

# Winning Appellate Advocacy: Persuasive Presentations

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JUSTICE ROTHSTEIN\*

Thank you Dick, for your generous introduction. There is just one thing I have to correct. When you said that I was in the law office in the afternoon, I would say that it was most afternoons. Some afternoons were in the pool hall.

It is great to be home and it is a singular honour to have been given the opportunity to participate in the Isaac Pitblado Lectures on the 100th Anniversary of the Manitoba Court of Appeal. I know all the members of the Court and I go back a long way with the old ones. My relationship with each of them, of course, is different. Guy Kroft, who just retired this week, and I know each other best because we were plaintiffs together. We had invested in a limited partnership and made a profit, unusual for me, and declared the profit as a capital gain. The Government said it was income and reassessed us. Guy was a judge at the time and I was still a lawyer. When it came time for examinations for discovery, we had to decide who would be discovered. Guy announced that it would have to be me because it would be unseemly for a judge to be examined. All I can say is, it's easier to ask the questions than to answer them.

Charlie Huband taught me trust law. Charlie looks the same today as he did 43 years ago. It's the hair – a sensitive subject for me.

I litigated with Dick Scott and Kerr Twaddle. They always won. Sometimes I was bitter about it. But I certainly don't want anyone to think that now it's pay-back time.

And, of course, Martin Freedman and I were partners and close friends for many years at Aikins, MacAulay & Thorvaldson.

So those are the old guys.

Now, Barb Hamilton was also a partner of mine at Aikins and a good friend. But she was much younger. Freda Steel, I have gotten to know quite well over the years since we both became judges. And Mitch Monnin and I know each other but mostly vicariously because Marc Monnin and I worked together in the Transportation Law Department at Aikins and Marc would complain to Mitch about how hard I was to work with.

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Well, I know I have engaged in name-dropping but if not now, when?

Yesterday, we heard Trevor Anderson tell us about the Courts and Judges in Manitoba's history and he mentioned Mr. Justice A.K. Dysart of the Court of Queen's Bench, Court of Appeal and indeed, an ad hoc member of the Supreme Court of Canada on one occasion - which reminded me of a case that all lawyers about my age are familiar with and which was taught in law school way back. It was a judgment written by Mr. Justice Dysart. For the benefit of the few of you who may not be familiar with it, I thought it would be worthwhile taking a couple of minutes to read to you some excerpts from his 1924 judgment in *Mitchell v. Martin and Rose*, [1925] 1 D.L.R. 260. The case was about the taxation of costs of the defendants who won by reason of the action being dismissed for want of prosecution. The law suit was commenced by a lady against the Chief of Police of St. Vital and the Police Magistrate for St. Vital.

Inasmuch as this appeal follows upon the refusal of the taxing officer to tax costs of separated defences, we will have to glance for a few moments at the background of facts out of which the action arises.

The defendant Rose is the Chief of Police for St. Vital, a flourishing suburb of Winnipeg, and is apparently a man of discriminating vigilance in enforcing a due and wholesome regard for the decencies of life within his bailiwick. The defendant Martin is a Police Magistrate for the same suburb, a well-intentioned man, willing upon occasion to stretch his magisterial authority far enough to embrace and to bring back to the straight and narrow path, an erring maiden whose venturesome feet have carried her out upon the wide and easy way.

The plaintiff on her part is described as an infant - being of the tender age of 20 years. Intermittently, she was employed in Winnipeg, but at the time of which we speak, August, 1923, she had managed to "cull her out a holiday" and to pay a visit of some days' duration to a friend of hers, in his summer tent on the east bank of the Red River, within the domain of the defendants' jurisdiction.

Upon that occasion, and in and about that tent, "there were sounds of revelry by night". From the reports which reached the attentive ear of Chief Rose, and which by him have been transmitted to us, we are led to understand that the revelries were indulged in by several persons, male and female; that these bacchanalian revellers frequently burst forth into nocturnal song that filled the great spaces of the night with sounds that echoed far and wide; and that they interspersed their choral offerings by shouts and shrieks that "nightly rent the midnight air".

