C.A. N^{o} A-456-11

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HER MAJESTY THE QUEEN

(Respondent)

- and -

DANIEL PELTIER

(Appellant)

What the Factum Judges Consider: A Teacher's Guide

NAME OF LAW FIRM
Address of law firm

Names of Counsel (Include First and Last Names)
Of Counsel for the Appellant / Respondent

Telephone:
Fax:
Email:

PART I:
INTRODUCTION

1. This case is about… **[Here, the judges look for a short paragraph which clearly and concisely captures the main issue (or heart) of the case. In *R v. Peltier*, the students might begin by explaining that, "This case is about the constitutionality of mandatory minimum sentences as applied to Aboriginal offenders." Since this is the opening statement and the first thing the judge will read, a good factum will use persuasive language and give the reader some indication of where the argument will go. This is not a good place to restate the facts or the trial judge's decision, since this is the subject of Part II of the factum.]**

PART II:
SUMMARY OF THE FACTS

2. The Applicant is an 18 year old Aboriginal male member of the Makwa First Nation. He resides, with his family, on the North Lake Reserve – a small and isolated community in Northern Ontario.

3. On June 17, 2012, the North Lake High School held its graduation ceremony. Later that evening, a number of students, many of whom were under 18 years of age, had a party in the park adjacent to the school. There was alcohol and drug use at the party.

4. The Applicant admits that he traded Oxycodone, a substance found in Schedule I of the CDSA, to a number of students in exchange for alcohol. Approximately half of these students ranged in age from 15 to 17 years old; the other half were 18 years of age or older. He also admits to selling two of the pills for cash to two individuals at the party who did not have any alcohol to trade; neither of these individuals were under 18 years of age.

5. The Applicant admits that he took the Oxycodone from his mother, who is recovering from a serious automobile accident which took place three months ago. The Oxycodone was prescribed to her by a doctor for the chronic pain which from which she suffers.

6. One of the students at the party had an adverse medical reaction to the combination of alcohol and Oxycodone and was rushed to the hospital that night. Fortunately, this young man recovered, but as a result of the incident, the party and the Applicant's activities came to the attention of the local police.

7. Mr. Peltier acknowledged his wrongdoing and pled guilty at an early juncture, forgoing his right to a trial.

8. On September 30, 2012, the Applicant, Mr. Daniel Peltier, pled guilty to a single count of trafficking of a controlled substance contrary to s. 5(3)(a)(ii) of the Controlled Drugs and Substances Act (CDSA), on the basis of an agreed statement of facts.

9. The Applicant maintains that he does not have a drug or alcohol problem, although he admits to drinking alcohol socially since the age of fourteen. His motivation in selling the Oxycodone was purely financial.

10. Mr. Peltier lives in North Lake with his mother and two younger brothers. His father died when he was 3 years old. Until two years ago, Mr. Peltier was his mother's second oldest son; her oldest son – and Mr. Peltier's older brother by two years – committed

suicide at the age of 18. Tragically, suicide, especially among teens, is not uncommon for this under-served community which suffers from chronic unemployment and a general lack of resources. Many of the middle-aged adults who live on this reserve attended residential schools, and the intergenerational impact stemming from this has been noted.

11. At the time of the sentencing hearing, the Applicant was not enrolled in school and had no prospects for employment. He does not have a criminal record.

12. **A summary of the trial judge's decision should follow here. Students are not allowed to change the facts above, but they can be judicious in highlighting aspects of the trial judge's decision in the next few paragraphs. Ideally, the summary should be no longer than 2-3 paragraphs. A good summary will make sure to include how Justice Toews decided on each of the four issues. Paraphrasing is just fine – they do not need to include full quotes – but they should reference the decision whether paraphrasing or quoting. For this section, "less is more" so students who are able to paraphrase the decision concisely, will do better than those who are too comprehensive – and end up reproducing the trial judge's decision in their own factum.**

PART III
GROUNDS OF APPEAL

ISSUE ONE: DOES S. 5(3)(A)(II) OF THE *CDSA* VIOLATE THE APPLICANT'S S. 12 *CHARTER* RIGHT?

