# A SURVIVOR'S GUIDE TO ADVOCACY IN THE SUPREME COURT OF CANADA

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*The following is an edited, etc. text of the first John Sopinka Advocacy Lecture presented to the Criminal Lawyers' Association at Toronto, on November 27, 1998.*

Thank you very much Allan [Gold]. I am very honoured by the invitation to speak today. John Sopinka died almost exactly a year ago this week and it is very fitting for the Criminal Lawyers' Association to inaugurate this series of lectures to perpetuate and to honour his great talent. It is a double honour to have John's daughter Melanie here. She not only shares her Dad's feistiness, but is, as her opponents have come to appreciate, a very considerable advocate in her own right.

It seems somewhat less fitting that I should be called on to give the first of these lectures. John Sopinka fit neatly into the long line of heroic counsel reaching back to Edward Blake, and descending through W. N. Tilley to John Robinette and others, including Bert Mackinnon and John's contemporary, Ian Scott, in our own day. The most I can claim is that I am a survivor, but in this room we are all survivors. What I have to say today should therefore be seen as a survivor's guide to advocacy in the Supreme Court of Canada.

The first point I want to make about John Sopinka is that he was a man with an attitude - only in extreme circumstances would he tug his forelock or use the phrase "May it please the court". He liked to win cases. He didn't think it was his job necessarily to give pleasure to the court. And

he never knew when he was beaten. The last occasion we worked together was at the Sinclair Stevens inquiry the year before John's appointment to the Supreme Court. He was representing Mr. Stevens in his personal capacity and I in his government capacity. Of course, the hearing in the end was, unfortunately, an overall disaster for "Sinc". It was said that the only difference between the sinking of "Sinc" and the sinking of the Titanic is that when the Titanic sank there was a band playing. John exhibited his usual defiance and resilience as the icebergs closed in. In one of the numerous motions to exclude evidence, which were invariably lost, John began by saying, "I have three arguments, one is hopeless, the other is arguable, and the third is unanswerable". The Commissioner, somewhat impatient, said, "Well, why don't you just give me your best argument". John said, "Oh, I am not going to tell you which is which".

The Mother of All Juries

Another of John's great strengths as an advocate was his ability to adapt his personality and strategy depending on what court or tribunal he was addressing. I only saw him once argue a case in the Supreme Court of Canada. Instead of the usual "in your face" style he preferred before trial courts, he adopted an altogether more conciliatory approach, pitching his case one way to one judge and another way to another judge as he looked back and forth around the semi-circle of wintry faces from end to end of the bench. Unlike some counsel, he didn't focus all of his argument at the middle of the bench, where experience is deepest but the votes carry no more weight. Like the experienced violinist that he was, he played to every corner of the auditorium. It struck me then, as he challenged each judge in turn, sensing who was leaning this way or that, that his argument before the Supreme

Court of Canada was very much in the style of a jury address. An address, if you will, to the mother of all juries. It is a style that works well at the Supreme Court. In some ways, the criminal bar, with its constant exposure to jury work, is probably better adapted to arguing an appeal before a court of nine judges than is the civil litigation bar.

But, I have to say this, there are some important differences between an everyday jury and the mother of all juries. Some lawyers seem to think they're talking to a group of nine people who have been randomly picked off the street. This is carrying the jury analogy too far. Let me list some of the differences.

First of all, you're not looking just to hang the jury, you're trying actually to persuade a majority to your point of view. You can't afford to give up on any of the nine votes until it's all over. You don't know who is on your side until the judgment issues. John didn't abandon his deckchair on the Titanic until the band played.

Secondly, don't be too rigid in your conception of the argument. Unlike a normal, everyday jury, you didn't select the jurors, they selected you and your case because there are issues in it they want to address. If you're a good advocate, you won't necessarily talk about what *you* want to talk about, you'll talk about what *they* want to talk about. You may think they've misread the "real point". If so, that's their problem. Your problem is to win the case.

Thirdly, this jury has a relatively short attention span for secondary arguments. The present foreman joined the court 18 years ago. If at times he thinks he's heard it all before, it's maybe because he has. Collectively, the present members of the court have been sitting there for over 75 years.[1] A lot of your argument probably consists of rehashing their old judgments. They likely remember more or less what they decided. You too could move quickly if your old opinions were the subject matter of the debate. There is really no need to recite once again the facts in *Regina v. Oakes*.[2] Get quickly to your real point and hit it with a two-by-four.

