

Writing Tips and Strategies: Persuasive Fact Writing

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What are the facts?

- First instance:
 - Established in the evidence
 - Inferred from the evidence
 - Statutory presumptions
 - Judicial notice
- Review or appeal:
 - As found by the decision-maker at first instance
 - Fresh evidence

Why are the facts important?

- Justice Laskin on good advocacy:
 - tell the court why your client should win – “moral highground” (**facts**)
 - then, tell the court how to get there (**law**)
- “Most cases are decided on the judge’s view of the facts”
- Avoiding a vacuum

Why is how you write about the facts important?

- Facts are crucial, but even more so for facts
- Synthesize the record
- Chance to tell a story
- Communicating the justness of your position

Why is how you write about the facts important?

- Modes of persuasion:
 - **Emotional bond**
 - **Credibility and character**
 - Logical and rational argument

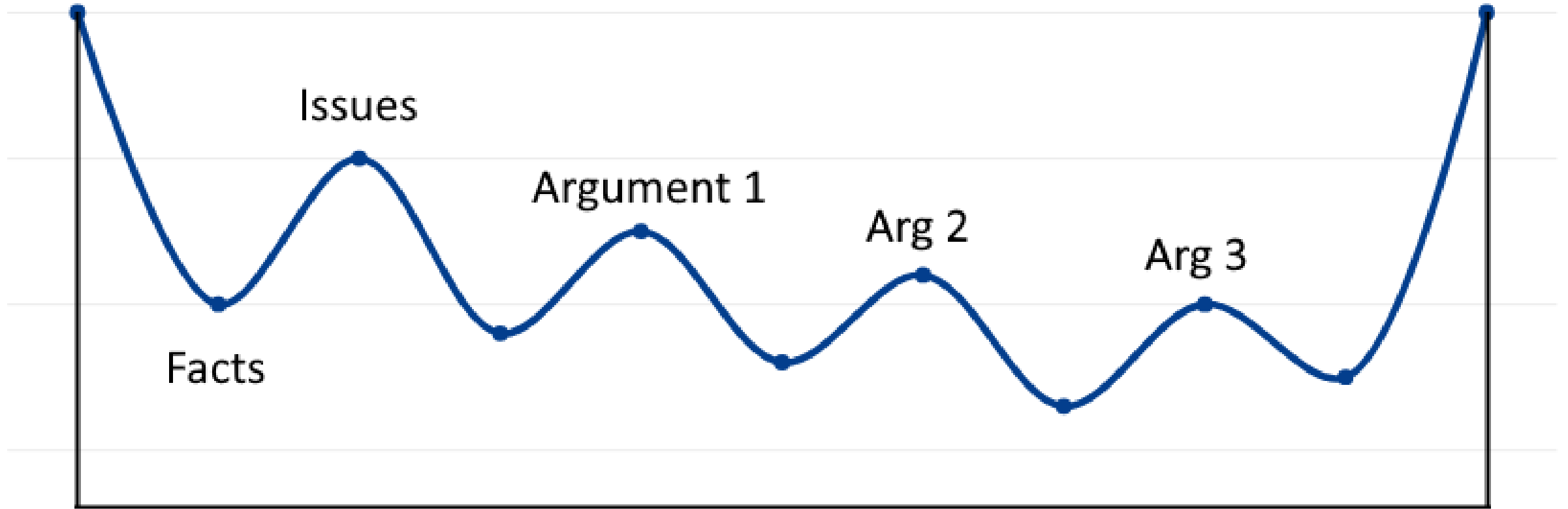
Golden Rule

- Always write for your reader, not for yourself
- It's not about you
- Who is your audience? Judges
- What do they know?
- What are characteristics common to judges?
- How do they prepare for a case?

Factum attention span

Overview

Conclusion



Be easy on the eyes 🙄

- White space
- Justification of text
- Varying font size & heading style
- Descriptive headings
- Graphs, charts and other visuals

You will read this first

1. And then you will read this second

You will read this third:

You might skip over this block quote completely because it's dense and looks like a lot of work to read. It's also filled with citations: R. Wydick, *Plain English For Lawyers*, 4th ed. (Durham: Carolina Academic Press. 1998) at 3, Bryan A. Garner, *Legal Writing in Plain English* (Chicago: University of Chicago Press. 2013); Chistine Mowat, *A Plain-Language Handbook for Legal Writers*, 2nd Edition (Toronto: Carswell. 2015). And maybe you're hoping that by just reading the sentence before and after it will explain what's going on in this block quote.¹

Then you will read this one fourth for the reason explained in the block quote.

