Walking on Thin Ice: Exploiting Strengths and Managing Weaknesses

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Strong cases are those where the law and the facts are favourable to the client. The client should win. Weak cases are those where the law and the facts are unfavourable to the client. The client should lose.

But often that does not happen. Why?

One explanation for unexpected results is that a party has failed to exploit strengths or has failed to manage weaknesses, so much so that the strengths are frittered away to nothing or the weaknesses devour the entire case.

We all know that those advancing weak cases are walking on thin ice. Due to the weakness of their cases, they may fall through the ice in any event, but one clumsy step will certainly put them through the ice. They may reach the shore, but they must walk carefully, mindful of the thin ice, managing their weaknesses effectively.

What fewer know is that those advancing strong cases are also walking on thin ice. They too will fall through if, confident in their strength, they stomp carelessly. They are more likely to reach the shore, but they must walk carefully, mindful of the thin ice, exploiting their strengths effectively.

This chapter offers some practical suggestions on how to exploit strengths and manage weaknesses.

A. The art of persuasion

Weaknesses are managed and strengths are exploited through the art of persuasion. This is a complicated and mysterious art, one that even the very best of our profession tell me they are continuing to learn and develop.

Permit me to share some personal experience. In my first years of practice, I thought that a superbly researched factum, with ample authority cited, would maximize my client's chances of success. But I soon learned that this sort of intellectual persuasion is not sufficient.

Over time, I learned that, even in appeals in our highest court, the facts in the case matter a great deal. Indeed, it is precisely in those cases that have the most interesting legal

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issues that the facts hold the greatest sway. This is because judges have a considerable degree of discretion in choosing what line of authority to adopt or in deciding how to exercise a legal discretion in a particular case. The sense of justice or fairness given by the facts of the case and how the advocate manages and arranges them can create a certain emotion that affects how these discretions are exercised. But I learned that emotional persuasion, even with intellectual persuasion, is not sufficient.

Parties with strong legal cases and good supporting facts still lose cases from time to time. This is because their counsel make their submissions in a manner that detracts from their credibility. The advocate is a window through which the judge views the law and facts of the case. If it is bad, opaque or distorted window, the judge's view of the law and facts can be diminished. Credibility persuasion is essential. The longer I practice the more I realize just how much I have underestimated its importance.

B. The three levels of persuasion

(1) Persuasion at the level of intellect

The first level of persuasion is intellectual persuasion. The judge wants to decide a case in a manner that is legally correct, that is, in a manner that is logical, supported by reason and consistent with legal precedent. The aim of the advocate must be to convince the judge that ruling in the client's favour is the legally correct thing to do.

Intellectual persuasion happens when three elements are present:

- all relevant elements of the evidentiary record are accurately and fairly identified;
- all applicable law and relevant authority is gathered and synthesized accurately and fairly and a coherent legal position based on law and authority is communicated; and
- the legal position is applied simply, rationally and logically to the evidentiary record.

(2) Persuasion at the level of emotion

The second level of persuasion is emotional persuasion. Some describe this as the "colour" of the case. Others describe this as the "moral highground" of the case. Most experienced litigators know that this can have a considerable effect on the outcome of the case.

Even in appellate courts, where the concern is officially with issues of law, there is usually considerable discretion involved in selecting the appropriate legal rule or

interpreting and applying the relevant governing authority. These are matters that can be influenced by emotional persuasion.

Emotional persuasion recognizes that many judges are human and react to impulses of fairness and justice. To the extent possible, they want to decide a case in a manner that achieves a desirable result on the facts.

But contrary to what some counsel think, emotional persuasion is sometimes quite irrelevant. Where there is a clear statutory provision or clear case authority that governs the case, the judge will have to follow it.

In many other cases, however, the good advocate must try to convince the judge that ruling in the client's favour is the right and just thing to do.

Emotional persuasion is achieving by managing the facts of the case in an effective way. The objective is to maximize the appearance or moral position of the client by skilfully selecting elements, primarily from the evidentiary record, and arranging them in a manner favourable to the client.

Chronological or witness-by-witness exposition of the facts frequently fails to achieve that objective. These forms of exposition do not tell a story with any moral lessons. They fail to trigger emotional responses.