The Sundown Rule

Fourthly, keep in mind that in most cases the Supreme Court operates on what I would call the "sundown rule". When you start your submission at 9:45 in the morning, remember that the judges are probably going to want to reach a tentative decision on the appeal before the sun goes down. This procedure is driven, I think, by the logistics of operating panels of up to 9 judges and

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[1] Lamer C.J. appointed March 28, 1980 ..... 10 yrs. 3 mos.
appointed Chief Justice July 1, 1990 ..... 8 yrs. 5 mos.
L'Heureux-Dubé J. - April 15, 1987 ..... 11 yrs. 7 mos.
Gonthier J. - February 1, 1989 ..... 9 yrs. 10 mos.
Cory J. - February 1, 1989 ..... 9 yrs. 10 mos.
McLachlin J. - March 30, 1989 ..... 9 yrs. 8 mos.
Iacobucci J. - January 7, 1991 ..... 7 yrs. 11 mos.
Major J. - November 13, 1992 ..... 6 yrs.
Bastarache J. - September 30, 1997 ..... 1 yr. 2 mos.
Binnie J. - January 8, 1998 ..... 11 mos.
**Total:** ..... 75 yrs. 7 mos.

[2] [1986] 1 S.C.R. 103.

seems to be a practice shared by other final appellate courts.[3] Courts of this size require the judges to prepare and think in *advance* of the hearing. Once oral argument is heard, the court wants to capitalize on some of the adrenalin pumping around the courtroom to, as Justice Estey used to say, "get this baby airborne". The "sundown rule" is a good thing from the lawyers' perspective. It allows your advocacy real impact by giving you a voice in the decision-making process at the moment it counts most.[4] The only difference between the lawyers and the judges on the day of the hearing is that you don't get to vote, and you have to leave our discussion when it's only half over.

I used to be concerned as a lawyer that if the court heard 15 to 20 appeals over a 2-week period, the facts and arguments would be a jumble before the judges really focussed on my case. I didn't appreciate the "sundown rule". My anxiety was aggravated by the length of time between the hearing and the ultimate rendering of the court's decision, which at one point in the mid-1980s occasionally stretched to a year and a half or more. My mistake was not to distinguish between the initial decision-making process and the more leisurely reasons-writing process. In the months following the hearing there is a lot of writing and rewriting,[5] and there is debate amongst the judges

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[3]The United States Supreme Court holds Friday conferences to deal with appeals heard during the week, plus literally hundreds of *certiorari* applications, or so say the law clerks: see Bob Woodward and Scott Armstrong, *The Brethren*, (1976); and Edward Lazarus, *Closed Chambers*, (1998). I was recently told by a retired law lord that the practice in our Supreme Court is comparable to that followed by the House of Lords and the High Court of Australia.

[4]*The Brethren*, p. 167: The rule of thumb in the U.S. Supreme Court is that advocacy at oral hearings sometimes loses appeals but seldom wins them. I don't think this is true of the Supreme Court of Canada. Oral advocacy can move the court both ways.

[5]Judges want to know the views of colleagues before starting to write. The view attributed to Frankfurter J. is quoted in Lazarus, *Closed Chambers*, at p. 323:

> When you have to have at least five people to agree on something, they can't have that comprehensive completeness of candour which is open to a single judge giving his own reasons untrammelled by what anybody else may do or not do. *Brown v. Board of Education* is an outstanding example where Warren

who sat on the case about how propositions should be formulated and what should be put in and what should be left out, and there is supplementary research done on points of difficulty, and the air is filled with memoranda to and fro among the judges. Opinions are modified. Minds are changed. If the court is closely divided on a particular appeal, the outcome could shift. But, all of this is not your responsibility. As a practising lawyer I never cared much about *why* I won or lost. What counted to the client was the result. Getting "this baby airborne" in the right direction as soon as practicable after your submission is what the "sundown rule" is all about.

The Court Conference

If you understand a few things about the court conference that takes place after the hearing, it should help you structure your approach to oral argument, to our collective benefit. The dynamic of the court conference is probably a function of its size. You have up to nine opinionated people trying to persuade each other about the correct legal result. The advocacy never stops, it just becomes more blunt. The court conference is a little bit like a family dinner where the arguments continue after the guests have left and the gloves come off.

