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Some Thoughts on Appellate Advocacy in Constitutional Cases

Mr. Justice Robert G. Richards*

I was told that my friend Professor Jamie Cameron would be introducing me today. That caused me to reflect on the year she and I clerked together at the Supreme Court. As Jamie mentioned, I worked for Justice Ronald Martland. At the time, he was the ranking puisne judge. By virtue of his seniority, he had the premium corner office: very spacious, high ceiling, over-stuffed red leather furniture, wood-panelled walls. As I recall, he had only two things on those walls. The first was cheaply framed a picture of his wife. The second, prominently displayed, was a New Yorker style cartoon. I liked that cartoon a good deal and thought it quite wonderful that a judge who had been on the Supreme Court of Canada for over 20 years would hang it in his office.

When I was appointed to the Court of Appeal, I decided to copy Justice Martland. It took considerable effort to track down the cartoon but I was ultimately successful. It now sits proudly on a shelf in my office where it can't be missed. It features two very ordinary looking middle-aged men in business suits. One of them is saying to the other "You know Ralph, this daily metamorphosis never ceases to amaze me. Around home I'm a perfect idiot. I can't do anything right. But I come to work, put on a black robe, get behind the bench and by God I'm it!"

I can assure you that the first part of that observation is correct — around home I am not infrequently a perfect idiot. Moreover, I suppose that if I receive many more introductions as generous as Jamie's, I just might begin to think I'm "it" as well and thereby live out the full scope of Justice Martland's cartoon.

As many of you will know, the most famous lines in the literature on advocacy are the ones used by American lawyer John W. Davis over 65 years ago. He compared lawyers to fly fishermen. The lawyer's

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challenge, according to Davis, is to devise arguments that attract and ultimately land judicial fish. He put it this way:

[I]n the argument of an appeal the advocate is angling, concisely and deliberately angling, for the judicial mind. Whatever tends to attract judicial favour to the advocate's claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?¹

As was explained, before my appointment to the Court of Appeal I spent some considerable time standing in the rivers of the law, wearing hip waders and throwing lines into the water — sometimes successfully; often times not. For the past 18 months, I have played the other role contemplated by the Davis metaphor. I have been under the water, trying to decide what to bite and what to ignore. I am pleased to accept the invitation to attend this excellent conference and to share some brief thoughts about appellate advocacy in constitutional cases based on my dual experience as both fisherman and fish.

The prosecution of a constitutional appeal is, of course, not a species of lawyering separate and apart from the non-constitutional variety. Good advocacy is good advocacy. The approaches, techniques and skills which make a successful appellate counsel are readily transferable across fields of law.

There have been many excellent presentations on the general business of how to present an appeal. The recent contributions of Justice Ian Binnie² and of Justice John Laskin³ are particularly noteworthy and provide useful guidelines for any practitioner. The main points here are rather well known. With respect to factums, they include the need for clear thinking, broad research and careful writing. In relation to oral argument, the most frequently stressed ideas include the importance of preparation, the significance of setting the agenda at the outset and the ability to handle questions. I will not attempt to re-plough those fields in any comprehensive way by starting with the notice of appeal and working through to the appellant's right of reply.

¹ John W. Davis, "The Argument of an Appeal" (1940) 26 A.B.A.J. 895, at 895, reprinted (2001) 3 J. App. Pr. & Pro. 745.

² "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (1999) 18 Advocates' Soc. J. 13; "In Praise of Oral Advocacy" (2003) 21 Advocates' Soc. J. 3.

³ "A view from the other side: What I would have done differently if I knew then what I know now" (1998) 17 Advocates' Soc. J. 16; "What persuades (or, What's going on inside the judge's mind)" (2004) 23 Advocates' Soc. J. 4-9.

Rather, given the nature of this conference, I propose to focus on a few matters of particular significance for constitutional appeals. There are eight of them. I wish they were seamlessly linked together by some overarching theme or vision, but they are not. They are simply a basket of very practical points which strike me as being especially worthy of attention in constitutional cases. In presenting them, I will try to comply with the organizers' request that I work in some personal war stories and otherwise do what I can to lower the intellectual tone of the meeting.

What I have to say will be framed in broad brush terms. But, of course, there is no such thing as a rule of universal application in this field. Principles have to be adapted to the circumstances of particular cases.