13. **It is generally recognized that mandatory minimum sentences do not violate s.12 unless they are grossly disproportionate to the offence committed. Students who researched this issue may have drawn on some of the following case law to support their arguments:**

R v. Smith **(1987) SCC – The facts of this case involve a significant amount of cocaine and a 7 year minimum sentence. The minimum sentence was not upheld under s.1 because punishing the less serious offender would not have the intended effect of deterring the more serious offender. It also enters the idea of a "most innocent possible offender" (MIPO). This means the analysis of whether a sentence is cruel and unusual requires consideration of whether or not the sentence captures an offender that would, on the facts, be subject to a sentence that is grossly disproportionate to the seriousness of the offence. The sentence must be more than "merely excessive". It must be "so excessive as to outrage standards of decency" and be disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable". The other consideration is if the sentence is simply barbaric in nature (ie. Death penalty, castration).**

14. **In assessing whether or not a sentence amounts to cruel and unusual punishment or treatment, contextual factors should be taken into consideration.**

R v. Wiles **(2005) SCC – This case outlines factors that should be taken into consideration: gravity of the offence, personal characteristics of the offender, circumstances of the case, actual effect of the treatment or punishment on the individual, penological goals and sentencing principles, existence of valid alternatives, and comparison to other sentences.**

15. **There is little to no movement towards a serious system of sentencing guidelines for judges to follow. There has, however, been an increase in the number of offences that have imposed mandatory minimum sentences. Courts have become increasingly deferential to Parliament when it comes to imposing minimum sentences despite never expressly disavowing the holding in Smith (Peter Hogg, Constitutional Law of Canada 2010).**

R v. Goltz **(1991) SCC – The issue in this case was the validity of a mandatory minimum sentence of 7 days in prison for driving a motor vehicle while prohibited. Gonthier, writing for the majority, held that a hypothetical MIPO had to be "reasonable" and not "far-fetched." The judge must apply "imaginable circumstances which could commonly arise in day-to-day life." Initially the MIPO of a person, acting as a good-samaritan might drive a car if it was required to save a life despite being legally prohibited from driving. This hypothetical person would then be subject to the minimum sentence even though it seemed completely disproportionate to their offence. McLachlin in dissent argued for individualized sentencing saying that mandatory minimum sentences**

"deprive the judge of the range of discretion which is appropriate having regard to the gravity of the offence and the potential circumstances which may arise."

R v. Morrisey **(2000) SCC – The issue in this case was a 4 year mandatory minimum sentence for criminal negligence causing death with a firearm. Gonthier, again writing for the majority, upheld the sentence saying that it pursued "sentencing principles of general deterrence, denunciation and retributive justice". In a concurring judgement, Arbour argued for a constitutional exception for cases where the MIPO situation was found. This would provide a judge with a discretionary option to apply a constitutional exception for certain offenders.**

R v. Ferguson **(2008) SCC – This case considered providing for a constitutional exemption from the mandatory minimum sentence in the case of a MIPO. The accused in this case was found guilty of manslaughter involving a firearm. The sentence was upheld at 4 years. McLachlin, writing for the majority, held that a constitutional exception should not be used in cases where a mandatory minimum is found to be unconstitutional. Instead, the minimum sentence should be struck down entirely.**

16. **The APPELLANT in this case might argue that the intended effect of the mandatory minimum sentence is not actually achieved in punishing offenders like Peltier. As in *R v. Smith*, Peltier is one of the less-serious offenders that are captured under this minimum sentence provision. It is unlikely that Peltier was what Parliament had in mind when the mandatory minimum was imposed. The fact that the offender is Aboriginal, that the offence is relatively minor in nature, and the detrimental effect of imprisonment on the individual in being unable to access diversion alternatives, compound to form a strong argument that a mandatory minimum sentence of 2 years, in this particular case, amounts to cruel and unusual punishment or treatment. The sentencing principles in Gladue demand that a court consider any and all possible alternatives to incarceration with specific attention and consideration to the systemic factors that led to the Aboriginal offender coming before the court. Only in the case of more serious offences are these principles to be given less weight. It is inimical to apply a mandatory minimum sentence in the face of the decision of Gladue and s.718. Failure to at least consider these factors amounts to an error of law. Applying a**

mandatory minimum in a case like this, which involves an aboriginal offender, effectively strips a judge's discretion to apply these factors.

