# Developing an Appealing Personality

by

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**INTRODUCTION**

This is, very deliberately, a brief practical non-academic no-nonsense primer on some practical points of (written) advocacy at the leave to appeal stage in the Supreme Court of Canada.

This paper is mercifully brief, pragmatic, and to the point - there is nothing worse than a long literary narrative on how to write better or be a better advocate - the only thing worse is a whole book on the subject.[1]

Some basics:

- leaves to appeal are done in writing, and "heard" in writing.
- oral hearings are rare (perhaps 1 or 2 a year).

Some recent contextual statistics:[2]

- numbers of leave applications are up as a general trend, though that varies from year to year: 2014: 502; 2013: 529; 2012: 557; 2011: 541; 2010: 465; 2009: 542; 2008: 528; 2007: 602; 2006: 506; 2005: 544; 2004: 568; 2003: 550.
- time taken to decide leaves to appeal has decreased from 5.7 months in 2002 down to 3.2 months in both 2008 and 2009, and up (to 4.4 months) in 2012, and back down to 3.2 months in 2014
- areas of law for applications for leave to appeal (2014):
    - Civil Procedure: 17%
    - Criminal: 18%
    - *Charter* (Civil): 9%
    - *Charter* (Criminal): 9%
    - Commercial, including Contracts: 6%
    - Administrative: 5%
    - Property, including Intellectual Property: 2%
    - Labour, including Employment: 4%
    - Torts: 3%
    - Family: 4%
    - Tax: 2%
    - Municipal: 2%
    - Others: 23%

    (Of all Applications for Leave, generally 25% are criminal and 75% civil)
- Applications for Leave to Appeal by region/court (2014):
    - Ontario: 151
    - Quebec: 119
    - British Columbia: 81

[1] See Selected Bibliography in Appendix.
[2] All statistics from "Statistics 2004 – 2014", Supreme Court of Canada.

- Federal Court of Appeal: 54
- Alberta: 40
- Saskatchewan: 6
- Nova Scotia: 18
- New Brunswick: 5
- Manitoba: 17
- Newfoundland and Labrador: 4
- Prince Edward Island: 6
- Northwest Territories: 0
- Yukon: 1
- Nunavut: 0

## 1. OVERVIEW OF THE PROCESS

How the leave to appeal process actually works internally at the Court itself is partially described in two articles by former law clerks[3], and is also described in Mr. Justice Sopinka's book *Conduct of an Appeal*:[4]

> "At any particular time, the Court is divided into three panels of three judges for the purposes of applications for leave. On a periodic basis (usually weekly), the list of completed applications for leave (those ready for submission to the Court), are separated into three lists, each of which is allocated to one of the three panels. Each application is assigned to a lawyer from the Legal Services branch of the Court for the preparation of an objective summary and memorandum outlining the facts, issues and submissions of the parties. The objective summary and memorandum are used as briefings for the panel considering the application.
>
> The panel seized of the application processes it with each member of the panel voting either to grant leave or dismiss. The panel then prepares its own memorandum summarizing its decision, which is circulated to all members of the Court. In a few applications, the decision is deferred by placing it on "Appendix C", which is discussed below. In cases in which the panel determines (unanimously or by a majority) that an application should be granted, the application is placed on "Appendix B" to be considered further at a Conference of the Court. Other members of the Court are advised that the application has been placed on "Appendix B".
>
> The procedure with respect to applications that do not find immediate favour with the panel is somewhat more elaborate. Where the panel determines that an application should be dismissed, notice is provided to all members of the Court that the panel proposes to dismiss the application on a specific date (usually a few weeks hence). If a

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[3] L. Sossin, *The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada*, (1997) 30 U.B.C. Law Review 279; McInnes, J. Bolton, N. Derzko, *Clerking at the Supreme Court of Canada* (1994) 33 Alberta Law Review 58. See also Hon. Bertha Wilson, *Decision-Making in The Supreme Court* (1986) 36 U of T Law Jo. 227; E. Macfarlane, *Governing from the Bench,* (Vancouver UBC Press 2013); Ian Greene et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal (Toronto: James Lorimer, 1998).*

[4] Mr. Justice Sopinka and Mark Gelowitz, *Conduct of an Appeal*, third edition, (LexisNexis Canada, 2012) pp. 234-243.