I. UNDERSTAND THE FORUM

A constitutional issue can be dealt with at any one of three different rungs on the appellate ladder: (a) trial level superior courts (in the case of appeals on summary conviction matters under the *Criminal Code* and in some administrative law contexts), (b) courts of appeal, and (c) the Supreme Court of Canada. Appellate advocacy at these three levels is not a one size fits all operation. In broad terms, the typical superior court judge will tend to focus on the specific case before him or her and to see the assignment as applying precedents and reviewing for error. Developing and clarifying the law is not the central part of the job description. However, as a case moves up the appellate ladder, the emphasis changes. In a court of appeal, legal principles can take on considerable importance. At the level of the Supreme Court, the focus is on broad concepts and the development of the law.

This means, of course, that an effective advocate has to shade his or her approach to fit the relevant appellate audience. A great pitch to a superior court judge may not be a great pitch to a court of appeal and a winning argument in a court of appeal may not be quite the right tack to take in the Supreme Court. Therefore, in developing and delivering submissions, it is important to be attuned to the level of court involved. In my experience, this is a point which is often overlooked. Just this week, a lawyer appearing before my Court in a Charter-based case was brandishing trial level decisions as if they were tablets from the mount. He had to be reminded that we were interested not just in what the law was, but in what the law should be.

II. CHARACTERIZE THE ISSUES

Influencing the way in which courts perceive the basic nature of an appeal can be fundamental to the outcome of constitutional litigation and, as a result, this is a matter which warrants considerable attention.

Let me refer to two cases which illustrate this point. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*,⁴ a broadcaster was attempting to get its cameras into the Nova Scotia Legislative Assembly. It presented its case as purely a section 2(b), freedom of expression, affair. Various legislative bodies, including the Speakers of the Assemblies in Manitoba and Saskatchewan for whom I acted, characterized the case as being first and foremost about parliamentary privilege. This was a very different perspective which shifted the foundations of the appeal. In the end, the Supreme Court agreed with the legislative bodies and ruled against the broadcaster.

*R. v. Latimer*⁵ is another case in point. Mr. Latimer ended his disabled daughter's life out of a belief he was justified in doing so in order to spare her from other surgery and treatment. In the early going, all of the actors, including the Crown, accepted the premise that the case was about Mr. Latimer's constitutional rights under the Charter. My clients were a number of disability rights groups. Through two trips to the Court of Appeal and one to the Supreme Court of Canada, we sought to portray the case as being fundamentally about the section 15 and section 7 rights of persons with disabilities. Over the course of the litigation, we were able to substantially adjust the lens through which the case was viewed.

III. LOOK FOR WORKABLE MIDDLE GROUND

An appeal presents a court with a problem to be solved. Most judges look for an answer which is fair to the parties, which is doctrinally sound and which does not unnecessarily foreclose future developments or refinements in the law.

In broad terms, this means it is often unwise to take an aggressive position and dig in, refusing to consider the prospect of finding a

⁴ [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319.

⁵ [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217.

compromise position. That is so because the argument of a constitutional case is not the equivalent of a final offer salary arbitration — the system sometimes used in professional sports where the arbitrator must select either the player's last offer or the team's last offer. Appeal courts do not work that way. They are often attracted to the reasonable middle ground solution to a problem and are not obliged to take either the extreme view presented by the appellant or the perhaps equally extreme view argued by the respondent. As a result, it can sometimes be a winning strategy to lay out a compromise position for the court, rather than to hope the judges find it on their own.

The *Patriation Reference Case*⁶ is a classic illustration of this approach. The question there, of course, was whether Ottawa could unilaterally obtain U.K. legislation patriating the Canadian Constitution. The standard provincial position was that Confederation consisted of a pact and that, under its terms, each province had to consent before the federal government could ask Westminster for change. This approach carried with it the real risk of national constitutional paralysis. The federal government's position was, in a sense, equally extreme. It said that provincial consent was legally irrelevant and that it could go to Westminster, as the sole voice of Canada, if and when it chose to.

Saskatchewan sought to highlight a middle ground. It developed the theory that the federal government did not need unanimous provincial consent but that it did need substantial consent. This had the effect of avoiding the straitjacket implicit in the positions of the other provinces but at the same time, of imposing some restraints on Ottawa's authority and requiring it to work with the provinces. As you know, the Saskatchewan view was ultimately endorsed by the Supreme Court in its decision. So, in that case, provincial interests were ultimately well served by the decision to abandon the extreme position represented by standard theory. By illuminating the middle ground, Saskatchewan made it much easier for the Court to opt against the position advocated by Ottawa.⁷

⁶ *Reference re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753.