¹ And you will read this last because if it's small and buried in at the bottom of the page it's probably not important.

Where do we write about facts?

- Overview
- **Statement of Facts**
- Statement of Argument

Statement of Facts

- **Factums on Summary Judgment – Rule 20.03**
 - (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a **concise argument stating the facts and law relied on** by the party.
- **Appellant’s Factum – Rule 61.11**
 - (c) Part III, containing a **concise summary of the facts relevant to the issues** on the appeal, with such reference to the transcript of evidence and the exhibits as is necessary;
- **Applicant’s Factums – Rule 68.04**
 - (b) Part II, containing a **concise summary of the facts relevant to the issues** on the application, **with specific reference to the evidence**;

Thinking about structure

- Parties
- Background/Context
- Story
- Legislative history
- Procedural history

Thinking about structure

- Create pithy but informative headings
 - Motion judge vs. Motion judge erred vs. Motion judge missed the third prong of the preferability analysis
 - Don't go more than a few pages without a heading
 - **Bold** or underline them
 - AVOID ALL CAPS
- Create an informative table of contents
 - Should provide a treetop version of why you should win
 - If it's not compelling, rewrite your headings

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS	1
A. Overview	1
B. Background and SOGI	2
C. The First Facebook Post.....	3
D. Reaction to the First Facebook Post.....	4
E. Neufeld’s Ongoing Public Statements	6
F. School Board Elections and Commencement of Defamation Proceedings	10
G. Decisions of Courts Below.....	13
PART II – STATEMENT OF ISSUES	14
PART III – STATEMENT OF ARGUMENT	14
A. Introduction: the PPPA.....	14

Thinking about structure

- Be thoughtful about the order
- Many options:
 - ~~Copy and paste the Statement of Claim~~
 - Separate disputed from undisputed facts
 - Witness by witness
 - **Chronologically**
 - **Topically**

Thinking about structure

- Before vs after
 - Good state of affairs and balance for Plaintiff
 - Defendant upsets balance
 - Significant impact on Plaintiff
 - Court should intervene to restore the balance
- Issues
 - Tort case split by elements needed to prove negligence
 - Contract case split by formation, implementation, breach, damages

What to include?

- Basic background facts
- 5Ws to address fundamental questions
- Facts to win and support the theory of the case
- Bad facts

What to include?

- Justice Stratas suggests reverse-engineering the case
- What do you need to support a cause of action?
- What's needed to support a legal test?
- What's needed to get to a particular remedy?
- What's essential for your story or narrative?

What to include?

- Facts section can be considered an overview of the facts
- Argument section is point first writing
 - State your point and then support it
 - **Fact** + law
- Context before details
- Why does the reader need to know this?

What to include? Bad facts & credibility

- Never misstate facts
- Careful with overstating claims
- Be careful omitting facts
- Address bad facts – context & relevance
- Concessions

Drafting tips – Better sentences

- Chief Justice McLachlin/George Orwell's six elementary rules of writing:
 - Originality
 - Simplicity
 - Brevity
 - Active Voice
 - Clarity
 - Flexibility

Drafting tips

- Refer to parties by name or label parties meaningfully
- Quote from transcript sparingly unless witness's own words are impactful
- Consider including a timeline or glossary

Drafting tips – Connections

- Make it flow:
 - Short
 - Transition words
 - Consider lead in paragraphs
 - Point first and no mysteries

Drafting tips – Fresh eyes

- Put it away and come back
- Make it impossible to misunderstand
- Write for your neighbour
- Have someone else read it

