Strategic Legal Writing: Preparing Persuasive Documents

by

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Hon. Justice Cheryl Robertson, Ontario Superior Court of Justice, Kingston

1. INTRODUCTION: THIS ISN'T A PAPER[1]

To speak plainly, follow what's recommended here, and you'll be able to:

- write your decision faster
- write your decision shorter
- write your decision more understandably,

and, you'll get appealed way less.

This isn't even a paper (and deliberately so). It's simply a list of practical points our *Supreme Advocacy* team in Ottawa uses to strategically revise what someone else has written (whether Reasons, a Factum, whatever) as a first draft, or to draft from scratch. There's nothing worse than reading someone else's writing about writing. The points below reflect a practical, no-nonsense summary of some of the more effective tactics of law related writing.

2. LEGAL WRITING – KEEP IT SIMPLE

1. Keep your message simple. Ideas still need to be big, but to be effective they must be clear and focused. Try to be simple enough that a stranger, preferably a non-lawyer, can read and understand it.
2. The best argument is that which seems merely an explanation. Essentially, you know you have created a strong 'marketing' argument when your reader responds by saying, "That makes sense".

3. KNOW – AND WRITE – TO YOUR AUDIENCE

Communicating to a new audience

3. Changes in information communication processes present new challenges to legal writing. Persuasive legal writing must consider and tackle the challenges presented by the impact of television, computers, e-mail, texting, and tweeting.
4. Take for instance, simply the effects of just one medium, television, on communication:

   Passivity – Information is delivered in a painless, non-challenging, puréed form with built-in techniques that motivate audiences to stay tuned.

   Inattention – One listens with barely half an ear.

[1] Ideas from this paper taken from writer's personal experience and other material, including Selected Bibliography at end of this paper, and in quotes from other material therein.

Lack of continuity – Commercials and daily-life interruptions teach us to expect information in small bites (bytes?).

Tight succinct stories – One and one-half minutes per (long) news story.

Visual support – Words are no longer the message givers; pictures tell the story.

Remote-control dismissal – We know how much power we have to dismiss anyone or anything that does not please us right away. It's not easy for the reader to just to turn the page.

Give practical context

5. Give colour, ambience, and action – for example:

   - Not "the car was moving in a northwesterly direction," But "the red car left the curb and started up Main Street toward the McDonald's on the corner"
   - Not "and in the files one finds", But "when he opened the drawer marked 'last year's accounts,' he found nothing".

4. GENERAL OVERALL RULES

Legal writin' versus ordinary writin': one purpose – think tactically, write strategically

6. Legal writing differs from other sorts of writing in that it is singularly directed toward persuading the reader (a party, tribunal member, trail judge, arbitrator or other decision-maker) to accept a certain position. Everything you write should put into the reader's mind the information, the decision, and reasons why. You're not writing to entertain, show how smart you are, how many authorities you can cite for one proposition.

Look at how things look

7. Tribunal members and counsel spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

Reader-friendly writing

8. Legibility (easy reading) is fundamental to readability (easy understanding). Good legibility is determined by font choice and the relationships between type size, line length and spacing (between letters, words, lines and paragraphs). An effective document is one that conveys your message well and quickly. A number of simple, but important, rules of thumb include:

   - don't rely entirely on standard prosey block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader;

- use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., 1(a)(i)). If you feel the need to go beyond that then chances are you've overused headings (you aren't drafting legislation after all). Avoid roman numerals — they look too much like a foreign language;
- if the items listed have no rank ordering, then bullets are preferable to numbered lists;
- never use a font smaller than 10 or larger than 12 for the main body of the text;
- avoid lines that are entirely capitalized ─ their uniform size makes them difficult to read;
- avoid underlining ─ it's a throwback to the days of typewriters. Use italics or boldface to add emphasis;
- there is evidence that justified right margins make text harder to read, so it may be best to use ragged right margins for factums;
- align headings to the left in a larger, bolded font. Use a smaller bolded font for sub-headings;
- readers like "white space", and makes the rest more easily absorbed.