⁷ This example comes from Binnie J. He points to both the *Patriation Reference* and the *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 as examples of creative Saskatchewan arguments which helped the court avoid extreme results. See "In Praise of Oral Advocacy", *supra*, note 2.

IV. RIDE HERD ON INTERVENORS

Intervenors are a fact of life in constitutional litigation. From the perspective of the bench, this phenomenon presents an interesting challenge. On the one hand, constitutional appeals typically raise questions of general importance which transcend the particular interests of the litigants and, as a result, it is often appropriate to give a wider constituency some voice in the appeal process. On the other hand, there is an obvious concern about opening the court room door so broadly that appeals are transformed into a sort of judicially supervised constituent assembly.

Whatever view one takes of this issue, the root reality is obvious: intervenors can and often do play a powerful role in constitutional appeals. Because of this, they represent an aspect of the appellate process which should be actively managed by counsel.

It is useful to begin thinking at the outset about the intervenors which might helpfully be involved in the case. A particular intervenor, for example, might be a welcome addition to the mix because it adds some fire power on the substantive side of the analysis. I have seen many cases where the principal parties have been assisted enormously by intervenors. Furthermore, regardless of the substance of the appeal, intervenors can also influence the flavour or dynamics of a case in subtle but important ways. In *Reference re Provincial Electoral Boundaries (Sask.)*,⁸ I was counsel for Saskatchewan in a Charter case concerning the voting rights provisions in section 3 of the Charter. It involved a situation where the government of the day had been accused, in effect, of an unconstitutional gerrymander and the Saskatchewan Court of Appeal had declared the provincial electoral map to be invalid. In those circumstances, we were anxious to have as many Attorneys General as possible intervene on our side of the appeal. They turned out in force and their mere presence gave the proceedings a very different dynamic than they might have had if the case had been a parochial Saskatchewan affair. The Supreme Court ultimately reversed the Court of Appeal and read section 3 of the Charter very narrowly.

In dealing with intervenors, it is also important to make appropriate submissions aimed at preventing the participation of those who might hurt the cause or, alternatively, to make submissions aimed at restricting

⁸ [1991] S.C.J. No. 46, [1991] 2 S.C.R. 158.

their participation by limiting or denying time for oral argument, requiring factums to be directed only at specific issues and so forth. All of that, of course, must be played out in the context of the rules and the culture of the particular court in issue.

Once the roster of participants in an appeal is established and the terms of engagement are resolved, it is also extremely useful to be in touch early on with the intervenors. Conversations about the record, the issues and the theory of the case can help to avoid those “friendly fire” incidents where an intervenor ends up hurting the principal party that it allegedly supports. The same applies to the argument of the appeal. A telephone call or meeting in advance of the hearing may allow the parties and their respective supporting intervenors to sort out who might say what and to work around any kinks in their proposed submissions.

Intervenors themselves should remember that they are specially invited guests at someone else’s party and that they have been asked to attend in the expectation they will add something of consequence to the proceedings. It is unwise to spend pages of factum or minutes of oral argument apprising the court of the good deeds and important cases the intervenor has been involved in over the years. “Political” speeches are not helpful and not particularly welcome. Get right down to business. Counsel for intervenors should make their submissions without repeating points which others have already made effectively. As well, counsel should remember to react to the evolving dynamics of the hearing. For example, an intervenor on the respondent’s side of the courtroom is in the generally enviable position of having listened to virtually the entire appeal and can take advantage of that fact by dealing directly with what have emerged as the key concerns or dimensions of the case.

V. SPEAK WITH ONE VOICE

Splitting the argument of an appeal between counsel is a practice not infrequently pursued in big cases and constitutional appeals often fit that description. Sometimes these divisions of labour seem quite sensible on the surface: “Chief Justice, I will take the first 30 minutes of our allotted time to handle the question of whether there is a breach of section 2(a) of the Charter; my associate will use the remaining 30 minutes of our time to deal with section 1 issues”. However, in my experience, this is

never a wholly successful strategy and it often creates significant problems.

Dividing up the argument necessarily forces it into compartments. In the example I have just used, counsel has assumed that the court thinks the section 2(a) part of the case and the section 1 part warrant equal attention. This might be entirely wrong. The court might think section 2(a) is largely a done deal and that the real action — the issue on which the case will turn and on which it would like to spend the bulk of the hearing — is section 1. Moreover, the court might not be inclined to respect a neat division of labour. It might want to move back and forth between section 2(a) and section 1 rather than treating those two aspects of the case as watertight compartments.