From the judges' perspective, the appeal has gone through a process of ever-increasing distillation and concentration. At the time of the initial preparation there is an enormous amount of paper flowing around. Bench memos are written, the facta are gone through, the leading cases are

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determined that the Court would give a unanimous decision without separate concurrences and in a rhetorical style calculated not to give unnecessary offences to the South. As a result, *Brown* is a short, flat and almost unexplained opinion.

looked at and the judges come to terms with what the appeal is all about. The oral hearing is still more focussed. When the argument moves back into the conference room it is distilled down to its most critical essentials. Thus, oral submissions should narrow, not broaden, the area of controversy. Judges at the oral hearing do not really need to be harangued in generalities as if they were bystanders at a public meeting. As a respondent, I used to like starting my submissions by saying, "Let me take a few minutes to set out where my friend and I agree and where we disagree". I would then do a tally of where we stood on the issues. I thought this opening created the illusion of a responsible individual open to reason and ready to focus on the issues ultimately in dispute. That is how I saw myself. The judges apparently saw me differently. I am told that when I was appointed, Justice Major said to the Chief Justice, "Tell Binnie he won't have to shout at us any more".

At court conferences the judges speak in reverse order of appointment.[6] The junior judge goes first. This is unlike the Supreme Court of the United States where the Chief Justice speaks first.[7] In a recent book on that court,[8] Mr. Edward Lazarus argues that the two great prerogatives of

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[6]This seems to have been the English tradition since Tudor times. In *The Lion and The Throne, The Life and Times of Sir Edward Coke*, Catherine Drinker Bowen writes of the Star Chamber at p. 109:

> "Judgment was delivered seriatim, as in a jury, with the least important man speaking first and so on up to the Lord Keeper."

[7]Apparently the Chief also had to keep the minutes. See *The Brethren* at p. 64. The following thought is attributed to Chief Justice Burger:

> "It was hard to participate fully in the arguments, lead the discussions, and at the same time keep precise track of the Justices' votes and positions. Since no one other than the Justices was allowed in the conference room, he had to do it alone."

[8]Edward Lazarus, *Closed Chambers* (1998).

the Chief Justice of the United States in relation to his colleagues are, first of all, the right to speak first (because, of course, then he or she gets the opportunity to define the issues and to give an indication of how a decision should be written, whether narrowly or broadly, what kind of issues have to be resolved. and so on). The second great prerogative, it is said, is the assignment of the writing of the opinion which, Lazarus claims, can become manipulative.[9] In an earlier book, *The Brethren*, it was said for example that Chief Justice Warren Burger was careful to stay away from Douglas, Brennan or Marshall, when it came to writing a decision under the First Amendment or the Due Process clause. Chief Justice Burger preferred to give the assignment to his more conservative colleagues.[10] It will be clear to you that on our court, by contrast, there is no insurmountable inhibition on any of the judges picking up a pen, or at what length. The Chief Justice allocates the writing of the principal opinions, but apart from seniority where insisted upon, the exercise is generally open and largely consensual.

In our court conferences there is a fair degree of discussion about the points that have been made as well as points that may not have been made in the oral argument. I don't know how many of you saw Chief Justice Rehnquist on the television last night giving an interview to Charlie Rose about Rehnquist's newly published book, but Rehnquist C.J. certainly came across as a "no nonsense" type of character. In his view, according to the recent study,[11] little importance is attached

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[9]Lazarus, p. 354.

[10]Lazarus, p. 354.

[11]Lazarus, *Closed Chambers*, p. 285: "Rehnquist actively discourages discussion or debate at conference. In his assessment, the Justices' views were determined beforehand and a lot of talk wasn't going to change anybody's mind. As Scalia admitted with a note of disapproval, 'To call our discussion of a case a conference is really something of a misnomer. It's much more a statement of the views of each of the nine Justices.' Rehnquist was fond of saying that once

to the discussion at the court conference. He thinks the judges are sufficiently opinionated and independent that they are not going to change their minds based just on what their colleagues think. He says to his judges why don't you just tell us where you are at, which way you are going to vote and then we'll get on into the writing phase and "the details will emerge in the writing". The Canadian style is more discursive. Parts of the oral and written submissions are frequently referred to around the conference table. What you say, or fail to say, *does* make a difference.