Run-on sentences. Big words.

9. Most law folks (tribunal members, judges, lawyers, others) write sentences that are too long. Small words work better than big ones.

Writing too much

10. Words are key to persuading. Too many words and the reader tunes out. Too few and they think you're hiding.

Legalese: drop it

11. Don't clutter your writing with long literary language that only law folk can be bothered to decipher. Legalese or medical lingo may now be second nature to you, but it sounds exclusive rather than inclusive.

Avoid long paragraphs: one-breath rule

12. A good rule of thumb is that a paragraph should not be so long that it cannot be read aloud in one breath (generally 2-3 sentences). If you have more to say, then break the ideas into separate paragraphs.

5. BAD WRITING: READER FEELS DUMB. GOOD WRITING: READER FEELS SMART

13. Deliver the goods simply, quickly, efficiently. Write in ordinary simple-to-understand language:

    - if you're writing it and it makes you feel smart, it probably makes the reader feel dumb
    - good writing makes the reader feel smart
    - bad writing makes the reader feel dumb.

14. Bottom line: good legal writing looks as if someone other than a tribunal member, a lawyer or other professional has written it.

Beware the acronym

15. Although trendy, acronyms can become the nemesis of clear writing. Overuse, or unclear/confusing use, defeats the purpose of pithy and unobtrusive shorthand. The best approach is to use them sparingly and rely on shortened versions of terms that will be immediately obvious to the reader.

Avoid formulaic qualifiers and phrases

16. They're a waste of space and add nothing to the quality. Classic examples include:

    - the appellant respectfully submits... (there's only so much respect even a judge can absorb)
    - for all the foregoing reasons...
    - we would submit…
    - essentially…

    Get rid too of verbose/fancy-dancy intros/fillers:

Instead of	Use
At that point in time	Then
By means of	By
By reason of	Because
By virtue of	By
For the purpose of	To
For the reason that	Because
From the point of view	For
In accordance with	By
In connection with	About
In favour of	For

In order to	To
In relation to	About
In terms of	In
In the event that	If
In the nature of	Like
On the basis of	By
Prior to	Before
Subsequent to	After
With a view to	To
With reference to	About
With regard to	About
With respect to	About
The fact that she had died	Her death
He was aware of the fact that	He knew that
Despite the fact that	Although
Because of the fact that	Because
In some instances	Sometimes
In many cases	Often
In the case of	When
In the majority of cases	Usually
It is not the case that he	He did not
During the time that	While
For the period of	For
There is no doubt but that	No doubt
Whether or not	Whether
The question as to whether	Whether
Until such time as	Until
Attend at	Go to

6. NOTHING IS ABSOLUTE

17. Absolute expressions (*all*, *always*, *every*, *invariably*, *never*, *none*, *totally*, *undoubtedly*) are rarely accurate and should be used lightly.

18. Absolutes tend to trigger a reader's perversity; once told "the campaign was a total failure," many readers begin to hunt for signs of partial success.

19. So avoid what Justice Laskin calls "false intensifiers" such as "certainly," "clearly," "absolutely", which actually weaken rather than strengthen whatever you're saying.

20. Understatement works much more strategically than overselling.

7. WHAT ARE YOU GOING TO CALL THEM?

21. Avoid lazy/easy short forms like appellant/respondent. The reader will never get into the story if the main players are faceless.

22. Don't make it a struggle for the reader to figure out who is who. Maybe use the word that describes who they are/what they do — doesn't have to be complicated:

    - Landlord, Tenant, Construction Company, worker, supervisor, whatever
    - use the parties' real names whenever possible
    - if the names are long, shorten them but don't take them out.

