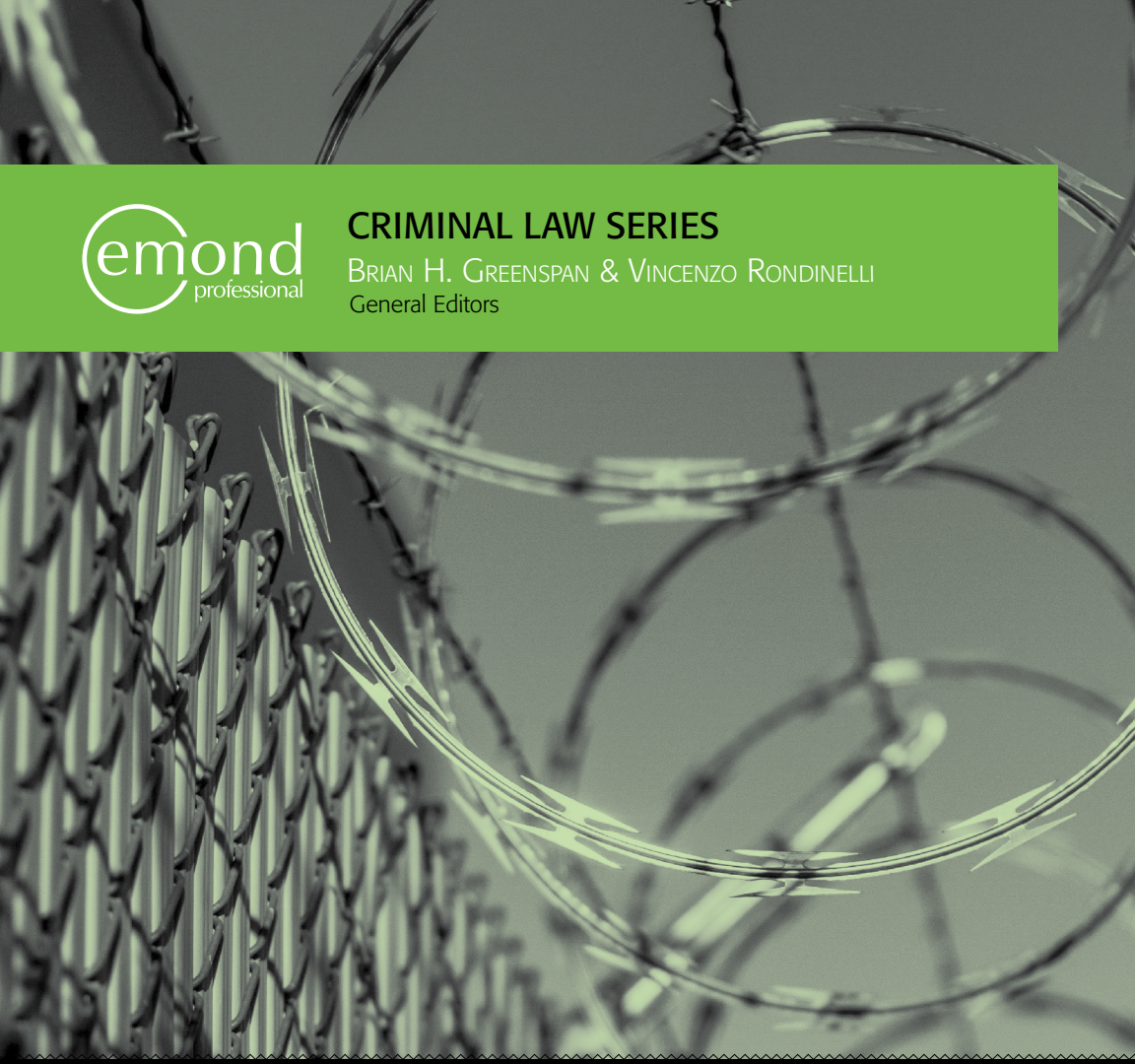

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Criminal Appeals

A Practitioner's Handbook

2

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I. Introduction

The specific procedural steps that must be taken to initiate and pursue a criminal appeal vary considerably depending both on the jurisdiction where the appeal is being brought and on the nature of the appeal—for example, whether it is indictable or summary, and whether it is against conviction or sentence or both, or against some other order or disposition. This chapter addresses the procedural requirements for ordinary first-level indictable appeals to the court of appeal—that is, appeals in which the defendant is appealing against a conviction (with or without an accompanying sentence appeal), or where the Crown is appealing against an acquittal or a stay of proceedings. The special rules governing appeals by either party against sentence alone are addressed separately in Chapter 8, Sentence Appeals. Appeals to the Supreme Court of Canada are addressed in Chapter 11.