> member of the Court not on the panel seized with the application is of the opinion that the application, by reason of its public importance, ought to be discussed by the full Court, notice is given to the other members of the Court, and the application is deferred to a subsequent conference of the full Court at which outstanding applications for leave are considered. The application is then referred to as an "Appendix D" application. A dissenting member of the panel seized of the application can place the application on "Appendix D" at the time that the panel's proposed disposition is announced.
>
> Appendices B and D applications are reconsidered by the panel seized with the application in light of comments received from the full Court at the conference held for that purpose. The decision of the panel is generally made during the discussion at the conference, and judgment is released shortly thereafter.
>
> An alternative category of application for leave is referred to within the Court as "Appendix C". These are applications which raise issues already before the Court either in other applications for leave or in appeals in respect of which leave has been granted. In the past, Appendix C applications were generally deferred pending the outcome of the prior application appeal."

An overview of the complete process (prepared in-house at *Supreme Advocacy* and put at the front of every file so that notes and dates can be added as that file progresses) for both the leave to appeal process and appeal process itself, with each step set out and the procedural or substantive authority for same, with deadlines and brief comment, is as follows:

## Main Procedural Leave to Appeal and Appeal Steps

| STEP | SECTION/ RULE | TIME PERIOD |
|---|---|---|
| 1. Leave to Appeal (LTA) | s.58(1)(a)<br>R. 25/26 | Serve & file **within <u>60 days</u>** after the date of the judgment appealed from[5]<br>• structure and content see R. 25 (grey cover)[6]<br>• file original + 5 copies<br>• file and serve electronic version of Memorandum; Notice of Application; Motion related to the Application<br>• file electronic filing form<br>• for service see R. 26 & s. 58(1)(a)<br>**IMP**: Rule 26:<br>• copy of notice to any party in the CA who is not named in the style of cause; file affidavit with Registrar<br>**IMP:** for Appeals as of Right, 30 days (to file NoA), not 60 |
| 2. Response (R) | R. 27 | Serve & file **within <u>30 days</u>** after file opened at the SCC<br>• original + 5 copies<br>• file and serve electronic version of Memorandum and any Response to Motion<br>• file electronic filing form<br>• green cover (unless correspondence) |
| 3. Reply (Ry) | R. 28 | Serve & file **within <u>10 days</u>** after service of R<br>• original + 5 copies<br>• file and serve electronic version of Memorandum<br>• file electronic filing form<br>• grey cover (unless correspondence) |
| 4. Leave to Cross Appeal (LCA) | R. 29 | Serve & file **within <u>30 days</u>** after service of LTA/NoA if AoR<br>• original + 5 copies<br>• file and serve electronic version of Memorandum; Notice of Cross-Application; Motion related to Application<br>• file electronic filing form<br>• green cover<br>**IMP**: R. 29:<br>• copy of electronic version of Notice, Memorandum, and any Motion related to Cross-Appeal to all parties; file affidavit with Registrar<br>• copy of Notice to any party in CA not named in style of cause; file affidavit with Registrar<br>LCA can be joined with R to LTA |

[5] <u>July</u> – July <u>not</u> count for any time periods except, ie: July <u>does</u> count for: 1. Record, F, or BoA at appeal stage. 2. LTI in an appeal. 3. Service of NCQ. s. 58(2) & R. 5(3). ie: July <u>not</u> count for Leaves (LTA, R, Reply).
<u>Christmas</u>: Dec. 21 – Jan. 7 not count for any time periods except, ie <u>does</u> count for: 1. LTA & NoA. 2. NCQ. R. 5.1.

