Supreme advocacy:

Tips and traps on your way to the Supreme Court of Canada

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Appeals to the highest court in the land require a unique approach to advocacy. The Americans recognize this fact and have a highly specialized "Supreme Court Bar," of whom the "elite eight" are the best known. Canadian barristers have not quite cottoned on to this approach and choose, to a large degree, to do it themselves. Fair enough. Here are some guidelines that do-it-yourself advocates should consider when they come to argue before our Supreme Court of Canada.

Test for leave employed by the Supreme Court of Canada

The Supreme Court of Canada grants leave where, with respect to "the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, ..."

Lawyers read this passage, but rarely believe it. There are more leave applications that delve into the facts and, by so doing, narrow the case into one that turns on minutiae rather than one decided on broad issues of policy. "This is a case that involves the competition for air space between traditional aircraft and drones." Perfect. Move on to the law.

The next most common mistake made by counsel seeking leave is to attempt to extrapolate from their legal arguments in the lower courts. The leave application requires counsel to look at their matter with entirely fresh eyes and in a new light. The leave court is not a court of error, no matter how egregious the error. Error is a matter entirely between the parties, but the leave court is interested in cases that create an important precedent across Canada. There have been many attempts to define what this means. Ask yourself two questions: (1) What questions in this case would be of interest to a law review in the applicable area of law? (2) What questions in this case impact on the everyday lives of Canadians, either as a whole or as a particular group, industry or profession? Obviously, if there have been case comments, blogs, or newspaper or trade articles about your case, they will be helpful. Put them in your leave application, front and centre.

If your case has involved an area of law that has attracted academic comment or conflicting appellate decisions, that is important, too. Highlight this point.

If your case has raised issues of the proper role of an appellate court as (1) a court of appeal or (2) a court of judicial review which can be answered only by the Supreme Court of Canada, that is of considerable interest to the leave court.

The key is to find an interesting policy issue that needs to be decided by the highest court in the land; or to find something

about the case that attracts the popular imagination; or is of crucial interest to a particular industry or group. In this regard, look not only at common-law principles or legislation that needs interpretation but also at the larger social, political and legal milieus in which the question arises. If necessary, you can submit what is known as a "Brandeis brief," a compilation of extrinsic evidence that illustrates how the decision in question impacts a particular group or the public as a whole. Demonstrate that your case involves an important question of law that is relevant to a particular industry or profession on a day-to-day basis, has led to a conflict between courts of appeal of different provinces, involves the application of federal statutes or has been the subject of international disputes.

The key, then, is to abstract beyond the facts of your case and the interests of the litigants and establish the precedential value of the broad issues implicated by the case to determine if it is important to Canadians, or particular groups of Canadians. If you are responding,

focus on the facts, emphasize recent Supreme Court of Canada authorities and stress the need to let a provincial precedent percolate through other provincial appellate courts to see if a consensus or divergence of opinion emerges.

Arguing the appeal

Never change a winning game but always change a losing game. One cannot count the number of times an appellant lost in the lower courts, often unanimously, then obtained leave with novel arguments based on academic literature or foreign jurisprudence, and then proceeded to lose before the Supreme Court of Canada by reverting to the same arguments that were unsuccessful in the lower courts. Isn't madness defined as doing the same thing over and over again, expecting a different result? If you won previously, trust in your argument but consider others that could be made.

A fox knows many strategies, but the hedgehog knows one all-purpose course of action, or so we are told. Does this mean we put all our eggs in one basket? Or do we sling as much pasta as we can against the wall, and see what sticks? The answer is simple: Know your judges. If one or more have a favourite theory that might apply to your case, you'd best ensure it is part of your written argument. So, too, if one or more judges have previously rejected your pet argument, you'd better have an alternative one in hand. How can you find this out? Research everything the judge has written, in judgments and articles.

Finally, oral argument is for the purpose of addressing the other party's – and the intervenors' – arguments. Proceed as if everything you have to say has been said in your factum, and that it has been understood. When there is only an hour to argue, you need to get all your counter-arguments out of the way first, before you revert to anything you said in your factum.

Conclusion: The Mike Tyson principle

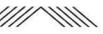
Boxer Mike Tyson famously said, "Everybody has a plan until they get punched in the mouth." So too, those who argue before the court are composed until their first hard question from the bench, which then can turn into a melee as one answer leads to a new question or five. The best approach is to have bullet points on a cue card and be sure you make these points on opening, on closing – or on both – before the verbal barrage from the bench begins. Having made the points you wanted to make, everything else said thereafter is simply gravy – you can relax and enjoy being a "poor player that struts and frets his hour upon the stage. And then is heard no more."

Notes

1. The eight US lawyers are Carter Phillips, Paul Clement, Ted Olson, David Boies, Seth Waxman, Gregory Garre, David Frederick and Lisa Blatt.
2. *Supreme Court Act*, RSC 1985, c S-26, s 40(1) [emphasis added].
3. *R v Turpin* [1989] 1 SCR 1296 at 1331.

BOOK REVIEW

The Red Book returns



Gordon Kaiser

J. Brian Casey
Arbitration Law of Canada: Practice and Procedure, third edition (Huntington, NY: Juris Publishing, 2017)

September 10, 2016, was an important day in Canadian arbitration circles. On that day, Brian Casey sent the third edition of *Arbitration Law of Canada: Practice and Procedure* to his publisher. The Red Book, as we know it, has become a staple in the Canadian arbitration bar. It is the bible for arbitrators and counsel alike.

The book has grown a bit since the first edition in 2004 and the second edition in 2011. The first edition was 358 pages. The second was 459 pages. Now it is 578 pages.

Those pages do not include the substantial appendices, which are very useful despite the additional size and weight. Those appendices were crucial to the initial success of this book, and they remain so. This book is one-stop shopping. The appendices include all the necessary references to the relevant statutes and rules.

One of the book's unique and most important features are the practice notes – invaluable whether you are a young counsel starting out or a senior arbitrator hobbling into the hearing room. The number of notes has grown over the years, and they remain concise and up to date.

The frequent updating is important, and rare. Few arbitrators as busy as Brian Casey could write three editions of a book this size in such a short time. In each edition, Brian thanks his wife, Eva, for putting up with countless lost evenings and weekends without complaint. We should be the ones thanking Eva.

The third edition has the same 10 chapters as the first one. They were the basics in 2004, and they remain the basics. Casey has avoided the temptation to wander into the esoteric. The expanded international content that has crept into the book is important both because of the growing number of international arbitrations and because Canadian lawyers are handling more international cases.

The differences between domestic and international arbitration stand out in Chapter 10, which deals with the recognition and enforcement of awards. The Casey chapter on this subject is as good as any out there. If you cannot enforce the award, there is no point having the arbitration. Here there are real differences between international and domestic arbitrations. There is concomitantly a growing army of lawyers and investigators with novel set-aside claims.

Both counsel and arbitrators should buy this book, and as quickly as they can. In fact, they should buy two copies since somebody will borrow one and never give it back.