In addition, the lawyer who bats second in this sort of arrangement has to hope and pray that the colleague going first has the modesty and the good sense to actually wrap up and sit down after 30 minutes. Often that does not happen and the poor counsel speaking last is left to scramble through his or her part of the case in a fraction of the time originally mapped out.

It may feel wonderfully democratic to divide the argument. Workload is shared; everyone gets their moment in the spotlight. However, the real objective is to win the appeal and, in my experience, splitting the advocacy role is generally counterproductive.

VI. MANAGE LEGISLATIVE AND SOCIAL FACTS

Legislative and social facts are potential hazards in constitutional cases. In the early days of the Charter, the rule seemed to be “anything goes”. In the first Supreme Court appeal I handled as Director of Constitutional Law — a case I inherited from my predecessor, the former Dean of this Law School and now MacPherson J.A. of the Ontario Court of Appeal — the Supreme Court was prepared to rely on the contents of newspaper articles exhibited to an affidavit for purposes of establishing the factual background justifying limits on Charter rights. On more than one occasion in those early days, I simply filed various studies, statistics and other materials with the courts in order to make out a section 1 argument or to assist in arguing that no Charter breach had occurred. Nobody cried foul.

Some 20 years later, we have largely emerged from the realm of pure *ad hoc-ery*. A good deal of the Supreme Court’s recent initiative in

this regard has been led by Binnie J. As counsel for an intervener, I was able to watch safely from the sidelines in *Public School Boards Assn. of Alberta v. Alberta (Attorney General)*⁹ when he struck a collection of statistics and other materials included by the appellant in a book of authorities and warned against “bootlegging evidence in the guise of authorities”. In *R. v. Malmo-Levine*,¹⁰ writing with Gonthier J., he endorsed as “correct” the trial judge’s decision to take judicial notice of certain government reports and documents but to hear *viva voce* expert evidence on the more debatable aspects of the marijuana controversy. And, more recently, he authored the Court’s decision in *R. v. Spence*.¹¹

In *Spence*, the Court examined the extent to which legislative and social facts can be properly made the subject of judicial notice. It recognized that the rules in this regard must be somewhat elastic and said the closer the fact in question approaches the dispositive issue in the case, the more a court ought to insist on compliance with the so-called gold standard criteria, *i.e.*, the more it ought to insist that the fact be either (a) so notorious as not to be the subject of debate among reasonable persons, or (b) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy. This meant that, in *Spence* itself, the Court refused to take judicial notice of how and to what extent racial discrimination affects the behaviour of jurors, a question at the centre of that case.

Significantly, in *Spence*, the Court also went out of its way to say that legislative and social facts should be established by expert testimony rather than by reliance on judicial notice when they relate to matters reasonably open to dispute. It pointedly said “litigants who disregard the suggestion proceed at some risk”.

Thus, as can be seen, this area of the law is being regularized to some extent. However, it remains a tricky business for counsel. The best approach is no doubt a cautious one which heeds the Supreme Court’s advice.¹²

⁹ [1999] S.C.J. No. 76, [1999] 3 S.C.R. 845.

¹⁰ [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571.

¹¹ [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458.

¹² Helpful background writings in this area include: Mahmud Jamal, “Legislative Facts in Charter Litigation: Where Are We Now?” (Third Annual Charter Conference, Ontario Bar Association, Toronto, October 15, 2004); Ian Binnie, “Judicial Notice: How Much is Too Much?” in Alan W. Bryant, Marie Henein & Janet A. Leiper, eds., *The Law Society of Upper Canada Special Lectures 2003: The Law of Evidence* (Toronto: Irwin Law, 2004), at 543.

VII. CONTROL THE RECORD

Constitutional litigation can put appeal courts in a difficult spot. The impact of decisions extends well beyond the litigants and yet, on the basis of the standard adversarial model, the litigants set and determine the record which drives the outcome of the appeal. Some judges have been very candid about their refusal to be held hostage by the parties' sense of what is necessary to a fully informed decision. For example, in *R. v. Sioui*, Lamer C.J. said he was entitled to take judicial notice of various historical documents "whether my attention was drawn to them by the intervener or as the result of my personal research ... The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case".¹³

I expect many advocates have had the uneasy feeling that, following the argument of an appeal, the judges have gone back to their chambers and, paraphrasing millionaire Montgomery Burns from *The Simpsons*, cried "Unleash the law clerks!" This is very unnerving stuff for counsel as it runs counter to the adversarial model of litigation which is embedded in every lawyer's bones.