Appeals by a defendant or by the Crown against a finding of "not criminally responsible on account of mental disorder" (NCR-MD) are governed by the same procedures that apply to ordinary indictable appeals. However, part XX.1 of the *Criminal Code*[1] contains special provisions that govern appeals from dispositions made following NCR-MD verdicts, and some provincial courts of appeal have created special procedural rules for these appeals. This highly specialized form of criminal appellate litigation is not addressed in this book.

Some provinces and territories have also established special rules for appeals by unrepresented defendants, which in some jurisdictions apply only when the defendant/appellant is in custody. Inmate appeals are addressed separately in Chapter 9, Self-Represented/Inmate Appeals.

Procedures in summary conviction appeals are broadly similar to those in indictable appeals, but there are some significant differences. Summary conviction appeals are dealt with in Chapter 10, Summary Conviction Appeals and Extraordinary Remedies.

The *Criminal Code* delegates rule-making powers to the provincial and territorial courts,[2] and the courts of appeal in every province and territory have established their own criminal appeal rules. These rules contain many broad similarities, but there are also important variations. Some of the most significant differences will be addressed below, but it is beyond the scope of this book to exhaustively itemize them all.

Despite these local variations, indictable appeals in all jurisdictions follow broadly similar paths. An appeal is commenced by filing with the court an initiating document, styled as the "notice of appeal" or "notice of application for leave to appeal," within a time limit established by the local rules. Once an appeal has been launched by giving this notice, the local rules require certain steps to be taken—mainly by the appellant's

1 *Criminal Code*, RSC 1985, c C-46.

2 Specifically, *Criminal Code*, s 482.

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counsel, but sometimes by counsel for the respondent or by court officials—to obtain and assemble the record from the proceedings under appeal. Once this record becomes available, counsel for the appellant must prepare and file a factum that summarizes the facts of the case and the arguments that are being advanced. Counsel for the respondent must then prepare and file a responding factum. When these actions have been accomplished, the appeal is ready to be argued.

II. The Notice of Appeal

Section 678(1) of the *Criminal Code* states:

> An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal *shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court*. [Emphasis added.]

The local criminal appeal rules address three main issues:

1. the form of notice that must be given;
2. whether this notice must be served on the opposing party and, if so, how this can be done; and
3. the time limits for commencing an appeal by giving notice.

A. Form of Notice

The criminal appeal rules in all of the provinces and territories require notice of appeal to be given in writing and to specify the form that is to be followed. The forms in different jurisdictions are all broadly similar, requiring the appellant to provide:

1. details about the case being appealed, including such matters as the charges, the level and geographic location of the trial court, the dates of the proceedings, the identity of the trial judge, the mode of trial (judge alone or jury), and the sentence imposed;
2. whether the appellant is appealing or seeking leave to appeal against conviction or sentence or both; and
3. the proposed grounds of appeal.

The notice must be signed by the appellant or by his or her counsel. Many jurisdictions provide a special simplified form for unrepresented defendants.[3]

3 British Columbia, Alberta, New Brunswick, Nova Scotia, Newfoundland and Labrador, and the three territories have special forms for use by all unrepresented appellants, whereas Ontario and Prince Edward Island have special forms that may be used only by appellants who are both unrepresented and in custody.

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Since the filing deadline for a notice of appeal is quite short (see below), appellate counsel will rarely be certain that all potential grounds of appeal have been identified at the time the notice of appeal is drafted. For this reason, it is usually advisable to include a basket clause in the notice that reserves the right to raise further and other grounds after receiving and reviewing the trial record. The rules in some jurisdictions also permit replacement or supplemental notices to be filed later if additional grounds have been identified.

B. Service

The criminal appeal rules in most jurisdictions do not require a defendant's notice of appeal to be served on the respondent Crown before it is filed.[4] Rather, the defendant is permitted to file multiple copies of his or her notice with the court, and court staff then forward a copy to the Crown. Many jurisdictions expressly permit filing by registered mail and/or courier, and many also have special rules for unrepresented inmates that allow them to file their notice of appeal by giving it to correctional staff, who are responsible for sending it to the court of appeal.

However, most jurisdictions require notices of *Crown* appeals to be personally served on the defendant (the respondent in the appeal),[5] with most jurisdictions also requiring that service be made *before* the notice of appeal is filed with the court, which must take place within the locally-established time limit for commencing the appeal.[6] Section 678.1 of the *Criminal Code* permits the Crown to seek an order for substitutional service if the respondent "cannot be found after reasonable efforts have been made to serve" him or her with the notice of appeal.

