SUPREME COURT OF CANADA — PROCESS & ADVOCACY — A PRACTICAL GUIDE FOR PRACTITIONERS

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This practical article on process and advocacy at the Supreme Court of Canada was written by a former Executive Legal Officer of the Court who now works as a Supreme Court agent in Ottawa. It starts off with a chart of the main procedural steps, gives a summary of recent statistics on leaves to appeal and appeal, and after a review of each step in the leave to appeal and appeal process, makes practical suggestions for improved written and oral advocacy, and finally concludes with comments on arguing the Charter at the appellate level.

Cet article pratique traitant la manière de procéder et de plaider à la Cour suprême du Canada fut rédigé par un ancien adjoint éxécutif juridique de la Cour qui travaille maintenant comme correspondant pour la Cour suprême à Ottawa. L'article début par un tableau des principales étapes de la procédure, il donne un sommaire de statistiques récentes concernant les demandes de permissions de pourvoi et les pourvois et il passe en revue chaque étape du procédé d'une permission de pourvoi, et d'un pourvoi. On y trouve des suggestions pratiques pour améliorer la plaidoirie orale et écrite et le tout termine par quelques commentaires sur la manière de plaider la Charte au niveau d'appel.

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Introduction

This paper was originally written as a basic and non-academic introduction to practising before the Supreme Court of Canada for a provincial Attorney General staff conference. It deals with process before the Supreme Court of Canada, as well as various matters of practice, including advocacy. As government counsel very often appear before the Supreme Court of Canada, the paper includes a brief section on the role of government counsel in the Supreme Court of Canada. The paper is very deliberately practical and non-academic.

I. *Chart of Main Procedural Steps*

The following chart shows the main steps in a Supreme Court of Canada proceeding.

STEP	SECTION/RULE	TIME PERIOD
1. Leave to Appeal	s. 58(1)(a) R.23	Within 60 days after the date of the judgment appealed from".1 For structure and content (particularly re excerpts of evidence) see R.23(3) and Notice to Profession Dec. 1993. For motions re Leaves to Appeal, see Notice to Profession Dec. 1993.*
2. Response, Cross appeal	RR. 23(11), 29 Notice to Profession Dec. 1993 (re Cross Appeals)	Within 30 clear days after the service of the Leave to Appeal.
3. Reply (optional)	R. 23(12)	Within 7 clear days after the service of the Response.
4. Formal Order Granting Leave	RR. 22(4) & 54	Drafted by appellant. No specific time period.
5. Notice of Appeal	s. 60(1)(a) and s. 58(1)(b) s. 60(4)	Within 30 days of leave to appeal granted, or 30 days of judgment appealed from if it is Appeal as of Right - and to file copy with Court appealed from.**
6. Security	s. 60(1)(b)	$500 within 30 days of Leave to Appeal granted. Can do same time as Notice of Appeal.

7. Constitutional Question or Application to Intervene	R. 32, R. 18. Notice to Profession June 1990.	Within 60 days of Notice of Appeal. Applications to intervene generally heard together.
8. Motion to Quash by Respondent	s. 44, R. 28	Within 60 days of Notice of Appeal.
9. Case on Appeal by Appellant	s. 62, R. 33, R. 34(1) Notice to Profession November 1994.	Within 3 months of Notice of Appeal.
10. Appellant's Factum	R. 38(3)(a)	Within 4 months of Notice of Appeal. For structure of factum and what may be put in an appendix, see Notice to Profession March 1992.
11. Respondent's Factum	R. 38(3)(b)	Within 8 weeks of Appellant's factum.
12. Intervener's Factum	R. 38(3)(c)	Within 4 weeks of Respond ent's factum .
13. Book of Authorities	Notice to Profession Nov. 1994	File at same time as Factums.
14. Notice of Hearing	R.44(4)	By appellant on all parties within 10 days of completion of the hearing list.
15. Material to be referred to in oral argument (optional)	Sopinka & Gelowitz book, page 217	Not less than 2 days before appeal.
16. Name of Counsel appearing, to Clerk of Process	R. 46(2)	Not less than 1 week before appeal.
17. Length of oral submissions and names address and telephone numbers of counsel arguing the appeal to Clerk of Process	Notice to the Profession May 1989 January 1991 and August 1991	Not less than 1 day before appeal.
18. Application to rehear	R. 51	Within 30 days of judgment.
OTHER IMPORTANT TIME PERIODS		
Motions to Court	R. 23.1(5)	20 clear days.
Motions to single Judge or Registrar.	R. 22	No time period in Dec. 1995 revision (SOR 95-573)

* s. 58(2) and Rule 11(4): July and August do not count in this calculation. *But*: — sections s.60(1)(b) and s. 58(2) when read together: July & August do *not* count for *Notice of Appeal*, but *do* count for Notice of Deposit of *Security*.

** See *Criminal Code* s.677, Notices to Profession June 1993 November 1994 and February 1995 for Notices of Appeal in Appeals as of right where Judge of the Court of Dissents.

II. *Necessity for a Local Agent*

The Supreme Court Rules require a local agent be retained for appeals.[1]

III. *Objective Summaries*

At the outset, a useful practice point is to note the existence of a particularly useful document which is placed on the court file and which Ottawa Agents, but not all principal lawyers, may be aware of: "Objective Summaries" of court files, prepared by in-house counsel at the Supreme Court of Canada, at the leave to appeal stage, and also appeal stage[2] which set out:

1. the nature of the case;
2. procedural history;
3. applicant's submissions;
4. respondent's submissions; and
5. grounds for appeal.

This Objective Summary, which gives a quick overview of the whole court file, is placed on the public part of the file itself, and is accessible by simply photocopying it at the Court's Registry by any interested persons and counsel arguing the appeal. It may be read by judges of the Court or their law clerks.

IV. *Recent Statistics*

The Supreme Court is a general court of appeal for Canada in both civil and criminal cases.[3] There are two routes to the Court. First, applications for leave to appeal constitute approximately 70% of the Court's caseload. Second, appeals as of right constitute approximately the other 30% of the Court's caseload. About 125 appeals in virtually every area of law are heard each year, and approximately 450-500 leaves to appeal are decided each year.

The most recent complete year for which statistics have been compiled by the Court is 1994, and the following are selected leave to appeal statistics:

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[1] Rule 15(3).

[2] Appeals "as of right" Objective Summaries are done to the appeal stage. See *infra*.

[3] *Supreme Court Act*, R.S.C. 1985, c.S-26 [am. R.S.C. 1985, c.34 (3rd Supp.) ss. 1 to 7; 1990, c.8, ss.33 to 41] [hereinafter "Act"].

- of 445 applications for leave submitted in 1995, 84 had not been decided on December 31, 1995, but 10.6% of the total figure of 445 were ultimately granted leave (on average approximately 15-25% of leaves to appeal are granted in any year.)
- areas of law for applications for leave to appeal:

	1993	1994	1995
- Criminal -	24%	30%	27%
- Charter -	11%	11%	8%
- Commercial -	8%	8%	8%
- Procedural -	12%	11%	12%
- Torts -	8%	6%	8%
- Labour -	4%	4%	8%
- Family[3.1] -	–	–	4%
- Property -	5%	4%	3%
- Administrative -	8%	6%	7%
- Québec Civil Code -	2%	2%	2%
- Taxation -	4%	3%	3%
- Constitutional -	2%	2%	2%
- Others -	12%	10%	8%

- Applications for Leave to Appeal, by Region/Court
  - N.W.T. - 1
  - Yukon - 1
  - Court Martial Appeal Court - 2
  - P.E.I. - 2
  - Newfoundland - 11
  - New Brunswick - 13
  - Saskatchewan - 15
  - Manitoba - 15
  - Nova Scotia - 20
  - Alberta - 48
  - Federal Cout of Appeal - 49
  - B.C. - 58
  - Québec - 103
  - Ontario - 107

A few additional statistics relevant to leaves:

1. In 1990, 424 were received and referred, 91 (21.5%) granted;
2. in 1991, 480 were received and referred, 83 (17.3%) granted;
3. in 1992, 460 were received and referred, 77 (16.7%) granted;
4. in 1993, 513 were received and referred, 84 (16%) granted;
5. in 1994, 496 were received and referred, 77 granted (16%), 1 reserved;
6 in 1995, 445 were received and referred, 47 granted (10.6%), 84 reserved.