To the watchful sleepers on the opposite bank of the Red, the nights grew hideous. They were annoyed and angered by what they saw and heard, and shocked by what they had neither seen nor heard, but suspected. They arose, and called upon Chief Rose to rid them of these troublesome neighbours.

Prompt at the call of duty, the defendant Rose set out to find the offenders, and at 4 o'clock on a summer's afternoon he found the tent, and in it, the plaintiff, recumbent on a bed, in extreme dishabille. On an adjoining bed lay her host, renewing his energy by "tired nature's sweet restorer - balmy sleep". To the indulgent eye of the law this scene was not offensive, but to the virtuous eye of Chief Rose it was highly reprehensible. He sought information from the couple, but information was not given him, - at least not the sort calculated to satisfy his then inquiring turn of mind. In the circumstances, being in doubt as to what he ought to do, he of course, arrested the plaintiff, and led her off in captive bonds to the police station. There he detained her for more than one

weary hour till Magistrate Martin could be notified and brought upon the scene. With the Magistrate's ready assistance he laid an information charging the plaintiff for that she "was found in a tent ... undressed on a bed ... without employment ..." for all of which - with other acts of commission or omission - he termed her a "vagrant". She was immediately put upon her trial. There was no defence, nor attempt at defence. The Magistrate wavered. He dimly saw his legal duty to acquit her; but he strongly felt a fatherly desire "to save her" from something or other. He ended by expressing the view that she ought to be confined with hard labour, and in order that she might be so confined, he convicted her. Upon the same night, before the sun went down, she was carried off to the place appointed for her confinement, and was there delivered into the safe-keeping of the Salvation Army Home, for a period of 6 months.

By zeal and a bail bond she was, in a few days, released from durance vile; and in due course, as soon as the appeal could be reached, the conviction was quashed, and the proceedings declared to have been wholly illegal and unwarranted.

No judge would write that judgment today. A complaint to the Judicial Council would surely follow instantly.

My topic is oral advocacy. When he was at the Supreme Court of Canada, Bud Estey was asked what constituted good oral advocacy. He said there are three rules - be clear, be brief, be gone. I guess I could leave it there but my ego won't let me.

Yesterday, Chief Justice Scott told you that, on average, ninety-seven percent of your appellate work will be in the Manitoba Court of Appeal or perhaps other appeal courts like the Federal Court of Appeal. And you will also be appearing on judicial review applications in the Court of Queen's Bench and that involves appellate advocacy as well.

So, I am going to start out with 5 ideas about appellate advocacy generally. And then I will turn to advocacy at the Supreme Court and give you 10 suggestions that will pertain particularly to that Court. Now this is a low tech presentation. You don't even have a copy of my remarks. So if you want to make a note of each point, now is the time to get out your pen.

## I. APPELLATE ADVOCACY GENERALLY

### A. Appellate Advocacy is Different from Trial Advocacy

John Laskin, a judge of the Ontario Court of Appeal tells a story about Coulter Osborne, the former Associate Chief Justice of Ontario and now the Ontario Ethics Commissioner. He says he was on a panel with Coulter, where each side was arguing that they had the moral high ground in the case. But the panel didn't think much of either side's position. Osborne started his judgment out with the observation: "In this case, the moral high ground is largely unoccupied." My point: judges, by nature, are sceptics. Appeal judges are concerned with legal error. Why the trial court or tribunal got it wrong. Their discretion is much more limited than that of the tribunal or trial court. So save the rhetoric for other α-

casions. It doesn't help on appeals. Likewise, it doesn't help to be angry in court or to be condescending to the judges or your opponent. That may work with witnesses but not with appeal judges.

## **B. Preparation**

Tom Cromwell dealt with this in discussing factums. You may have had a junior prepare the factum. The file may not justify the hours you have to spend to be fully prepared. But that doesn't mean you can pick it up the night before the appeal and wing the oral presentation. You have to expect that the judges will ask questions about something in the record or about your legal theory. The worst thing that can happen is to lose an appeal because you didn't bring something important from the record to the attention of the judges in answer to a question. The judges won't be scouring the record or necessarily reading the cases that are relevant unless you point them out.