On the other hand, writing up the facts in a manner that tells a story – thematic exposition – offers an opportunity to arrange the facts in a way that achieves emotional persuasion. Just as a plot of a novel or movie can trigger strong emotional responses, so can the facts portion of a written submission.

(3) Persuasion at the level of credibility

The third level of persuasion is credibility persuasion. Judges are aware that counsel making submissions are acting as advocates: their submissions are made solely to advance the interests of their clients who are paying them. Therefore, judges have to read submissions cautiously, perhaps critically, perhaps even with considerable doubt.

This is a credibility hurdle that counsel must overcome.

Good counsel must aim to have their submissions enjoy so much credibility that they become the judges' sole or primary source of assistance in the case.

Credibility persuasion can be achieved in many ways:

- High quality presentation – good, clear writing in a properly formatted, succinct document, with the facts and law skillfully arranged and everything supported by ample, helpful, accurate citations.

- Candour – addressing, demonstrating an awareness of, or not evading the strong points in the opposing party's case and the weak points in the client's case;

- Accuracy – correctly stating the facts and law on point;

- Fairness – stating the facts and law on point in a way that is balanced, without excessive spin, colour or rhetoric;

- Careful selection of detail – including all of the facts and law necessary for the judge to deal with the case, without including unnecessary or irrelevant detail;

- Helpfulness – synthesizing the facts and law and presenting it in a simple way that makes it easy for the judge to understand with citations that take the judge to the key authorities and the parts of the evidentiary record;

- Proper tone – a calm, welcoming, clinical dialogue that seduces judges uncritically into the submission, not a hectoring, preachy diatribe that repels all.

C. Addressing the judges' needs

The three levels of persuasion must be directed to one objective: addressing the judges' needs. Judges are more likely to receive favourably a written submission if it addresses their needs.

Three basic needs of the judges are:

- *Education / elimination of uncertainty.* The judges know very little or nothing about the case. Your written submissions must educate the judges. They must be brought from a state of ignorance and lack of confidence about the particular case to a state of full information and full confidence about it. Education is essential: with it, they will feel capable and confident when making the final, all-important decisions that will affect the parties' lives.

- *Time management.* The judges are often overworked. Also, like us, dealing with legal cases is not the only thing they have to do or want to do in their lives. Like all talented professionals, they have competing demands on their time and, as sometimes happens to all of us, they may have very little time to read and study written submissions. The aim must be to present short, easy-to-read, highly credible submissions that the

judge can quickly understand or accept in an unconcerned, unquestioning and uncritical way.

- *Achieving practical and just results, confidently, without ramifications.* Most judges, even those on our highest appellate courts, do not like making new law and are not trying to change the world through sweeping pronouncements.[1] Instead, most judges are interested in solving real-life problems with real-life solutions, in a manner that is as narrow, practical, and fair as possible. Therefore, short and easy arguments that have few and limited implications are more warmly received and more confidently embraced than long and difficult arguments that have many and broad implications.

D. The importance of persuasion at the level of credibility

We have discussed each of the three levels of persuasion and, in a preliminary way, how each level of persuasion can be achieved. We have also discussed the three basic needs of judges and how those needs can be met.

Now let's compare how each level of persuasion can be achieved and how the three basic needs of judges can be met. An interesting insight emerges.

The methods of achieving credibility persuasion – presenting in a high-quality way, engaging in candour, fairness, accuracy, careful selection of detail and helpfulness, and employing a proper tone – are exactly the same methods by which the three basic needs of judges can be met.

Often the last and least-considered level of persuasion, credibility persuasion, in fact, is of great importance. In fact, in my view, deficiencies in credibility persuasion are the main reason why strong cases lose and weak cases win.

E. The challenges posed by strong cases and how to manage them

(1) The basic problem

The basic problem is one of misplaced enthusiasm in a strong case. The advocate, realizing the strengths of the case, wishes to push those strengths as far as they can go. Unfortunately, this can result in doing too much and doing it in the wrong way. This is the equivalent of stomping on ice that is perhaps thinner than the advocate realizes.

There are many examples of this.

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[1] See, *e.g.* Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

Some have a tendency in strong cases to devote excessive, overly-detailed attention to strong facts or strong law. For example, some counsel who have a factually strong case take the judges through the facts, witness by witness. After all, each witness was so wonderful, why not go through it all and relive it all, in all its glorious detail?