[3.1] Family law statistics not tracked by S.C.C. in 1993 and 1994.

V. *Process*

(1) *An Overview of the Main Procedural Steps for Leave to Appeal and Appeal*

The following summary comprises an overview of the main procedural steps that one encounters in the Leave to Appeal and Appeal process:[4]

1.	Leave to Appeal:	serve and file application within 60 days after date of judgment appealed from[5]
2.	Response:	serve and file Response within 30 clear days after the service of the Leave to Appeal[6]
3.	Reply:	serve and file Reply within 7 clear days after service of the Response[7]
4.	Notice of Appeal:	serve and file Notice within 30 days of Leave to Appeal being granted, or within 30 days of judgment appealed from if it is an Appeal as of Right[8]
5.	Security:	post $500 within 30 days of Leave to Appeal being granted[9]
6.	Constitutional Question or Application to Intervene:	serve and file Notice of Motion to state a Constitutional Question or Applica tion to Intervene within 60 days of the Notice of Appeal[10]
7.	Motion to Quash by Respondent:	make Motion to Quash within 60 days of Notice of Appeal[11]
8.	Case on Appeal by Appellant:	serve and file Case on Appeal within 3 months of Notice of Appeal[12]

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[4] See above for the Chart of the Main Procedural Steps in a Supreme Court of Canada Application for Leave to Appeal and Appeal itself.

[5] *Supra* footnote 3, s.58(1)(a).

[6] *Rules of the Supreme Court of Canada*, SOR/83-74 [am SOR/83-335, 83-930, 83-821, 87-60, 87-292, 88-247, 91-347, 92-674, 95-325, 95-573] R.23(11) [hereinafter "R"]. The Rules are enacted pursuant to s.97 of the *Act*.

[7] *Ibid.* R.23(12).

[8] *Supra* footnote 3, s.60(1)(a); s.58(1)(b).

[9] *Ibid.* s.60(1)(b). But not criminal appeals.

[10] *Supra* footnote 6, R.32, R.18.

[11] *Supra* footnote 3, s.44; *supra* footnote 6, R28.

[12] *Ibid.* s.62; *supra* footnote 6, R.34(1).

9. Appellant's Factum:	serve and file Factum within 4 months of Notice of Appeal[13]
10. Respondent's Factum:	serve and file within 8 weeks of Appellant's factum[14]
11. Intervener's Factum:	serve and file within 4 weeks of Respondent's factum[15]
12. Book(s) of Authorities:	No longer joint. Optional (but almost universal). Now to be filed at the same time as the Factum.[16]
13. Notice of Hearing:	Appellant to serve within 10 days of the completion of the hearing list (the Rule, R.44(4), does not require the notice be also filed, but it is common practice to do so).
14. Excerpts of Material to be Referred to in Oral Argument:	optional (but recommended): submit not less than 2 days before appeal[17]
15. Name of Counsel Appearing:	make available to Clerk of Process not less than 1 week before appeal[18]
16. Length of Oral Submissions and Details Regarding Counsel Arguing the Appeal:	provide to Clerk of Process not less than 1 day before the appeal[19]
17. Application to Rehear:	make application within 30 days of judgment[20]

(2) *Applying for Leave*

If the judgment appealed from is from a court of final resort in a province, there exist no jurisdictional limitations to the Court's power to grant leave to appeal. Previously, the Court did not have jurisdiction to grant leave on sentence matters. The Court does now,[21] but it is not common. Previously, the Court did

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[13] *Supra* footnote 6, R.38(3)(a).

[14] *Ibid.* R.38(3)(b).

[15] *Ibid.* footnote 6, R.38(3)(c).

[16] Notice to the Profession, November 1994.

[17] J. Sopinka and M.A. Gelowitz, *The Conduct of an Appeal* (Toronto: Butterworths, 1993) at 217. May be required by the Registrar in lengthy cases and filed on the day of the hearing of the appeal: Notice to the Profession, November 1994.

[18] *Supra* footnote 6, R.46(2).

[19] Notices to the Profession, January 1991 and August 1991.

[20] *Supra* footnote 6, R.51.

[21] *Hill* v. *R.* [1977] 1 S.C.R. 827; *R.* v. *Gardiner*, [1982] 2 S.C.R. 368.

not have jurisdiction to grant leave where a court of appeal had refused leave. The Court does now, again.[22] Further, the Court did not previously have jurisdiction to grant leave in either *habeas corpus* or committal decisions in extradition matters. It does now, again.[23]

As to the standard for granting leave — going back to basics — one looks to section 40(1) of the *Supreme Court Act*:[24]

> by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question [the case is] one that ought to be decided by the Supreme Court or is, for any reason, of such a nature or significance as to warrant decision by it...

There is of course a certain circularity in this "test".

Putting literally hundreds of decisions aside as to what is and what is not of public importance, Wilson J. said in a 1989 *Charter* decision:

> ...it is important to look not only at the impugned legislation [...] but also to the larger social, political and legal context.[25]

One may consider, as some do, filing an affidavit with the application for leave to appeal indicating *why* you are of the opinion the issues in the appeal are of public importance.

For example, if one's case involves a provincial statute, look at other provinces' legislation to see if they have similar statutes, and if so, list excerpts from these other provinces' statutes as exhibits in an affidavit. In other words, suggest that *all* other provinces' legislation is also "on trial" when provincial legislation is in issue, emphasize the problem that a potential conflict between provincial statutes could produce, and the appropriate role of the Supreme Court of Canada in providing a national solution.

In *criminal* cases, one would want to emphasize a question of law impacting on the administration of justice, or the *Charter* itself. In *civil* cases, one would want to emphasize important public issues, constitutional issues, or again, issues arising from the *Charter* itself. In both criminal and civil cases, conflicting opinions from different Courts of Appeal should, of course, be highlighted.

Issues of relevance only to the parties, whether criminal or civil, tend not to get leave, unless serious legal error (one of public importance) can be identified.

The Court almost always refuses to hear moot cases, or academic questions of law rendered moot either by subsequent statutory amendment, or by one party being unable to continue.[26] This refusal appears to be motivated in part by the pressure of the docket of cases waiting to be heard.

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[22] *MacDonald* v. *City of Montreal*, [1986] 1 S.C.R. 460.

[23] *A.G. (Can.)* v. *Schmidt*, [1987] 1 S.C.R. 500; *Republic of Argentina* v. *Mellino*, [1987] 1 S.C.R. 536.

[24] *Supra* footnote 6.

[25] *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1331.

[26] *Borowski* v. *A.G. (Can)*, [1989] 1 S.C.R. 342 lays down the principles.