17. **The RESPONDENT in this case might argue that the sentence is not "grossly disproportionate" to the offence committed. The sentence is aimed at deterring and denouncing drug trafficking to young people in and around schools. Imposing a mandatory minimum achieves this effect by bringing certainty of punishment for this particular conduct that is extremely damaging at schools and to youth in general. The effect on the individual offender is to hold them accountable for their actions while providing for certainty of punishment. This satisfies the penological goals and sentencing principles of deterrence and denunciation. The respondent could maintain that it is exactly this type of behavior that Parliament has sought fit to denounce and deter, therefore deference should be given to that objective. Parliament is an elected body of representatives who are acting on behalf of the Canadian public who has a vested interest in creating safe communities, free of drugs. Protecting young people and schools from exposure to illegal drugs is a valid objective and the imposition of mandatory minimum sentence for offenders engaging in the trafficking of drugs is a reasonable course of action to take.**

ISSUE TWO: DOES S. 5(3)(A)(II) OF THE *CDSA* VIOLATE THE APPLICANT'S S. 15 *CHARTER* RIGHT?

18. **The section 15 issue in this case was a tricky one to deal with. There are no obvious submissions, or easy answers. Students should not be expected to canvass all of the arguments offered below as examples. It is more important that they appreciate the different steps of legal analysis that s. 15 requires, and fit their arguments into that framework. Good factums would recognize that this case concerns <u>adverse effects discrimination</u> – the inequality the appellant alleges is not characterized as the express exclusion from some sort of benefit, or a policy that targets a specific group. Section 5(3)(a)(ii) of the CDSA does not directly discriminate. It treats all individuals the same; is a facially neutral policy**

or standard of sentencing. Such a case is not novel, but is more analytically complex than most.

19. **The challenge for the appellant is in establishing that by treating aboriginal offenders the same as other offenders, without regard to their aboriginal status, the legislation has a discriminatory effect. They must, essentially, argue that the equality guarantee in s. 15 mandates differential treatment in the circumstances, a premise that will seem counterintuitive to many.**

20. **The challenge for the respondent is meeting this argument without becoming too wedded to rigid notions of formal equality that have been rejected by the courts as overly restrictive.**

21. **Really good factums would recognize that the two cases referred to by the trial judge, *Law* and *Lovelace*, while relevant, do not paint a complete picture of the law. In *R. v. Kapp*, the Supreme Court of Canada qualified the test from Law, preferring the simpler two-part test originating in Andrews: (i) whether a law creates a distinction based on a prohibited ground, and (ii) whether the distinction creates or perpetuates disadvantage or stereotyping. This is not to say students are incorrect in referring to Law, but the contextual factors in that case are no longer rigid requirements – they are tools in assessing the perpetuation of disadvantage and stereotyping.**

22. **The APPELLLANT might acknowledge that there is no direct discrimination in this case, but could characterize the effects of a mandatory minimum as adversely affecting aboriginal persons more than others. The facts contained in paragraph 13 would be helpful in making this argument. They speak to Mr. Peltier's community, the impacts of teen suicide, chronic unemployment, and the intergenerational impact stemming from residential schools. By ignoring these acute circumstances of this and other aboriginal communities, the mandatory minimum sentencing regime disproportionately affects aboriginal offenders. Put another way, the removal of a flexible, differentiated approach to**

sentencing offenders is felt more harshly by aboriginal offenders. For support, a strong appellant's factum might refer to an existing case where facially neutral law has a differential impact on the basis of a prohibited ground of discrimination, such as *Eldridge*, or *Meorin*.