[6] Documents sealed/confidential, see R. 19.1

| | | |
|---|---|---|
| 5. Response to Cross-Appeal (RCA) | R. 30<br>Form 29 | Serve & file **within <u>30 days</u>** after service of Application for Leave to Cross-Appeal<br>• original + 5 copies<br>• file and serve electronic version of Memorandum; any Response to Motion related to the Application<br>• file electronic filing form<br>• grey cover<br>• RCA can be joined with Ry to Response |
| 6. Reply to Cross-Appeal | R. 31 | Serve and file **within <u>10 days</u>** after service of R<br>• original + 5 copies<br>• green cover (unless correspondence)<br>• file and serve electronic version of Memorandum; any Reply to Motion related to the Application<br>• file electronic filing form |
| 7. Judgment & Notice of Deposit of Judgment | | Sent by Clerk of Process within 1 week after LTA judgment. |
| 8. Order ("Formal Order granting Leave" - FOGL) | | Done by SCC |
| 9. Taxation of Costs | R. 83(2) | Notice of Taxation to be served and filed within 6 months of costs order |
| 10. Notice of Appeal (NoA) | s. 60(1)(a)<br>s. 58(1)(b)<br>s. 60(4)<br>s. 63<br>RR. 33-34<br>Form 33 | Serve & file **within <u>30 days</u>** of LTA granted, or 30 days of judgment appealed from if AoR[7]<br>• file (within 21 days of NoA filed in SCC) copy with court appealed from<br>**IMP:** R. 33: if AoR, to include:<br>• QoL on which dissenting judgment based<br>• Judgment & reasons<br>• Form 25B re: whether sealing order/publication ban/legislation<br>**IMP:** R. 34: NoA must be sent to all other parties in the court appealed from (ordinary mail last known address or fax number); file with Registrar affidavit attesting to names of parties & addresses to which copies sent.<br>• s.57: Appellant can limit grounds of appeal.<br>• Serve and file electronic version of NoA (and Form 25 if AoR) |
| 11.Security Deposit (SD) | s. 60(1)(b)<br>s. 64<br>(**amendment pending to abolish**) | No longer done |

[7] NoA must set out the provision of the statute that authorizes the appeal. In the case of an appeal under *Criminal Code* see Rule 33(1)(d).

| | | |
|---|---|---|
| 12. Constitutional Question | RR. 60-61 | Serve & file **within 30 days** after LTA has been granted or after filing NoA in appeal where leave not required [8]<br>Serve and file electronic and paper<br>Serve and file within 1 week Order and Notice on AG's |
| 13. Application to Intervene | R. 56 | **LTA**: **within 30 days** after filing LTA[9]<br>**Appeal**: **within 4 weeks** after filing AF[10]<br>Serve and file electronic |
| 14.Motion to Quash | s. 44<br>R. 63 | **Within 30 days** after filing of a proceeding<br>Electronic filing optional |
| 15.<br>Appellant's Factum (AF)<br>Appellant's Record (AR)<br>Appellant's Book of Authorities (ABA)<br><br>If Cross-Appeal, see RR.35(3)–(4)<br>36(2)(a)(i)<br>43<br>Form 29 | R. 35<br>R. 38<br>R. 40<br>R. 42<br>R. 44 | Serve & file **within 12 weeks**[11] after filing NoA<br>If CQ, 12–week period starts running once CQ decided).<br>**Serve**: - 3 copies F on Respondent and other Appellant<br>- 1 copy Record & BoA on Respondent<br>- 1 copy F, BoA and Record on Intervener<br>- Electronic version of F, Record and BoA on all<br>**File**: - original + 23 copies F & 20 copies of Record with Parts I & II<br>- 11 copies of other volumes of Record<br>- 11 copies BoA<br>- Electronic version of F, Record and BoA<br>Factum: beige Record: **orange** BoA: beige<br>Contents of Record: R. 38<br>Printing of Record: Guidelines<br>Contents of F: R. 42<br>Contents of BoA: R. 44<br>**IMP:** Deadline for electronic version: 5 days after paper filing (do not forget filing form) |

[8] Rule 60 now allows an A.G. to bring a Motion to state a CQ without being required first to obtain leave to intervene.
[9] Intervener can file a Response factum. R. 27. If full party status below/mis-en-cause, need not apply for LTI. R. 22(2)(c)(i).
[10] Can ask for oral argument. R. 42(2)(e)
[11] If filing and service to be done within a specified no. of weeks after a specified day/event:

- exclude that day/day of event
- include the last day of the last 7-day period
- exclude a day that's a holiday to compute a period of less than 6 days. R. 5(1.1)