In terms of procedure:

a. All leave applications must now be submitted in writing.[27] One may request an oral hearing, but these are ordered only by the Court. Reasons must be clearly set out why an oral hearing is being requested. The oral hearing can be done by satellite video conference at no special cost to the parties.

b. The leave application must be filed and served within 60 days of the judgment of the Court of Appeal below[28] — time runs from the date judgment is announced (*not* signed or entered) — but July and August are not used to compute time.[29] Criminal appeals, up until 1987, had 21 days; now the same time periods apply to both civil and criminal.[30] One can apply for time periods to be extended, prospectively or retroactively.[31] Time is computed (as to "clear days" etc.) in accordance with the *Interpretation Act*.[32]

c. The leave application normally consists of:

(i) a notice of application for leave to appeal;
(ii) a supporting affidavit, if any;
(iii) material intended to be relied on, in chronological order;
(iv) judgments and reasons below (of all courts);
(v) memorandum of argument, divided as follows:
Part I: Statement of Facts
Part II: Points in Issue
Part III: Argument
Part IV: Nature of Order requested (and if appropriate, *never* forget to ask for costs)
Part V: Table of Authorities
(vi) excerpts of statutory enactments as an appendix

New evidence requires a separate application.[33]

d. The Respondent now has 30 clear days to file a Response.[34]

e. The Applicant has 7 clear days to file a Reply to that Response.[35]

f. If the Applicant has not served and filed all materials necessary for an application for leave in the time prescribed, the Respondent may apply to dismiss the application,[36] and if three months have elapsed, the Registrar may

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[27] *Supra* footnote 3, s.43.

[28] *Ibid.* s.58(1)(a).

[29] *Ibid.* s.58(2).

[30] *Ibid.* s.58(1)(a). But the time period for criminal appeals *as of right* is *30* days, not 60: s.58(1)(b).

[31] *Ibid.* s.59(1); *supra* footnote 6, R.5.

[32] *Supra* footnote 6, R.11(1).

[33] *Supra* footnote 3, s.63.

[34] *Supra* footnote 6, R.23(11).

[35] *Ibid.* R.23(12).

[36] *Ibid.* R.25(2)(a).

serve a notice on the parties that 15 days after service of same the application for leave will be dismissed as abandoned,[37] and the Respondent's costs taxed.[38]

g. The internal court procedure (by virtue of a series of internal appendices A through D) is that:[39]

(i) The leave is referred to a panel of three judges, together with an "Objective Summary" (which is public and placed on the court file) and covering memorandum prepared by in-house legal staff. A judge may also request his or her law clerk to prepare a "leave to appeal memo" which is reviewed by that judge, and often given to other judges.

(ii) If the panel determines leave should be granted, other judges are consulted and their views sought, but the final decision rests with the original panel.

(iii) If the panel determines leave should be refused, the other members of the Court are so advised in writing, and invited to give their reason(s) why it should in fact be granted. If any one judge so wishes, it is referred to Judges' Conference for discussion — but the original three decide.

(iv) Leaves are cross-referenced within the Court, and judges are informed of the following: any other leave received; any received and referred; or any reserved appeal which has similar issues. If so, your application for leave may be held in abeyance while a decision is made on another leave or another appeal.[40]

(3) *Appeals as of Right*

There are more than one would think:

(a) *Pursuant to the Criminal Code*[41] *— Main Provisions*

(i) by a person convicted of an indictable offence whose conviction is affirmed by the Court of Appeal — on any question of law on which a judge of the Court of Appeal dissents: s. 691(1)(a).

(ii) by a person acquitted of an offence whose acquittal is set aside by the Court of Appeal — on a question of law: s. 691(2)(a) (a

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[37] *Ibid.* R.25(2)(b).

[38] *Ibid.* R.25(3).

[39] The information here is taken from Sopinka and Gelowitz, *supra* footnote 17 at 171-172, and M. McInnes, J. Polton & N. Derzko, "Clerking at the Supreme Court of Canada" (1994) Alta. L.R. 58.

[40] The Court now has the power to "remand the whole or any part of the case to the court appealed from or the court of original jurisdiction". S.C. 1994 c.44, s.98, amending s.43 of the *Supreme Court Act*.

[41] R.S.C. 1985, c. C-46 (as am.).

stay[42] or quashing of an indictment[43] is the equivalent of an acquittal, and so, if overturned gives rise to an appeal as of right.)

(iii) by the Attorney General where the Court of Appeal sets aside a conviction and orders a new trial (the appeal as of right is by the Attorney General, not by the accused, because the accused is getting a new trial).

(iv) by the Attorney General — on a question of law on which a judge of the Court of Appeal dissents: s. 693(1)(a).

(v) by the Attorney General or accused — where a writ of *habeas corpus* is refused: s. 784(3).[44]

(b) *Pursuant to the Criminal Code — Subsidiary Provisions*

(i) by a person tried jointly with a person in (a)(ii) above even if the conviction is sustained in the Court of Appeal — on a question of law:

s. 691(2)(b).

(ii) by a person found not guilty on account of insanity whose acquittal is affirmed (on that ground) in the Court of Appeal, or against whom a verdict of guilty is entered by the Court of Appeal (under s. 686(4)(b)(ii)) — on any question of law on which a judge in the Court of Appeal dissents:

s. 692(1) and (3).

(iii) by a person found unfit due to insanity to stand trial where that is affirmed by the Court of Appeal — on any question of law on which a judge in the Court of Appeal dissents: s. 692(1) and (3).

(c) *Pursuant to the Supreme Court Act*[45]

(i) an appeal from a provincial reference to the provincial Court of Appeal — where that province's statute says there is an appeal as of right: s. 36.

(ii) a reference to the Court by the Governor in Council[46] (or Senate or House of Commons)[47] the Court here has original jurisdiction, and this is not therefore an appeal as of right *per se*.

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[42] *R.* v. *Jewitt*, [1985] 2 S.C.R. 128.

[43] *Kalanj and Pion* v. *R.*, [1989] 1 S.C.R. 1594.

[44] If a judgment on a *habeas corpus* application is rendered, leave is required: s. 784(5). The practice in most jurisdictions is to roll the questions of issuance of the writ and judgment into one proceeding, so resort to s.784(3) is unusual.

[45] *Supra* footnote 3.

[46] *Supra* footnote 3, s.53.

[47] *Ibid.* s.54.

(d) *Pursuant to Other Acts*

(i) *Competition Act* [48]

— against an order of prohibition or dissolution on a question of law: s. 34(3).

(ii) *National Defence Act*[49]

— against a decision of the Court Martial Appeal Court — on a question of law on which a judge dissents: s. 245.

(iii) *Dominion Controverted Elections Act*[50]

— against the final decision of a Superior Court after the trial of an election petition on any question of law or of fact: ss. 64-69.

(iv) *Federal Court Act*[51]

— against any decision of the Federal Court of Appeal in the case of a controversy between Canada and a province, or between two or more provinces: s. 32.

(v) *Young Offenders Act*[52]

— in the case of indictable offences, pursuant to Part XVIII of the Criminal Code: s. 27(1)[53]

(4) *Interim Steps Before One is Heard on Appeal*

(a) *The Formal Order Granting Leave*

If leave to appeal is granted, the formal order is drafted by the appellant, approved by the respondent, then submitted to the Registrar of the Court for signature: RR. 22(4) and 54.[54]

The practice is that whoever makes an application or motion drafts the order. There is no specific time period in which to file the formal order granting leave.

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[48] R.S.C. 1985, c. C-34 as amended by R.S.C. 1985 (3rd Supp.), c.34.

[49] R.S.C. 1985, c. N-5.

[50] R.S.C. 1985, c. C-39.

[51] R.S.C. 1985, c. F-7.

[52] R.S.C. 1985, c. Y-1.

[53] But not:

(a) where there has been a finding of guilt or an order dismissing an information: s.27(5), in which case leave is required.

(b) in the case of decision rendered pursuant to ss.28-32, from which no appeal lies (s.27(6)).

[54] *Supra* footnote 6; as well, s. 677 of the *Criminal Code* must be complied with in an "as of right appeal" based on a dissent in the Court of Appeal below.