Some counsel in a legally strong case take judges through all of the key cases in great detail, in effect forcing them to read detailed headnotes of all of the helpful cases. Some repeatedly use long block quotations from cases.

The problem with this approach is that pages and pages of strong witnesses, strong quotations, strong facts and strong law, without any attempt to synthesize and compress it all, can detract from overall persuasiveness. Reams of detail, even good detail, can obscure the case and get in the way of educating judges about the case. The judges have to work unnecessarily hard and take much unnecessary time to remember all of the detail. Further, the case is no longer a simple case, so obviously in the client's favour. It has become a complex case, filled with detail and law to master and write up.

The strong case may well still prevail. But is now less likely that the judges will conclude: "Of course, X must win." It is now more likely that the judges will conclude: "We may have to look at this more closely."

Other effects, completely contrary to any of the three levels of persuasion, may happen. For example, judges, like any other readers, might get frustrated with the barrage of trivia and start to skim over it all. Even worse, they might ignore it entirely and flip ahead to the next heading. In written advocacy, this is the equivalent of judges during oral argument staring off distractedly into space or walking out of the room during the argument.

What is happening is that on the strongest parts of your case – the parts of your case on which you want to judge to pay maximum attention – the judges are paying far less than full attention. The strengths are being frittered away.

There are other varieties of "too much detail".

One is the use of too many arguments. Some counsel think that their written submissions become stronger when they offer fifteen arguments in support of their position. In fact, there may be only one or two that are truly strong. The problem here is that the inclusion of so many arguments creates an impression that the case is difficult and so caution must be exercised. In addition, the inclusion of so many weaker arguments can dilute what should be an absolutely overpowering effect created by brief exposition of the strongest arguments.

Another problem is not so much the quantity of detail but the "volume" at which it is presented. Some try to enhance the persuasiveness of the case by using colourful, sometimes extreme adjectives. Others simply state bald, strong assertions without detail in support. The philosophy here is, "If you've got it, flaunt it." How many times have

we read bald, adjective-laden assertions such as, "The massive delay in this case is nothing short of egregious"?

Those that are addicted to colourful words use them repeatedly. The effect is like using exclamation points at the end of every sentence! The exclamation points add nothing of substance! They do not persuade! In fact, they can repel the reader! The same is true for colourful adjectives!

Fortunately, there are many ways in which the natural strengths of a case can be hammered home.

(2) Selling the strong case

The key to selling the strong case is to exercise credibility persuasion in a manner that fully addresses the needs of the judges. There are some simple and practical techniques.

(a) Point first exposition

Readers are better able to manage and understand details when they understand from the outset the particular point that is being developed. This is the case even if, contrary to the technique of "courageous selection" discussed below, the author decides to present reams and reams of detail.

The technique of "point first advocacy", or expressing the conclusion up front, empowers readers by enabling them to assess the significance of each item of minute detail, putting it in its proper conceptual place and attaching appropriate weight to it.

An excellent form of "point first advocacy" is to use headings, exactly as has been done in this chapter. Each main idea is signalled up front to readers. Readers are not left guessing about the point that is being developed. Instead, items of detail slide quite easily into readers' minds, often quite uncritically, because readers immediately understand the significance, relevance and weight of each item as they encounter it.

(b) Courageous selection

Written submissions are not meant to be encyclopedias of every last piece of evidence that supports your client's position. Have courage that the judges will dive into the record, using your helpful and accurate citations, if they want more information. Select only the most important and necessary evidence to establish a factual proposition.

Courageous selection results in brevity. Brevity creates an impression that the case is simple and easy to decide. If the case is strong, this is precisely the impression that should be created. All three levels of persuasion, especially credibility persuasion, are

enhanced and the needs of the judges – efficient education, time management and the confident achievement of practical and fair results without causing disturbing implications – are satisfied.

Selection also applies to the use of legal authorities. Some counsel list seven authorities in support of an easy proposition. They think that the citation of many authorities tells the judge just how well-established the proposition is. In fact, it may communicate that the proposition is complicated and that in order to apply it, the judge must read and analyze the seven cases.

In extreme situations, the over-use of authorities can transform a simple and strong case into a "big legal case" and threaten every one of the judge's needs. Education is slowed down as there are seven cases to weigh and analyze, time management objectives are under threat as the judge eyes the thick book of authorities that must be read, studied and analyzed and, since this is now a "big legal case" the judge must go slowly, critically and cautiously in order to avoid creating any unwelcome implications.