There is nothing new about this description of the court conference. What is surprising, I think, is how few counsel, myself included, really put their minds to how to use an understanding of the process in the design of their written and oral arguments.

Oral Advocacy

If you have read John Sopinka's extensive writings on appellate advocacy, and he wrote a great deal of useful learning on the topic,[12] you will have a pretty good insight into how to conduct an appeal in the Supreme Court of Canada. He tells you how to write a factum and construct a winning

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the Justices voted, the details of any particular ruling 'would come out in the writing'."

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- "The Many Faces of Advocacy", *The Advocates' Society Journal*, Hilary Term, March 1990, Vol. 9, No. 1.
- "The Conduct of an Appeal from the Perspective of Counsel and Judge", *The Advocates' Society Journal*, Hilary Term, March 1992, Vol. 11, No. 1.
- "Advocacy in the Top Court", *The National*, May 1995, Vol. 4, No. 4.
- Sopinka and Gelowitz, "The Conduct of an Appeal", 1993, Butterworth's.

argument. I don't want to go over ground which John and others like Justice John Arnup[13] have already covered so well. In a speech like this, to paraphrase Professor Albert Abel,[14] you have to choose between tedious particularity and overarching generality. I am going to stick to "overarching generalities" today. I want to suggest a few do's and don'ts that may help you to survive your next hearing in the Supreme Court and live to docket another day.

(i) *The key to advocacy is focus*

There is a wonderful metaphor used by an American lawyer by the name of John Davis who used to argue regularly before the Supreme Court of the United States. He drew an analogy between the appellate advocate and a fly fisherman. He put it in this way: "In the argument of an appeal, the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial favour to the advocate's plea is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other".[15] This piscatory metaphor was formulated with the U.S. equivalent of the "sundown rule" in mind, but it applies equally to our Supreme Court, and is as concise a definition as one can find of the kind of focus that was characteristic of John Sopinka's arguments.

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[13] Arnup, *The Law Society of Upper Canada Gazette*, (1979), at p. 27. Justice Arnup's article is an excellent source of wisdom about advocacy as well as plenty of entertaining anecdotes.

[14] 15 University of Toronto Law Journal, at p. 102.

[15] John Davis, *The Argument of an Appeal* (1940), 26 A.B.A.J. 895), quoted in *Arnup, supra*.

(ii) *Look at your appeal from the judges' perceptive.*

You might be surprised at how many practitioners apparently fail to reflect on why leave was granted in an appeal that is not as of right. In my short time on the court there have already been occasions when the legal issue which the Court expected to be argued in a criminal case was ignored by the appellant. If the respondent saw the issue, he or she wasn't about to volunteer it. Perhaps the court's practice not to give reasons in disposing of leave applications contributes to this problem, but most Rumpole-like survivors spend at least *some* quality time thinking about the appeal from the court's perspective. Everybody knows – or should know – that leave isn't usually given to sort out the facts. There may be all kinds of cases that appear to you to be wrongly decided on the facts that appellate courts can do little about. The Supreme Court has neither the mandate nor the capacity to retry the case. If leave was granted, there must be more to your appeal than your overwhelming sense of grievance at the courts below, and your desire for vengeance in what we used to call the "Big House". The "mother of all juries" has a heart of gold, but submissions that ignore the limits of appellate review will get short shrift at a court conference.

(iii) *Don't assume everyone agrees about what the issue is*

A related point. Some counsel operate on the assumption that everybody will ultimately agree on what the argument is about. This is a mistake. A key to success to advocacy in the Supreme Court of Canada is the ability to set the agenda, in other words to define the issue or issues raised by the appeal in a way the judges find attractive, and that will motivate them to want to write

in your favour.[16] It helps, of course, if your argument also lays out a path by which the writing part can be accomplished.