23. What you call them (or don't call them) may be a strategic decision.

8. TELL A STORY

24. Every file (that is absolutely every file) has a story. The basic elements of every story are:

    - the beginning, the middle, and the end
    - a compelling point of view
    - simple active sensorial language (i.e., language that evokes sensory images)
    - consistent use of the present tense.

Making your story work

25. Writing a story isn't easy (if it was we'd all be John Grisham and wouldn't have our day jobs). Figure out what your story is, map out the main components, write it down and then build the necessary legal elements around that framework. Include a couple of simple elements:

    - setting your story in a particular time and place
    - including a human element
    - some familiar details
    - simple, ordinary and disarming language
    - visual words
    - an event of personal importance that everyone can relate to
    - an absence of argument (the reader doesn't want to feel like you are manipulating them down a garden path).

Tell your story in the present tense

26. The present tense is really important. Telling the story in the past tense turns the reader into an observer. In contrast, the present tense makes them a participant, wondering what's going to happen next.

9. POINT-FIRST WRITING: DON'T WRITE IT LIKE A MYSTERY NOVEL

27. Make sure you clearly and explicitly state your point or proposition before you start; try and develop or discuss it. Avoid writing your reasons (or even a paragraph) like a mystery novel, focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn't have to figure it out. You're trying to persuade the reader to accept your reasoning, not show how clever you can be at telling a complex convoluted story. It's better to provide context before detail, tell the reader off-the-bat what issue or idea or topic you're going to discuss in the paragraph, articulate it in the first sentence (usually your conclusion or submission on that issue) and the remainder of the paragraph is there to support your position.

10. FIND A THEME

28. The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance "Did the defendant value money more than safety." In such instances, it is not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.

Write your theme down

29. For best effect, write down your theme before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour. Start "this case is about…".

11. DATES: WHEN TO, WHEN NOT TO

30. Many folks writing legal stuff add in dates because it makes them feel precise or clever. But don't fall into the trap of writing it for yourself – write it for the reader that's going to read it. Usually dates are just clutter.

    e.g.: "On Oct. 15, 2016 , Dr. McTavish informed the Plaintiff the pain running down the back of her leg was from a pulled hamstring. On Nov. 16, 2016, the Plaintiff reported ongoing leg pain, and Dr. McTavish became concerned there was a more serious issue. The Plaintiff returned to Dr. McTavish on Nov. 30, 2016, Dec. 7, 2016, and Dec. 20, 2016, each time complaining that her leg pain persisted. Dr.

> McTavish referred the Plaintiff to an orthopedic surgeon on Dec. 23, 2016, and on Jan. 10, 2017 the surgeon diagnosed a herniated disc that was impinging on the Plaintiff's sciatic nerve."

31. Here's the basics on when to, when not to, do the date thing:

- dates distract
- if the issue has no time-sensitive legal imperative, drop the date
- putting in unnecessary dates gives the reader the cue that there is a time-sensitive issue, then stay on the lookout for that phantom point, and when they realize they've been fed a false impression they get p*ssed off
- putting in a date that's not key diverts the reader from what you want them to be looking for – all you've done is create your own red herring.

32. So how do you establish the chronology of events without using dates? Here's how:

- focus on the temporal relationship between important events by using words and phrases that quickly capture that relationship for the reader
- use simple words indicating time, such as: then, after, before, following, later
- avoid fancy alternatives like: subsequent to, prior to, at which point in time
- instead of referring to raw dates, use units of time, such as: hours, days, months, years.

33. Here's the original example, re-written:

> "Dr. McTavish originally told the Plaintiff the pain running down her leg was from a pulled hamstring. But a month later she reported ongoing leg pain, and Dr. McTavish became concerned that there was more serious injury. The Plaintiff returned to Dr. McTavish three more times in the next two months. Each time complaining her leg pain persisted. After the last visit, Dr. McTavish referred the Plaintiff to an orthopedic surgeon, who diagnosed a herniated disc that was impinging on the Plaintiff's sciatic nerve."

