

Federal Court



Cour fédérale

Leave and judicial review applications : Tips and best practices

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Federal Court
2016 Borderlines Podcast**



Drafting – Style and Structure – Top 25 things to remember

- 1. Respect** the page limits
- 2. Use headings** and subheadings to organize your arguments
 - Structuring your argument in general is key – poor organization makes following the argument much harder
- 3. Avoid** incendiary language or hyperbole – e.g., “outrageous,” “ridiculous”
- 4. Poor grammar** reflects poorly on your argument
- 5. Language:** write in the language you’re comfortable in – not the language you think you’ll have the most success in (the French rumour)
- 6. Citations:** Place below each paragraph – not in footnotes
- 7. Affidavits:** Don’t draft affidavits that sound like they came straight out of counsel’s mouth



Drafting – The Law and the Facts

8. **Jurisprudence:** Ensure your references to the jurisprudence are up-to-date and on point
9. **Facts:** Ensure the relevant facts are sufficiently described. Everything turns on the facts
10. **Evidence:** Support your positions with the most reputable, objective sources of evidence
11. **Weaknesses:** Deal directly with the weaknesses in your case
12. **Standard of review:** Pay careful attention to the standard of review
 - Where it is reasonableness, explain how its application leads to the result you are seeking – and ensure your arguments don't read like an appeal on a correctness standard
 - Support your case with up-to-date jurisprudence
 - Ensure that pre-*Dunsmuir* jurisprudence is still good law
 - Ignore it at your peril
13. **Context:** judges routinely deal with a broad range of different areas of the law
 - Federal Court judges see a lot of immigration and refugee law, but it's always useful to provide some statutory context.
14. **Proofread** your brief and tailor to your case any material culled from your precedents



Drafting – Getting to the Point

15. **Factum:** Focus your written brief on your strongest issues – and keep those issues to a very small number

– Warning Signs: 30-page facta, 2 pages of issues to be decided

16. **Concede** issues in good time where possible – not a good idea to do it on the day of the hearing if it can be avoided

17. **Economy:** include key documents in leave materials, eg – not every possible document about a country, when only a few are really crucial

18. **Settlement:** See what can be done to settle in as much time in advance of the hearing as possible

19. **Narrowing of issues:** Explore where issues can be narrowed with opposing counsel

20. **Replies:** Make any reply submissions brief and punchy – avoid repetition with initial submissions (avoid repeating yourself entirely)



Drafting – Timing and pre-hearing strategy

21. **Timeliness:** be timely in filing – set a schedule for yourself to meet. There is flexibility now within the 90 days between granting leave and the hearing, so be proactive

22. **Interlocutory matters:** Avoid last minute motions and stays. If you plan ahead, you'll have a much better chance of meeting the “serious issue to be tried” in the *Baron-Wang* context

23. **Think ahead:** consider, where warranted, what the rules allow: eg - cross-examinations; settlement discussions, case management; longer hearings requests where complex issues.

24. **Costs:** keep in mind special rules for immigration costs

25. **Certified questions:** come prepared; avoid asking for post-hearing submissions on certified questions, costs (or anything else)



Oral Presentations: My top 10 suggestions

1. **Be succinct and punctual:** KISS principle, where possible
2. **Be aware:** pace yourself (90 mins goes quickly)
3. **Listen well:** answer questions
4. **Summarize:** provide a road-map at the outset
5. **Assume:** judge has read your submissions -offer to review facts
6. **Follow:** judge's lead, even if it does not match #5
7. **Move on:** when the judge signals you are not making headway
8. **Be straightforward:** highlight strengths; don't mask weaknesses
9. **Respect:** the Court staff (ushers, ROs); opposing counsel
10. **Carpe Diem:** you only get one shot – prepare, prepare, prepare



Last but not least

Don't Forget ...

- **Credibility/integrity:** Never compromise your credibility/integrity
- **Professionalism:** includes courtesy towards opposing counsel but also all court staff. All of these people will remember you.
- **Reputation:** your reputation is all you have
 - Your written work, respect for your client, the other side, the court staff, and the judiciary will pay dividends, if not in today's case, then in tomorrow's.
 - “It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently” – Warren Buffett



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Justice Roger Hughes, a year after he was appointed to the Federal Court, gave a presentation entitled “What I wish I'd known when...”. I can leave you with no wiser words...

Judges want to do the Right Thing: Every Judge hearing a case wants to do the right thing -- in law and for the parties. Don't get in the way of the right thing through unnecessary objections, protracted rhetoric, or sloppy practice, which will make you rather than your client then becomes the focus of attention.

Solve it Yourself: Co-operation between counsel and the parties can go a long way toward an ultimate resolution of the dispute. Counsel should between themselves get the procedural underbrush out of the way. Give notice to the other side as to issues and procedural objections. Give copies of materials to the other side sufficiently in advance so that minor objections and misunderstandings can be dealt with before the Court needs to intervene. Let the Court decide unresolved legal issues and address equitable concerns of the parties.

Keep your Focus on the Main Event: The main event is the trial. Procedural matters are side issues that slip away once the trial is heard. Years of procedural wrangling may improve billings – but they wear down your client as much as the opposition, and tie up the Court's time with solicitor's fussing and petty quarrels. This is not strategy.

Don't Trust the Court Registry to Function Perfectly: The Court Registry, like every other human endeavour has its faults. Documents filed at the last moment may not get processed immediately. Documents filed in one city may not reach the Judge in another city. The Registry is not a computer, it is people. File before the last minute. Ask that the Registry Officer bring a matter to the attention of the relevant Judge or Prothonotary quickly. E filing can help.

Get to the Point – Fast: Judges are overwhelmed with work, of all different kinds, decisions have to be made now, Reasons have to be written now. The train must keep moving. _A Judge has to read your materials in advance. Get them filed well in advance. Your materials should be clear and concise. Settle.

Avoid Evidentiary and Legal Overload: Too much in evidence, too many documents, too many witnesses, distract from your case and weary the Judge. Make your underlying point and leave it. If the other side challenges the evidence they should do so with a concise point. Masses of stuff just to prove a point already in evidence is agonizing. _The same with law. Cite the best and highest authority. If other Judges have said the same thing you don't need to cite it all. Only when there is an important distinction made or some contrary law do you need to cite it.

Winning is Wonderful – Learn to Lose: Any counsel can deal with winning – it takes maturity to lose. Good counsel with good cases sometimes lose – bad counsel with bad cases sometimes win. Keep you emotions to yourself. Act honourably and with dignity.

We Talk: We talk among ourselves about the law – our cases – our decisions – and about you. _We recognize good professional counsel and welcome cases where they appear. _We know bad, unprofessional counsel. We grit out teeth and get through it.

Be a Pro: You are a lawyer. Law is a profession where your duty to the law and to the Court rises above everything. _Serve the interests of your client well – as a professional, a good skilled, honourable professional. That way, you win and we all win.

- Justice Roger Hughes, 2006



Take-aways

An ounce of prevention is worth a pound of cure.

The best way to increase your client's odds is to get it right the first time.

By failing to prepare, you are preparing to fail.

If you have to litigate, you're only as good as your application.