The Court of Appeal of Alberta

July 12, 2004

Importance of Factums

The restrictions on time for oral appellate argument flow from, and reinforce, the importance of factums.

A panel of justices of the Court of Appeal always read the reasons of the judge appealed from, and all the factums filed. They often read other things too: salient law, or key pieces of evidence. Therefore, the justices always come to oral argument knowing the facts and the basic issues. Often some or all of them also bring some tentative views about the appeal.

So any counsel who views the factum as a formality, or shuffles its production on to a junior who is not fully trusted or informed, sends an ill-trained understudy to perform on opening night. The factum is not a mere rehearsal for a play to be performed later. Counsel's later oral argument might swing around one or two or three justices whom the factums had led to a tentative contrary view. But why would counsel wish to assume that heavy burden, by filing a poor factum?

Even if counsel succeeds in so swinging the panel around, a new problem then arises. Most justices do not take detailed notes of oral argument. The Court of Appeal cannot give an oral judgment if the judgment may make new law, or if the case is complex. If the Court of Appeal reserves decision, writing a judgment will take weeks. By then memory of oral argument has faded, and most notes of it are brief. The factums remain to reread, and so become more and more important. A persuasive careful factum once again tends to dominate. It is a continuing advocate, and a necessary reference book.

Oral argument is an opportunity for counsel to clear up misunderstandings, supply emphasis or focus, and learn what the panel of justices are interested in, or disagree with. Above all, it lets counsel answer their questions. It is not the time to explain the facts or issues, raise new arguments, or merely drive slowly past the argument in counsel's factum.

Content of Factums

Though the Court of Appeal allows a factum as big as 30 pages, usually that is far too long to be effective. Usually 10-12 pages suffice. An interesting factum is far more effective than a tedious one.

The "facts" section should be non-contentious and say just enough to explain the issues. More contentious fact allegations should be in the appropriate parts of "argument" section.

Argument in a factum should be a series of short clear sentences, many supported by citations of the Appeal Book or legal authorities. If possible, the sentences should form a logical compelling sequence, even a syllogism.

Repetition and variations on a theme are very counterproductive. A quotation of law is usually a poor idea unless it is so strong that it would sound improbable in a paraphrase or précis, or it is amazingly well expressed. The Rules forbid quotations of evidence in the body of a factum.

Counsel often forget the Appendix of Statutes and Rules (R. 540(4)) and the Appendix of in-trial rulings under appeal, or vital exhibits (Consolidated Practice Directions Part C.3).