Some trial lawyers think appellate advocacy is about supplying answers to questions which arise naturally and inevitably out of their fact situation. My experience, such as it was, demonstrated, sometimes unhappily, that there is nothing inevitable about the issues on which an appeal ultimately turns. It is possible in some cases to define issues on which there is general agreement. But this is not always so. I illustrate my point by a recent case called *Cuerrier*[17]. This was a criminal case in which the accused was charged with sexual assault for having unprotected sex with two complainants, one of whom he had actively misled as to his HIV status, while to the other he deliberately failed to disclose his HIV status. The lower courts acquitted on the basis that the women had ultimately consented to sex, and therefore no assault occurred. The Supreme Court unanimously allowed the appeal, holding that as a matter of law it would be open on the facts to convict the accused of sexual assault, and ordered a retrial. There were three judgments concurring in the result. This offended at least one editorial writer, who argued that the fact Mr. Cuerrier

> may wilfully have endangered others is certainly the sort of behaviour the criminal law must punish, and severely. And the Court unanimously agreed that Mr. Cuerrier should stand trial for assault. But how they got to that result is even more vital than whether or not Mr. Cuerrier is eventually convicted. In this single decision, the court

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[16]Counsel writing leave applications, in particular, need to keep this in mind.

[17]*R v. Cuerrier*, [1998] 2 S.C.R. 371.

> gave three opinions that ran the gamut from feminist radicalism to traditional common law conservatism.[18]

I have learned over the past year the truth of the saying that it is unwise to argue with people who buy printer's ink by the ton. Nevertheless I have to tell you that the editorial writer missed the point when she complained that the judgments confused matters by providing different answers to the same question. The point is that the judges were focussing on different questions. At the risk of over-simplification, let me illustrate my point. Those judges who stood accused of "traditional common law conservatism" looked at the 1983 amendments to the *Code*, the introduction of the word "fraud" into the list of factors in s. 265 of the *Code* capable of vitiating consent to an assault, and interpreted the "fraud" amendment as introducing a more flexible test that nevertheless takes its colour from the context of a physical assault. They thought the dishonesty of an accused has to be such as to expose the victim to a significant risk of serious *physical* harm. Here, the duty to disclose increased with the potential gravity of the health consequences from unprotected sex, and AIDS stood at the head of the line.

What the editorial writer considered "feminist radicalism" was a set of reasons that in fact turned on a different interpretation of what the case was really all about. In this view, the intent of the 1983 amendments was to recognize and affirm the physical integrity and individual autonomy mainly of women, but also of men, and the question was how to give effect to this broad purpose. Having posed the question in this way, it easily followed that autonomy and bodily integrity should

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[18] *Ottawa Citizen* editorial, September 10, 1998.

not be violated as a result of fraud of any description. The deception was not limited to *physical* harm. The vitiating deception would extend to almost any "dishonest act" that induced the consent. The premise was that Parliament considered the common law to be too narrow and intended to draw entirely new boundaries.

The third concurring judgment thought that in 1983 Parliament intended to somewhat modify but not to throw out the traditional limits of the old law. The question was how far could the Court push the interpretation without exceeding Parliament's limited expectations. In effect, from this perspective, the question was where to draw the line on judicial activism. The court should be conscious of its policy limitations. Proceeding incrementally, the notion of fraud could legitimately be expanded to include deceit about the risk of infection of a venereal disease, including AIDS. More radical expansion would put in question the respective constitutional roles of Parliament and the courts. A different framing of the question begat a different solution.

Running through all three judgments was yet a fourth question which was "should the criminal law be messing about in what is fundamentally a public health issue? Could criminalization of some aspects of unprotected sex chill compliance with reporting requirements and undermine the ability of the public health authorities to deal with a very serious health problem?"

Three judgments. Three quite different perspectives on how to characterize the real issues underlying the appeal. My point is that your role as the advocate is to do your utmost to get all members of the court on the same page, asking a question to which the only reasonable answer

favours your client. Beyond that, *Cuerrier* shows that in a particular case there may be many routes to victory, and you should not overlook any of them.

(iv) *Nailing the jelly to the wall*

The same issue can be presented differently in different appeals. The outcome may depend on how successful you are at nailing the forensic jelly to the wall in a particular case. Take, for example, the third potential question in *Cuerrier*, namely the respective constitutional role of Parliament and the courts. The issue is full of ambiguities and surfaced in different ways in at least three other appeals which I survived before the court over the past 15 years, one for the government[19], one against the government[20], and one for the Speaker of the Senate.[21]

In the *Thomson Newspapers* case, we attacked an amendment to the *Canada Elections Act* which banned publication of polls 72 hours before a federal election. Some of you may have seen John Crosbie's reaction to the decision of the Court striking down the publication ban. He saw it entirely as a constitutional issue. He said the judges had become the Godzillas of government and the legislature and the executive had become the Mickey Mouses. The question, he thought, was whether non-elected, appointed judges, should be telling elected people how to run an election. On the other hand, my clients, the Thomson and Southam newspaper chains, argued that the "question"

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[19] *Operation Dismantle*, [1985] 1 S.C.R. 441.

