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Introduction

Thank you for asking me to come to Vancouver to speak about arguing insurance cases in the Supreme Court of Canada. Appearing in the Supreme Court is, without a doubt, the best thing a barrister can do.

I was fortunate to appear in the Supreme Court very early in my career, in 1962. I argued that the now long forgotten tort of alienation of affections did not exist in the law of Ontario, though more than 100 years of precedent said that it did. My argument carried the day.

And a good thing too. As the Chief Justice of the Supreme Court of Louisiana said of the tort in 1934:

> "With regard to compensatory damages – and with due regard for the priceless gift of a good wife's affections, - we believe that when a man discovers that another man has alienated his wife's affections he has not lost something; he has merely learned something."

There is little opportunity or time in the Supreme Court of Canada for humour, but occasionally there is no choice.

On one occasion, I was asked by the Supreme Court of Canada to intervene in a case called *Wholesale Travel*, which raised the same issue as a case of mine for Ellis Don, where I was for the respondent, pending before the court, but not due to be heard for some months.

In due course, my case was scheduled. On the day before it was to be argued, the court came down with the decision in *Wholesale Travel*, 5 to 4 against it, with reasoning fatal to my argument in *Ellis Don*, unless I could distinguish it. Chief Justice Lamer wrote for the minority.

Unsurprisingly, when the case was called the next morning, before all nine judges, Chief Justice Lamer said to prosecution counsel that it was not necessary to hear from him, and that the court would hear from me first. Not an auspicious start.

I launched into my manful and earnest attempt to distinguish the undistinguishable, but it was clear that my argument really depended on the proposition that the minority of the Supreme Court judges were right and the majority had it wrong.

Finally Chief Justice Lamer said "Mr. Cherniak I agree with you, but I could not persuade enough of my colleagues." I shot back "Yes, Chief Justice and you had a lot more than one hour to try to do so".

I got a large laugh. But the prosecution was not called on, and we lost.

Advocacy in the Supreme Court of Canada on behalf of insurers, or for anyone else, is a very different exercise than what we as advocates customarily do for a living.

First, unlike any other court, you need permission to get there. When you consider that the court only takes 55 to 65 cases per year, out of the tens of thousands of cases in the country, and the several thousand that go to the ten provincial courts of appeal, truly, many are called, but few are chosen. In the U.S., Conrad Black is apparently one of them.

Second, when you get there, no matter how complex the case or how long the trial, you have to condense it all to a 40 page factum and a one hour oral argument, a substantial portion of which (if you are lucky) will be taken up with answering questions from very well prepared judges, armed with a detailed bench memo from their clerks, requiring counsel to be equally prepared and focused on the issue that you want the court to decide.

Third, the decision will usually be made at the bench conference that immediately follows the hearing (Justice Binnie calls it the "Sundown Rule"), which means that:

- The factum must have been excellent and persuasive.
- Judges, being human, are used to deciding cases, and they are also smart. Each judge will have come in to the hearing with a definite leaning to one side or another, or in some cases, with his or her mind mostly made up.
- You have to be on the right side of where the law is or ought to be going, or at the very least, persuade them that this is not the case to go there.

The upside of arguing in the Supreme Court of Canada is that the oral argument is the last thing they hear before they retire to the conference room to decide the case. So you want to make a forceful impression, to reconfirm support from the judges leaning your way, and attract some new support.

So, in the oral argument you must forget the boilerplate of the case and laser in on the issue or issues that you think are decisive, and be prepared to answer the questions put to you by the bench, directly, concisely and persuasively, because they will certainly be based on what is

troubling that judge about the case or your argument, either as framed in the factum or in your oral submission.

The art is in framing the issue in a way that will both appeal to the court, or at least a majority of it, and will result in a judgment in your client's favour, much easier said than done, as will appear when I discuss *Whiten v. Pilot* as an example of winning the argument, but with fatal consequences to the client.

Finally, the two hours of argument, yours and your opponent, will be replayed endlessly on CPAC, for your parents, spouse, children and colleagues to see and critique. I never cease to be amazed at how many insomniacs and "no lifers" there are that tell me they have seen me on CPAC.

This last consideration points out what I have often said, only half jokingly, is the true reason that counsel pleading a case work so hard; so as not to make a damn fool of yourself, more important than ever if you venture into the Supreme Court of Canada.

Leave Applications

For the case to be in the Supreme Court of Canada, the insurer must have obtained leave from the court, or have been dragged there by a successful leave application from the other side.