Of course, not all judges will have all those reactions in response to a single authority-laded paragraph, but those who are addicted to the over-use of authorities will use that counterproductive technique repeatedly, increasing the risk of harm to the task of persuasion.

Where possible, the desired impression to be created is that the case is a simple one, with few implications. Where possible, use a minimum number of authorities.

(c) Compression

There is a way of synthesizing and presenting detail, emphasizing the strongest parts of a case in a persuasive way. This is achieved through the technique of compression. It is best illustrated by an example.

Here are some paragraphs from a fictional written submission. The author, a federal Crown attorney, is trying to persuade a judge that some evidence, obtained in a manner that was contrary to s. 8 of the Charter, should nevertheless be admitted into evidence:

> 23. In *R. v. Collins*, the Supreme Court held that a three-fold test must be followed in order to assess whether evidence that has been obtained in a manner that violates the Charter should be excluded. Under that test, the Court looks at whether the admission of the evidence would affect trial fairness. The Court also looks at whether the Charter violation was serious. Finally the Court looks at whether the admission of the evidence in all of the circumstances of the case would bring the administration of justice into disrepute.
>
> (case)
>
> (case)
>
> (case)

24. Courts have held that trial fairness is affected by whether the evidence is real evidence that exists without the participation of the accused or whether it has been conscripted from the accused.

(case)

(case)

(case)

25. Courts have held that the more serious the Charter violation, the more likely the evidence will be excluded.

(case)

(case)

(case)

26. Finally, Court have held that the seriousness of the offence with which the accused has been charged is a relevant factor tending to favour the admission of the evidence into the proceeding.

(case)

(case)

(case)

27. The accused submits that the admission of the evidence would affect trial evidence because the napkin that the accused used to blow his nose and that was used to obtain the DNA results was conscripted from him.

28. The accused submits that the Charter violation in this case – forcibly taking the napkin from the accused's hands – is a serious one.

29. The accused also submits that the alleged offence, manslaughter, is not as serious as first degree murder and there have been manslaughter cases whether evidence has been excluded under s. 24(2).

30. The Crown submits that the evidence is real evidence. The accused was not told to blow his nose so it was not conscripted from him. The accused was in the process of throwing the used napkin into the waste basket (*i.e.*, abandoning it) and so the napkin is more properly characterized as real evidence.

31. The Crown submits that the Charter breach was not serious. The Crown merely intercepted the napkin while the accused was in the process of throwing it away. This is far from a seizure from someone who was unwilling to part with possession.

32. Finally, the Crown submits that the administration of justice would be brought into disrepute if this evidence were excluded, as this was a cruel killing of a 70 year old man.

33. Therefore, the Crown submits that the evidence should have been admitted into the proceedings.

This passage does convey its message. However, you will notice that the author is demanding a great deal of effort from the reader.

In order to understand this submission, the reader must remember the three-fold legal test in paragraphs 24, 25 and 26 in order to understand the significance of the accused's submissions in paragraphs 27, 28 and 29 and the Crown's submissions in paragraphs 30, 31 and 32. Only then does the reader accept the conclusion in paragraph 33.

This is easy if the judge is very familiar with the test. But if the judge is not familiar with the test or if the test is more complicated, then this approach might be unsatisfactory.

At its worst, a judge who is unfamiliar with this area of the law might have to read the paragraphs in the following order in order to understand the submission: 24, 25, 26, 27, then back to 24 in order to understand 27, then 28, then back to 25 in order to understand 28, then 29, then back to 26 in order to understand 29, then 30, then back to 24 in order to understand 30 (and then perhaps even back to 27 to be reminded of the accused's position on this point), then 31, then back to 25 in order to understand 31 (and then perhaps even back to 28 to be reminded of the accused's position on this point), then 32, then back to 26 in order to understand 32 (and then perhaps even back to 29 to be reminded of the accused's position on this point) and then 33. This is not unlike a mouse trying to navigate a maze, especially where the subject-matter is especially complicated.

The above passage also fails to implement the technique of "point first" exposition. At some point, the judge might wonder what submission is being developed. It is a mystery and so the judge has no idea about what significance, relevance and weight should be attached to each item of detail. As a result, the judge might abandon this complicated maze and jump to the end to see what point is being developed and then go back to the start of the maze and begin again.