Did you miss the dates, understand what happened, and when?

34. What if you're writing about a time-sensitive legal issue, and you need to include specific dates, what to do then? Simple best way: calculate the relevant time frames for the reader and state them explicitly.

Three examples:

- "On October 23, 2016, two weeks before the close of Discoveries, defence counsel sent a letter seeking dates for the Plaintiff's examination. Almost two weeks later, on November 4, 2016, the Plaintiff's lawyer responded with two available dates."

- "The Plaintiff learned that she had a possible negligence claim in March 21, 2016 which triggered the six-month discovery period against the City Defendant. She served her Statement of Claim less than 5 months later, on August 4, 2016."
- "The Court ordered the Defendant to produce the document by February 13, 2017. Nevertheless the Defendant remained uncooperative – producing the disputed Records more than two weeks beyond the Court's deadline, on March 3, 2017."

Doing the math for the reader not only makes the sequencing of events more obvious, but gives you the opportunity for strategic advocacy: to drive home a point in a way you could not with raw dates alone.

12. SKIP THE CLICHÉS

35. Expressions worn thin by countless repetition are not persuasive and should be avoided.

36. Everyone's familiar with the expressions below – familiarity is precisely the problem:

- Add insult to injury
- Bitter end
- Blind as a bat
- Turn for the worst
- Pitch black.

37. Clichés diminish the credibility of your reasons.

13. BUT AN APPROPRIATE ANALOGY IS OK

38. As a practical reality, most people reason from analogy based on their experience. People decide what feels right. Many tribunal members/judges cannot easily accept a new proposition unless it's a logical extension of an already-held view. A simple analogy can go a long way toward convincing your listener/reader, either to confirm what they already accept, or move one step sideways from an accepted position.

14. BE REALISTIC – MAYBE THERE'S ANOTHER SIDE TO THIS?

39. Every case has two sides (and sometimes three, or more). If you close your eyes to the other side's case (often, the person who's going to lose) your credibility will be affected if you ignore, or worse deny, indisputable problems.

40. A good strategy is to be the first to reveal the damaging information. Do not describe it as a "problem", call it a "challenge". Tell the reader so any reviewing court sees you've put it out there. Sounds simple, but be fair − it builds reputation.

15. BE SELECTIVE IN WHAT YOU CITE

41. Only cite the leading case, or, at most, the two leading cases. Safety lies in authority not in numbers. Citing 15 cases for the same point of law tells the reader/reviewing court one of three things:

    - there isn't any real authority for your position
    - you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
    - you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

42. Will explain (in person):

    - Double-L rule
    - Triple-L rule.

16. AND ONLY INCLUDE NECESSARY QUOTES

43. People hate to (and usually don't) read long block quotations. Paraphrasing is usually a better strategy than direct quotation. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:

    - keep it really short
    - edit (use three periods…when you edit out)
    - add emphasis.

17. AND ABOUT CITATIONS

44. **Always** when citing a case put the actual page/paragraph that your point/quote is on − proves, at a minimum, you've read it, and not pasted it over.

18. CHECK YOUR WORK: FLOAT IT BY SOMEONE ELSE

45. Two tribunal members (or, better, a member and a non-lawyer) are generally better than one. So, after you've done a few drafts, let someone who isn't familiar with the case have a look at it. Listen, don't talk, or explain – if you have to talk or explain, whatever you've written is not good enough. A Scottish farmer friend of mine says, "When I talk I learn nothin'".

46. John Steinbeck: "No one wants advice − only corroboration".

47. Don't be shy to redraft − and redraft till you get it right. No serious writer gets it right the first time − why should you? Louis Brandeis: "There's no such thing as good writing − only good rewriting".

19. BE REAL, DON'T BE ACADEMIC

48. Don't be academic. Write your law review article after you've retired. The key to a good decision is: clarity, brevity and simplicity. No-one has ever been convinced by an argument they didn't understand (no matter how brilliant it may have been).