On the basis of my short 18 months on the bench, I can think of but one way to avoid these sorts of concerns and that is by generating a record which is sufficiently complete and to the point that the court does not feel it has to go beyond what has been presented to it. There is only one reason judges are drawn to reach outside the record which has been developed. The reason is that they are uncomfortable. They believe more information will allow them to make a stronger decision. So, although it may sound trite, counsel can largely avoid the risk of judges doing their own homework by the simple expedient of doing it for them.

VIII. DEAL WITH COMPLEXITIES

I need not remind this group that there are areas of Charter litigation which are quite involved. The section 1 analysis prescribed by *Oakes*¹⁴ is one example. The approach to section 15 mandated by *Law*¹⁵ is

¹³ [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025, at para. 60.

¹⁴ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103.

¹⁵ *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497.

another. I expect that many of you have despaired at the task of having to shape an argument around those requirements. It is not always easy and, as a result, sometimes there is a tendency or temptation to take short cuts or to be somehow less complete or diligent or precise in those parts of a factum or argument than in others. I see this all the time.

It is a mistake. Unless and until the jurisprudence changes, the rules of the game are the rules of the game not just for counsel but for judges as well. The more convincingly, clearly and completely that a court can be shown how to work through *Oakes* or *Law* or other complex lines of analysis, the more likely that path will be followed. Leaving a court to make its own way through the thicket involves an inevitable risk that it will come out in the wrong place.

At the same time, however, counsel who might be troubled by the existing state of the law in some area and who have constructive views as to how it might be tweaked, modified or improved should not hide their light under a basket. Finding some appropriate way to lay out those ideas might create change. For example, being a government lawyer at the time, I thought the *Oakes* test as originally formulated imposed an impossible burden with respect to the justification of legislation in the social policy realm. The concerns in this regard raised in cases like *Irwin Toy*¹⁶ were presumably not unrelated to the Supreme Court's decision to soften *Oakes* in its application to those kinds of problems. So, litigants should play the game as prescribed but, if they have a view as to how to improve the rules, they should lay them out. There might be a receptive audience.

IX. THE MEANING OF LIFE

Let me end by dealing with the questions which I expect have occurred to almost every lawyer who has donned robes and lugged a briefcase into an appeal court. Those questions often surface late at night after a disappointing loss. They are to this effect: Does any of it matter? Do lawyers count? Would the result have been any different if I had simply stayed in bed? Should I join a rock band and move to Tijuana?

The practitioners in the audience may be happy to learn that, on the basis of my judicial experience to date, advocacy does make a difference. Life does have meaning. Indeed, I think life is particularly

¹⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927.

meaningful for those lawyers who labour in the constitutional field. That is because constitutional cases provide especially interesting scope for competing characterizations of problems, because they involve complex social and legal policy issues and because their outcomes are, at least in relative terms, often indeterminate. There are simply more opportunities in constitutional cases than in non-constitutional ones for counsel to approach matters in ways which will impact bottom-line decisions.

In more particular terms, I can confirm that factums, as indicated by received wisdom, are extremely important. It is easier to succeed in an appeal with a strong factum and a weak oral argument than to succeed with a weak factum and a strong oral argument. It is not glamorous, but the simple truth is that more appeals are won by the efforts of lawyers sitting on their backsides in the library writing factums than are won by the efforts of lawyers standing on their feet presenting oral arguments. The sweat which counsel invest in factums pays real dividends.

That said, I certainly do not subscribe to the view that oral argument is of marginal or little consequence. It is not capable of tipping the balance where the result is clear. I have yet to encounter, either as lawyer or judge, counsel who could truly transform a sow's ear into a silk purse. However, in close cases and in difficult cases, oral argument can make the difference.

Finally, let me also say that, to a degree which I have found surprising, good lawyers are valued by the courts. Judges look forward to those cases where they know they will have the assistance of strong counsel. In this regard, I recently came across an article by former U.S. Supreme Court Justice and Nuremberg war crimes prosecutor Robert Jackson. He put it this way:

As I view the procession of lawyers who pass before the Supreme Court, I often am reminded of an old parable. Once upon a time three stone masons were asked, one after the other, what they were doing. The first, without looking up, answered, "earning my living". The second replied, "I am shaping this stone to pattern". The third lifted his eyes and said, "I am building a cathedral". So it is with the men of the law at labour before the court. The attitude and preparation of some show they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little

cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a cathedral.¹⁷

That is grand language but I wholeheartedly agree with it. Skillful counsel are highly regarded. The fish respect and appreciate good fishermen.

¹⁷ Robert Jackson, “Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations” (1951) 26 A.B.A.J. 801, at 864.