| | | |
|---|---|---|
| 16. Respondent's Factum (RF)<br><br>Respondent's Record (RR)<br><br>Respondent's Book of Authorities (RBA) | R. 36<br>R. 39<br>R. 42<br>R. 44 | Serve & file **within <u>8 weeks</u>** of service of Appellant's F and Record<br>**Serve**: - 3 copies of F on Appellant, and other Respondent<br>- 1 copy Record & BoA on Appellant<br>- 1 copy of F, BoA, & Record on Intervener<br>- electronic version of F, Record and BoA<br>**File**: - original + 11 copies Record (if any)<br>- original + 23 copies F<br>- 11 copies BoA<br>- electronic version of F, Record and BoA<br><u>Factum</u>: green <u>Record</u>: green <u>BoA</u>: green<br>Contents of Record: R. 39<br>Printing of Record: Guidelines<br>Contents of F: R. 42<br>Contents of BoA: R. 44 |
| 17. Intervener's Factum<br><br>Intervener's Book of Authorities | R. 37<br>R. 44 | Serve & file **within <u>8 weeks</u>** of order granting leave to intervene <u>or</u> if an Attorney General, **within <u>20 weeks</u>** of the filing of a notice of intervention under R. 61(4)[12]<br>**Serve**: - 1 copy (F & BoA)<br>- electronic version of the F and BoA<br>**File**: - original +23 copies F<br>- 11 copies BoA<br>- electronic copy of F, Record, and BoA<br>Covers: blue<br>Contents of BoA.: R. 44 |
| 18. Scheduling Appeal | R. 69(2) | After Respondent's F is filed or due (8 weeks after AF) Registrar issues list of appeals and send notice of hearing to all parties. |
| 19. Condensed Book | R. 45 | **Serve:** 1 on all parties<br>**File**: - 14 copies with clerk on day of hearing<br>- same colour as F<br>- Electronic version is optional |
| 20. Name of Counsel appearing at Appeal, to Registrar | R. 71(4) | At least 2 weeks before appeal heard |
| 21. (Formal) Judgment | | Sent by Clerk of Process approx. 2 days after Judgment rendered. |
| 22. Costs | R. 83(2) | Within 6 months |
| 23. Application to Rehear | R. 76 | Before judgment or **within <u>30 days</u>** after judgment |

[12] Within 8 weeks of A's F if:
- intervener full party status below
- mis-en-cause
- Bd/Trib. whose jn. in issue

] ie treated like a R.

| | | |
|---|---|---|
| 24. Response to Motion to Rehear | R. 76(2) | Within 15 days after service of the Motion |
| 25. Payment out of Security for Costs | R. 86 | N/A |
| 26. Discontinuance or Dismissal | R. 93<br>R. 64(LTA)<br>s. 69<br>R.65<br>(appeal) | |
| Motion to Court | RR. 52-54 | Original and 14 copies (grey cover)<br>**Response**: within 10 days after service of Motion (green cover)<br>After Response filed/10 day period ended, Registrar sends notice of hearing |
| Motion to single Judge or Registrar | RR. 47-51 | Original and 1 copy<br>Motion related to LTA may be filed with LTA (if bound, grey covers – if so, add 4 copies)<br>Serve and file electronic version<br>**Response**: within 10 days after service (if bound, green covers)<br>**Reply**: within 5 days after service (if bound, grey covers) |

**Abbreviations**

LTA : Leave to Appeal
LTI : Leave to Intervene
NoA : Notice of Appeal
AoR : As of Right
R : Response or Respondent
Ry : Reply
RCA : Response to Cross-Appeal
A : Applicant or Appellant
CQ : Constitutional Question

CoP : Clerk of Process
NTP : Notice to Profession
N/M : Notice of Motion
SD : Security Deposit
I : Intervener
CA : Court of Appeal
LCA : Leave to Cross-Appeal
CC : Criminal Code
PoJ : Pronouncement of Judgment

F : Factum
AR : Appellant's Record
AF : Appellant's Factum
ABA : Appellant's Book of Authorities
QoL : Question of Law

FJ : Formal Judgment
RR : Respondent's Record
RF : Respondent's Factum
RBA : Respondent's Book of Authorities
BoA : Book of Authorities

1. **Motion to a Judge or the Registrar**
Must include draft of Order sought including costs: Rule 47(1)(e)
Print and electronic

2. **Computation of time**
i) Holiday: a day that's a holiday not included in computing time period of less than 6 days (Rule 5(2))

ii) July: July not included in computation of time except for, ie July is included for:
service and filing of:
1. F, Record, BoA at appeal stage
2. Motion, Response, Reply for LTI in an appeal.
3. NCQ under 61(2) (Rule 5(3))

iii) Dec. 21-Jan 7: not included in computation of time except for LTA, NoA (Rule 5.1), and Motion to state CQ

iv) Time is otherwise computed according to *Interpretation Act*.