C. Filing Deadlines

In most jurisdictions, an indictable appeal must be commenced *within 30 days* of the date of the defendant's *sentencing* (or, in the case of a Crown appeal from an acquittal, the date of the acquittal). However, some jurisdictions have different time requirements. It is important to note that in a defence appeal the appeal clock only begins to run *on the date the defendant is sentenced*, even if the defendant is only appealing against the conviction.

4 In Nova Scotia an appellant will be exempt from having to serve his or her notice of appeal on the Crown only if he or she is unrepresented and in custody.

5 Some jurisdictions (e.g., Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, and Newfoundland and Labrador) permit the Crown to serve represented defendants/respondents through their counsel.

6 The rules in some jurisdictions (e.g., New Brunswick, Prince Edward Island, and Newfoundland and Labrador) permit the Crown to file its notice of appeal first and only serve the defendant afterwards, within a specified time limit.

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Regard must also be given to the rules for computing time in the applicable jurisdiction. In most jurisdictions, the appeal period is computed by counting forward 30 days (or 60 days, in the Northwest Territories and Nunavut), starting on the day *after* the date of sentencing or the defendant's acquittal, and *including* weekends and holidays. For example, in most provinces with 30-day appeal periods, a defendant who is sentenced on March 15 would have to file his or her notice of appeal by the end of the day on April 14, or on the next business day if this date falls on a weekend or holiday. However, the Nova Scotia criminal appeal rules calculate time differently, using a method that excludes both the date of filing and all the intervening weekends and holidays. Accordingly, even though the Nova Scotia rules require notice of appeal to be filed within 25 days of the date of an acquittal or the date of sentence, the exclusion of weekends and holidays from the 25-day calculation means that the appellant actually has *more* time to file his or her notice than in those provinces where the time limit is 30 days, but where this time is calculated by including weekends and holidays.

In situations where *both* the defence and the Crown have a potential right of appeal,[7] the rules in most jurisdictions require *both* parties to exercise their right of appeal within the same time period (usually 30 days). However, in a few jurisdictions[8] a party who does not initially file its own appeal is given additional time to file a cross-appeal if the other party appeals.

In all jurisdictions, section 678(2) of the Code authorizes the court of appeal or a judge of the court to grant an extension of time for filing a notice of appeal, either before or after the appeal period has expired. The case law recognizes that when deciding whether to grant an extension of time, courts should consider a number of factors, including whether the appellant formed a bona fide intention to appeal within the required time, whether the respondent would be prejudiced, whether the proposed appeal is arguable, and "overall, whether the extension of time is in the interests of justice."[9] When an extension of time is sought by the Crown because it failed to properly serve its notice of appeal on the respondent before the deadline, courts will also consider "whether reasonable diligence was exercised in attempting to locate the [respondent] for service."[10]

7 For example, if a defendant is acquitted on some counts and convicted on other counts, he or she is entitled to appeal the convictions while the Crown is entitled to appeal the acquittals.

8 New Brunswick, Prince Edward Island, and Nova Scotia.

9 *R v Watkins*, 1999 CanLII 1374, 45 OR (3d) 405 (CA).

10 *Ibid*.

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III. Perfecting an Appeal

Most indictable appeals are heard and decided on the basis of the record in the court below, which ordinarily consists of: (1) a transcription of the court proceedings below, prepared and certified as accurate by a court reporter; and (2) copies of all significant court documents and exhibits that are capable of being reproduced. In some jurisdictions these documents are all filed together as an "appeal book,"[11] while other jurisdictions require the transcripts to be filed separately, so that the appeal book contains only the court documents and exhibits.[12]

There are significant variations between jurisdictions when it comes to assigning responsibility for obtaining and preparing these materials. The examples given below should be seen as merely illustrative rather than exhaustive.

An appeal is often said to be "perfected" once most or all of the materials necessary for it to be heard have been served and filed, but different jurisdictions define "perfection" differently (and some do not use the term at all). For example, the Ontario rules specify that an appeal will be considered "perfected" once the transcripts, the appeal book, and the appellant's factum—the main documents the appellant must obtain or prepare—have all been served and filed.[13] Once these materials have been filed, a hearing date can be set, with the respondent's factum filing deadline calculated by counting backward from the scheduled hearing date.[14] However, the Newfoundland and Labrador rules specify that the respondent's factum is due 30 days after receipt of the appellant's factum, and the appeal is not said to be "perfected" until both parties' facta have been filed and one or the other side has filed an application to set a hearing date. The PEI rules define perfection similarly. Other jurisdictions do not use the concept of "perfection" or make it a precondition for setting a hearing date. For example, in Alberta, Quebec, the Northwest Territories, and Nunavut the rules provide that once a notice of appeal has been filed, the registrar of the court of appeal shall enter the case on the lists for the court's next sittings.