I estimate that there have been approximately 750 cases argued in the Supreme Court of Canada over the last 10 years and likely less than half of them have been civil cases. A rough count of the cases in that period either directly involving insurers or significantly affecting them is about 35, or about 3 or 4 per year on average. Leave is granted in about 5% of the civil cases where an application is made. I have provided you with a list of insurance related cases heard by the court in the last ten years.

There are two main ways to get the three judge panel assigned to each leave application interested enough to recommend to the court that leave be granted. The first is when the case raises an important issue that has demonstrable national implications and is either novel, or it can be demonstrated that the time has come for the existing jurisprudence to be reconsidered, because of changes in the legal, political or social landscape, over time.

The second route where there are conflicting decisions in the provincial appellate courts, and it is in the national interest that the conflict be resolved.

On occasion both those considerations are present. What is of lesser, and in many cases marginal, importance, is whether the underlying Court of Appeal decision, or at least the result, is right or wrong.

That is because, on occasion, the court is waiting for a case to come to it that gives it the opportunity to speak on an issue that it thinks is important, and grants leave even if it thinks the Court of Appeal decision is right and largely agrees with the reasons.

A good example of this kind of case is the *Canadian Red Cross v. Krever*, in which the issue was the limits (or lack of limits) on the power of a commissioner to issue notices of potential findings of misconduct to targets of a public inquiry.

We believed, for the Red Cross, we had a strong case on natural justice principles and public policy to quash the notices, but it became apparent within about 30 seconds of my argument in the Supreme Court of Canada that the Red Cross position had no hope whatever of success, as I was immediately faced with a barrage of hostile questions from all nine members of the bench, delivered with machine-gun like rapidity, often simultaneously. My prepared argument was stillborn. It was perhaps the most excruciating 60 minutes of my legal career, and to the extent that I could think at all during that hour, it was only to wonder why, if they felt that way, they had ever granted leave in the first place.

Quite clearly, the court wanted to make a statement about the powers of commissioners in public inquiries, given the prominence and importance of the several public inquiries going on in Canada during the 90s, and this case gave it the opportunity. But they had no interest at all in my take on the issue.

One can see these very same considerations in some of the insurance cases that I have been involved in, where leave was granted.

In *Pilot v. Whiten* (2001), where the Ontario Court of Appeal, in a split decision, had reduced a punitive damage award by a jury from $1 million to $100,000, the Supreme Court of Canada felt it was time that it wrote on the burgeoning phenomena of bad faith claims and punitive damages in Canada, and, as events demonstrated, it took the opportunity to comment on and settle the law.

In *Walker v. Ritchie* (2007), a catastrophic injury case in which the unsuccessful defence appeal to the Ontario Court of Appeal had encompassed several aspects of the very large award, the leave application to the Supreme Court of Canada focused on only one issue, whether a defendant (and his insurer) could be required to pay not only the plaintiff's costs, on the highest

scale available, but in addition, the premium that the contingency fee lawyer charged the successful plaintiff, because of the risk that the lawyer had taken of possible non-success and because of the degree of success achieved. The court thought that was an issue that was worthy of its consideration, since Ontario was the only jurisdiction, at least up to that point, where such a result was possible. The insurer was right to focus on that one issue only, when seeking leave. Leave would never have been granted if it was just an add on to the other issues that had no national importance. Though only about $200,000 was involved, the issue was important to the industry.

In *Canadian National Railway v. Royal SunAlliance Insurance* (2008), a case arising out of the failure of a tunnel boring machine under the St. Clair River, the issue was the application of the design failure exclusion, where there was no negligence and arguably known standards had been met, yet the design failed in expected conditions. There was conflicting jurisprudence inside and outside of Canada as to the meaning of the commonly worded exclusion, and a strong dissent in the Court of Appeal. As the ultimate result showed, the majority turned the existing jurisprudence on its head, and applied a negligence standard to the actual allocation of the risk of the machine failing under normal conditions.

Conversely, in the years following *Pilot v. Whiten*, it has been virtually impossible to convince the Supreme Court of Canada to hear a punitive damage case, unless, like in *Honda*, it is part of a larger issue. For instance, in the case of *Ferme Laplante v. Farm Mutual Insurance*, a fire case, a jury award of $750,000 in punitive damages was reversed by the Ontario Court of Appeal on a two to one split, the majority applying the reasoning in *Whiten v. Pilot*. The Supreme Court of Canada refused leave, notwithstanding the strong dissent. The court had clearly said all it wanted to on the punitive damage issue.

You can see from the list of cases that I supplied the kinds of insurance related issues the court found worthy of hearing. Limitation questions and the scope of the duty to defend are among the wide variety of cases accepted. The court was interested in setting the limits of tort recovery in cases like *Childs v. Desormeaux* (social host liability) and *Mustapha* (the fly in the bottle), the results in both cases narrowing tort liability.