3. **Computation of Days**
- the day on which the first event occurs is excluded
- the day on which the second event occurs is included
(s. 27(2) *Interpretation Act*)

4. **Computation of Weeks**
- see R. 5 (1.1)

## 3. THE STANDARD FOR GRANTING LEAVE

The standard - even though it's circular - is set out in s. 40 (1) of the *Supreme Court Act*:

> "by reason of its *public importance* or the importance of any law or any issue of mixed law and fact involved in that question, one that *ought* to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to *warrant* decision by it " (emphasis added).

Probably a more realistic and practical standard is that set out by Madame Justice Wilson in a 1989 decision;

> "it is important to look not only at the impugned legislation ... but also to the larger social, political and legal context."[13]

And Chief Justice McLachlin has written:

> "When considering whether to grant leave to appeal, the Court looks at whether the issue in some way extends *beyond the interest of the immediate litigants*.
>
> *Contradictory decisions* on the same point of law among two or more provincial courts of appeal is *often indicative* of the issues suitable for hearing by the Court. The entrenchment of the *Charter* has greatly increased the number of constitutional cases where leave to appeal is granted. A right of appeal may also be accorded on a *novel point of law*, where a c*onflict of doctrine* exists or where a *pervasive provincial statute* is called into question.

[13] *R. v. Turpin* [1989] 1 S.C.R. 1292 at 1331.

> The Court today is also making a concerted effort to hear *private law cases* that raise important issues, to ensure the continued development of a healthy Canadian jurisprudence in private law."[14]

Another standard which may be realistic is the following:

> "Does this sound like an interesting case we'd like to hear argued before us?"

Were the latter true in some cases, then strategic considerations enter into how the leave to appeal factum and response factum (depending on the case) should be drafted.

## 4. WHETHER TO APPLY FOR LEAVE IN THE FIRST PLACE

Some practical considerations:

- you've got 60 days (in most cases) to put in your leave to appeal. Wait until you (or your client) have cooled off from losing at the Court of Appeal - make the decision carefully and objectively: ask the question: will your case satisfy (or be made to satisfy) the standard for leave?

- do chances of success warrant the cost and trouble?

- if you've lost at the Court of Appeal in a particular province/territory, is there a risk that appealing to the Supreme Court of Canada could mean losing there too, and thereby establishing a negative country-wide precedent?

- is there a solid and substantive basis for the appeal (as compared to a procedural/interlocutory one) with issues really suited for a determination by Canada's highest court?

- is the decision below based more on credibility or findings of fact?

- even if there is an error of law below, is it so substantial as to have affected the outcome of the trial or the Court of Appeal decision?

- are you really filing a leave to appeal because your clients want you to, or because it is your considered and professional opinion that an appeal is order, and has a realistic chance of success?

- are there Court of Appeal decisions in opposition to each other that require settling by the S.C.C.?

- if there is a *Charter* issue, was it squarely raised at trial and was there a sufficient factual context put forward at trial to sustain it?

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[14] *Appeals to the Supreme Court of Canada, Law Matters*, CBA Alberta, April 2005, p.4. Emphasis added.

- if a particular provincial/territorial statute /regulation (or provision thereof) is in issue, are there similar provisions in other provinces/territories/federally which one could argue would be directly affected by a S.C.C. decision?

## 5. PRACTICAL ADVOCACY

To get right to it, the key practical considerations when 'designing', drafting and strategizing a factum are bulletized below.

But first, three preliminary strategies that can develop the impact of a factum, all three rather obvious, but all three often (surprisingly) ignored in practice:

- **The opening:**

  Your factum should create anticipation immediately. A strong focussed opening paragraph emphasizing the public importance (or lack of public importance if you're the respondent) can be very effective. Don't do the usual and simply give a one-paragraph procedural history of what happened below.

- **Analogy:**

  An analogy that brings home the essential importance of your case (or again non-importance if you're the respondent). Recently seen:

  - a case involving discipline of an auditor by a discipline panel allegedly comprising direct competitors: "It will be the legal equivalent of a cow wandering in to a slaughterhouse".

  - a sex abuse case: "A neon light that never goes off".

  - a re-trial of a 79-day trial involving elderly (aboriginal female) witnesses: "The legal equivalent of watching ambulance drivers stuffing car accident victims back in to the car wrecks".

- **The closing:**

  Likewise can be very effective. Can pull the whole factum together into one whole, or rephrase and redevelop the opening, to give the factum a feeling of logic.

### (a) When Acting for the Applicant

- consider filing an affidavit with the leave to appeal, setting out the reasons why your case raises issues of public importance. Not an expensive hired gun (academic or otherwise), and certainly not a lawyer; preferably somebody objective from that industry who can attest as to impact, and what that impact is.