When I was in the Federal Court Trial Division, I heard a judicial review in which the applicant's lawyer was quite well known. I remember asking him a question about something in the record. His answer was "That question will be answered after the break". I asked him another question and got the same answer. Eventually I stopped asking questions and, of course, he never gave me the answers after the break. He lost. I believe he was counting on his reputation. It didn't work. I was taught that the three rules of oral advocacy are preparation, preparation and preparation, that appeals are won in the library and not in the courtroom. You can't wing it from the factum. And a by-product of being prepared is that if you tend to be nervous in court, thorough preparation is the best antidote.

## **C. Point First Style**

You heard in the discussion of factums about point first style. It applies to oral argument as well. You state your proposition first and then develop it. You may think the judges need to know the facts first or that stating a conclusion first will make the ultimate conclusion repetitive. Forget that. Don't go to a reference in the record or a case or a statute without first telling the judges why you are going there and what the point is you are intending to make by the reference. I don't know how many times I have had to ask counsel why he or she is referring to a reference in the material or in a case. If the judges don't get it until the end, all the time you spend taking them through the references is of much less value than it might have been. So put the conclusion up front.

## **D. Use a linear and explicit approach**

A linear and explicit approach is one that starts at the beginning and explicitly deals with each step along the way. You would be surprised at how many lawyers dive right into the middle of an argument, use jargon or make implicit assump-

tions about what the judges understand. The judges will have read the material. They will have some familiarity with it and you may sense from their comments as you go along, that you can make assumptions about what they know. But otherwise, you must be as explicit as possible as you make your legal argument about how one provision relates to another, or why a particular fact is significant. Don't assume the judges know. Take them to the relevant provisions of the Act or record, and explain to them why they are significant. Take it step-by-step and they will follow you.

### **E. Engage the judges**

I had an appeal in the Federal Court of Appeal in which, when it came time for reply, the appellant's lawyer said he had no reply. I then said that I wanted to ask him some questions. He said "I have closed my case". I asked if he was refusing to answer questions. His reply was again "I have closed my case". I guess he must have forgotten this was an appeal and thought he was in a criminal trial. He lost.

The point is that oral argument is your opportunity to engage the judges and satisfy their questions. If you are getting questions and you aren't answering directly and simply, you are missing the most important opportunity you have in oral argument - reinforcing what the judge already is thinking if it is favourable to you and changing the judge's mind if the questions are unfavourable. Sometimes the questions are just for information, but, again, it is important to answer neutral questions simply and directly to give the judge the information he seeks. If you think the judge's hostile questions suggest he or she is getting off on a tangent, a polite but determined response to bring the judge back to the relevant point is required. If you have to disagree with a judge, do it with a clear explanation. It is not easy to tell a judge that he or she is wrong. So you have to be delicate. But you can't be bullied by a judge.

## **II. ADVOCACY IN THE SUPREME COURT OF CANADA**

I am now going to turn to oral advocacy in the Supreme Court. Some of what I will say will apply to all appellate and judicial review courts but my focus is primarily on the Supreme Court.

The first thing that was new to me when I came to the Supreme Court is the extremely limited time for oral argument.

As we said yesterday, at the Supreme Court of Canada, parties are given one hour each. Intervenors are given ten or fifteen minutes. It doesn't matter how important the case is or how many issues are involved. Those are the time limits.

Another difference between my work at the Federal Court of Appeal and the Supreme Court is the amount of pre-hearing preparation. At the Federal Court of Appeal I would read the trial or tribunal decisions and *facta* once in advance and then re-read them on the morning of the case. I would wait until after the

hearing to examine the record, facts and authorities submitted by the parties in more depth.

At the Supreme Court, my pre-hearing preparation is more extensive for two reasons. First, the cases that come before the Supreme Court are complex and usually involve a number of parties and interveners. So the volume of the materials is greater and the content is more dense. Second, in order for the Bench to effectively question counsel during the short oral hearing, the judges must distill what they think the contentious points are before they step into the courtroom.