That is plenty of work. The danger of skimming or skipping exists. At a minimum, the objective of meeting the judge's needs for education and time-management is not well met.

The technique of compression, a key weapon for credibility persuasion, solves the problem. Rather than deploying the legal test in an academic or abstract way and then applying the test to the facts, the technique of compression gets right to the point. Here is the same passage as above, but reworked using the technique of compression (and also engaging in point first exposition):

> 23. The Crown submits that although the police gathered the evidence contrary to s. 8 of the Charter, the evidence was properly admitted under s. 24(2) of the Charter, following the three-fold test in *R. v. Collins*:
>
> > • *Will admission affect trial fairness?* The accused submits that trial fairness is affected because the napkin was conscripted from the accused and was not pre-existing, real evidence This is an incorrect characterization of the napkin. The accused was not told to blow his nose so it was not conscripted

> from him. The accused was in the process of throwing the used napkin into the waste basket (*i.e.*, abandoning it) and so the napkin is more properly characterized as real evidence.
>
> (case)
>
> • *Was the Charter violation serious?* The accused submits that the napkin was forcibly taken from his hand. This is incorrect. The police merely intercepted the napkin while the accused was in the process of throwing it away. This is far from a seizure from someone who was unwilling to part with possession.
>
> (case)
>
> • *Effects on the administration of justice*? The accused submits that this is just a manslaughter case, not a murder case, so exclusion would not bring the administration of justice into disrepute. The Crown disagrees. This was a cruel killing of a 70 year old man.
>
> (case)

This passage conveys the same information, in a much shorter, more direct way. By employing the technique of compression, the author has simply put "like with like". All of the information relevant to the each branch of the test is grouped together and the three branches are physically arranged as a list. The author has transformed the passage from a very challenging series of paragraphs to what is essentially something akin to a marketing brochure.

The technique of compression saves the judge much work, while sacrificing none of the detail. It educates and saves the judge time, thereby satisfying two basic needs of the judge. As a result, it is more persuasive.

(d) Diagrams and charts

Sometimes strong facts are obscured by a blizzard of detail that, like the example in the preceding section, requires judges to do plenty of work in order to grasp the point. The solution is to remember that sometimes pictures are worth a thousand words.

For example, take a case where the facts very strongly suggest that one company controls another company. Counsel drafts the following paragraphs into the written submissions:

> 12. Before November 21, 2006, 134982 Canada Inc. was owned 51.0% by Property Investments PLC and 49.0% by 158892 Canada Inc.
>
> (evidentiary reference)

13. At all material times, 32.5% of the shares of 158892 Canada Inc. have been owned by 143729 Ontario Ltd., which in turn has been 51.0% owned by Land Developments Inc. At all material times Land Developments Inc. has owned 17.6% of 158892 Canada Inc.

(evidentiary references)

14. On November 21, 2006, Property Investments PLC sold 1.1% of its shares to Land Developments Inc.

(evidentiary reference)

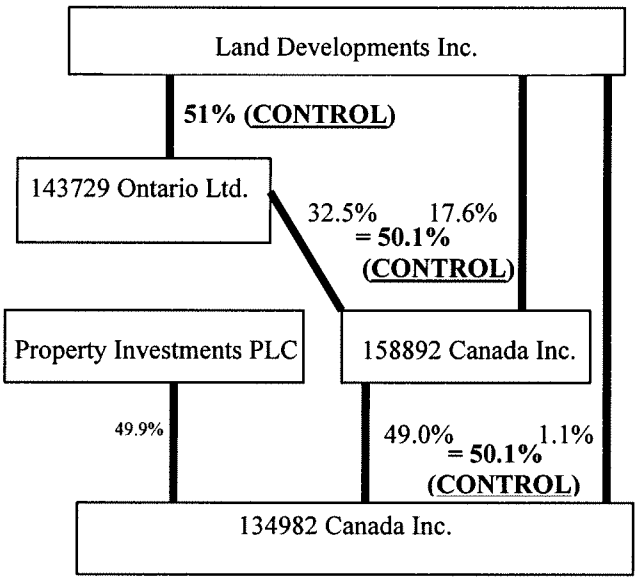
15. Therefore, at the present time, 134982 Canada Inc. is effectively controlled by Land Developments Inc.