- if legislation is involved, look at other provinces /territories /federally to see if they have similar provisions, and list excerpts in a pull-out chart. Thereby suggest all of that legislation is also "on trial".

- if legislation is in conflict, emphasize the problem this conflict produces, and the appropriate role of the S.C.C. in giving a national solution.

- in criminal cases, emphasize a question of law impacting on the administration of justice, or the *Charter* itself.

- in both criminal and civil cases, conflicting Court of Appeal decisions should of course be highlighted.

- something very important for every Applicant is that the facts are their Achilles' heel. The S.C.C. presumably wants cases with clean settled facts, not cases with highly disputed facts when they're being called upon to be a trial court. A good way to deal with it is to do a strong first paragraph which sets out what the case is really all about ("This case is about..." is good), followed by a second paragraph giving only the necessary facts the S.C.C. needs to know to understand the legal issues and understand the issue of public importance (commencing for example "A brief factual chronology is as follows:..").

- the opening paragraph is key. It sets the scene. It should tell it all, in simple non-legal language. It may be read first.

- likewise the issues section. May be read first. Must be drafted with extreme care to demonstrate public importance.

- Table of Contents may be read first also. Here headings and subheadings which make a positive statement, and develop a logical flow, should be used.

- if the proper role of the Court of Appeal viz-a-viz the judge-at-first - instance role of the trial court is possibly in issue (for example, assessing the evidence), have a look at (and possibly quote/refer to) the following S.C.C. cases:

    - *Pax Management Ltd. v. Canadian Imperial Bank of Commerce* [1992] 2 S.C.R. 998 at 1013

    - *Ont. (A.G.) v. Bear Island Foundation* [1991] 2 S.C.R. 570 at 574

    - *R. v. Burns* [1994] 1 S.C.R. 656 at 663

    - *R.J.R. MacDonald Inc. v. Canada* (A.G.) [1995] 3 S.C.R. 199 at 334

    - *ter Neuzen v. Corn* [1995] 3 S.C.R. 674 at 694, 701-2, 709

- *D'Amato v. Badger* [1996] 2 S.C.R. 1071 at 1090-91
- *Schwartz v. Canada* [1996] 1 S.C.R. 254 at 278-281
- *Hickey v Hickey* [1999] 2 S.C.R. 518 at 528-529
- *Housen v Nikolaisen* [2002] 2 S.C.R. 235 at 245-263
- *H.L. v. Canada (Attorney General)* [2005] 1 S.C.R. 401, two paragraphs in particular: paras. 1 (p. 409) & para. 56 (pp. 421-422)
- *Shafron v. KRG Insurance Brokers (Western) Inc.* [2009] 1 S.C.R. 157, paras. 13 (pp. 164-5), 47 (p. 176), 55 (p. 179), 58 (p. 180)k
- but see also: *Madsen Estate v. Saylor* [2007] 1 S.C.R. 838 at 846, "…where the circumstances warrant, appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record…" (*per* Rothstein J.)

- particularly when on for the Applicant, resist the temptation of the protective cover of legal jargon and academic argumentation. Be real. Be yourself. Write it the way you'd say it. The way you'd explain it to the person making you a "medium double double"[15] at *Tim Horton's* or a "Skinny Frapp"[16] at *Starbucks*. Write your academic article later, after you've won.

- do <u>not</u> be tempted to argue the whole appeal or do a redraft of your Court of Appeal factum. It's all different now, there's only one theme: public importance.

- likewise do *not* focus on all the merits of the appeal or why you should win the *appeal* or worse, focus in on the factual detail of your case.

- it can be very useful (for the Court) to set out both the jurisprudential and <u>social</u> context of your case, and tie it to practical reality.

- because practically no leaves to appeal are actually heard orally, the written memorandum of argument "should be a self-contained and comprehensive explication of the reasons why the case deserves the attention of the Supreme Court."[17]

- you should not have more that two or three points in issue - some have ten or more, which dilutes effectiveness - few Courts of Appeal make ten major errors in one judgment.

[15] Medium coffee, double cream, double sugar.
[16] Non-fat Frappuccino
[17] *Supra* note 4, p. 239.

- the final and fundamental point is that the leave to appeal factum should be specifically designed and drafted so as to get the Court's *interest* - *not* convince them of the right of your case or the merits of your appeal. It's *almost* worth drafting your leave to appeal factum from scratch without looking at facta below.