On a leave application, the factum is restricted to 20 pages. The art is to present the facts in the most sympathetic, but accurate, way possible, and so that they demonstrate what makes the case a singular one and the issue ripe for consideration by the court, as well as the injustice of the result in the lower courts, or the confused or unfair state of the law in Canada.

Although you will, of course, want to show why the Court of Appeal decision is wrong, the principal concentration of argument must be why the court ought to hear the case and the implications for the jurisprudence, the industry or the affected part of the population of the failure to do so, and the precedent set by the court of appeal reasons. Showing that Canadian jurisprudence is out of step with other countries can increase the chances of success.

Conversely, the role of the respondent is to demonstrate that the issue sought to be raised is not important or national in scope, but even if it is, this is not the case to deal with it, and in any event, the Court of Appeal got the case right.

There is often an attempt to demonstrate the national importance of the issue by the use of affidavits, sometimes from distinguished academics and sometimes from industry experts or executives who speak in learned fashion about the implications for the industry, the public and, in the case of law professors, the jurisprudence of the lower court decision.

In the right case, affidavits can be helpful, as long as they focus on the national implications or importance and not the merits, and appear to be objective, rather than partisan. My own view is that industry affidavits can be helpful, but those from academics less so, on the theory that the court considers itself expert on jurisprudence.

An example of a case where affidavits were not only ineffective, but were struck out on a motion to the court, along with many paragraphs of the leave application, was in the salvage loss deductible cases, where a five judge panel of the Ontario Court of Appeal reversed an earlier decision upholding a class action for salvage deductible claims, resulting in the dismissal of 30 actions commenced in reliance on the earlier Court of Appeal decision. The affidavits sought to be filed on the leave application were by lawyers involved in the cases, to the effect that the five judge decision was both wrong and would have a devastating effect upon the plaintiffs' lawyers involved because of the investment they had made in the cases, relying on the earlier decision. It was hardly surprising that these self serving affidavits were given short shrift, the court concluding that the purse of plaintiffs' class action lawyers failed to qualify as either relevant, or a national issue!

When you act for a respondent to a leave application, as we did in *CNR v. Royal and SunAlliance*, often the best strategy is to try to show that the facts of the case do not squarely raise the important issue sought to be put before the court, in the sense that the majority of the court was clearly right on the peculiar and complex facts of the case. However, where, as in *CNR*, the Court of Appeal reversed a very thoughtful Superior Court decision two to one, with a

strong dissent by one of the judges who had been involved in the earlier jurisprudence and there were conflicting decisions, it was predictable that the court ultimately granted leave.

Of course, responding counsel, especially those who have experience arguing in the Supreme Court of Canada, always have mixed emotions about trying to defeat a leave application, because there is nothing else in what appellate counsel do that matches arguing cases in the Supreme Court of Canada. Most of us can and do take every opportunity to do so, even on a *pro bono* basis, in part out of duty and in part because, as I said at the outset, it is the best thing a barrister can do.

The Factum

So you are in the position that leave has been granted. What do you do now?

No reasons are given for granting leave. It wasn't because they like you. Your job is to divine why leave was likely granted, and what issue the court decided it wanted to address.

The factum and the selection of the written record is undoubtedly the most important part of the exercise, because it is that the court will read and the clerks will use for their bench memo. A factum that simply argues that the lower courts were right or wrong, on the law or the facts, is a recipe for disaster. If your research has been narrow and incomplete or confined to Canada, you can be sure that the bench memos given to the judges will not be. If you have never prepared a factum for the Supreme Court of Canada, make sure that you review some facta that have been used and successful in the court, or get help from those who have been there. It is very helpful to have the assistance of the many litigators all across the country who have served as clerks in the Supreme Court of Canada, because they have an excellent idea of what a good factum should contain and look like. Believe me, as clerks they saw many of the other kind.

While it is essential to keep in mind that the court is not a court of error, but rather one of policy, it is certainly fair game to point out the error in the lower courts. It is similarly appropriate to point out how sympathetic your client is and the invidious comparison with the conduct of the other side. Witness the picture of the beleaguered Whiten family burned out of their home and in their nightclothes, in the middle of a cold January night, as compared to the proven misconduct of the insurance company in the way that it adjusted and defended the fire insurance claim. (Defence lawyer letter to his expert witnesses "Let's gird our loins for battle!)

