

## **Some thoughts on advocacy in judicial review proceedings**

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Many counsel who appear before the Federal Court of Appeal advocate their cases beautifully. Some, less so. A few, not at all.

In my brief time on that court, certain thoughts about advocacy have occurred to me. I would like to share them with you candidly.<sup>1</sup>

### ***Remember which court system you are in***

The Ontario court system and the Federal Court system are separate systems with their own jurisprudence. Each system tends to rely on its own cases. Only in cases of doubt or cases with novel points might one look at the other system's case law.

### ***Write a good factum***

Judges read and study the factums perhaps more than most realize. Often in judicial review proceedings, the factums play a big role in the outcome of the case and oral argument changes nothing.

If you cannot draft a good factum,<sup>2</sup> you should try to improve your skills, taking advantage of the wealth of available instructional material.<sup>3</sup>

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\* Justice, Federal Court of Appeal. To the extent that I express any views on issues of substantive law, they should be regarded as tentative and subject to modification depending on submissions received in particular cases.

<sup>1</sup> I presented this paper at the Law Society of Upper Canada's conference, *The Six-Minute Administrative Lawyer 2011* (Osgoode Hall, Toronto, February 24, 2011).

<sup>2</sup> See generally Hon. John Laskin, "Forget the Windup and Make the Pitch: Some suggestions for writing more persuasive factums" and Hon. David Stratas, Hon. Kathy Feldman and Hon. Janet Simmons, "Some Factum Suggestions."

***Consider using the facts more: they can persuade***

The record on judicial review is almost always a paper record. The facts may seem dry and unimportant to you. Remember, however, that facts, presented effectively, can trigger the judicial impulse to do justice in a particular case.

To many judges, the standard of reasonableness can be applied in fairly flexible ways. If you convince a court that a decision is factually harsh or unfair, you may lead a court to find that decision is unreasonable. That sort of convincing is achieved primarily through skilful selection and presentation of the facts, not the law.

On issues of procedural fairness, the facts are especially important.<sup>4</sup> Here, consider telling the factual story from the standpoint of your client. Professional writers call this “focalizing the story” or presenting the “point of view.”<sup>5</sup>

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<sup>3</sup> A wealth of instructional materials are available on writing and how to draft factums. On the basics of writing, especially as applied to factums, see Stephen V. Armstrong and Timothy P. Terrell, *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* 3d ed (Thomson Legal Publishing, 2009); Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace*, 10th ed (Harper Collins, 2010); Richard C. Wydick, *Plain English for Lawyers*, 5<sup>th</sup> ed (Carolina Academic Press, 2005); Bryan A. Garner, *Legal Writing in Plain English: A Text With Exercises*, 2d ed. (University of Chicago, 2001). More advanced factum and writing instruction is available from these works, which I highly recommend: Thomas A. Cromwell, ed., *Effective Written Advocacy* (Canada Law Book, 2008); Bryan A. Garner, *The Winning Brief: 100 Tips For Persuasive Briefing in Trial and Appellate Courts* (Oxford University Press, 1999); Roy Peter Clark, *50 Essential Strategies for Every Writer* (Little, Brown and Company, 2008); Steven D. Stark, *Writing to Win: The Legal Writer* (Broadway Books, 1999); Constance Hale, *Sin and Syntax: How To Craft Wickedly Effective Prose* (Random House, 1999); Arthur Plotnik, *Spunk and Bite: A Writer’s Guide to Bold, Contemporary Style* (Random House, 2005).

<sup>4</sup> The level of procedural fairness is determined by a series of factors that are factual in nature: *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817 at paras. 23-27. As the Supreme Court has repeatedly held, “[t]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

<sup>5</sup> See, e.g., Stephen Wilbers, *Keys to Great Writing* (Cincinnati: Writer’s Digest Books, 2000), ch. 7.

In doing this, don't just assert fairness or unfairness. Rather, through careful selection and arrangement of detail, demonstrate the fairness or the unfairness.