**(b) When Acting for the Respondent**

- See above with regard to certain matters such as headings, table of contents, analogies etc. which also apply to a Respondent.

- As noted above, the facts are the Applicant's Achilles' heel. One option (among others) is to attack the heel, argue facts, not law (unless the law is settled, and settled recently by a Court of Appeal/Supreme Court of Canada decision). Do a complete review of the trial transcript (or material filed in chambers) and see what key facts/factual findings you can legitimately take issue with.

- If you can argue the case is only important locally, or to the parties themselves, say so, and say *why*.

- If the trial judge was upheld by a unanimous Court of Appeal, say so - in the first (or second) paragraph.

- Only argue law if you really have to - there's only really one issue: public importance, and should the S.C.C. want to hear the case. The actual legal merits of the case are of secondary importance - for now (of primary importance at the appeal itself).

- Can the case at trial or at the Court of Appeal below be developed by you as Respondent in such a way as to encourage the reader to legitimately think "This has all been fully dealt with below. Why should we get in to this?"

- Consider the pros and cons of filing an application to adduce fresh evidence (and consider filing the fresh evidence with the application).

- As a Respondent, the best way to win at the Supreme Court of Canada is never to go there at all: put the necessary time and resources in to your response factum, to avoid the risk and expense of a full appeal.

- A pragmatic way to respond to a leave to appeal is:

- this is a factually based case;
- set out the trial judge's/chamber's judge's key findings, which if undisturbed, leave no issue;
- the case is important only to the parties;
- the case is important only to the particular locality/province/ territory;
- the case is not really a "final or other judgment"[18] of a Court of Appeal, but rather procedural or interlocutory in nature.

- A strategically-written Response factum should be focussed, surgical and above all sleep-inducing – encouraging the reader to say "no big deal here".

**(c) When Acting for the Intervener (In a leave to appeal)**

In some (though not many) you may wish to apply to intervene:

- You can now (under the new *Rules*) apply for leave to intervene in a leave to appeal[19].
- Focus in on the issue of public importance.
- Walk your own path. Don't merely sing in the choir of one side or the other.

## 6. AFTER THE FIRST DRAFT & PRIOR TO FILING: TECHNICAL COMPLIANCE

The Court is strict on technical compliance with the *Rules*.

But it is more important than mere technical compliance: the closer your factum is to the standard format in which the judges and their clerks generally read factums, the more persuasive and professional your factum will be.

Supreme Court of Canada Registry gives out a checklist to counsel when a factum is rejected, which sets out selected technical matters the staff specifically check, some of which are as follows:

- 21.5 cm x 28 cm paper
- printed on left
- proper font size (typeface no smaller than 12 pt and no more than 12 characters per 2.5 cm)
- proper line spacing (1 ½)

[18] s.40(1) *Supreme Court Act.*
[19] Rule 55, but on motion.

- margins not less than 2.5 cm
- correct colour of cover
- correct style of cause *per* Rule 22 (2) – (3)
- names, addresses, telephone, fax and email addresses of counsel and agents
- pages numbered top centre
- paragraphs numbered consecutively
- not in excess of page maximum
- table of authorities: alphabetical order, paragraph numbers
- reference(s) in factum
- signed by counsel
- reasons and formal judgment for all courts below
- proof of service.

## 7. CONCLUSION

**In conclusion**, leaves to appeal are the most common filing at the Supreme Court of Canada, ranging from approximately 550 to 650 the last number of years. To get leave, practical written advocacy is important. It's not difficult. It only takes time. And a brutal editor. But as everyone's mother has probably told every child, "If it's worth doing, it's worth doing well".[20]

**And one final thing:** don't rely on your computer's spell checker. The following paragraph would pass muster:

> *Scottish (or English) spelling can seam like a maize,*
> *and put won straight into a hays.*
> *Butt now never fear, the spell-checker is hear,*
> *and is sew well-deserving of prays.*
> *Butt let awl pore spellers bee ware of the checker*
> *(as well as the therapist – or should that be the rapist)*
> *and ewes it with care, lest yore hair bee turned into a hare.*
> *Or lest you be thought the Loch Ness Monster (or worse, his butt).*

[20] The Celtic corollary, oft quoted by my grandfather if it's *not* worth doing: "Save yeer breath tae blaw on yeer porridge"...