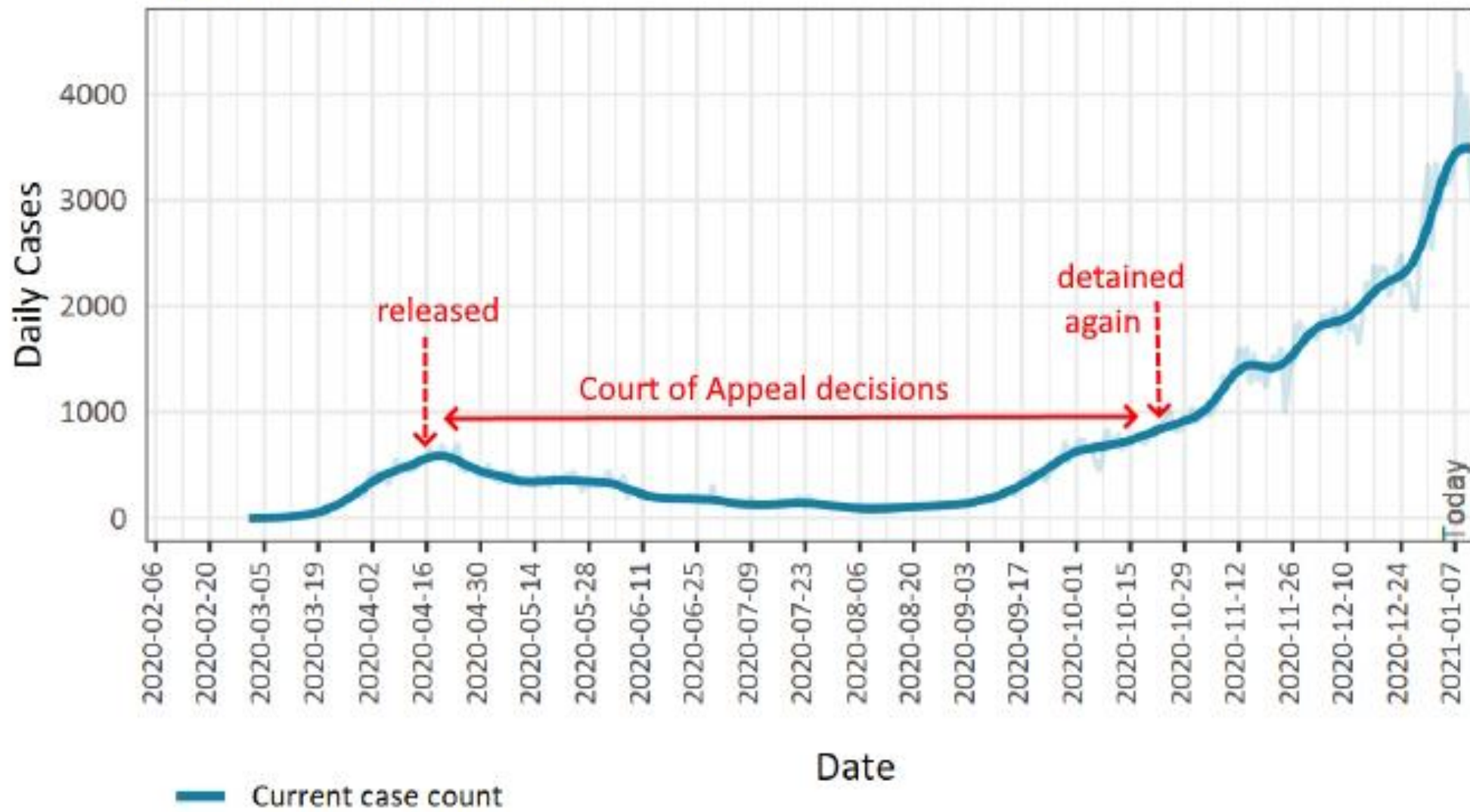
Drafting tips – Avoiding RDMs

- Its vs it's
- There, their, they're
- Singular vs plural possessives
- Consistent tense
- Sentence length
- Attribution
- Is the word “that” needed?
- **Read it out loud**

Visualizing complex material facts

- Malcolm Gladwell – *Blink: Power of Thinking Without Thinking*
 - Snap decisions
 - Unconscious differentiates between relevant and irrelevant information in seconds
 - Influenced by unconscious associations
 - Can be influenced by visual information
- Chris Guthrie – *Blinking on the Bench: How Judges Decide Cases*

Epidemic Curve: Ontario



Summary of PHO Restrictions in effect from Nov. 2020 to Jan. 2021



Effective Date	In-person Worship	Other Indoor Gatherings <u>Public Spaces</u>	Outdoor Gatherings	Indoor Gatherings at Private Residence
Nov. 9, 2020	Allowed (20% capacity with social distancing). ¹	Allowed (max 10 persons but many exceptions). ²	Allowed (max 10 persons but many exceptions). ³	Allowed (can have 5 guests). ⁴
Nov. 12, 2020	Not allowed (except for <u>max five person</u> funeral, wedding, baptism). ⁵	Allowed (max 5 persons but exceptions for retail). ⁶	Allowed (max 5 persons with social distancing). ⁷	Allowed (can have 5 guests). ⁸
Nov. 22, 2020 (order challenged)	Not allowed. ⁹	Allowed (max 10 persons but exceptions for retail). ¹⁰	Allowed (max 10 persons with social distancing). ¹¹	Not allowed (except for people who live alone <u>may have one guest</u>). ¹²