So, what does all that pre-hearing preparation by the judges and limited time for oral argument imply for counsel? I'll give you 10 pointers.

### **A. Importance of a Good Factum**

If a good factum is important in the Court of Appeal, proportionately, the factum will be even more important in the Supreme Court. You won't have time to address every issue in oral argument. Indeed, if the judges have many questions, you may get to present very little of your prepared oral submissions. So a comprehensive, clear and concise factum is critical.

### **B. Adhering to Time Limits**

I don't know when counsel finds out that they have only one hour for argument. But it seems to me that some of them prepare as if they had a half day. Then they discover that they have only one hour. So rather than editing to reduce the oral argument, they just come to Court and talk fast. The sense of panic and the race to get in everything counsel wanted to say makes the oral argument almost worthless.

You also have to remember that, in your time, you will be answering questions, so you can't tailor your argument for a full hour. You should probably tailor it to about half an hour. If you do that, you will have time for questions and the points you want to make. And if you sit down before the time is up, no one will complain.

You heard yesterday that time limits are strict. At the end of the hour allotted to counsel, the red light will go on and counsel has to stop.

At one hearing, counsel was so determined to get through the points he planned to address that he continued making submissions after the red light went on. The Chief Justice reminded him that he had run out of time. He asked if he could make some concluding remarks. The Chief Justice allowed him to do so, but instead of stating his conclusions he went right back into his points, this time trying to race through them at a break neck speed. The Chief Justice reminded him again, more tersely, that his time was up and suggested that all of what he had to say was already in his factum. Counsel asked if he could just address one last point. The answer was "no."

But let me tell you that he got better treatment than I did in my last case be-

fore the Supreme Court. It was in 1990 or 1991, one or two years before I was appointed to the Federal Court Trial Division. It was an appeal under the Competition Act about whether interveners before the Competition Tribunal could call evidence. I was acting for Air Canada and Jack Major, my predecessor at the Supreme Court, was acting for Canadian Airlines (as it then was). We were the appellants, trying to stop the interveners from calling evidence. Jack was senior to me and he declared that he would argue first. Well, he took up about fifty minutes and left me only ten minutes. I got up and began arguing and before I knew it, the red light came on. Well I just carried on. The Court would surely understand and give me some leeway. Brian Dickson was the Chief Justice at the time. After about thirty seconds, he interrupted me and stated, "The Court will adjourn" and all the judges stood up with me in full flight in the middle of a sentence. Well, counsel can't really say "Just a minute, sit down. I haven't finished". All I could do was to go back to my seat. The Court came back fifteen minutes later and threw us out without hearing the respondent. The only saving grace was that the decision wasn't unanimous. We lost 6-1.

### **C. A Condensed Book of References is Essential**

Because of the limited time for argument, you can't take the time to refer to the record or to the case books. In one recent case, there was an extensive evidentiary record. The judges were surrounded by mountains of orange appeal books. Counsel intended to refer to a number of pieces of evidence from the record. He began directing the judges to turn to page 193 of volume 1, page 864 of volume 4, page 4133 of volume 20, page 2857 of volume 14, then back to page 864 of volume 4 and so on. Counsel ate up valuable minutes as each judge shuffled through their stack of books. Needless to say, the exasperation on the bench mounted. A number of the judges voiced their frustration. But more importantly, not only was the bench irritated, they were confused. And, of course, counsel ran out of time.

It is almost as bad to give judges a list of volumes and page references from the record and tell them to look it up for themselves. I have sat on cases in which counsel makes a submission and then says, "Evidence for this proposition can be found at page X of the appellant's record, page Y of our factum and page Z of our book of authorities." And counsel will then begin anew with the next submission. If you are going to refer to the record in your oral submission, take us to the reference and explain how it supports your argument. You can't expect the judges to take your word for it or rely on us to look it up later. If it is important enough to be mentioned in the first place, bring us to the specific reference in the record.