23. **The APPELLANT should establish that s. 5(3)(a)(ii) of the CDSA is substantively discriminatory (language of *Lovelace*) in that it perpetuates disadvantage or stereotyping (language of *Kapp*). Given that the provision is facially neutral, it will be difficult to engineer an argument that focuses on stereotyping (though several may exist). However, the application judge's characterization of the appellant's argument, at para. 31, provides a good example of how the appellant can argue disadvantage. The over-incarceration of Aboriginal people in the criminal justice system, and systemic discrimination faced by Aboriginal peoples amounts to disadvantage that would be perpetuated by mandatory minimum that preclude a differentiated approach to sentencing.**

24. **Overall, the key to the appellant's s. 15 claim is stressing the importance of substantive equality, rather than a rigid focus on formal equality. A particularly good appellant's factum might anticipate an argument that a sentencing regime that treats individuals differently according to prohibited grounds of discrimination would itself infringe s. 15(1). The appellant might respond to this argument by reference to s. 15(2) which protects differential treatment for an ameliorative purpose.**

25. **The RESPONDENT might argue that s. 5(3)(a)(ii) of the CDSA applies with equal force to all offenders, irrespective of any prohibited grounds of discrimination. The mandatory minimum is neutral. A strong respondent's factum will recognize, however, that s. 15(1) captures more than just direct discrimination, and will address the issue of adverse effects discrimination. The respondent might argue that Mr. Peltier's case is not like other cases, such as *Eldridge* or *Meorin*, where a differential impact is produced by treating all individuals the same. When a mandatory minimum applies, it is equally the case for all**

individuals that no personal circumstances permit a departure from the minimum sentence. Any other mitigating factors, apart from aboriginal status, that arise in the sentencing context are equally taken out of play by the enactment of a mandatory minimum. Moreover, some of those possible mitigating factors, like age, and health status, are themselves prohibited grounds of discrimination.

26. **The RESPONDENT might also argue that s. 15(1) does not oblige the government to alleviate disadvantage that exists independently of their actions. Though this argument was rejected in *Eldridge* it may have more traction on the facts of this case. While aboriginal people face systemic discrimination, high relative rates of incarceration, and significant issues on a community level, this does not obligate the government to respond at the highly specific level of enacting an exemption to a two-year sentence for trafficking drugs to minors. Finally, some respondents will argue that special considerations for aboriginal offenders would itself infringe the equality rights of non-aboriginal offenders. The argument may be worth raising, however, s. 15(2), which protects ameliorative programs even where they distinguish between individuals on the basis of a prohibited ground, is likely a full answer.**

ISSUE THREE: IS THE INFRINGEMENT JUSTIFIED BY S. 1 OF THE *CHARTER*?

27. **This issue was all about the *Oakes* test. Students who really understood the issue knew that they had to do an *Oakes* analysis for both the alleged s. 12 and s. 15 infringements. OJEN's handout on section 1 and the *Oakes* test guides students through the analysis, but a good factum would have taken the different steps and applied them to the facts of this case.**

28. **Whether a limitation on the rights guaranteed by ss. 12 and 15 is "prescribed by law" is not reasonably at issue in this case, and the appellant should concede this point. Students might mention this first step, but should not devote any**

significant attention to it. A strong factum would address all remaining components of the s. 1 analysis and the Oakes test: for the limit to be justified it must have a pressing and substantial objective. It must also satisfy the three requirements of proportionality: (i) a rational connection to the objective, (ii) minimal impairment of the Charter right(s) in question, and (iii) proportionate effect – are the benefits of the law great than the negative effects? The onus is on the respondent to demonstrate that each of the components of the Oakes test is met. A good factum would not argue each and every point of the test, but pick the strongest aspects of the test to highlight. (For instance, there is little point in the Appellant arguing that the limitation isn't prescribed by law; instead, it would be more persuasive to focus their arguments on minimal impairment and proportionate effect.)