[20] *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 S.C.R. 877.

[21] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

was whether freedom of expression, a right entrenched in s. 2 (b) of the *Charter*, could be limited by politicians in what was contended to be their own self-interest. Our question was why Parliament should be allowed to single out opinion polls from all of the other potentially misleading bits of information swirling about in the dying days of a general election. There was nothing wrong with "strategic" voting based on last minute polls. So far as we were concerned, voters should be free to cast a vote based on the candidate's haircut, if that was their preferred criterion. On that appeal, on a razor thin 5 to 3 vote, the Court defined the issue as freedom of expression, not the appropriate role of the various constitutional players. If one vote had shifted, the court would have divided evenly, and the result would have been to preserve the decision of the Ontario Court of Appeal, which had unanimously upheld the ban.

It was otherwise in the *Nova Scotia Legislative Assembly* case where the challenge was whether CBC cameras should be allowed into the House of Assembly against the opposition of the elected members. The CBC argued its s. 2(b) point. In response, the various legislative bodies across the country, including the Senate of Canada, for whom I acted, raised the barricade of parliamentary privilege and said, "Look, parliamentary privilege is as much part of the Constitution of Canada as is freedom of expression under 2(b) of the *Charter*." You can't have one value in the Constitution trumping another. The exercise of privileges by Parliament and the provincial legislature is not subject to judicial review. Our subliminal message was that if the media has a *Charter* right to introduce cameras into the legislature over the members' opposition, the media should have the same *Charter* right to introduce cameras in trial courts over the opposition of the

trial judges. Soon after that point was grasped, the media goose was cooked, and manifestly seen to be cooked. Once again, it all depended on how you defined the question.

The earliest of the three cases is *Operation Dismantle*, where a coalition of disarmament groups sought to halt the testing of cruise missiles on the basis that such tests increased the possibility of nuclear war. I argued for the federal government that the Court should not involve itself in political questions relating to national security. We relied on a number of cases in the United States Supreme Court which held that in the nature of things judges lack the expertise, background and information to determine defence policy.[22] Our Supreme Court disagreed. While it dismissed the appeal of Operation Dismantle on the basis of non-justiciability, Madam Justice Wilson said that *Charter* rights trump defence policy and national security. "I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters", she said.[23] In short, in these examples, where the court was persuaded that human rights was the issue, the decision went one way. Where the court was persuaded that the issue was judicial restraint and a recognition of the proper constitutional order, the decision went the other way. Which way the question on any appeal gets to be formulated is, I think, a key function of appellate advocacy.

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[22] *The Brethren*, p. 126: "The Court had ceded to the President and the military virtual autonomy in war-related matters. 'You can't fight a war with the Courts in control,' Black had said."

[23] *Operation Dismantle* at p. 467, emphasis is in the original.

Obviously the question you say governs the appeal will normally drive the answer that you want. It if were otherwise you would not be advocating that particular question. On a practical level, you can often get better mileage arguing concepts in your hour before the Supreme Court than you can by trudging through pages of black letter law. If you persuade the judges about the right question, they will generally figure out how to get to the answer, even if it means circumnavigating some difficult precedents. The beauty of the "sundown rule" is that it gives you the chance to motivate the judges at a critical stage when their views about the correct characterization of the appeal are crystallizing. .