20. TABLE OF CONTENTS AND WHY HEADINGS ARE IMPORTANT

49. In all likelihood, your table of contents will be read first. The purpose of the table of contents is to help the reader navigate through the body of your decision. Therefore, your headings and subheadings summarize your decision; mirroring the logical flow of your reasons.

50. Choose headings and subheadings (so they'll show up in the table of contents, if you're doing one) that:

- make a positive statement
- develop a logical flow.

21. THE FACTS SHAPE THE OUTCOME

51. All courts are powerfully influenced by the equities of the case, by the needs of real people. The facts have an overriding influence. The facts really are the hardest part (well, issues section is tough too) to write because of our training or experience. Writing legal argument is almost easy, but the facts are where most of the time should be spent. After all, the facts are the context within which the legal issues are decided and that factual context is therefore highly determinative of the overall outcome.

52. Justice Laskin: "Judges strive to do justice between the litigants, and almost always the facts show where justice lies. I call this the paradox of appellate advocacy. Despite 'patently unreasonable,' despite *Housen*, and despite deference to discretionary decisions, the facts matter far more than the law in most appeals."

Frame facts to fit theme

53. Scenes or units of action that illustrate the theme are more engaging than narrative summaries of facts or courtroom recitations of evidence.

Craft your facts

54. Although readers generally best remember stories told in chronological sequence, it may be more strategic for us not to start at the beginning but start with the most significant event in the case.

55. For example, starting with the accident itself, is an option.

22. TEN ADDITIONAL POINTERS FOR ADMINISTRATIVE TRIBUNAL DECISION-WRITING

No. 1. Develop a Template, Use It, Stick With It.

56. For example, here's the standard S.C.C. C.J. Dickson-developed basic template the S.C.C. has been using the last 40-plus years – works for them:

(i) Facts

(ii) Judgments Below

(iii) Issues [followed by subheadings]

(iv) Analysis [followed by subheadings – generally tracking the same subheadings, and in the same sequence, in the Issues section]

(v) Conclusion/Disposition.

57. One important note, in terms of avoiding complexity, the S.C.C. generally sticks with not more than three levels of headings/subheadings, eg.:

- Main heading: (iv) Analysis
- Subheading: eg. "A. Colour of Right Defence" – subheadings alphabetized A-D/whatever (without brackets)
- Sub-subheading: eg. (1) "Testimony of XYZ" – sub-subheadings sequenced numerically (1)-(4)/whatever (with brackets).

If your case were to eventually go on to the S.C.C. on appeal:

- would it look good if you'd followed their template
- even if (or, particularly if) tribunals/courts above you did not?

No. 2. Cite a Precedent (or two)

58. Has a previous decision already answered this question? While tribunals are not bound by *stare decisis* in the same manner as courts (*Weber v. Ontario Hydro*, [1995] 2 SCR 929 at para. 14), consistency is a valid objective and it generally lends strength to a decision (*Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*,

[1993] 2 SCR 756). Conversely, the presence of diametrically opposed decisions (eg two decisions going opposite ways) raises red flags.

No. 3. Keep it Short

59. If the S.C.C. can do it so can you.

Decision	Length[2]	# of Times Cited
Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62	26 paras.	2400+
R. v. Gagnon, 2006 SCC 17	25 paras.	1000+
Resurfice Corp. v. Hanke, 2007 SCC 7	30 paras.	750+
R. v. Shepherd, 2009 SCC 35	25 paras.	800+
R. v. C.L.Y., 2008 SCC 2	22 paras.	740+

60. Bottom line(s):

- writing too much just gets you in trouble
- why set up a large(r) target that makes it easier for others to hit/overturn?
- Chief Justice Lamer (in another context) − mother whale to calf: "If you hadn't gone to the surface and spouted, you wouldn't have gotten harpooned."