11 For example, this is so in Alberta, Nova Scotia, and Nunavut.

12 For example, this is so in British Columbia, Ontario, New Brunswick, Newfoundland and Labrador, the Yukon, and the Northwest Territories. In Saskatchewan and Quebec the documents that would in most other jurisdictions be filed in the form of an appeal book must instead be included as appendixes or schedules to the appellant's factum.

13 Ontario *Criminal Appeal Rules*, SI/93-169, r 18. The Saskatchewan rules do not use the term "perfection," but authorize a hearing date to be set after the filing of the appellant's factum—which in Saskatchewan includes the transcripts and appeal book as appendixes.

14 Under rule 21(3) of the Ontario *Criminal Appeal Rules*, the respondent's factum must be filed "not later than ten days before the week in which the appeal is to be heard"—that is, by the Thursday of the week two weeks prior to the week of the hearing. New Brunswick takes a similar approach, except that the "Respondent's Submission" is due on the 20th day of the month preceding the month of the scheduled hearing.

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A. Transcripts

The *Criminal Code* contemplates that most indictable appeals will be conducted on the basis of a transcript of trial proceedings (see s 682(2)). The various criminal appeal rules likewise assume that the trial transcript will ordinarily be obtained and filed before the appeal is argued, although some jurisdictions create exceptions (such as for appeals by unrepresented inmates). The rules in most jurisdictions make the appellant's counsel responsible for ordering and paying for the transcripts, although some jurisdictions assign this task to the registrar of the court of appeal[15] or to the clerk of the trial court.[16]

Many provincial and territorial criminal appeal rules specify the portions of the trial proceedings that must ordinarily be transcribed, although they allow the parties to agree to omit certain portions as unnecessary. For instance, rule 8(8) of the Ontario *Criminal Appeal Rules* provides that in a conviction appeal,

> 8(8) [u]nless otherwise ordered by a judge, or except as otherwise consented to by the respondent, there shall be omitted from the transcript,
>
> (a) any proceedings in respect of the selection of the jury;
>
> (b) any opening address of the trial judge;
>
> (c) the opening and closing addresses of counsel;
>
> (d) all evidence in the absence of the jury and all submissions of counsel, in the absence of the jury except,
>
> (i) submissions as to the proposed content of the charge and the trial judge's ruling thereon and reasons,
>
> (ii) objections to the charge and the trial judge's ruling thereon and reasons,
>
> (iii) submissions respecting questions from the jury and the trial judge's ruling thereon and reasons;
>
> (e) all final argument where there is no jury; and
>
> (f) all objections to the admissibility of evidence, except a notation that an objection was made and a brief summary of the nature of that objection and the position of counsel, but the trial judge's ruling and reasons in respect of the objection shall be set out in full in the transcript.

Rule 8(18) then allows the parties to avoid complying with these requirements if they "make an agreement respecting the transcript required for the appeal," which must be put in writing and signed and included in the appeal book.

However, some jurisdictions take a different approach and simply leave it up to the parties to decide which portions of the proceedings should be transcribed. For example, the Newfoundland and Labrador *Court of Appeal Criminal Appeal Rules* require the

15 For example, in Saskatchewan.

16 For example, in Quebec.

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appellant to order and file transcripts only of "those portions of the record in the proceedings that he or she believes are necessary to enable the issues on appeal to be determined."[17] If another party to the proceedings believes additional transcripts are necessary, that party must order them or seek the direction of the court. In Saskatchewan, the rules leave it up to the court of appeal registrar to decide whether "based on the nature of the proceedings, a transcript is necessary,"[18] and if so to decide which portions of the proceedings should be transcribed.

The rules in some jurisdictions[19] permit the parties to agree between them to dispense with the transcript entirely and have the appeal proceed on the basis of an agreed upon statement of facts.

B. The Appeal Book

In most jurisdictions, the rules require copies of key court documents and trial exhibits to be bound together into an appeal book.[20] As noted above, some jurisdictions also require trial transcripts to be included in the appeal book, while in other jurisdictions they must be filed separately. Most jurisdictions assign responsibility for preparing the appeal book to counsel for the appellant. In Manitoba, however, the rules require the Crown to prepare the appeal book even when the Crown is the respondent.

Since the party preparing the appeal book must include copies of the trial exhibits, the different appeal rules all provide mechanisms for having the file from the trial court sent to the court of appeal. In Ontario, counsel for the appellant must file a requisition with the lower court within 14 days of filing the notice of appeal (rule 11). However, in many other jurisdictions the process is initiated by the court of appeal registrar's office after a notice of appeal has been received.