(b) *Notice of Appeal*

The Notice of Appeal is served and filed within 30 days of leave having been granted, or 30 days from the date of the judgment below in an appeal as of right.[55]

The notice of appeal, unlike the requirements in other appellate courts, need not set out the grounds of appeal, but can limit the grounds of appeal.[56]

(c) *Deposit of Security*

There is no security deposit requirement in criminal cases.[57]

In civil cases it is $500 within 30 days of the service and filing of the notice of appeal.[58]

One can apply for exemption from the deposit and all other filing fees, based on a "motion *in forma pauperis*".[59]

(d) *Stating Constitutional Questions*

If the constitutional validity or applicability of a law or regulation is intended to be challenged, a party (generally the appellant) must apply (the application is generally referred to the Chief Justice) to state a constitutional question within 60 days of the filing of the notice of appeal.[60]

Notice of same is sent to the Attorneys General of the Provinces and territorial Ministers of Justice for their consideration as to whether to intervene (that is, intervene as of right — they need not apply).[61]

If one is applying to state a constitutional question, be prepared to show exactly where the issue was raised and dealt with by the Courts below.

(e) *Case on Appeal*

The appellant generally initiates an agreement as to the contents of the Case on Appeal,[62] which is to be filed by the appellant within three months of the notice of appeal being filed,[63] all in Supreme Court of Canada format.[64]

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[55] *Supra* footnote 3, s.58(1)(b); a copy to be served with the Court of Appeal below: s 60(4).

[56] *Ibid.* s.57.

[57] *Ibid.* s.64.

[58] *Ibid.* s. 60(1)(b).

[59] *Supra* footnote 6, R.47.

[60] *Ibid.* R.32.

[61] *Ibid.* s.53(5).

[62] *Supra* footnote 6, R.33, *supra* footnote 3, s.62(1).

[63] *Ibid.* R.34(1).

[64] *Supra* footnote 3, s.33(5).

In the event of non-agreement as to contents, it is settled by the Court of Appeal below or a judge thereof, not by the Supreme Court of Canada.[65]

The respondent and interveners are served one copy each. Twenty-four copies of the Case on Appeal are filed with the Court.[66]

(f) *Factums*

The appellant's factum has to be served and filed within four months of the notice of appeal.[67]

The respondent's factum is to be served and filed within eight weeks of the appellant's,[68] and the intervenor's within four weeks of the respondent.[69]

Rules 33 and 37-41 deal with the preparation of factums. They should be read carefully. Staff are instructed to refuse for filing non-complying factums. Some of the more important aspects of these Rules are:

1. length not more than 40 pages, excluding appendices;
2. printing on left hand of pages;
3. lines spaced one and one-half lines apart; and
4. appellant's cover buff, respondent's green, and intervener's blue.

The detail is important — not only because failure to satisfy Rule 33(1)(c), which requires that every 10th line has to be numbered in the left-hand margin, can mean your factum is rejected — but because the closer your factum is to the standard format the judges normally see, the more readily accessible and credible your factum will be.

Parties receive three copies of each other's factum. Interveners must serve one copy on each of the parties and on each other intervener. File 24 copies with the Clerk of Process.[70]

This writer refrains from a detailed review of the Rules as to technical compliance, though the following is a list of the items which are specifically double-checked by Court staff upon submission of the *leave* application: pursuant to a Court registry checklist, a copy of which checklist is remitted to counsel who have filed a factum not in compliance with the Rules (of course the writer has never seen [only heard of] such a checklist):

- Required Documents:
  - number of copies received
  - 21.5 cm

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[65] *Ibid.* s.62(1).
[66] *Supra* footnote 6, R.34(1)(a).
[67] *Ibid.* R.38(3)(a).
[68] *Ibid.* R.38(3)(b).
[69] *Ibid.* R.38(3)(c).
[70] *Ibid.* R.38(1), (2), (4)(a).

- printed on left side
- appropriate print size

- Cover Page:
  - colour
  - style of cause
  - nature of application
  - names and addresses of counsel and agents
- Table of Contents:
  - material listed chronologically with dates
  - pages of material numbered consecutively
- Notice of Application
- Lower Court Judgments:
  - formal trial court judgment
  - reasons of trial court
  - formal appeal court judgments
  - appeal court reasons

- Memorandum of Argument:
  - statement of facts
  - points in issue
  - statement of argument
  - order requested
  - table of authorities
  - 20 pages maximum
  - signature of counsel

(g) *Book(s) of Authorities*

These may be prepared (optional, but almost universal) and are now served and filed along with the factum.[71]

Books of authorities are no longer *joint*. Only important cases should be included, and significant passages highlighted or underlined.[72]

Ten copies are to be provided to the Clerk of Process, with one copy to each opposing counsel, and the intervener.[73]

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[71] *Ibid.* R.37(2), Notice to the Profession, November 1994.

[72] Notice to the Profession, November 1994.

[73] The number of copies is not prescribed by the Rules, but the practice has developed whereby ten copies are filed with the Clerk of Process.

(h) *Inscription*

Inscribing the appeal is now time-triggered. The appellant can no longer control it because the Registrar *automatically* inscribes the appeal when the respondent's factum is filed or the time for same (eight weeks) has expired.[74]

The order and dates of each appeal are determined by the Court's Registry in consultation with the Chief Justice shortly before or shortly after the "inscription day", which precedes each session.[75]

The Manager of the Process Registry informs your agent in Ottawa of the date, who then informs you. The Manager of the Process Registry may contact you directly. If the date given is not possible for you, an alternate date may in some circumstances be made available.[76]

In 1994, the average time lapse between the date of inscription and date of hearing was 3.83 months.

(i) *Sittings*

There are 3 sessions a year, commencing:

1. late January;
2. late April; and
3. early October[77]

A session lasts six weeks, with hearings two weeks on and two weeks off for Court sittings.

(j) *Time Periods*

July and August do not count in the computation of most time periods - except for the appellant's factum, respondent's factum, and Case on Appeal.[78]

(5) *The Hearing Itself*

There are generally two appeals a day — if one needs more time you have to apply for it in advance (and such motions generally go to the Chief Justice).[79]

Morning appeals now commence at 9:45 a.m., and the afternoon appeals at 2:00 p.m.[80]

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[74] *Supra* footnote 6, R.44(1).
[75] *Supra* footnote 3, s.79.
[76] *Supra* footnote 6, R.44; *supra* footnote 3, ss.56 and 79.
[77] *Supra* footnote 3, s.32(1), (2).
[78] *Supra* footnote 6, R.11(4).
[79] Notices to the Profession, July 1992 and August 1995.
[80] *Ibid.*

Each side has one hour each, and the appellant may split the time between argument and reply. If the appellant uses the entire hour allotted for argument in the principal argument, five minutes will be allotted for reply. If the appellant does not use the entire hour for principal argument, up to a maximum of fifteen minutes can be put over for reply, which, together with the normal five minutes for reply, can be used for a total of twenty minutes.[81]

There is no Queen's (or King's) Counsel table. The appellant sits on the left, while the respondent sits on the right. Interveners sit behind the appellant and respondent, depending on whom they are supporting — and there are no chairs in the middle.

Counsel are of course gowned. One may request the presence of a non-lawyer (or non-Canadian lawyer) at one's table by rising at the beginning to so request of the Chief Justice or senior judge presiding.

When the Chief Justice or senior judge calls one's name (it is read from the "counsel sheet" prepared that morning — on arrival, make sure you check in with the Clerk of Process)[82] rise, then sit down.

The number and *coram* of the Court hearing one's appeal is available from the Clerk of Process that morning only (as of 8.30 a.m). Nine judges sit in most cases (those of particular importance to the public, and those raising constitutional issues), though seven is also common, and five is the minimum.[83]

(6) *The Judgment Process*

The Court may deliver judgment from the bench or after a brief recess, but more commonly reserves.