No. 4. Standard of Review: Minimize Your Chances of Being Overturned on Review
Area still fluid – keep up-to-date

61. Standard of review, remains a hot-button issue. Still fluid. It ain't over yet. Ask Commission staff lawyers for updates as needed.

But here's a quick-n'-dirty overview:

Reasonableness =

- is the decision below justified/intelligible/transparent
- does it fall within a range of possible outcomes
- and, is it defensible re facts and law.

Correctness =

- reviewing court needn't show deference

[2] Only majority reasons if there are multiple sets of reasons.

- can undertake its own analysis
- can decide if agrees/disagrees.

62. Plus a recently added 'gloss', added by *Ledcor Construction v. Northbridge Indemnity* 2016 S.C.C. 37:

    - where matters involves interpretation of a standard form contract
    - the interpretation at issue is of precedential value
    - there's no meaningful factual matrix specific to the parties to help in the interpretation process

    then this is better characterized as a question of law subject to a correctness review.

63. Look before you leap – keep the standard of review in the back of your mind when writing a decision. Under *Dunsmuir*, there are two standards of review: correctness or reasonableness. The SCC explained the choice between the two in *Smith v. Alliance Pipeline Ltd*., 2011 SCC 7 at para. 26:

> The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (Dunsmuir, at para. 60...); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61).On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

<u>No. 5.</u> It's Ok to Write an 'Uninteresting' Decision

64. Appellate counsel have an appetite for good legal controversy. Starve them.

65. See for example, a Court of Appeal's decision in *Hunter v. Wismer*, 2005 CanLII 22200 (Ont. C.A.) – what every court or administrative tribunal of first instance hopes to see on appeal or judicial review (what's below is the *complete* judgment):

> [1] We agree with the appellant's counsel that a case of this nature is very fact driven. This reality was indeed fully appreciated by the trial judge who in very carefully prepared reasons found that the appellant by reason of the lack of control of his snowmobile was "wholly at fault through his own negligence". We are of the view that there was sufficient evidence to support the findings of the trial judge.
>
> [2] The appeal is therefore dismissed.

[3] The respondent is entitled to his costs in the amount of $5,000.00 plus disbursements and GST.

No. 6. Consider an Oral Judgment (Inclusive of Reasons)

66. Q.B./Superior Court/Provincial Court judges often give Oral Judgments at the end of (or shortly after the end of) even long motions/summary judgments/trials of (even two weeks or more).

67. There's no need to write an LL.M. thesis. Only do enough – as some judges' motto is to "Get the job done". Write more when you've been moved up to the Supreme Court (of Canada) – and even they don't always write long.

No. 7. Template for Oral Judgments

68. Here's a good basic template if you go with the recommended (because it's easier and faster to write) issue-driven way to write judgments/reasons.

- Introduction
    - What this case is about
    - What issues are raised
    - [Additional background if needed]
    - [Assessment of credibility]
- First Issue
    - Relevant legal principle(s) & statutory provisions(s)
    - Positions of the parties
    - Evidence/ facts relevant to the issue
    - Findings of fact and credibility
    - [Law as applied to your findings of fact → your conclusion on this issue]
- Second Issue…
- Conclusion/Disposition.

No. 8. Always Consider The Following When Developing Your Judgment

69. Always consider:

- who is/are the persons(s) who most need to understand what my oral/written judgment says
- are there points/things I need to emphasize/repeat
- are the transitions clear, am I regularly telling them where I'm going

- have I acknowledged both parties' positions on each issue
- am I comfortable enough with my decision that I can deliver it with sufficient comfort and eye contact, including to the losing party[3].

No. 9. Common Error: The Fact Dump

70. Avoid the fact dump:

- no need to impress a reviewing tribunal/court with how much you know/how smart you are
- facts by themselves do not carry meaning, only have meaning in the context of issues
- put the facts close to the issues, it provides a filtering system whereby you'll see what you can leave out and what needs to stay in[4].