***Brief, focused arguments work***

If the standard of review is correctness, one need only establish an error. If the standard of review is unreasonableness, one needs to demonstrate a decision that is, colloquially speaking, beyond the pale.

Long-winded, torturous arguments give us the impression that there might not be error or at least that the error might be highly debatable, or that there is nothing beyond the pale. Brief, sharply focused arguments work much better.<sup>6</sup>

***Have the courage to select your arguments***

Too many counsel run too many arguments. Some run as many as seven arguments. This detracts from counsel's credibility. It may be that we reject your first argument but find the second argument compelling. It may be that we reject your first two arguments but see some attraction in the third argument. But after we've rejected your three strongest arguments, do you really think that somehow your fourth argument will be a game-saver? What about the fifth, sixth or seventh arguments?

Recognize reality. Have the courage to advance only one or two of your strongest arguments.<sup>7</sup>

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<sup>6</sup> See generally n. 2, *supra*.

<sup>7</sup> *Ibid.*

***Give us the bottom line, not the case law tour: synthesize***

In preparing your factum, you may have had to review ten cases in order to formulate a particular point. Just because you had to read each of those cases doesn't mean that we have to. Where possible, make it easy for us – just give us the bottom line, and perhaps cite only a couple of the most representative decisions. As long as it is accurate and fair, simple, synthesized exposition of the law comforts and attracts judges; undue complexity worries and repels.<sup>8</sup>

***Make oral argument matter***

Many counsel design their oral argument to mirror what they wrote in their factum. This is a waste of time. We've read and studied your factum. Why waste your time telling us what we already know and understand?

After all of the factums have been filed, it should be obvious to you what the issues in dispute are. On some of those issues in dispute, your client may be in real trouble. Do not ignore those issues. Concentrate on them – because we will. Oral argument is your opportunity to persuade us on the difficult issues on which your client may fail.

***Don't forget legislative facts***

In order to review a decision of the tribunal, it is often useful for us to know about the nature of the tribunal, its personnel, its powers and procedures, the presence of a privative clause, procedural issues such as whether proceedings before it are adversarial or inquisitory, whether policy matters come to bear in the decision-making and so on.

Many of these basic factual matters about the tribunal and its decision-making process are set out in the tribunal's governing legislation. To the extent that it is

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<sup>8</sup> *Ibid.*

relevant or might affect our view of the case, tell us about these legislative facts early in your facts section.

Too often we are confronted with a blizzard of facts about the particular matter that was before the administrative tribunal – just as if we were a first instance decision-maker with no need to defer – before we are told any of the legislative facts about the tribunal, its powers and its personnel. This is a mistake. We need to be given the context surrounding the decision-maker before we are confronted with the factual detail of the particular case.

Legislative facts are often highly persuasive. You should not hesitate to go into the detail in order to persuade us. It's one thing to assert baldly that an expert labour board decided the matter. It's quite another to demonstrate the board's expertise by tell us that the decision was made by a board whose members, by virtue of a particular section, can only serve if they have longstanding experience and knowledge of labour matters.

### ***Cases concerning legislative interpretation***

Many judicial reviews concern tribunal interpretations of legislative provisions. Although tribunals are often given deference when they interpret their own "home" legislation, most courts insist that the legislation be interpreted in accordance with certain Supreme Court decisions.<sup>9</sup> These decisions emphasize the need to look at the plain words of the section, the interrelationship among the sections including the section at issue, and the overall purpose of the legislation.

To argue unreasonableness effectively, counsel should focus on whether the tribunal decision deviates from the overall purpose of the legislation, causes disruption in the interrelationship with the provisions, or is contrary to the plain meaning of the provision. To do this, in many cases the court needs to be informed, early in the factum, and perhaps even in the facts section of the factum,

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<sup>9</sup> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

about the entire legislative scheme and how it works. In too many cases, counsel are looking just at the individual section without acquainting us with the entire scheme in which it sits.

***We care about the text of legislation and so should you***

We rely on the text of the relevant legislation. Many counsel, though, do not give us the text of the legislation we need to decide the case. I prefer that the legislation be in the back of the memorandum, in a schedule where I can access it easily.