29. **The APPELLANT'S ARGUMENT: It is reasonable for the appellant to concede that the legislation has a pressing and substantial objective, (to deter and denounce drug trafficking with respect to minors), but a strong appellant factum will cast the pressing and substantial objective in a fashion that suits the appellant's arguments concerning minimal impairment and proportionality.**

30. **At the rational connection stage, the appellant faces an uphill battle. It is difficult to argue that the imposition of mandatory minimums does not advance the objectives of denunciation and deterrence (of drug trafficking, and especially in respect of youth) at all. Depending on how the appellant frames the objective of the legislation, some reasonable arguments may be available. For example, the appellant might argue that while the objective may be to deter and denounce, the actual effect of the provision is to remove a degree of judicial discretion from the sentencing process. What is required to effect denunciation and deterrence will depend upon the circumstances of the offence and the offender, circumstances that cannot be considered under a mandatory minimum regime.**

31. **The appellant has much more to work with at minimal impairment. The appellant can argue that in order to achieve its goal, the government can use alternative**

that have less impact on the equality rights of aboriginal offenders. The presence of 718.2(e) in the Criminal Code, which mandates that sentencing judges pay particular attention to the circumstances of aboriginal offenders, could be cited for the proposition that fundamental sentencing principles of denunciation and deterrence are not jettisoned simply because the circumstances of aboriginal offenders are taken into account. Parliament has struck a balance between the need to consider restorative justice in the case of aboriginal offenders and the need to deter and denounce serious crimes, through the enactment of s. 718.2(e). The government could have crafted s. 5 of the CDSA to allow for a similar balancing.

32. **At the final stage of the proportionality test, a strong factum will clearly set out the salutary and deleterious effects of the provision. In discussing salutary effects, the appellant should be fair, but might downplay the deterrent and denunciatory value of mandatory minimum sentences. In discussing deleterious effects, many of the same points applicable to demonstrating disadvantage under s. 15(1) are applicable. The appellant should reference the facts set out at para. 13 of the application judge's decision, as well as the arguments canvassed at paras. 31 and 36.**

33. **The RESPONDENT'S ARGUMENT: A strong respondent factum will have a clear statement of a pressing and substantial objective. This may include a reference to the preamble of the *CDSA*, or sentencing principles generally. Denunciation and deterrence should feature. Students might also cite consistency of sentences as an object of mandatory minimum sentencing provisions generally.**

34. **At the rational connection stage, the respondent should argue the clear link between firm, consistent sentences, and the message to potential offenders that society does not condone the evil of drug trafficking to minors, and will respond seriously to that threat.**

35. **At the minimal impairment and proportionate effect stages of the analysis, the respondent faces a greater challenge. The respondent might argue that the goals of the legislation can only be served by treating all offenders the same and that special treatment for some offenders would tend to undermine the pressing and substantial objectives of the legislation. The respondent might also argue that in the spirit of and pursuant to s. 718.2(e) of the Criminal Code, the circumstances of aboriginal offenders remain relevant considerations for sentencing, in that a mandatory minimum is not a fixed sentence, but only a fixed lower threshold. The mandatory minimum is more flexible and less restrictive than a fixed sentence regime. In balancing the positive and negative effects of the legislation, the respondent should emphasize the dire harms associated with drug trafficking and use among minors.**

ISSUE FOUR: DOES S. 5(3)(A)(II) OF THE *CDSA* VIOLATE S. 35(1) OF THE *CONSTITUTION ACT, 1982?*

36. **The Supreme Court of Canada decision in *R. v. Sparrow* sets out the four-step framework for analyzing s. 35(1) claims. A good factum would consider each of the four steps:**

37. **Step 1: Has Peltier demonstrated an aboriginal right?**

The Supreme Court of Canada in R. v. Van der Peet, [1996] 2 S.C.R. 507, laid out the test for determining whether a practice, custom or tradition is an aboriginal right within the meaning of s. 35(1): "... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group asserting the right." A good factum will show an understanding of how the Van der Peet test should be applied in Peltier's case, and should exhibit an understanding that the practices, customs and traditions that constitute aboriginal rights under the Van der Peet test must have existed before European contact.