The judges retire to the private Judges' Conference Room for discussion. A preliminary vote is held (commencing with the most junior — the opposite of the United States Supreme Court) and it is determined who will write.

After Ottawa agents are notified, a press release is issued (usually on a Monday) announcing judgments for the following Thursday at 9:45 a.m. Release of judgments is not oral in Court as it used to be, but by deposit with the Clerk of Process.

In 1995, the time lapse between hearing and judgment was 3.8 months.

(7) *Miscellaneous Matters*

(a) *References to the Court*

Section 53 of the *Supreme Court Act*[84] authorizes the federal Governor in Council to refer "important questions of law or fact" to the Court, and section

[81] *Ibid.*

[82] Notice to the Profession, January 1991 and August, 1991.

[83] *Supra* footnote 3, s.25.

[84] *Ibid.*

36 gives an "as of right appeal" from a provincial reference previously referred to that province's Court of Appeal.

(b) *Intervener Status*

There are two types of intervener status:

1. As of right:

   Attorneys General (and now territorial Ministers of Justice) can intervene as of right pursuant to a constitutional question having been stated,[85] and also have the right to be heard orally.

2. On motion:

   "Any person interested" can apply on motion to intervene in an appeal, within 60 days of the filing of the notice of appeal.

The right to oral argument must be specifically applied for and granted.[86] Usually not more than 15 minutes is given.

(c) *Constitutional Questions*

This has been dealt with above, but one additional point may be made here: the importance of how the constitutional question is stated is sometimes not fully realized. Depending on what happened below, it can have the effect of limiting or extending the scope of your appeal. Whilst one can do a first draft yourself, consulting with an experienced Ottawa agent can be helpful.

One small point in drafting the question(s): if section 1 of the *Charter* is involved, a breach of the *Charter* by impugned legislation is an "*infringement*" (not a "violation") of a *Charter* right — only after it is not saved by section 1 does it become a "violation".

(d) *Cross Appeals*

Under Rule 29 a respondent can cross appeal with leave.

Section 7[87] permits an appellant to file a limited notice of appeal. Two possible views result:

1. if a *notice of appeal* is so limited, a respondent who wants to cross appeal on a matter not put in issue in the notice of appeal must seek leave to appeal any portion of the judgment not specified in the notice of appeal.

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[85] *Supra* footnote 6, R.32(4).

[86] *Supra* footnote 3, s.43(1)(c).

[87] *Ibid.* "The appellant may appeal from the whole or any part of any judgment or order and, if the appellant intends to limit the appeal, the notice of appeal shall so specify."

2. an appeal, if by leave, is limited to the grounds raised in the *application* for leave to appeal.

Though there is no ruling on this matter — if in doubt, apply for leave to cross appeal — the existence of s.57 would appear to be consistent with the view that once the Supreme Court of Canada has granted leave to appeal, the entire case is open for review unless expressly limited.

Rule 29 has recently been revoked and replaced, clarifying that a respondent who wishes to either set aside or vary any part of the judgment appealed from must now apply for leave to cross-appeal, within 30 days of the application for leave to appeal, or within 30 days of the notice of appeal in appeals as of right.[88]

(e) *Stay of Proceedings/Stay of Execution*

A new section in the *Supreme Court Act*[89] provides that a single judge of the Supreme Court of Canada can now deal with a stay pending an application for leave to appeal.[90]

The United States Supreme Court has had a virtually unlimited power to remand matters back to the lower court of appeal[91] (for example, for that court to reconsider its decision in the light of intervening cases). The Supreme Court of Canada now also has this power[92] as do some Courts of Appeal.[93]

(f) *Show Cause Hearings*

"Show cause hearings" are organized one day each session on the initiative of the Court (and usually on the initiative of the Chief Justice).

Court files are identified that have been proceeding slowly, and counsel of record are requested to attend in Court in person to show cause why their appeal should not be quashed.

The technical law is as follows:

1. *Criminal Cases:*

The appeal must be "brought on for hearing" on or before the court session following that during which the court of appeal handed down its judgment.[94]

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[88] SOR/93-488 and SOR/95-325.

[89] *Supra* footnote 3.

[90] *Ibid.* s.65.1 as recently revised by S.C. 1994, c.44. See s.65 for the general stay of execution section, also revised by S.C. 1994 c.44.

[91] *Egan* v. *City of Aurora*, 365 U.S. 514 (1961).

[92] *Supra* footnote 3, ss.46-46, particularly s.45.

[93] For example, the Federal Court of Appeal does: *Federal Court Act*, R.S.C. 1985, c.F-7, s.52(b)(iii).

[94] *Supra* footnote 41, s.695(2).

2. *Civil Cases:*

The appellant must file and serve the appellant's factum within 6 months of leave being granted, or within 6 months of the notice of appeal (in the case of appeals as of right).[95] Section 71(1)[96] permits the respondent to bring a motion to dismiss if the appellant does not bring the appeal on the first session "after the appeal is *ripe* for hearing".

However, the rule is that one has 6 months from the notice of appeal being filed to perfect the appeal.

If you get the call to appear — usually about a month's notice — and generally because one's factum is not in, getting one's factum in within the two weeks immediately following will generally save your file and your honour. Filing one's material (with a motion to extend time) will often avoid the show cause hearing.

VI. *Advocacy*

(1) *Making the Decision to Appeal at All*

Perhaps the questions to be asked before one appeals to the Supreme Court of Canada are: Should you really be appealing? Do the chances of success warrant the costs for such an action? A lower court's decision has to be examined carefully and objectively — after you and your client have cooled off. Then you can rationally decide whether there is a solid basis for appeal — whether it is an issue that really is suited to the Supreme Court of Canada. For example, a decision below, based more on credibility or findings of fact, is unlikely to get leave. Even if there is an error of law, is it so substantial as to have affected the outcome of the trial or the Court of Appeal decision? Are you filing a leave to appeal application because your clients want you to — or because it is your considered and professional opinion that an appeal is in order, and has a realistic chance of success?[97]

Where the alleged error is in a *Charter* context, one should consider whether it is squarely raised at trial and whether there was a sufficient factual basis at trial

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[95] *Supra* footnote 6, R.45 as amended by SOR/95-326.

[96] *Supra* footnote 3, Emphasis added — whatever "ripe" means.

[97] Chief Justice Taft of the United States Supreme Court used to tell of lawyers who sometimes explained their presence before the Court in the following way:

> May it please the court, I know that this case should never have come here, but I was afraid it was the only chance I would ever have, and as the jurisdictional grounds were present, I though I would like to come up and argue one case before you, so that I could tell the boys back home about the time I appeared before the Supreme Court of the United States. I don't know exactly how an argument should be made before you, but I have endeavoured to divide mine in three very common-sense divisions. First, I shall argue to the court the law of the case. I shall then argue the law as applicable to the facts, and in conclusion, I will make one wild pass at the passions of the Court.

to ascertain it. Courts of Appeal and the Supreme Court of Canada are very wary of striking down legislation or limiting governmental action unless there has been a full investigation of the facts.[98]

(2) *The Leave to Appeal Application*

Once you feel you have found legitimate grounds, take the opportunity to develop and refine them in your leave to appeal application through to the point of conciseness and clarity. One should have two or three points, not more than two or three lines each. If one does have solid arguments, you will want the court to be aware of them — to clearly see what the issue is (or issues are). The issues are made clear through the use of concise language. Also, avoid repetition by rephrasing your arguments. Make your points clearly and strongly. The cleanliness and clarity is important; if you make your case sound too complicated — too much smoke and mirrors — the judges on the leave to appeal panel may think you do not have much of an appeal. Dispense with the standard clauses that say nothing (e.g. "The learned trial judge misdirected himself/herself as to the law applicable to the evidence").