C. The Factum and Book of Authorities

The appellant and respondent in an indictable appeal are ordinarily both expected to file facta, although this requirement is often waived in appeals involving an unrepresented defendant. The criminal appeal rules in each jurisdiction contain detailed rules that govern the appearance, length, and contents of facta, the specific details of which vary considerably from one jurisdiction to the next (see Chapter 4, Drafting the Factum).

17 Supreme Court of Newfoundland and Labrador, *Court of Appeal Criminal Appeal Rules*, SI/2002-96, r 11(2).

18 *The Court of Appeal Criminal Appeal Rules (Saskatchewan)*, SI/2011-9), r 12(b).

19 For example, this is so in British Columbia, New Brunswick, Newfoundland and Labrador, and the Yukon.

20 In Saskatchewan, the rules require these documents to be filed as appendixes to the appellant's factum rather than in a separate appeal book.

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Most of the criminal appeal rules also contain provisions that require the appellant's factum be filed within a short time of the trial transcript being received. For instance, rule 18(3) of the Ontario *Criminal Appeal Rules* purports to require appeals to be "perfected"—that is, for the proper number of copies of the transcript, appeal book, and appellant's factum as required by the rules all to be served and filed—within 90 days of receipt of the transcript, unless the registrar or a judge orders otherwise. However, it is universally recognized that this deadline is completely unrealistic in most cases. Once a transcript has been ordered it is usually impossible to predict exactly how long it will take to prepare, and appeal counsel cannot hold themselves in a state of perpetual readiness waiting for it to arrive. Accordingly, in Ontario, rule 18(3) is roundly ignored by the defence bar, Crown offices, and the court itself, even though it remains on the books.

IV. The Respondent's Procedural Steps

As noted above, in most jurisdictions the respondent's factum is due a specified number of days after the appellant's factum has been filed.[21] In Ontario and New Brunswick the respondent's factum is due within a specified number of days of the scheduled hearing date, which in these jurisdictions is set only after the appellant's materials have been filed. Other jurisdictions (for example, Alberta, the Northwest Territories, and Nunavut) provide that the respondent's factum is due by a specified number of days "before the date of commencement of the sittings at which the appeal is to be heard,"[22] with that date being determined before the appellant has filed its materials.

21 The timing given for British Columbia, Saskatchewan, Manitoba, Prince Edward Island, Newfoundland and Labrador, and the Yukon is 30 days. Nova Scotia gives the respondent only 10 days, but excludes weekends from this calculation. Quebec gives the respondent 60 days.

22 *Rules of the Court of Appeals for the Northwest Territories as to A. Criminal Appeals B. Bail on Appeals*, SOR/78-68, r 17(2)(ii).

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I. Introduction

While oral argument is more dramatic, writing a persuasive factum is the core skill of an appeal lawyer. In a substantial majority of appeals, the judges will arrive for oral argument with a strong opinion about what they intend to do, and it is a rare case where they can be persuaded to change their mind through an effective oral argument. Experienced appeal lawyers and judges will tell you that the factum provides about 90 percent of the value of the advocacy in an appeal. The importance of written advocacy is increased by the time restrictions most appeal courts now place on oral argument.

Back when the appellate courts were less busy and many gave counsel unlimited time to make their oral arguments, it was common for lawyers to file brief facta that consisted of little more than skeletal frameworks of arguments they planned to develop on their feet. In our view, this style of bare-bones factum writing is no longer effective in the modern era of strict time limits.

When writing a factum, it is generally advisable to assume that the court has no prior knowledge about the case or the issues the factum will present. This is particularly true in the case of the appellant's factum, which may well be the first document on the case that the judges read. The factum should be capable of standing alone and explaining to the court the relevant facts, the applicable law, and what the court below did that warrants appellate intervention and why.

An effective factum should do two things. It must present your client's case and arguments clearly and forcefully while simultaneously establishing your credentials as someone the judges can trust to assist them. The court depends on counsel for assistance, so misrepresenting the facts or misstating the law does not do you or your client any favours.

A. Rules of Court Regarding Facta

Most appeal courts have created detailed rules that dictate the physical appearance of facta and address matters such as the page limit, the allowable font and margin sizes, the colour of the covers, whether the printed pages should be bound on the left or right side, etc. They also typically require a factum's content to be divided into a series of numbered parts with specified mandatory heading titles.

The rules vary considerably from court to court. For example, facta in the Alberta Court of Appeal[1] and the Supreme Court of Canada[2] are to be prepared using 1.5-line spacing and must be bound with the text facing up on the left. The appellant must use beige, ivory, or buff covers, while the respondent must use green covers. In contrast,

1 See the *Alberta Rules of Court*, AR 124/2010, r 14.26(1).

2 See the *Rules of the Supreme Court of Canada*, SOR/2002-156, r 21(1).

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facta in the Ontario Court of Appeal[3] must be double-spaced and bound with the text on the right, and the appellant's factum must have a blue cover. Since the registrar desk staff tend to enforce rules of court stringently and will refuse to accept non-compliant facta, it is essential that you prepare your documents with the local rules in mind.