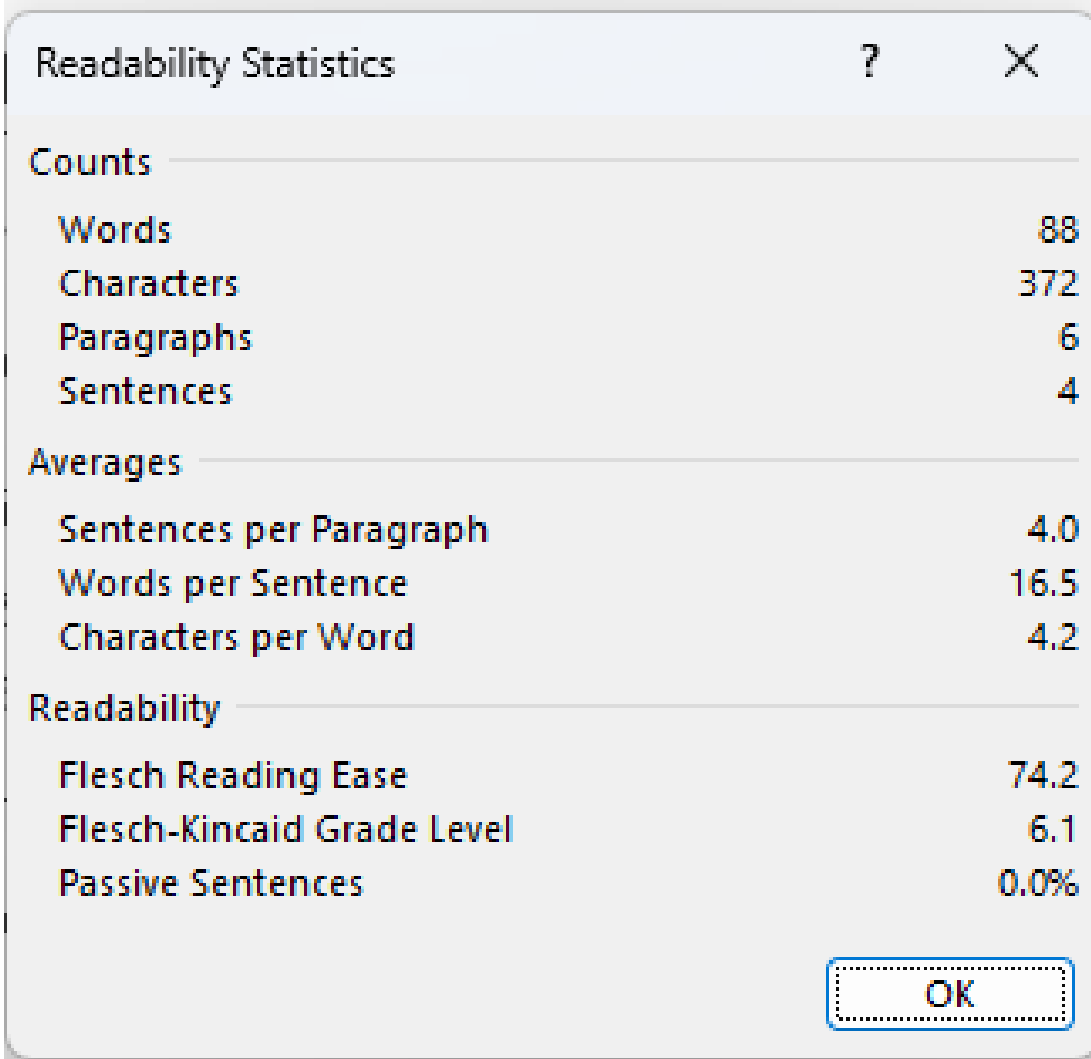
Writing tools

- Word – turn on readability stats
- Quillbot – shortening documents or summation
- Grammarly – spellchecking

Word readability stats

When correcting spelling and grammar in Word

- Check spelling as you type
 - Mark grammar errors as you type
 - Frequently confused words
 - Check grammar with spelling
 - Show readability statistics
-



Readability Statistics	
Counts	
Words	88
Characters	372
Paragraphs	6
Sentences	4
Averages	
Sentences per Paragraph	4.0
Words per Sentence	16.5
Characters per Word	4.2
Readability	
Flesch Reading Ease	74.2
Flesch-Kincaid Grade Level	6.1
Passive Sentences	0.0%