(v) *Don't overlook in oral argument any point essential to your success*

Oral argument should be complete and self-contained. Don't overlook any point essential to your success. A wise practice for counsel in the Supreme Court is to hand to the judges a book of extracts or "condensed book" at the beginning of the oral argument. Most lawyers include the key extracts of evidence and passages from the case law. This avoids wasting time while waiting for the judges to shuffle through a mountain of paper looking for the particular document you want to refer them to. Having handed in the Book of Extracts, however, many lawyers don't take the time to go through it. They'll say, "Well, Tab 37 - that's the contract. I won't take time to go to it now. I know you are going to read it in due course. I just want you to know that it is there." Bad mistake! If a particular extract of testimony contained in the middle of a dozen or more volumes of transcripts is essential to your success, or you think everything turns on a particular provision in the contract buried in 5 volumes of exhibits, stop and read the extract to the court. This is "must have"

information for the court conference that is to follow; the "sundown rule" teaches that the time to make your point is *now*. The great old advocates in the heroic tradition figured out the necessity of doing that a lot faster than I did. Mr. Justice John Arnup[24] tells the story of W.N. Tilley who was grinding through a contract case in the Supreme Court years ago. The judges became worried that he was going to read the whole document to them. The Chief Justice stopped him and said: "You don't need to do that, we'll read the evidence." Tilley responded, innocently: "Will all your Lordships read the evidence?". "Yes." "Will all your Lordships read all the evidence?" "Yes, of course." "Then," said Mr. Tilley, "let's read it together!" - and he carried on.

(vi) *Questions from the Bench: listen before you leap*

The last thing I want to touch on in terms of the oral hearing is the matter of questions from the bench. Of course, everybody who talks about advocacy at any level of the courts will emphasize the need to face up to questions. If something is bothering the judges, better that it be out on the table than concealed in the recesses of their minds, only to pop out later at the court conference when you are no longer around to deal with it. Some lawyers complain that a problem in the Supreme Court is that often the hearings consist of little else but questions. This is an unfair criticism. We didn't interrupt you when you were preparing your factum. Now it's our turn.

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[24] Arnup, *supra* note 13, p. 27.

You are confronted with nine judges who are going to have to deliver at least their preliminary views of what this appeal is all about shortly after the conclusion of oral argument. If something is in the back of my head and I am not sure what the answer would be from one side or the other, I'm going to ask it. You may have spent the previous night in a hotel room mapping out each minute of your argument. I am sorry of course if my interruption disrupts your game plan and burns valuable time. I need the answer to my question because it helps me to do my job even though it may make your job a whole lot messier. As the expression goes, *sauve qui peut.*

Having said that, there are many different kinds of questions and you should respond to different types of questions in different ways. I will try to illustrate this point by dividing questions into what I think are seven useful categories, then give a hint about how I think you should handle them.

The first type of question is the genuine inquiry for enlightenment. It may be something as simple as clarifying a point of fact, or a question like "Well, you are resting your argument on the *Charter* but is it not really a division of powers case?", or "How would you say our decision in *Re The Sliding Door Company* applies to this situation?". This category consists of straightforward questions which you likely anticipated in preparing the appeal. Your reaction should be extremely helpful and solicitous.

The second category is slightly more confrontational and has to do with the fact that some members of the court are more linear in their thinking and others prefer a more dialectical approach.

An example of the second category question is, "The appellant says this, and you say that, but I don't see how your point answers her point. Could you elaborate?" This category is slightly more confrontational in that it brings into collision the opposing views. I think your posture should be one of mild surprise that it is not evident what your position is but nevertheless you are happy to oblige with a short elaboration.

The third category of question is where the Court goes further than asking you to elaborate and a judge purports to state your position. Justice Cory is expert at this. He says something like: "I suppose your position is that the presumption of innocence is a golden thread that goes through the warp and woof of the criminal law, do I have your point?" You can adopt his formulation, but you have to realize that you are before the mother of all juries and while he is being helpful in terms of his own thinking, your impetuous adoption of his formulation could potentially inflame colleagues of a contrary view at the other end of the bench. I call this category the "friendly fire" kind of question because although it comes from a supportive source it may wind up fatally wounding your argument when the other 8 votes are counted.

The fourth category of question is overtly hostile fire. A few minutes ago Alan Gold referred to the *Rose*[25] case in his opening remarks. There was a good example of "hostile fire" in that case, which involved an attack on the constitutionality of requiring a defence counsel who calls evidence to forfeit the right to be the last to address the jury. The obvious hostile question to the appellant

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[25] *R v Rose* (S.C.C., 25448: judgment released November 26, 1998, unreported).

was, "Are you saying, counsel, that every jury trial where the accused called evidence since 1892 has violated fundamental principles of justice?" It's at moments like this that you should close your eyes and think of John Sopinka standing on the deck as the icebergs gathered at the *Sinclair Stevens Inquiry*. Don't try to please the questioner at the expense of weakening your argument. You don't know at that stage how many of the judges are silently agreeing with you. Sometimes hostile fire questions provoke counter-fire from other judges, in which case, agreeably from your perspective, the hostile questioner may be engulfed in back-fire.