Include everything that might be relevant. This is especially the case in issues of statutory interpretation and other cases where legislative facts bear upon the issue. Too often parties give us only the particular provision under which a decision is made.

***Understand Dunsmuir***

Some counsel argue for a particular standard of review in a particular case. But their position is clearly against *Dunsmuir*.<sup>10</sup> It's as if they have never read a word of it.

For example, too often counsel argue that the standard of review for a tribunal's interpretation of legislation is correctness because that is a legal matter. The thinking is that Courts always have the power to decide questions of law and can readily interfere with tribunal determinations of those questions.

Of course, *Dunsmuir* tells us that that is not the case. The nature of the question – whether it is legal, factual or a mix of the two – is only one factor in determining the standard of review.<sup>11</sup> Further, *Dunsmuir* creates a presumption that a tribunal

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<sup>10</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

<sup>11</sup> *Ibid.*, at para. 53.

interpreting its home statute will be reviewed on the basis of the deferential standard of reasonableness.<sup>12</sup>

Counsel that run points that are clearly contrary to *Dunsmuir* destroy their credibility with the Court.<sup>13</sup> Understand *Dunsmuir* thoroughly. Do not advance arguments that are clearly against it.

### ***Go beyond Dunsmuir and get into the refinements***

When the Supreme Court released *Dunsmuir*,<sup>14</sup> many questions arose. What is a true jurisdictional question that gives rise to correctness review?<sup>15</sup> What is the meaning of the reasonableness standard of review?<sup>16</sup> Does the level of deference within the reasonableness standard vary according to the type of case?<sup>17</sup> When will a court find that a decision is unintelligible or lacks transparency?<sup>18</sup>

Today, when faced with these questions, many counsel are wedded to *Dunsmuir*, as if *Dunsmuir* was the last and final word and no other court has dared to touch it.

It has been three years since *Dunsmuir*. And lower courts have been very busy offering answers to the questions raised by *Dunsmuir*.<sup>19</sup>

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<sup>12</sup> *Ibid.*, at para. 54. See *Canadian National Railway Company v. Canadian Transportation Agency*, 2008 FCA 363 at paras. 49-51 and *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, 91 O.R. (3d) 412 at para. 41 (C.A.).

<sup>13</sup> Your credibility significantly affects your ability to persuade. See D. Stratas, “Skating on Thin Ice,” in Cromwell, *supra*, n. 3.

<sup>14</sup> *Supra*, n. 10.

<sup>15</sup> *Ibid.* at para. 59.

<sup>16</sup> *Ibid.* at paras. 46-50.

<sup>17</sup> *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 at para. 32; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, (2008), 237 O.A.C. 71; *Guinn v. Manitoba.*, 2009 MBCA 82 at para. 29; *International Association of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc.*, 2008 ABCA 400, [2009] 2 W.W.R. 215 at para. 12.

<sup>18</sup> *Dunsmuir*, *supra*, n. 10 at para. 47.

On all of the *Dunsmuir* questions, the Courts of Appeal have given at least partial answers to all the *Dunsmuir* questions.<sup>20</sup> In your research, devote considerable attention to those courts. Use the case law of the Divisional Court or the Federal Court, as the case may be, to see if they have refined the Court of Appeal case law in your jurisdiction.

***Think carefully about running alternative arguments on standard of review***

Too many counsel argue that the standard of review should be correctness when there is no real basis for that. Then they argue in the alternative for success under the reasonableness standard of review. This tactic sometimes impairs their credibility before the reviewing court.

Where there is no basis for the correctness standard, simply drop it and make your pitch under reasonableness review.

***A special word about earlier case law on the standard of review***

*Dunsmuir* tells us that if “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question,” the earlier case law will govern.<sup>21</sup> Accordingly, many counsel correctly focus on the standard of review that has already been set for the particular administrative decision that is under review.