II. Writing Style

While general advice on how to write well goes beyond the scope of this book, lawyers should seek to avoid stylistic weaknesses that are frequently seen in appellate facta—specifically, overly complex writing and excessive jargon. It is best to use simple language and punchy, straightforward sentences.

Avoid the use of unnecessary Latin phrases and technical terms. Especially avoid larding your factum with "it is respectfully submitted" or similar phrases that serve no purpose except to deaden your writing. The court will understand that your factum contains respectful submissions and there is no need to repeatedly remind them of this.

Short paragraphs that make a single point can help make your factum easy to read and absorb. Aim for "point-first writing"—that is, state your point and then develop it—so that your reader always understands where you are headed.

Of course, like most general rules, these guidelines are riddled with exceptions. Short and punchy sentences and paragraphs are not *always* better; sometimes a longer exposition will more clearly and effectively make your point. The trick is in knowing when to follow these guidelines and when to abandon them.

III. The Overview

The overview is a crucial advocacy tool for both the appellant and respondent. It should generally be no longer than a page or two, and should succinctly explain the nature of the appeal, the key points in issue, and your main arguments. Many appeal lawyers will spend more time per word on the overview than on any other part of the factum. Grabbing the court's attention and making a good first impression are critical to making your factum persuasive. Since the overview is so important and has to accurately reflect what follows it, it is often best to draft it last, after you have had a chance to fully develop your arguments. If you draft your overview first, it is important to return to it later because you may need revise it to reflect how your position evolved as you crafted your written argument.

For the appellant, the overview is an opportunity to explain to the court what the appeal is about, why it raises important issues that ought to pique the court's interest, and why your client—the defendant or the Crown, as the case may be—has a legitimate

3 Ontario *Criminal Appeal Rules*, SI/93-169, r 16.

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complaint about what happened in the court below. For the respondent, it provides a chance to rebut any favourable impression the court may have formed about the appeal after reading the appellant's factum, and an opportunity to reframe the issues to set up your own arguments.

IV. The Statement of Facts

Many appeal lawyers find that writing statements of facts is the least interesting and rewarding part of drafting a factum. It is a task that is often delegated to juniors and articling students. However, it would be a serious mistake to underestimate the importance of a well-crafted statement of facts or the skill required to draft one. A well-written and carefully structured statement of facts is an essential part of written advocacy.

Most appeals ultimately turn on the facts of the case. Even in cases that involve pure legal issues in which the case-specific facts are of secondary importance, the underlying equities of the case will often be in the back of the court's mind. Most judges are driven by concerns about fairness. While appellate courts will sometimes be more concerned about how their decision will affect other people in the future, in most criminal appeals—particularly those that do not raise novel points of law—a judge's main concern will be whether the proceedings in the court below could have resulted in a miscarriage of justice.

A statement of facts must be fair and accurate. If you misrepresent or misstate important evidence, you can expect your opponent to forcefully point this out to the court. At the same time, an effective statement of facts can be crafted to put as favourable a spin on the evidence at trial as the facts permit. The tone of the statement of facts should remain objective and its content should be scrupulously accurate, but your editorial choices about how certain facts are presented and portrayed can serve a valuable advocacy function.

The facts that are important to your arguments should be set out in sufficient detail to equip the court with everything they need to decide the issues you raise. Depending on the circumstances, it sometimes works best to simply indicate in the statement of facts that the evidence bearing on a particular issue will be summarized in detail later during a part of the argument that addresses a particular ground of appeal. Evidence that has less or no relevance to the grounds of appeal can be summarized more briefly, although it is important not to leave the impression that you are trying to conceal unfavourable facts.

A. Structuring the Facts

It is crucial for a statement of facts to have an organized and coherent structure. The facts, as far as it is possible, should be presented in a way that is clear and compelling to the reader, and they should flow like a story. The goal is to educate the court as painlessly as possible about the significance of different pieces of evidence in relation

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to both the case as a whole and the specific grounds of appeal. However, the best way to do this can vary considerably depending on the particular facts and issues in the case. Sometimes the best and clearest structure will be a simple chronological narrative. In other cases it will work better to start with a later event, such as the commission or discovery of the crime, and then loop back to explain how it came about or came to light. When reviewing your draft you should try to put yourself in the position of a reader who knows nothing about the case, and ask yourself: "Have I given the reader all the information he or she needs to understand what comes next?" If not, restructure the presentation of the facts so that this information is provided by the time the reader needs it.