The leave to appeal can if necessary be amended later to include any new and genuine ground for appeal. Soothe any other apprehensions concerning under inclusion by ending with the phrase:

> And upon such further and other grounds as the court may entertain and counsel may advise.

(3) *The Factum*

(a) *Importance*

The factum represents both your argument and *you personally* at all stages of the appeal. Most importantly, it offers the opportunity to make a strong first impression long before your case is actually heard. This initial strength can be exploited to create momentum that continues throughout the appeal. The factum is with the judge before, during, and after the argument, and is also reviewed by the law clerk. It is studied and referred to by the judge in drafting reasons. It is therefore the centrepiece of the process, and is your most important asset.

Your factum should create anticipation in the justices for your oral argument. Whilst your oral argument will only be heard *once*, your *factum* will be read over *many* times before a decision is made.

Use simple, clear language. While compelling a Justice to look up a word in a dictionary may be viewed by some as a literary accomplishment, this goal is not the desired one of your factum.

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[98] *Supra* footnote 40 at 93-100, and 206. By way of example, see *Danson* v. *Ont. (A.G.)*, [1990] 2 S.C.R. 1086; *Moyas* v. *Alta (Lab. Rels. Bd.)*, [1989] 1 S.C.R. 1572.

Do not be academic. Write your academic article after you've won and changed the law. Tie your factum to practical reality.

(b) *Preparing to Draft*

Before the court can appreciate the issues, you must precisely define them yourself. As mentioned above write them out. Where possible, limit yourself to two or three issues, with two or three lines devoted to each. If you have ten, then you may not be seeing the forest for the trees — few courts of appeal can make ten substantive errors in a single judgment.

Do not be tempted to argue your whole appeal or do a redraft of your Court of Appeal factum. Rather, focus on the specific grounds of appeal or errors you allege were made in the Court of Appeal.

Once you have clearly set out the issues, summarize the evidence that excludes any irrelevant facts. Follow your summary with a brief statement of law that is tied to the facts. Do not bury your points with every existing authority. A *short* quotation from a cited case may be very helpful in illustrating a point. Especially with *Charter* issues, academic writings and decisions of foreign jurisdictions may assist in defining them in a Canadian context.

To summarize:

1. write out the issues;
2. set out beside each issue a summary of the evidence; and
3. briefly state the law.

(c) *Statement of Facts*

While the presentation of the statement of facts is often neglected, remember that this is the factual basis for the Court to apply the law, and it is therefore extremely important. Legal issues are not decided purely in theory — even, or particularly, in the Supreme Court of Canada — but by the facts which originally gave rise to them. This is all the more so with the *Charter*, and the exclusion of evidence under section 24(2) of the *Charter* illustrates this point. Without a solid factual foundation, the relevant legal argument becomes greatly weakened by having no "real world" application — and leaves you vulnerable to the other side (not to mention vulnerable to the judges). Your statement of facts will obviously not distort or omit material facts, a tactic that would almost certainly doom your credibility and likely your argument. Rather, emphasize favourable testimony or supportive findings of fact. All material facts must be included, chronologically if possible. If not stated chronologically, headings should be used.

The statement of facts should start out strong. Again, it is the first thing the Justices will read of your case when they open your factum. Consider the example of *Constitution Insurance Co. of Canada* v. *Kosmopoulos*, [1987] 1

S.C.R. 2, which dealt with the otherwise dry topic of insurable interest on a replacement insurance policy as between an individual and a corporate entity. The first paragraph of the respondent's factum sets out in a simple, clear manner the alleged injustice:

> Mr. Kosmopoulos' leather business was carried out in a small store where he sold the leather goods he made in a room at the back of the store. It was a small operation. The equipment he used consisted of two sewing machines, two cutting tables, one hand cutting knife and one steam iron. Other than himself, the business had one full time employee, one part time employee and the help of Mr. Kosmopoulos' wife.

Another example is *R.* v. *Lavallee*, [1990] 1 S.C.R. 852, a landmark case which founded the "battered wife syndrome" defence. The first two pages of the appellant's factum use simple, ordinary language and are keyed by page number to the evidence (which gives an almost documentary film quality). Most importantly though, these pages tell an easily understood story. The first nine paragraphs from the Factum are as follows: —

> 1. The appellant, ANGELIQUE LYN LAVALLEE, was charged with the offence of Murder and acquitted at a trial conducted in the City of Winnipeg, in the Province of Manitoba, before the Associate Chief Justice, Mr. Justice Scott, of the Court of Queen's Bench of Manitoba, and a jury. The Jury returned its verdict, and the appellant was acquitted on the 22nd day of September, 1987.
>
> 2. The appellant had lived with the deceased, Kevin Rust, for a number of years.
>
> 3. The deceased was killed by a gunshot wound to the head which had been fired by the appellant in an upstairs room of their home at 10 Girdwood Crescent, Winnipeg.
>
> 4. Robert John Ezako was a friend of Kevin Rust. He testified that Mr. Rust and the appellant had lived together for a number of years (Transcript of Evidence P. 549). He had been present at many arguments and fights between the appellant and the deceased (Transcript of Evidence P. 551). Mr. Ezako testified that he was present at the altercations between the parties in 1985 and 1986 (Transcript of Evidence P. 553). On a number of occasions, the Appellant would "get a warning" that she was going to get it (Transcript of Evidence P. 556). When the deceased said she was going to get it, he meant it (Transcript of Evidence P. 591).
>
> 5. The witness testified that there were a few incidents where they were viciously fighting (Transcript of Evidence P. 583). They would fight for two or three days straight, four times a week (Transcript of Evidence P. 584). Mr. Ezako also testified that the arguments would work their way into a slap "or backhand" over little stupid things, every week or two for three years (Transcript of Evidence P. 589).
>
> 6. The witness related one occasion when the appellant and the deceased were fighting, the deceased slapped the appellant, she called him a name and he went back and slapped her again, and the fight continued in that manner (Transcript of Evidence P. 593). Mr. Ezako also testified that during the worst beating he witnessed, the appellant was "screaming like a pig getting butchered" (Transcript of Evidence P. 602).
>
> 7. Mr. Ezako testified that on another occasion he and the appellant and Kevin Rust were driving home from Brandon. All were in the front seat. The appellant was sleeping, but her hand was resting on Mr. Ezako's leg. Kevin Rust noticed this and

slapped her in the face and grabbed her. Mr. Rust was shaking the appellant and yelling at her (Transcript of Evidence P. 608).

8. The witness testified further that on a different occasion, the appellant had a black eye. Both she and Kevin Rust had told Mr. Ezako that she had fallen and banged her head on the door or railing. The witness stated that he did not believe this explanation, because he knew both parties too well and he knew they were fighting (Transcript of Evidence P. 606).

9. Constable Popplestone of the City of Winnipeg Police Department testified that on the night in question, he was called to 10 Girdwood Crescent. He testified that after the appellant was advised of the possible charge against her, she began to cry. He testified that she stated he just kept beating me all the time, I just couldn't take it any more, and then she said:

HE SAID IF I DIDN'T KILL HIM FIRST HE WOULD KILL ME. I HOPE HE LIVES. I REALLY LOVE HIM.[99]

She also stated:

I didn't mean to do it. I'm too young to go to jail, and he told me he was going to kill me when everyone left." (Transcript of Evidence P. 669).

(d) *Points in Issue*

Try to state your issues in a succinct way, but in a way which suggests the answer you are seeking. They then become *part* of your argument, not merely its point of departure.

This point becomes even stronger when you use your issues as the headings for your legal argument (see below). Lead readers along instead of making them find their own way.