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<sup>19</sup> As of the time of writing this paper, *Dunsmuir* has been mentioned 125 times by the Federal Court of Appeal, 1724 times by the Federal Court, 25 times by the Court of Appeal for Ontario and 76 times by the Divisional Court.

<sup>20</sup> For example, on the issue of “true jurisdictional question,” see *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284 at para. 29; *Public Service Alliance of Canada v. Canadian Federal Pilots Assn.*, 2009 FCA 223, [2010] 3 F.C.R. 219.

<sup>21</sup> *Dunsmuir*, *supra*, n. 10 at para. 62.

Many, however, feel irrevocably bound by those earlier decisions. That is not what *Dunsmuir* says. It says that the standard of review must have been “determined in a satisfactory manner” in the earlier case law. It is open to you to say that the earlier jurisprudence should no longer be followed because it is unsatisfactory.

Some earlier case law seems very much contrary to the approaches in *Dunsmuir* and some judges may welcome an opportunity to engage in reassessment and revision. This may be particularly so in cases where standard of review rulings concerning the same, similar or related provisions seem to conflict.

### ***Get past standard of review issues***

I have spent plenty of time dealing with standard of review issues, above. But in the post-*Dunsmuir* era, standard of review is often not a live issue or one on which the courts want to spend much time.

In the post-*Dunsmuir* era, there is an increasing trend for judges to devote most of their attention to the merits of the review – *e.g.*, why a particular decision is or is not reasonable. In most cases, that is where you should devote most of your attention. In some cases we still get pages and pages of submissions on standard of review when only a small number of paragraphs will suffice.

Related to this is the need to give judges the credit for knowing some law on the standard of review. We still get detailed lectures on *Dunsmuir* from some counsel as if it just came out last week and we have never read it before. Some of us just about have the key paragraphs of *Dunsmuir* memorized!

### *Arguing unreasonableness*

Many counsel do not understand that the reasonableness standard is a deferential standard. Too many argue their cases as if the reviewing court were a trial court, able to make its own findings of fact and law.

In *Dunsmuir*, the Supreme Court spoke of reasonableness as being a range of outcomes that is available to the tribunal.<sup>22</sup> The inquiry for the reviewing court is whether a tribunal's decision falls within that range.

Therefore, when challenging a tribunal decision under the reasonableness standard, counsel should try to articulate why a particular decision falls outside of the range of reasonable outcomes. To do this effectively, counsel need to devote much thought and attention to this – in many cases it is the fulcrum on which the case goes one way or the other. Sadly, in many cases, counsel's discussion is superficial and not as helpful as it might be.

When arguing unreasonableness, some counsel shy away from telling us why a decision falls outside the range of reasonable outcomes. Instead, counsel addresses a different, much easier question. Counsel tries to convince us that an argument rejected by the tribunal was capable of acceptance. Sometimes counsel does such a great job that we end up convinced that the tribunal got it wrong.

But that misses the mark. We are shackled by the reasonableness standard. We cannot interfere just because we think the tribunal should have accepted the argument. We cannot interfere just because we think the tribunal reached the wrong result. Instead, counsel's burden under the reasonableness standard is higher. Counsel must show us that the tribunal reached a result that was completely *outside the range* of outcomes available to the tribunal.

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<sup>22</sup> *Dunsmuir*, *supra*, n. 10 at para. 47.

***Badges of reasonableness or unreasonableness***

It is difficult to put a string through the jurisprudence on what reasonableness means. Many cases are decided on their own facts.

Nevertheless, some courts have identified “badges” or certain specific indicia that show that a tribunal decision is or is not reasonable. These can be useful to invoke in a reviewing court.