Although it is often tempting to simply summarize the evidence witness by witness in the order it was heard by the trier of fact, this is rarely optimal. While this structure may be the simplest one for the writer, from the reader's perspective it is usually difficult to follow and tedious to read. Like all general rules, there are exceptions. Sometimes a witness-by-witness summary of the evidence that bears on a particular issue works well—for example, in a case where multiple eyewitnesses have contradictory recollections of an event they all witnessed, and where you are trying to highlight the fallibility of human memory. Different structures will suit different sorts of appeals. While in many cases a chronological review of the relevant events will be the easiest to understand, in a complicated circumstantial case it may be easier for the reader if the evidence is organized by theme. Choose the structure that makes the story easiest to understand for a reader with no prior knowledge of the case.

As mentioned above, in all but the simplest of cases the statement of facts should begin with a brief overview of the evidence that identifies generally what the case is about, the basic facts, the positions of the parties, and the grounds of appeal. Do not force the court to wade into a review of the evidence without any understanding of what they should be looking for and what issues will ultimately be important.

It is often helpful to follow the overview by introducing the accused and other major witnesses and significant people in the case, identifying anything relevant about their backgrounds and relationships to one another. It is sometimes useful to provide a description of a geographic area or location if the reader will need this information to follow the narrative as it unfolds. If maps or photos will assist in this regard, tell the reader where to find them in the record. Sometimes it might even be appropriate or useful to include an especially significant photo or diagram directly in your statement of facts.

B. General Advice for Writing the Facts

Make sure your statement of facts covers all of the evidence that was important to the arguments made at trial on issues that are relevant to the appeal, *especially* evidence that is unfavourable to your position on the appeal. The most common major advocacy error in a statement of facts is omitting mention of inconvenient or damaging facts.

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While massaging the facts in this way may make your factum superficially more persuasive, the importance of an omitted fact will be magnified once the respondent points it out and emphasizes your failure to mention it. Your credibility—and your ability to be an effective advocate for your client—will be severely damaged. If the judges think they cannot trust what you say about the evidence at trial, they will also question whether they should believe what you say about the law.

If the significance of a piece of evidence won't necessarily be obvious to the reader, it is helpful to briefly explain it. For example, you can use this phrasing: "The Crown contended that this evidence demonstrated … ." Don't leave the court wondering why you've chosen to mention something. Similarly, if an area of evidence is important to a ground of appeal, it can be helpful to highlight that fact, perhaps in a footnote.

Quotes from the record can be very effective in emphasizing an important point, but be wary of including long block quotes that can cause a reader to start skimming.

C. The Respondent's Statement of Facts

The main issue confronting a respondent is whether to write a statement of facts at all. If the appellant's factum accurately outlines the relevant facts, it is rarely effective advocacy to rewrite them for the court while adding your own spin. If the appellant's statement of facts is accurate but slanted, consider writing an overview that reviews the respondent's position on the facts rather than slogging through the whole of the evidence for a second time.

Where there are important omissions in the appellant's factum, a brief statement of facts that does no more than identify and set out the omitted evidence will usually be most effective. Only when the appellant's factum fails entirely to lay out the evidence in a comprehensible or fair way should the respondent choose to write its own full statement of facts.

D. Sentence Appeals

Some provinces have particular rules about the statement of facts in sentence appeals. In Ontario, the appellant's factum in a sentence appeal begins by answering a series of specific questions,[4] and in the case of a sentence appeal after a conviction that followed a trial, the parties are required to attempt to negotiate an agreed statement of facts.[5] In the Yukon, sentence appeals are argued based on two-page statements rather than anything in a traditional factum form.[6]

4 *Ibid*, r 17(1).

5 *Ibid*, r 8(12).

6 Yukon Territory Court of Appeal, *Criminal Practice Directives*, 2006, Directive 4.

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V. The Legal Argument

There are even fewer universally applicable rules about how to best structure written legal argument. As a general rule, it is usually best to put your strongest and most significant grounds of appeal first. However, in some cases it will be best to organize the grounds of appeal based on the remedy you are seeking. Grounds of appeal that would result in an acquittal or that apply to more counts on the indictment or information should often come before narrower grounds of appeal. However, in some appeals the order of the grounds will be dictated by the internal logic of the arguments and their relationship to one another. For example, if you are arguing that the trial judge erred by admitting certain evidence and then made a further error in explaining the significance of the evidence to the jury, it will usually be best to deal with the admissibility issue first even if you think your argument on the jury instruction issue is stronger, since winning on the first issue may make the second issue moot.