So you have to judiciously decide what references you need to make in oral argument from the record or the cases or the statutes. Everything has to be in a condensed book of references and indeed some counsel do provide them. You shouldn't even refer to your factum. If there is some paragraph in your factum

that you want to refer to, it should be in the condensed book. And the condensed book has to be limited to the page from the case or the record that is relevant, so that under each tab there is only one or perhaps two pages. Any more than that and the judges will be fumbling for the right page and time will be taken up.

One final thing about the condensed book. When you are in Court, you will see nine law clerks sitting in a row perpendicular to the counsel table. I know that it involves additional cost and it is certainly not a requirement of the Rules. But you would be well advised to have nine additional copies of the condensed book for the law clerks, in addition to those for the judges. The law clerks play an important role in working on the judgment with the judge. So you are missing a beat if you don't provide to them everything you are giving to the judges.

#### **D. Questions from the Judge**

I have already spoken about answering judges questions in my remarks applicable to all appellate and judicial review courts. But I will now add a couple of points about questions from Supreme Court judges that I have actually observed myself. A number of the Supreme Court judges ask questions with long preambles. Sometimes the judge will even start out by saying, "The difficulty I am having with your argument is . . . ." Listen to the preamble carefully. Sometimes, I can't understand the point the judge is making. If you can't, say so. Get the judge to repeat the question until you get it. Or respond to the judge by saying, "Do I understand your question to be . . . ?" While it is not invariable, when a judge asks a question with a long preamble, or with "the difficulty I am having", in all likelihood, that judge is against you, at least on the point the question is about. Your job is to politely but firmly explain to the judge why the preamble is wrong or why the premise of the question is wrong. You may not convince that judge, but there are eight others there. Those who are with you will use your answer, if it is effective, when they meet in the conference after the case.

In one case, I asked a question and it wasn't one with a long preamble. But it did challenge one of the interveners who was making a certain point. Indeed, I myself was a little troubled by the point but still, I would have found in favour of the side that the intervener was supporting. However, in the conference following the case, one of the judges picked up on my question and explained why she was going the other way using my question as her rationale.

Also, you must listen to the question asked of your opponent. They may provide clues about where the Bench is going. If you have a slam-dunk answer to a question asked of your opponent, it is very effective to say, "You asked Mr. so-and-so a question about \_\_\_\_\_ and I'd like to address that." But you have to be careful. If you believe the judge has the point, it can be dangerous to enter into a prior exchange because you might just open up a can of worms for yourself.

E. Why was leave granted?



There are a small number of appeals as of right. But the vast majority are there because leave has been granted.

You have been granted leave because three judges determined that your case involves an issue of national importance. Normally, it is the result that matters to the client. But the Court is more concerned about how to get there. It isn't normally going to be useful to argue that the case is limited to its own facts. It is highly doubtful that leave would have been granted for a one-off case in which the principles would not have broader impact.

In one hearing, Chief Justice McLachlin asked counsel what theoretical line the Court should take if it found for his side. Counsel was apparently unprepared to speak to the theory of his case rather than the specifics. The Chief Justice let him off by saying that perhaps it was unfair to expect him to do the work of the Court. It wasn't unfair and she really didn't let him off. He should have had an answer. Justice Binnie says that you should always plot out and have in mind how the judgment will read. If you can give the Court the legal analysis, you will be doing their work for them and you will be more likely to be successful and see your theory in the judgment.

In another case, counsel was asked about the constitutional implications of his position but declined to answer on the basis that he was not well-versed in constitutional law. It is difficult to imagine but it appears that it had not occurred to him that the dispute in this case of interest to the Court was a constitutional division of powers issue.

Instead, his argument focussed narrowly on the facts of the particular case. He was unable to answer the Bench's questions about how cases with slightly altered facts would be decided, that is whether provincial or federal law would apply. He lost.

It is important to look at the judgments of the Trial and Appeal Courts to discern what issue it was that caused the Supreme Court to grant leave. Often there will be more than one legal point in a case. But not each of those legal points will be of particular interest to the Supreme Court. In one case, counsel spent over half the time arguing about a point that wasn't really very controversial. To the Court, it was the other point that had national significance. You may be told at the hearing which points are of interest to the judges. But you may not be. You have to consider the judgments appealed from and the factum of your opponent and get right to the point of contention. It does you no good to spend time on a point that you can win easily and ignore the difficult but important point.