For example, when a tribunal decides a matter by following an administrative policy and no one suggests the policy is invalid, the decision is likely to be found to be reasonable.<sup>23</sup> A tribunal decision that follows earlier tribunal jurisprudence may be more likely to be found to be reasonable. A tribunal decision that is consistent with the purpose of the statute under which it is made is more likely to be found to be reasonable than one that is not.<sup>24</sup>

A tribunal decision that deviates from earlier tribunal jurisprudence may be more likely to be unreasonable. A tribunal’s reliance on irrational facts may be an indication of unreasonableness.<sup>25</sup> The failure of a tribunal to follow a methodology set out by statute may also be a sign of unreasonableness.<sup>26</sup>

***A brief word about adequacy of reasons***

Tribunal decisions supported by inadequate reasons can sometimes be quashed. Some counsel, invoking the generality of the comment in *Dunsmuir* that decisions must have “transparency,”<sup>27</sup> tend to overuse this potential ground of review.

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<sup>23</sup> *League for Human Rights of B’Nai Brith Canada v. Odynsky*, 2010 FCA 307 at para. 87.

<sup>24</sup> *Montreal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at para. 42.

<sup>25</sup> *Kane v. Canada (Public Service Commission)*, 2011 FCA 19.

<sup>26</sup> *Almon*, *supra* n. 17; *Kane*, *supra*, n. 25 per Stratas J.A. dissenting at paragraphs 133-135.

<sup>27</sup> *Supra*, n. 10, at para. 47.

Courts of Appeal have spoken on the matter and they say that the threshold for success on adequacy of reasons is rather high.<sup>28</sup>

Further, *Dunsmuir* would seem to point in different directions on this point: while decisions must be “transparent,” a reviewing court is to pay “respectful attention to the reasons offered or *which could be offered in support of a decision.*”<sup>29</sup> Does this mean that in some circumstances a court can overlook the absence of reasons on a particular issue? And, in the end result the tribunal might be ordered to reconsider the matter and draft its reasons better, a remedy perhaps of little practical benefit? Adequacy of reasons may not always be as good a ground as some might think.

***Remember that remedies are discretionary***

A decision that is wrong under correctness review or unreasonable under reasonableness review is not automatically quashed. The Court has a common law and statutory discretion<sup>30</sup> not to quash the decision. In the right sort of case, good advocates in judicial review proceedings select and present the facts skilfully in order to influence the exercise of that discretion.

The recent decision of the Supreme Court of Canada in *MiningWatch Canada* reminds us that this discretion is very broad.<sup>31</sup> In *MiningWatch*, the Supreme Court found that certain aspects of an environmental assessment process did not comply with the *Canadian Environmental Assessment Act*: the responsible authorities “acted without statutory authority” and in contravention of “the requirements of the [Act].”<sup>32</sup> However, the substantive decisions made by the

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<sup>28</sup> *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, 320 D.L.R. (4th) 733; *Clifford v. Ontario (A.G.)*, 2009 ONCA 670, 98 O.R. (3d) 210, leave to appeal to the SCC refused, [2009] S.C.C.A. No. 461.

<sup>29</sup> *Supra*, n. 10, at para. 48.

<sup>30</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18.1(3); *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 3.

<sup>31</sup> *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

<sup>32</sup> *Ibid.*, at paras. 42 and 52.

responsible authorities at the end of that non-compliant process were not challenged. The Supreme Court adopted a balance of convenience approach, looking at a very broad range of factors, and found that there was “no justification” to quash the substantive decisions made and force everyone to go through the assessment process again.<sup>33</sup> The Court acknowledged that its approach would “allow a process found not to comply with the requirements of the CEAA to stand.”<sup>34</sup> However, this was preferable to the potentially disproportionate impact that quashing the decision would have had on the parties and the broader community.

The message in *MiningWatch* is that the broadest range of practical factors must be considered and legal error or non-compliance should not be given undue weight: the practicalities of a case can often outweigh the legalities and stop a decision from being quashed.<sup>35</sup>

Here, as in so many areas of advocacy in judicial review proceedings, skilful advocacy and careful selection and presentation of the facts can yield rich dividends.

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<sup>33</sup> *Ibid.*, at para. 52.

<sup>34</sup> *Ibid.*

<sup>35</sup> For a recent, post-*MiningWatch* application, see *The Community Panel of the Adams Lake Indian Band v. Dennis*, 2011 FCA 37 at paras. 26-37.