A really good factum might refer to the Supreme Court's decision in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, which is the leading case on aboriginal self-government claims under s. 35(1). *Pamajewon* says that the aboriginal right of self-government (assuming, but not deciding, that this right exists) extends only to activities that meet the *Van der Peet* test. A really good factum might also refer to the Supreme Court's decision in *R. v. Sappier*, 2006 SCC 54, which explained what it means for a practice, custom or tradition to be "integral", rejecting the notion from *Van der Peet* that the practice must be of central significance to, or a defining characteristic of, the aboriginal society in question.

<u>A good Appellant's factum</u> would take the position that the right to self-government is protected under s. 35(1) and focus on explaining how the use of alternative practices to resolving disputes is integral to the distinctive culture of the Makwa First Nation. They could argue that the Makwa First Nation's sentencing methods are integral to its ability to structure relations within its community and for the continuity of its culture. They might point out that the federal government has recognized a right to self-government and argue that this right must exist as a result of aboriginals living in self-governing communities prior to European contact. We do not have a lot of evidence about the history of the Makwa First Nation's use of restorative justice, but the Appellant should point to the evidence we do have (which is stated at para. 49 of the case scenario).

<u>A good Respondent's factum</u> would go beyond agreeing with Toews J. and would argue that the use of alternative practices to resolving disputes, while important, is not sufficiently integral to the distinctive culture of the Makwa First Nation. The Respondent could point to the lack of evidence that such practices are integral to the Makwa First Nation. The Respondent could also point out that aboriginal rights are not frozen in time and argue that any right the Makwa First Nation has to self-government has evolved with the enactment of criminal laws,

so no longer includes the ability to determine the sentencing process for individuals who breach federal or provincial laws.

38. **Step 2: If Peltier has demonstrated an aboriginal right, has that right been extinguished?**

Before the Constitution was enacted in 1982, aboriginal rights could be extinguished by legislation. After 1982, once aboriginal rights were constitutionally protected under s. 35, even legislation that is inconsistent with an aboriginal right does not extinguish that right unless the government's exhibits a "clear and plain" intention to extinguish an aboriginal right. The "clear and plain" intention test for extinguishment was set out in *R. v. Sparrow*. A good factum will apply the "clear and plain" intention test, and may recognize the difference between how aboriginal rights could be extinguished before and after 1982.

A good Appellant's factum would argue that Toews J. erred in holding (at para. 50) that any right of the Makwa First Nation to use restorative justice pre-contact was extinguished when Parliament enacted the sentencing provisions in the Criminal Code because there was no "clear and plain" intention to extinguish this right. A good factum would recognize the distinction between regulation and extinguishment, and argue that the sentencing provisions in the Criminal Code regulate the Makwa First Nation's right but do not extinguish that right.

A good Respondent's factum would go beyond agreeing with Toews J. and provide reasons why the sentencing provisions extinguished the Makwa First Nation's right. They could also argue that any aboriginal right the Makwa First Nation had to use its own sentencing practices was extinguished before 1982 when the government first enacted sentencing provisions, because using its own dispute resolution practices is inconsistent with using the sentencing processes prescribed by the Criminal Code.

39. **Step 3: If Peltier has demonstrated an un-extinguished aboriginal right, has that right been infringed?**

In *R v. Sparrow*, the Supreme Court directed that certain questions be asked to determine whether the aboriginal right has been infringed: "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right?" A good factum would address these three questions.

For the first question, the Appellant might argue that it is unreasonable to recognize that the Makwa First Nation has a right to use restorative forms of dispute resolution, but then hold that sentencing circles or other forms of alternative dispute resolution cannot be used to sentence offenders under s. 5(3)(a)(ii) of the CDSA. For the second question, the Appellant could argue that this imposes undue hardship because of the high rates of crime involving and incarceration of aboriginals. For the third question, the Appellant could argue that s. 5(3)(a)(ii) of the CDSA clearly denies the Makwa First Nation their preferred means of resolving disputes because it does not allow for discretion in how aboriginal offenders are sentenced.