The court wants to do the right thing. If it thought the case was governed by existing jurisprudence, it would never have granted leave in the first place. So reference to case law is

only helpful to the extent it points them in the direction you want them to go. You can assume they have read their own judgments. They know the rule of "*contra proferentum*".

The Oral Argument

Those of us who appear with some regularity in the Supreme Court of Canada often wonder whether oral argument there really makes a difference, given the degree of preparation done by each justice before the hearing and the fact that they are not known for having difficulty making up their minds.

I put the very question to Justice Charron at a Cambridge Lectures bull session two years ago in this way: "Given the amount of our time and our client's money that counsel spend preparing themselves for oral argument, does it make a difference?"

Her answer was phrased very diplomatically, but the import was clear. "Not very much".

On the other hand, both Justices John Sopinka and Ian Binnie, who as lawyers argued many cases in the court, presented papers that take a different view, and have said that, in a close case, oral advocacy can be crucial. I agree. We haven't been doing it for 2000+ years for nothing. Now that I sit often as an arbitrator, I can see how oral argument can turn around a view that I came into the oral argument with.

Justice Sopinka put the importance of counsel to the outcome of a case at about 10-20% in the Supreme Court of Canada, but he was talking about the factum as well (Advocates' Society Journal, March 1999).

No one who has ever seen John Robinette argue at the Supreme Court of Canada would ever doubt that oral advocacy there made a difference, but like the rest of us, and given the number of times he was there, even John Robinette lost his share.

Much of what I am going to say about oral advocacy at the court is shamelessly borrowed from Justice Binnie's marvellous Dubin lecture, published in the Advocates' Society Journal in March 2003. I say shamelessly, because who should know it better than one who has seen it from sides of the bench? I commend it to anyone who does oral advocacy in the courts, at any level, but especially at the Supreme Court of Canada. I have also referenced a paper delivered by Justice Binnie earlier in his career on the bench, *A Survivor's Guide to Advocacy in the Supreme Court of Canada*, published in the Advocates' Society Journal, in August 1999.

As Justice Binnie puts it "Any competent advocate can win or lose a 9-0 unanimous judgment of the Supreme Court of Canada, but it sometimes takes serious skill to push the court over the line in a 5-4 split".

Having just been on the losing end of a 4:3 decision in the St. Clair Tunnel case (in which Justice Binnie wrote for the majority), after a 2:1 win in the Court of Appeal, I winced when I re-read that line.

Justice Binnie preferenced the quote that I just read by saying that on occasion on a key fact, or an important legal principle differently appreciated, can push a close case one way or the other.

He describes the case conference that follows argument as "Like a family dinner where the arguments continue after the guests have left and the gloves come off". He adds that parts of the oral and written submissions are frequently referred to around the conference table.

The lesson is that you want to give the judges who are leaning your way all the help you can, and you don't necessarily know, from the questions, who they are.

The clear message from both Justices Sopinka and Binnie is that the objective of counsel arguing before the Supreme Court is to set the agenda, define the question to be decided, focus the argument in the way that can win the case for them, and divine what Justice Binnie has called the "working hypothesis" formulated before coming in to the argument, judges who are testing the hypothesis on counsel, and reinforce it if in your favour, and meet it, if not.

The winning strategy is when the court thinks that the question to be argued in the case is the one that can only be answered by reasonable people in your favour.

To use *Keays v. Honda* as an example, in a case where we reversed the lower courts' decision, the question we wanted the court to consider was whether there were reasonable limits to the accommodation that an employer had to give to a disabled worker who, several days a month, did not show up for work, over a long period of time, and whether Honda had acted within those limits. The respondent plaintiff treated the case as a human rights issue between a disabled employee and a monolithic, overbearing, faceless and heartless corporation. The problem for the plaintiff was that notwithstanding the lower court decisions, the facts did not back up that view, and the court had a different agenda, including that it wanted to revisit the rationale for awarding *Wallace* damages.

In *Walker v. Ritchie*, the success fee case, the plaintiff wanted to characterize it as one of access to justice. Our position as appellant was that access to justice considerations were

satisfied by the contingency regime, and the real issue was fairness to the insurer in being able to mount a viable, though unsuccessful, defence, without penalty. That was the way the court saw it.

What I have just outlined is easier said than done, and much of it must have been developed in your factum. If it is your first time there, watch some arguments, live or on CPAC, or go with experienced counsel.

Unlike arguing in most courts of appeal these days, in the Supreme Court of Canada prepared arguments don't work. If you have prepared an hour long argument and get a chance to drone on and deliver it, the case will almost certainly be decided 9-0. As one judge once put it "We didn't interrupt you when you were preparing your factum. Now, it's our turn".