(e) *Legal Argument*

Short numbered paragraphs containing one idea — but not necessarily one sentence — are the rule. After stating your position, support it with the most important case(s), not *every* relevant authority. Make your point clearly. Support it. Move on. You will thereby keep the Justices' interest rather than exhaust their patience with unnecessary reading.[100]

Avoid the appearance of exaggerated deference by prefacing every paragraph with "It is respectfully submitted" or "If it pleases the Court." Instead, use "Further....", It follows...." or other words for suggesting a logical sequence.

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[99] Bold and capital characters in original.

[100] The Judges' reading and workload is extremely heavy. Thurs make your legal argument "appealing" (If you will excuse the pun) — as Mr. Justice La Forest is quoted as saying: "There are some days you think you're on a treadmill. And then a judgment comes along. And it has 10 little fingers. And 10 little toes. And suddenly it's all beautiful again". *Canadian Barrister* (15 June 1990) at 1.

Begin with your strongest point, your position on it, and the existing support for it so that nothing is left to assumption. Use your *headings* to make a statement - for example, the first heading of the legal argument section in *Kosmopoulos* says:

> *The Factual Expectancy Test is the Appropriate Test for Insurable Interest.*

It's not only a heading, it's a statement, which it makes the point strongly and clearly.

Don't risk being perceived as defensive by too strongly criticizing your opponent's argument before you have clarified your own position. Establish your own side and then work from this strength.

Remember, as well, an effective advocacy tool is to build an argument point by point, but leave the ultimate inference arising from those points unstated. In other words, consider constructing your argument so that inferences are drawn, not stated.

A simple and effective way of organizing your legal argument while still being able to develop logical flow is to state your legal proposition in a single short paragraph with references or citations placed after your paragraph.

For example (made-up from the case noted below):

> The question of the appropriate government funding of this particular group raises the issue of the role of the courts and the legislatures in a *Charter* context. The role of the courts is not, except in the narrowest and clearest of cases, to read in excluded groups in the case of non-constitutionally guaranteed rights.
>
> *Charter of Rights and Freedoms*, s. 15.
>
> Put name and citation of case, with specific page reference(s).

(4) *Arguing the Appeal*

(a) *A Proposal for Structuring the Argument*

Mr. Justice Sopinka has suggested the following method:

i) *Opening*

This should be brief, since the evidence has already been introduced and the issues are clear. The purpose is to get the interest of the court.

For example, consider the following two openings:

1. *Not recommended*:

> Opening of *Regional Municipality of Peel* v. *Her Majesty the Queen in Right of Canada* S.C.C. June 2, 1992:

It will be my submission that the principles of unjust enrichment can be invoked for, first, there is an enrichment of or benefit to the Plaintiff. It is not necessary that the Defendant have had a legal obligation to pay in order to constitute having received a benefit. Second, enrichment is at the expense of the Plaintiff. Third, it is unjust that the Defendant not compensate the Plaintiff for the benefit obtained. As against the federal government, it will be argued that the benefit can arise in any one of three ways. The first is that the federal government has an interest in seeing that its legislation is made effective.

2. *Recommended*:

Opening (of Mr. Justice Sopinka, when a lawyer) of *Nelles* v. *A.G.* of Canada S.C.C. — February 29, 1988

My Lords and my Ladies. In this case the Court of Appeal has decided that Crown Attorneys enjoy immunity from civil suits that makes them unique among public servants. The common law has refused to recognize any protection from civil liability for a public servant who has acted maliciously but the Court of Appeal says it made one exception.

ii) *Points in Issue*

Points to be discussed should be stated and elaborated, including any changes. You can also save time and become more focused by announcing any points to be dropped. If there is more than one counsel, the Court should be made aware of who will be discussing what point.

iii) *Review of the Evidence*

Only critical findings of fact need be repeated to make sure the Court and counsel are working from the same basis. However, the recitation of a powerful passage of evidence can be a very effective tool. If you think the Court is sufficiently familiar with the facts, you may want simply to ask if the Court would like them reviewed.

iv) *Review of the Law*

Instead of just reciting case law, you should also state the relevant *principle* and the *logic* behind it. Then, by supporting this logic with other cases, texts and articles, the court will be more receptive to your interpretation of the law on this point. A recommended sequence in dealing with a point of law is:

1. refer to the case name, tab number and level of court;
2. state the case's (i.e. your) proposition of law and give the relevant facts (if any);

3. state the Court's decision regarding your proposition, perhaps with a short quote; and
4. say how the case supports the result that you are seeking.

(b) *Oral Advocacy Before the Court*

(i) *Your Opening*

This has been dealt with above.

(ii) *Knowing your Material*

If you did not handle the trial, familiarize yourself with it by thoroughly examining the transcript, then indexing and summarizing the transcript. Break it down into issues and relate them to each witness.

Knowing the law, including the facts, ratio, court level *and judges' judicial history* is essential. You must also be aware of previous dissents — those who previously dissented in a previous case may be on your bench. Data-base searching now permits you to search by judge, and build up a judicial judgment history on that judge.

Similarly, you must of course know the law your opponent is relying on equally well as they. Go to the cases that found their argument, and demonstrate how your opponent's position is untenable.

iii) *Preparing Your Oral Argument*

A significant amount of work can actually be involved in preparing an oral presentation. The content and manner of argument must be finely tuned and well-rehearsed — spontaneity (paradoxically) takes a lot of practice.

iv) *Delivering Your Oral Argument*

(A) *Style*

Be yourself — otherwise you may be remembered more for your performance than your argument. A lack of eloquence or dramatic flair may be compensated for by a mastery of the law and strong logic.

(B) *Don't Read Your Factum Out Loud*

A prepared script, while providing security for counsel new to the Supreme Court of Canada, provides an irresistible temptation to simply read from it and an irresistible temptation to the judges to throw you a question to stop you from reading it — they've all read it anyway.

In addition, a lack of eye contact may be interpreted as unfamiliarity with the material or as a one-dimensional understanding of that material.

The alternative is to use notes in point form. By rehearsing from them, they will act as a guide — so you can look at the Court and gauge their reaction. You can learn a *lot* just by watching — you sometimes see who is with you and who is not.

(C) *Two Options: Argue From Your Notes or Argue* from Your Factum

When using notes to argue, it is vital that the Court knows from where in your factum your point originates. By cross-referencing your notes with your factum, you can easily advise a Justice of your argument's location.

The obvious danger of using your factum is that you may simply end up reading it verbatim. Whilst the court is unlikely to let you do this for very long, you should nevertheless plan to buttress and emphasize arguments in the factum, not simply recite them.

(D) *Start Strong*

Starting with your strongest point gives your argument immediate focus. It will also impress upon the judges that you have an appeal with validity and will earn respect and attention, if not agreement.

(E) *Show Organization to Your Argument*

Map out for the Court exactly where you are going with your argument by listing the issues and dealing with them one at a time. If at all possible, each issue should be self-contained with its own introduction, body and conclusion. Dealing with your points one by one limits damage that may otherwise occur if some points turn out to be unacceptable and the Court chooses to disregard or not to hear you on certain matters.

Advise the Court when you are moving to the next point.