All judges, but particularly Supreme Court judges, are concerned with the setting of precedence and understanding the implications of a finding in favour of one side or the other. So you have to be prepared to answer hypothetical questions about the application of principles of law that may go beyond the facts of your immediate case. The Court is concerned with the wider implications if they go down the path that you are advocating.

### **F. Don't ask the Court to Lightly Depart from Prior Decisions**

Yesterday Professor Parkes spoke about the Courts overruling their own decisions. The Supreme Court may reverse its own decisions. And it has been said that today's dissent may become tomorrow's majority. However, as you were told yesterday, one of the responsibilities of the Court is for the consistency and predictability of the law. So it will be a tough argument that the Court should reverse a prior decision. The Court's natural inclination is to want to be consistent with prior rulings. I don't say that it is impossible. But that is the difficult side of the case. It is probably an easier argument to get the Court to distinguish a prior decision and if that can be argued, it should be.

It will also be difficult for you to tell the Court what it really meant in a particular judgment. I have heard judges say to counsel when the argument is made, "I think I know what we meant in that case."

Similarly, do not assume that if a particular judge was in dissent in a prior case, you will succeed in overturning it now that the membership of the Bench has changed. In one hearing, counsel's entire argument was based on the dissenting opinion in a previous Supreme Court case. The only member of the panel who had sat on that case had concurred with the dissenting opinion. Counsel's argument seemed to be aimed directly at this judge who eventually piped up, "I know that is what I thought. But we lost."

### **G. Always have a Contingency Plan**

You are there to win. But if you lose, you should have a contingency plan in order to contain the loss. Sometimes a judge will say, "Well, if we find for the other side, what do you say about remedy?" Sometimes this occurs in a Charter case where there can be a variety of remedies – a suspended declaration of invalidity, a less intrusive approach to striking down legislation than may be asked for by the other side, reading in and so on. If you don't address that in your factum, the judges may ask you what you can say about remedy during oral argument. So you should think about a contingency plan and have it ready if needed.

### **H. Intervening**

Sometimes you will be acting for an intervener. Your time for oral argument will be only ten or fifteen minutes. You can make only one point in ten or fifteen minutes, possibly two if they are straightforward. So go for a small victory. In a section 1 Charter case, don't argue the whole Oakes test. If you are opposing the Government, you only need to be successful on one of the Oakes factors. Focus on the strongest and limit your argument to that point. Let your factum or the other interveners speak for the rest.

## **I. Expert Advice**

No lawyer wants to hand over a Supreme Court appeal to another counsel. Understandably so. If you have been through the trial and the appeal, you know the record and the theory of the case better than anyone else. However, chances are you may not appear in the Supreme Court very often and so you might not be familiar with the techniques for arguing there. In Ottawa and elsewhere, there are lawyers who specialize in Supreme Court appeals. They themselves don't necessarily appear. But they are consulted by counsel who do have conduct of the appeal and I believe they provide valuable advice, sometimes about some of the things I have mentioned today. And I am sure about other aspects of effective Supreme Court advocacy. If you are not a regular at the Supreme Court, and not many lawyers are, it would be worthwhile consulting one of those lawyers. By the way, I don't get a commission for this commercial.

I said I had 10 points. But actually, I have one more. Maybe the most important.

## **J. The end**

When you are finished, sit down. Some lawyers think they are obliged to talk until the red light goes on. If you are just filling up time at the end, you are probably not as coherent as you were before and you may end up confusing the judges or getting yourself into difficulty. You may have time left for questions and there are no questions or very few. That is usually a good sign. When you are finished, sit down. The judges will consider it an act of mercy.

I want to conclude by telling you all that it has been a great experience to have come home, to renew friendships and make new ones. I have enjoyed every one of the presentations that have been made. I can honestly say that these Pitblado lectures are of as high a quality as at any conference that I have attended. I know that it has been a learning experience for me and I hope for you as well. Thank you.