Rather, what counsel must try to do in the time between the prepared opening and the first question is to put the question you want the court to answer in the way that you want it formulated and tell the court why it should be decided that way, not just because the jurisprudence demands it, but because it is in the best interest of the country or the public and, though this may be more implied than spoken, because it is fair that it be so decided.

Then be ready for all the questions that may arise out of your formulation of the question to be decided, or from the way that your opponent has sought to frame the issue.

The art, and it is an art, is to get what otherwise would have been the prepared argument out in the response to the questions from the bench, always being careful to give direct, responsive answers to the actual question asked.

Some of the questions will be merely for clarification of the point that you are making or for some additional information about the facts. But you must be aware of and ready for "the working hypothesis" I referred to, where the questioner is in effect asking for counsel's answer to the preliminary view that he or she has come in to the hearing with. If the hypothesis seems to fit your argument, you must be prepared to reinforce it, but if it does not, you had better have thought about the point and come up with an answer as to why the hypothesis does not work. If you cannot do so, you have lost that judge. If the hypothesis put to you has never occurred to you and you have no answer for it, you have a distinct problem and had better concentrate on the questions from the other judges on the bench.

My own practise is, with the help of my colleagues, to come up with the most likely questions and organise my notes with the answers to those questions, and have only the barest outline of what order in which to make the necessary points, if the questions lag.

We always have a trial run about a week before the oral argument, with the members of the firm acting as the court, throwing questions at me. I never fail to significantly revise my argument after such a session, when I see how it comes out the first time.

The court requires a condensed book, which is handed in on the day of hearing. There is no point in making it thick, because it won't be read. Put in only the extracts of the documents, transcripts and cases that are truly key, and that you may want to point them to them in your argument. Make them easy to find. Citing cases, especially earlier decisions of the court, should only be done very sparingly. It is a court of policy, not binding precedent.

The object, of course, is to win the case for the client and why or how it is won, in the last analysis, makes little difference, either to the client or to counsel.

But there are occasions where there are larger issues at stake, and even if the battle is lost and the client is a casualty, the war can nevertheless be won. *Whiten v. Pilot* was such a case. The question the plaintiff posed and the court wanted to answer was whether an insurance company could act in the way that Pilot did to its insured and get away with the $100,000 "slap on the wrist" as a penalty. My pointing out that in no previous case had a punitive damage judgment against an insurer in Canada exceeded $20,000, and that the highest award in Ontario for the most egregious conduct by an employer towards an employee had attracted only a $50,000 award, cut no ice with the court. It agreed, 8 to 1, with the jury and the dissent of Laskin, J.A. in the Court of Appeal, that a $1 million award was justifiable.

But the argument that I made was that there had to be a principled basis for the awarding of punitive damages, with stated criteria that had to be present and satisfied. Insurers had to be free to investigate and defend claims, even if unsuccessful, and there were degrees of bad faith, not all of which justify a punitive award. That argument did resonate with the court, and the reasons of Justice Binnie set out numerous criteria and circumstances that needed to be present before even egregious facts could result in a punitive award. Those reasons now require trial judges to instruct themselves and juries in such a way that punitive damage awards against insurers, and generally, since that decision are quite rare, and even when awarded, are moderate. For example the $750,000 jury award against Farm Mutual in the *Ferme Laplante* case was set aside in its entirety by the Ontario Court of Appeal, based on *Whiten*, even though the court found some bad faith elements in the insurer's conduct towards the insured, but not sufficient to justify a punitive award.

Finally, let me talk, as did Justice Binnie, about attitude. You must appear committed to your argument, prepared and confident. If you want to practise in the appellate courts, especially in

the Supreme Court of Canada, you simply cannot crumple under fire. Those of us who cut our teeth in the Ontario Court of Appeal in the 1960s, as young counsel under the crossfire from Justices Laidlaw, Aylesworth and Schroeder, as well as others, learned that lesson well, and those that could not, never came back. We learned to be polite, though bloodied, unbowed under the barrage and, as respectfully as possible, required the court to hear our arguments.

You will not be bloodied by the very polite judges now sitting in the Supreme Court of Canada, but you must not demonstrate, by body language or otherwise, that you have no confidence in your case. (If you haven't convinced yourself, you have little chance of convincing anyone else.) Even when under fire from one judge who is clearly against you, you cannot be sure that the other eight judges agree. Winning 5-4 is just as good as winning 9-0, and in many ways more satisfying. You simply cannot let yourself and your client down.

And you never know. I have said many times, the only people that think they can predict what the Supreme Court of Canada will do in any given case have never been there. Sometimes hope really does spring eternal.