No. 10. If You Don't Ask, You Don't Get

71. Ask counsel/parties (have tribunal/court staffer ask) in advance for an Agreed Statement of Facts – even if partial.

23. AND FOUR FURTHER POINTERS AS TO THE SUGGESTED PROCESS FOR WRITING A TRIBUNAL DECISION

No. 1. Write it in this order:

- issues section
- facts section, highlighting facts relevant to the issue(s)
- analysis section
- disposition.

This is the fastest, and most effective way, to write a decision.

No. 2. Yes, use a template, but also use headings/subheadings specific to the decision at hand – it's easier for the writer to write, and easier for the reader to read.

For example, here's Chief Justice Dickson's use of specific headings in *Ogg-Moss v. R.* (1984) 2 S.C.R. 173:

(i) Background and Facts

(ii) The Decisions in the Ontario Courts

(iii) The Grounds of Appeal

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[3] National Judicial Institute, "Oral Judgments and Short Endorsements", Vancouver, Mar. 2015

[4] *Ibid.*

(iv) The Purpose and Effect of s. 43

(v) Is a mentally retarded adult a "child" for the purposes of s. 43?

(a) "Child" in s. 43 and its common law antecedents

(b) The functional reading of "child"

(vi) Is a Mental Retardation Counsellor a "Person Standing in the place of a Parent" to a Mentally Retarded Person Under His Charge?

(vii) Is the Relationship between a Mental Retardation Counsellor and a Mentally Retarded Adult Under His Care That of "Schoolteacher" and "Pupil"?

(a) "Pupil"

(b) "Schoolteacher"

(viii) Using Force by Way of Correction

(ix) Conclusion.

<u>No. 3.</u> Facts – not easy to write, because the temptation is to write down absolutely everything that happened so's you cannot be criticized for leaving anything out.

Here's five things judges are taught:

- reduce the statement of facts as much as possible; the only essential facts are those that are necessary to decide the legal questions at hand.
- introduce your judgment with a factual overview that clarifies the issue and creates a framework for the more detailed treatment of facts to follow.
- when the facts are not in dispute, avoid repetition by providing a factual overview, withholding details until they become relevant to the particular issues of the case.
- when the facts are in dispute, consider the following possibilities:

  (a) dividing the undisputed facts from the disputed facts.

  (b) narrating the facts as a unit, with the occasional interruptions for disputed facts.

- keep the reader informed of how you intended to handle the facts and why; when the facts are not in dispute, say so; when they are, indicate the nature of the problem and how you intend to handle it; in short, provide context before you plunge into the facts.

<u>No. 4.</u> And last, write for the losing party too:

- so they know you have fully considered their position

- but, don't go overboard – don't unwittingly set yourself up for an appeal[5].

24. CONCLUSION

Make sure there is one

72. Make sure there actually is a conclusion.

73. Occasionally, the relief requested can be tricky. Although there is a tendency to simply grant/deny the application or appeal, it's obviously worthwhile to carefully consider all of the alternatives before deciding.

Answer your own questions

74. Writing the conclusion is simple if the opening was well-drafted. You can close by answering the questions posed in the issues section. However, it isn't enough to simply give the answers, a good conclusion will also outline the reasoning that leads inevitably to the answer provided.

Finish where you began

75. Pick up the theme of your opening. Restate it, refine it, re-develop it. It can build a logical solidity, can close the circle.

If it's worth doing…

76. As my mother (Bernadette) told me (and your mother told you): "if it's worth doing, it's worth doing well".[6]

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[5] Edward Berry, "Writing Reasons. A Handbook for Judges" (2nd ed., E-M Press, 2001).

[6] Or as my grandfather (John Doig) would say when I tried to reply to my mother with any sentence beginning with "But" – "Save yeer breath tae blaw on yeer pooridge."

Selected Bibliography follows from which ideas in this non-paper are drawn, and which can be consulted for further information.