OK

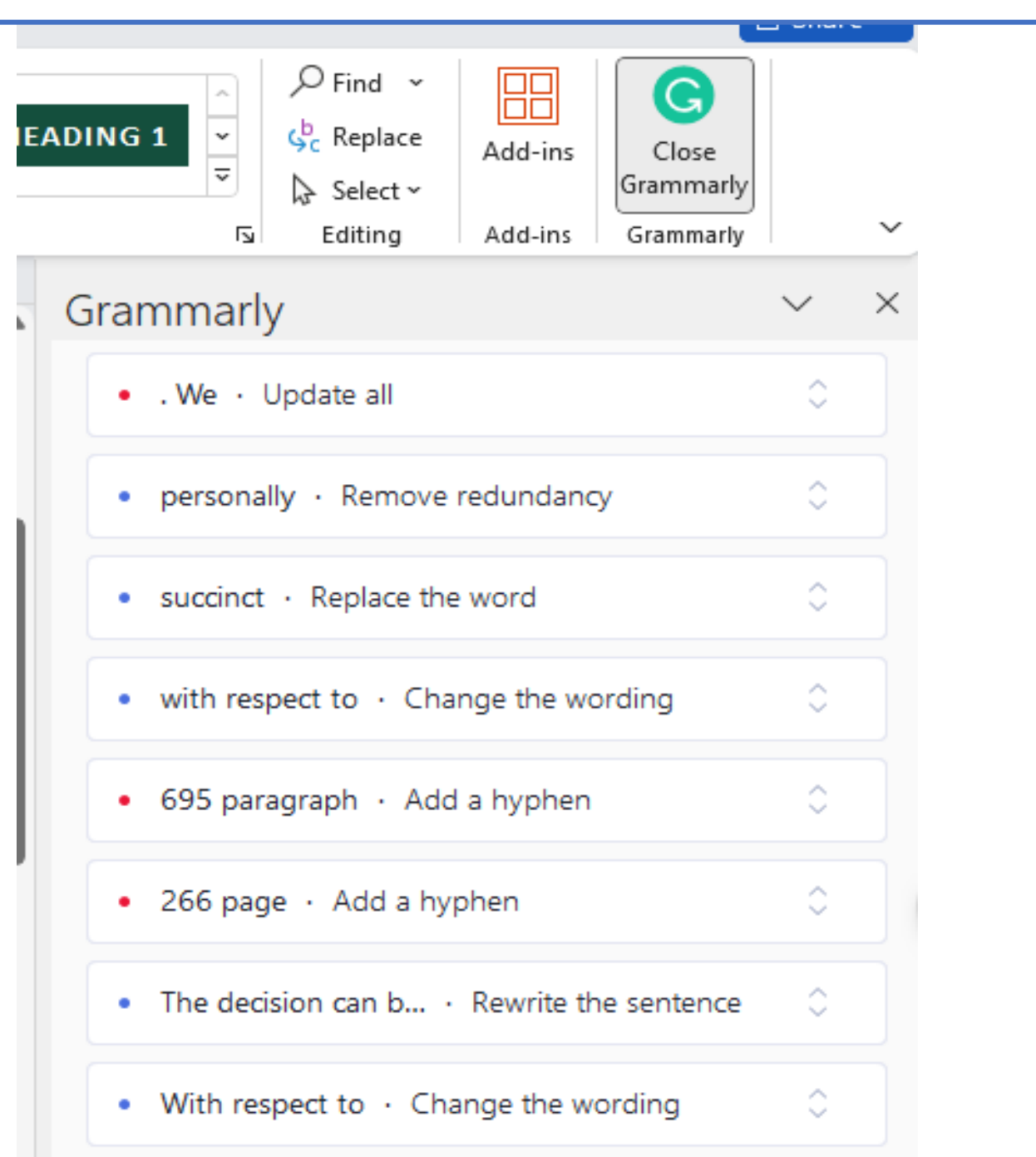
QuillBot

Condensed 547-word SCC decision in *R. v. B.E.M.*, 2023 SCC 32 to:

The Court of Appeal of Alberta dismissed an appeal involving a case involving a complainant's childhood sexual assaults. The court ruled that Crown counsel's anecdote about a personal childhood memory was not relevant to the evidence and was not at odds with the role of counsel. The court found that the anecdote did not result in an unfair trial or a misrepresentation of the complainant's memory. The court also noted that the anecdote was not about an offense or conduct comparable to the allegations at issue. The trial judge cautioned the jury not to consider the counsel's comments as evidence and advised them to use their common sense understanding of how memories operate. The court concluded that the Crown counsel's improper anecdote did not render the appellant's trial unfair. The appeal is dismissed.

Grammarly

- Add-in for Word →
- Web option available



Key takeaways

- “Most cases are decided on the judge’s view of the facts”
- Golden Rule: Write for your reader
- Better headings
- Make it flow
- Read it out loud