How can you tell what is friendly fire and what is hostile fire? I had my own rule of thumb as an advocate before the Court and it was this: If Peter Cory asked the question it was probably friendly; if anybody else asked it, it was probably hostile.

The fifth category of question should probably be called collateral fire. That is where you are proceeding happily along one train of argument then suddenly a question seems to come off the wall. I remember years ago listening to Michael Goldie arguing the *Canadian Arctic Gas* case.[26] He was taking the Court through minutes of a key meeting when suddenly Pigeon J. threw down his pencil and said, "Now are you going to read this over and over and over again?" Well, the fact was, neither Mr. Goldie nor anyone else had previously referred to it. Nevertheless Mr. Goldie, the agile warrior that he was (and is), recognized the question as totally collateral to the flow of his argument, and adroitly backed off, apologized, circled around and eventually came back to the

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[26] *Committee of Justice & Liberty v. Canada*, [1978] 1 S.C.R. 369. Michael Goldie, now Goldie J.A. of the B.C. Court of Appeal, acted for the Canadian Arctic Gas Consortium.

extract he needed to refer to and carried on without interruption. I would say that the proper posture for an advocate experiencing collateral fire is submission! By definition if it's collateral it can't hurt you and therefore there is no point in making an issue of it.

The sixth category of question is cross-fire. This is where you become an innocent bystander. Some of you may recall the *Borowski* case[27] a few years ago about whether a high profile anti-abortion crusader, Joe Borowski, could get public interest standing to attack the constitutionality of the abortion law, s. 251 of the *Criminal Code*. Chief Justice Laskin, who had pioneered the concept of public interest standing in *Thorson v. Attorney General*[28] and *Nova Scotia Board of Censors v. McNeil*[29] was opposed to giving standing to a political crusader who, as he saw it, was merely experiencing "an emotional response" to the abortion legislation. Martland J. took a different view, and wanted to use Chief Justice Laskin's earlier decisions to put the skids under some of the remaining barriers to public interest status. I was there opposing Borowski, and was caught in a cross-fire between Chief Justice Laskin and Justice Martland who both regarded my submission as essentially irrelevant to their debate. My advice in a category six situation is to mumble inaudibly and let the titans slug it out.

The seventh and last category of question (and I am mindful of the time and will wrap up shortly) is what used to be called the "Martland question". Justice Martland, during the 70s and early

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[27] *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575.

[28] *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138.

[29] *Nova Scotia Board of Censors v. McNeil* [1976] 2 S.C.R. 265.

80s, was not inclined to ask many questions, but he would sit and fret and fool around with his papers and look quizzical and scratch an ear and call for books to be sent in, and talk to his neighbours, but at some point in the proceeding there would be a kind of chilly silence and Martland would clear his throat and out would come *the question* trailing wisps of smoke behind it. There wasn't anybody in the courtroom who didn't realize that the moment of truth had arrived. If you were able to deal with the Martland question the case was as good as won, and you felt yourself galloping towards the sunlit uplands of victory. And if you failed, there was a kind of a death watch that set in. The questioning from other members of the bench dried up. The judges began to make their notes for the court conference. Nowadays, mercifully, the red light goes on.

*Attitude*

Finally, I want to go back and pick up my first point about John Sopinka's attitude. Attitude is everything in advocacy. No matter how disastrously you think the hearing is unfolding, be steadfast and defiant. Don't crumple. Don't take up the posture of a whipped cur, signalling by your body language that you wish you were somewhere else. You don't know who your friends are on the bench or how many they are in number. If you let yourself down you let them down as well, and above all you let down your client. If at the conclusion of an apparently disastrous hearing you can walk out of there with flags flying and your chins up, then in my book you can say that you are an advocate worthy of the John Sopinka tradition.

On that note Mr. Chairman, I conclude the first of what I expect will be a series of John Sopinka Advocacy Lectures that over the years will become increasingly scholarly and erudite. It was an honour to be asked to deliver the opening pitch. It was also extremely decent of you, given that I am the one making submissions today, to hear me out without harassing me with awkward questions. Thank you.