) The Facts 60

(3) The Issues 61
(4) The Law 62
(5) Order Requested 63
7. A Word on Responding Factums 64
8. Books of Excerpts 64

Chapter 5 The Wrong Stuff — How to Write a Truly Bad Factum
Justice Marvin Catzman and Justice Stephen Goudge 65
1. Introduction 65
2. The Proper Approach 66
3. The Rules of Civil Procedure 66
4. The Format 67
5. The Style 68
6. The Introduction 69
7. The Facts 69
8. The Argument 70
9. Conclusion 71

Chapter 6 Aristotle and Effective and Defective Legal Writing
Paul M. Perell 73

Chapter 7 Walking on Thin Ice: Exploiting Strengths and Managing Weaknesses
David Stratas 81
1. Introduction 82
(1) The Art of Persuasion 82
(2) The Three Levels of Persuasion 83
(a) Persuasion at the Level of Intellect 83
(b) Persuasion at the Level of Emotion 84
(c) Persuasion at the Level of Credibility 84
(3) Addressing the Judges' Needs 85
(4) The Importance of Persuasion at the Level of Credibility 86
(5) The Challenges Posed by Strong Cases and How to Manage Them 87
(a) The Basic Problem 87

(b) Selling the Strong Case 88
(i) Point First Exposition 88
(ii) Courageous Selection 89
(iii) Compression 90
(iv) Diagrams and Charts 94
(v) Using Smart Citations 96
(vi) Managing Block Quotations 99
(vii) Clinical Exposition and Skilful Use of Detail 101
(viii) Giving Judges Ownership of an Idea 102
(ix) Writing Style: Clear, Direct and Brief 103
(x) Responding to the Other Side's Weak Case 105
(xi) Remember the Weak Spots 106
(6) The Challenges Posed by Weak Cases and How to Manage Them 106
(a) The Basic Problem 106
(b) Selling the Weak Case 107
(i) Present the Strengths First 107
(ii) Managing Bad Facts: The Technique of Juxtaposition 107
(iii) Managing Bad Law: The Techniques of Issue Characterization and Concentration 109
(iv) Recognizing and Exploiting Gaps 109
2. Conclusion 110

Chapter 8 Written Argument at Trial
Paul M. Perell 111
1. Introduction and General Advice 111
(1) The Rhetorical Situation 111
(2) General Advice 117
2. Issues of Fact 119

Chapter 9 Arguing the Facts: Some Suggestions for Drafting the Facts Part of a Factum
John B. Laskin 127

1. Introduction: Effectively Arguing the Facts 127
2. Ten Questions to Consider 128
   (1) Why Should I Win This Case? 129
   (2) What Are the Facts That Show Why I Should Win? 129
   (3) What Facts Do I Need to Support My Legal Arguments? 130
   (4) Is There Law That Should Go Into the Facts? 130
   (5) Are There Facts That I Can Show As Well As Tell? 131
   (6) Have I Explained What Went Right, or Wrong, in the Court or Tribunal Below? 133
   (7) Do I Need to Put Any of the Other Side's Facts in Context? 134
   (8) Have I Fulfilled the Promise of the Overview? 135
   (9) Have Any Important Facts Been Left to the Law or Argument Part of the Factum? 136
   (10) "Why Are You Telling Me This?" 137
3. Conclusion 138

Chapter 10 Arguing the Law in a Factum
Benjamin Zarnett 139

1. Introduction 139
   (1) The Argument of the Law Begins in the Overview Section of the Factum 141
   (2) Describe the Facts in the "Fact Section" So That They Resonate With the "Law Section" 143
   (3) Have a Clear Purpose for each Paragraph of the Law Section 144
   (4) Argue, Do Not Merely State, the Law 145
   (5) Use Point First Advocacy, Including When Introducing a Quote from a Case 146
   (6) Always Address the Standard of Review on an Appeal 147
   (7) Avoid Memorandum of Law Style Writing 148
   (8) Maximize the Effect of Case Law by Minimizing the Number of Cases Cited 149

(9) Maximize the Effect of Statutory References by Putting Them in the Context of the Statutory Scheme and Aligning Them With the Statute's Purpose 150

2. Conclusion 151

Chapter 11 Factums and Memoranda of Argument in the Supreme Court of Canada
Gregory J. Fitch 153

1. Introduction 154

2. Contextual Factors Unique to Written Argument in the Supreme Court of Canada 156
   (1) Leave Applications 156
   (2) Appeals 157

3. Observing the Technical Requirements for Written Argument in the Supreme Court of Canada 160
   (1) Printing Requirements 160
   (2) Formatting Requirements 161
   (3) Electronic Requirements 161
   (4) Service and Filing Requirements 162
   (5) Computation of Time: General Rules 163
   (6) Getting Assistance from the Registry 163

4. Memoranda of Argument on Applications for Leave to Appeal and Motions: Rules Respecting Form and Structure 163

5. Preparing the Memorandum of Argument on an Application for Leave to Appeal 165
   (1) Jurisdiction and Practice of the Court 165
   (2) The Applicant's Memorandum of Argument: Identifying the Issue of Public Importance 168
   (3) The Respondent's Memorandum of Argument: Contesting the Claim of Public Importance 170
   (4) The Essential Components of the Memorandum of Argument 172
   (5) Service and Filing of the Leave Application and Response 175

6. Factums: Rules Respecting Form and Structure 176

7. Preparing the Factum on an Appeal 179
(1) The Role of the Factum 179
(2) General Suggestions for Factum Preparation 180
(3) Service and Filing of the Factum 182
8. The Essential Components of a Supreme Court of Canada Factum 183
(1) The Overview and Statement of Facts 183
(2) The Questions in Issue on Appeal 188
(a) Scope of the Issues 188
(b) Framing the Questions on Appeal 190
(3) Statement of Argument: From the Issue to the Answer 191
(4) Costs 194
(5) The Order Sought 194
9. Preparing an Intervener's Factum 195
10. Conclusion 198
Recommended Reading 198
Appendix A Form 22 (General Heading) 199
Appendix B Form 23 (Cover) 200
Appendix C Guidelines for Preparing the Electronic Copy of a Factum on Appeal or Cross-Appeal 200
Appendix D Form 65 (Notice of Intent to Dismiss Appeal for Delay) 202