The Respondent might argue that the limitation is not unreasonable and any hardship is not undue because the mandatory minimum does not apply to every offender guilty of trafficking, but only to those who involve minors or target schools (where safety is a particularly important concern). Sentencing for most crimes allows for discretion in considering the appropriate sentencing process for the aboriginal offender. The mandatory minimum in question applies to a particularly serious offence.

40. **Step 4: If that right has been infringed, is the infringement justified?**

In *R. v. Sparrow*, the Supreme Court set out the following test to address whether an infringement is justified: First, is there a valid legislative objective? Second, is the infringement consistent with the fiduciary relationship between the government and the aboriginal peoples? A good factum would address this test.

A good Appellant's factum might argue that the legislation goes too far by removing discretion in how offenders are punished. The mandatory minimum may justifiably capture offenders who specifically target their drug crimes at children, but goes too far in also capturing individuals like Peltier who is a first time offender and just turned 18. The Appellant might argue that the government has not upheld its fiduciary duty to the aboriginal people by failing to consult with the Makwa First Nation before enacting the mandatory minimum sentence and failing to acknowledge their right to self government by removing all discretion in sentencing under s. 5(3)(a)(ii).

41. **A good Respondent's factum might argue that the deterring crime is a valid legislative objective, particularly where crimes are targeted at minors or at schools. The Respondent might argue that the government acted in the best interests of the aboriginal peoples by enacting the mandatory minimum sentence because the goal is to decrease crime and increase safety in all communities in Canada, including that of the Makwa First Nation.**

APPLICATION TO THIS CASE

42. **This is essentially a conclusion. Factum judges look for a concise (preferably one paragraph only) summary of the four issues argued above. Students who write persuasively, without exaggerating their case, do well here.**

PART IV

ORDER REQUESTED

43. It is respectfully requested that…

This is a simple line – depending on whether they are the Appellant or the Respondent, students will specify:

"It is respectfully requested that the appeal be allowed."
or
"It is respectfully requested that the appeal be dismissed."

ALL OF WHICH is respectfully submitted by

_____
Name of all four counsel
Of Counsel for the Appellant/Respondent

DATED AT (LOCATION) this ____th Day of **(month), (year)**

Some General Tips from the Factum Judges

Students do not need to cite a lot of case law to write a good factum. It is better to cite fewer, more relevant cases than it is reference many random cases – just for the sake of filling out the "authorities cited" page. It is important to pick precedents wisely – otherwise the case can be weakened.

Whenever possible, break down each issue into sub-issues and then separate those out with additional sub-headings. This makes the argument easier to follow and it will also help students to organize their own thoughts on the case.

When it comes to the presentation of the issues, follow the format specified in the factum template. Often, the factum template has arranged the issues this way because it corresponds to the appropriate analysis of the issues. In this case, for instance, you would not want to present your arguments on issue two before your arguments on issue one because it is necessary to determine issue one before proceeding to any of the other issues.

Students should stick to their own issues; if they have been tasked with issue four, they shouldn't be talking about the Charter – this is for their colleague to argue. Students should focus on their own issues or else the factum as a whole is confusing and difficult to read.

In general, it is not wise to overstate your case! If a judge thinks you are trying to oversell your point, you risk losing your credibility with the court. You never want a judge reading your factum to stop and say, "Hey – wait a minute – is that right?" Exaggeration doesn't make for good advocacy.

Try to start from general principles of law and work out to the specifics of your case.

Broad statements of your conclusions should be used sparingly (i.e. at the conclusion of a section), but another really good place to use them is in a heading. For example:

- **S. 5(3)(A)(II) OF THE CDSA VIOLATES THE APPLICANT'S S. 12 CHARTER RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

In place of:

- **DOES S. 5(3)(A)(II) OF THE *CDSA* VIOLATE THE APPLICANT'S S. 12 *CHARTER* RIGHT?**

When there isn't a lot of helpful case law for your issue – argue the facts. When the cases don't say what you'd like them to say, distinguish the facts in your case from the facts in these cases.

The best facta are both persuasive and concise. To avoid rambling and talking around the issues, draft an outline before you begin writing and ensure that each paragraph makes one specific point.