Counsel for the appellant will sometimes face a difficult tactical decision about whether to anticipatorily respond to an argument that he or she expects the respondent to raise. Since appellants in criminal appeals usually do not have the right to file reply facta, the appellant may have no other opportunity to provide written argument on the point. On the other hand, it may be better advocacy not to make the other side's arguments for them, even if only for the purpose of knocking them down. It depends on the particular circumstances and requires counsel to exercise their best judgment, considering such matters as the prominence of the argument in the proceedings below and the extent to which the point can be effectively addressed orally.

As the respondent, you should not necessarily feel bound to mirror the structure of the appellant's factum. It will often be easiest to respond to the appellant's points in the same order in which they were raised, but if you conceive of the issues in a different way, or if your response to a number of grounds of appeal overlap, there is nothing wrong with adopting a different structure.

As the respondent in a criminal appeal, you are also entitled to raise additional arguments that were not advanced by the appellant, as long as they were raised at trial and support the order below. For example, if the trial judge finds a violation of the defendant's section 9 Charter[7] rights, but admits the seized evidence anyway under section 24(2) and enters a conviction, the defendant can appeal the conviction on the basis that the trial judge erred in his or her application of the Charter test for excluding evidence. In response, the Crown is entitled to argue that the trial judge erred by finding a section 9 breach in the first place, since this argument, if successful, would support the order admitting the evidence and the conviction. In Supreme Court appeals, the

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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appellant has the right to file a further factum in response to any such new arguments raised by the respondent. However, no such right generally exists under provincial appeal court rules. Accordingly, in some situations the appellant may decide to anticipatorily address in its own factum any new arguments it expects the respondent to raise.

When responding, you should also aim to make your factum self-contained. While you can obviously assume that your reader has read the appellant's factum, it is best to avoid forcing the reader to refer to it in order to follow your argument. For example, if you refer to a point made at paragraph 32 of the appellant's factum, briefly identify what this point is instead of assuming that the reader will have the appellant's factum open in front of him or her and will look it up.

Before you draft each ground of appeal, consider what you are asking the court to do. Many grounds of appeal involve a simple argument that the trial judge erred in applying a settled principle of law. The structure of such a ground will usually be fairly simple: identify the principle of law, review the relevant events at your trial and the ruling or legal instruction, and explain the error. When you are deciding how much attention to give the legal principles that you are relying on in the factum, consider how well known they are. Lengthy reviews of settled law may waste space in your factum if they relate to issues that arise often on appeal and with which appellate judges are well familiar. Belabouring trite points may cause you, at best, to lose the court's attention; at worst, the judges may even be insulted by your apparent assumption that they are ignorant of basic legal principles. For example, a common mistake when responding to a sentence appeal is to write extensively about the standard of review. Since this issue arises in connection with virtually all sentence appeals and since sentence appeals are extremely common, appeal judges will be very familiar with the applicable principles. They will much prefer you to get on with it and address the specifics of the case before them. You can make your point about the standard of review, but it is better to do so *briefly*.

On the other hand, there are many areas where the law on an issue is well settled, but it arises only infrequently. In this situation, even experienced appellate judges may appreciate a reminder in the form of a concise summary of the principles and the leading authorities.

It is just as important to be scrupulously fair and honest in your legal argument as it is when summarizing the facts. If there is a critical fact or prior legal authority that hurts your position, you *must* deal with it up front and explain why your argument should nonetheless succeed. It is a failure of advocacy to ignore a weakness in your argument and hope against all odds that opposing counsel and court both fail to notice it.

Depending on the circumstances, you may not need to cite every imaginable case that supports your point. Citing ten cases as authority for a basic principle of law may be excessive, particularly if there are one or two recent cases that concisely summarize the point and the prior authorities. On the other hand, citing a larger number of cases can be useful if you are trying, for example, to emphasize that a particular principle or

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sentencing range has broad support in the authorities. All other things being equal, courts of appeal generally find their own prior decisions and those of the Supreme Court of Canada to be the most persuasive, but judgments from other provinces, trial courts, or even foreign jurisdictions may be useful, particularly if they address novel points of law.

VI. Conclusion

In cases where your advocacy can affect the result, your best weapon is a pithy, well-organized, and persuasive factum. Focus on a strong overview, simple and point-first writing, and a structure that allows your argument to flow logically and be easily comprehensible to a reader with no prior knowledge of the case. To assist the reader, we have included a Sample Court of Appeal factum (Appendix A), with identifying information redacted. We have also included the appellant's factum in the Supreme Court of Canada in *R v Grant*[8] (Appendix B), the leading case on the exclusion of evidence under section 24(2) of the Charter.

8 *R v Grant*, 2009 SCC 32.

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