Again, before diving straight into the case law, give it an appropriate setting — the issue, your position, principles, and how the relevant case law interacts with these factors.

v) *Your Conclusion*

Particularly when dealing with a hypothetical situation or a policy question, find an example or an analogy that graphically illustrates the implications. This makes for a strong and effective conclusion. Try to think of something that will stay with the judges long after they have left the courtroom. For example, Alan Gold, when arguing a case on the otherwise dry and technical area of electronic consent surveillance said:

When a boy and girl have sexual relations it's part of the risk of growing up that the boy will then talk about it to his friends. [I]magine if unknown to her he had videotaped their escapades and then started showing the tapes to his friends. [It's like a] nuclear bomb.[101]

(c) *Some Do's and Don'ts*

Do	Don't
- say if a quote is *obiter*	- quote out of context
- attack *obvious* and *significant* flaws in your opponent's factum	- examine every flaw in your opponent's factum
- be assertive	- resort to overstatement
- let your messages sink in; if a judge is writing, wait until he or she finishes	- give personal opinions
- emphasize certain words	- get angry or appear to be angry
- use short, effective quotations	- say "L'Heureux-Dubé J." or "L'Heureux-Dubé" and do not mispronounce a judge's name
- wait for the Justices to find your quotation before reading it	- say "If I can remind your Lordships" when Madame Justice L'Heureux-Dubé or Madame Justice McLachlin is sitting — they may want to be reminded too
- make wise concessions	- use pat phrases like "If it pleases the Court", "I am sure my learned Justices", or "In my respectful opinion" — there is only so much pleasure, learning and respect even judges of the Supreme Court of Canada can absorb
- make submissions, give positions	- repeat a point unless it was apparently not understood the first time

[101] *Lawyers Weekly* (16 January 1990) at 20.

- use respect when addressing or referring to Justices and judges ("Madame Justice L'Heureux-Dubé", not "L'Heureux-Dubé J." for example)

- ensure that appeal materials are professional in appearance (clean-indexed, tabbed, etc.)

- be selective in your choice of cases

- advise the Court if a ground of appeal has been abandoned

- make sure the Court always knows where you are in your argument

- keep the argument as short as possible

- exceed the time limit

(5) Questions from the Bench

Try not to react defensively or aggressively when asked a question from the bench. The Court is probably just looking for help in dealing with an issue. They are not out to attack you personally — so do not take it personally.

When asked a question, deal with it immediately — don't dodge it or delay answering it. If you are stumped for an answer, pleading ignorance on that particular question will always be more appreciated than evasion.

Some counsel prepare in advance for questions by having their colleagues or Ottawa agents examine them. Their prodding, baiting and cajoling might be the best preparation of all.

Be aware that a seemingly negative question (for example, one which does not support your case*) may in fact be coming from a Justice who is really al*ready on your side from having read your factum, but really only wants to be assured of a particular point — most commonly, that your case is *limited* in some way,

and what points give them trouble. *D*on't stick to your fixed agenda — that speech you've rehearsed in the hotel bathroom mirror the night before.

VII. Advocacy and the Charter

This *could b*e the subject of a short book all by itself.

The Charter is still young at more or less 14 years of age, and certainly there will be a continued evolution in how to deal with a Charter issue — and there is certainly a difference in arguing the Charter at trial as compared to on appeal — but the following are some points to bear in mind:

1. You may be making new law. Thus, be sure to consider the consequences of new law being made, both in the factum and in oral argument. Be ready for the "what if" question.
2. The issues are wider — particularly if a section 1[102] argument is involved. Thus cite cases from other jurisdictions and other courts, particularly the United States, Europe (not just the House of Lords) and the Commonwealth. Cite also the opinions of academics, whether in law or in the social sciences. It's a short-cut way of getting their views in without having to produce them as a witness or have them cross-examined.

   On rare occasions consider having an expert file an affidavit — but not too many, nor affidavits simply giving their opinion on X, Y or Z.[103] You do not want the Court to think you are trying to argue your case by an opinion poll of high-priced experts, which can be counterproductive.
3. Other material, or other non-Canadian material, may be necessary to *make, or resist,* a section 1[104] argument. Is the statutory provision being scrutinized rationally connected to the governmental objective which the statutory provision is designed to achieve? For example, what is the law on this point in other "free and democratic societies"?
4. There is now more scope for making use of what used to be called *"travaux préparatoires"*, and what used to be previously inadmissible, such as government white papers, green papers, reports of legislative committees, reports of royal (or other) commissions, statistical studies, and so on.
5. Most importantly, when the *Charter* is argued, the law itself is often on trial. Thus traditional "pure law" methods no longer work. You have to now consider social issues. You have to understand those social issues by reading in the area, or talking to social experts — or most time-saving, by asking an expert to give you a reading list. You have to learn the jargon — the Justices will have — therefore you should be ready for a question. For

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[102] *Supra* footnote 3.
[103] *Ibid.* R.19.
[104] *Ibid.*

example, what is a statistical "outlier", and what is the difference between an "average", a "mean", and a "median"? What is the current psychiatric thinking on delayed response to physical or sexual abuse?

6. Ensure you present sufficient "evidence" or argument in a Charter case, particularly if there is a section 1[105] argument.

7. Consider well before you make a Charter-type concession. In Schachter (July 9, 1992), Chief Justice Lamer wrote the following at pages 10-11:

> I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that Andrews v. Law Society of Upper Canada, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the iss*ue of r*emedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.
>
> All of the *above e*ssentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

As to the Charter, doing something that has never been done before no longer has, if you will excuse the pun, the same appeal it used to have. Bear in mind Lord Denning's 1954 advice:

> What is *the argument on the other side?* Only this, that no case has been found in which it has been done before. This argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.[106]

VIII. The Role of Government Counsel

The writer and colleagues have scanned through the court files and factums of government appeals over the last several years, and make the following brief practical points (which often apply to appeals generally):

1. in the leave application, focus on why the issues are of public or national importance rather than on the merits.

2. do not be tempted to:

   - file materials late, with a motion to extend time. Even though permission is generally granted, it does not help your cause, particularly if materials are filed so late that judges have little time for detailed review and consideration.

   - play fast and loose with technical requirements such as page limits, margins, etc., which may escape sanction in some cases, but again do not help your cause.

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[105] *Ibid.*

[106] *Packer* v. *Packer*, [1954] U.C. 15 at 22.

- use debatable techniques such as placing material which is properly part of the factum in an appendix.

3. oral argument

   - You have a time limit, so get to the heart of your case quickly. Do not spend significant time dealing with preliminary or collateral points such as clearly secondary issues, lengthy recitals of the facts, etc.

   - an underused technique is to read aloud short pertinent or forceful passages in cases or other authorities — to emphasize the point you're making and also sequence a logical flow — but make sure you refer the Court to the tab and page number in your Book of Authorities, and allow them time to underline, highlight, or make notes.

4. If you are acting for a Provincial Attorney General or territorial Minister of Justice in the role of an intervener, either as an "as of right intervener" by virtue of a constitutional question having been stated pursuant to R. 32 or having successfully applied for leave pursuant to R. 18, do not simply repeat, rephrase or refine the submissions of the parties — it is not appreciated by the judges — whether in the factum or in oral argument.

I*f you do not* agree with one side, say so, briefly say why, and sit down. The strong simple point you make will be remembered. A shorter repeat performance of the side you support will not.

Conclusion

The above therefore is a brief overview and guide to practical process and practical advocacy at the Supreme Court of Canada. If it has been relatively easy to read and accessible, it has served its purpose.

It is appropriate to conclude with a point of advocacy by quoting from (United States) Supreme Court Justice Robert H. Jackson, who underlined that to win in the Supreme Court one should try to elevate one's case beyond the boundaries of the case itself to a higher level:

> To participate as advocate in supplying the basis for decisional law-making calls for the vis*ion of* the *prophet, as well* as a profound appreciation of the continuity between the law of today and that of the past. [The lawyer] will be sharing the task of reworking decisional law by which every generation seeks to preserve its essential character and at the same time to ad*apt it* to contemporary needs. At *such a moment the lawyer's case ceas*es to be an episode in the affairs of a client and becomes a stone in the edifice of the law.[107]

[107] United States Court of Appeals Judge Aldisert, *Winning on Appeal, Better Briefs and Oral Argument*, (Clark Boardman Callaghan, 1992) at xii. With thanks to John Burns, How & Associates, Georgetown, Ontario.