(evidentiary reference)

Chances are that judges who do not skim or skip over these paragraphs will get out their pens and start to draw a diagram in order to understand the point. The strength of the case is obscured. Credibility persuasion suffers and the needs of the judges are not addressed as well as they might.

The solution is to draw the diagram for the judges. Here is the above passage, reworked using the technique of a diagram:

12. The following diagram illustrates that Land Developments Inc. controls 134982 Canada Inc.:



(evidentiary references)

Within seconds, judges will understand and be convinced that there is strong case of a chain of control from the top company to the bottom company. The use of a diagram

saves the judges much work, while sacrificing none of the detail. It educates and saves time, thereby satisfying two basic needs of the judges. The strength of the case is not smothered in inscrutable, brain-numbing detail. The strength now shines through.

A related tool, the chart, can be used to show that a particular governing authority is completely on point with the case that the judge has to decide. Rather using a series of paragraphs that review the facts and law of the governing authority and the facts and law of the case at bar, a chart can compress and juxtapose all of that detail into a short, persuasive snippet of information. For example:

> 32. The Supreme Court of Canada's *Smith* case and this case are virtually identical in all material respects. This case must be decided in the same way as *Smith*:

	***Smith v. Jones*, (citation)**	***The case at bar***
Facts	92 square inch posters advertising a legal rock concert posted on 25 municipal telephone poles. Municipal by-law preventing posting of any posters on telephone poles.	88 square inch posters advertising a legal theatre production posted on 43 municipal telephone poles. Halifax by-law no. 43-06 prevents posting of any posters on telephone poles.
Decision on s. 2(b) of the Charter (freedom of expression)	By-law prevented expression. Violation of s. 2(b) of the *Charter*.	Halifax by-law no. 43-06 prevents expression. Violation of s. 2(b) of the *Charter*.

Charts can also be used to illustrate differences between a key case and the case at bar in support of a submission that the key case should be distinguished.

(e) Using smart citations

Weak citations in written submissions can harm a strong case. On the other hand, strong citations can help to hammer home a strong case.

Inaccurate or incomplete citations can mean that the judge is suddenly forced to play an unwanted game of "hide and seek", searching through the thick record or authorities to find the item.

There are subtler but still annoying versions of "hide and seek". For example, counsel cites the case authority but does not disclose the volume or tab number of the case authority. The judges are forced to go to an index – often an index at the front of a volume where the case authority is not to be found – in order to find where it is. Another is the citation of an authority, but not the page number or paragraph number where the

particular proposition is to be found, forcing the judges to read the whole case to find the relevant proposition. This does not meet their needs.

Even accurate citations can force the judges to play an unwanted game of "hide and seek". For reasons known only to them, many counsel cite a legal authority accurately and completely, and then later cite the same authority omitting the reference, choosing instead to use the word "*supra*". The judge who is curious about the date of decision or the level of court who encounters "*supra*" is forced to seek the first instance of the case authority in the written submission, completely disengaging from it, flipping through previous pages. It is so much better, from the standpoint of credibility persuasion and meeting the judges' needs, to repeat the accurate and complete citation and to omit the use of "*supra*".

Certain types of citations, known as smart citations, can be used to manage detail effectively, make things easier for the judges, and allow the strength of the case to shine through. Smart citations are those that give the citation in a complete and accurate way but go further, by offering additional snippets of useful information, often in parentheses after the citation. Sometimes the smart citation prevents judges from having to turn up the reference. Consider the following examples:

- "*Smith v. Jones*, [0000] 0 S.C.R. 000 at para. 00; *Book of Authorities*, Tab 00 (Smith J. holds that a mens rea of dishonesty is required for theft)" – this is useful when a paragraph deals with four propositions and you want to signal what case stands for what proposition).

- "*Smith v. Jones*, [0000] 0 S.C.R. 000 at para. 00; *Book of Authorities*, Tab 00 (majority decision of Dickson C.J.C.)" – this is useful when you want to invoke the name of Dickson C.J.C. in support of a point on which he is widely regarded to have considerable expertise.

- "*Jones v. Smith* (0000), 0 X.X.X. 000 (Prov. S.C.) at para. 00; *Book of Authorities*, Tab 00 (rev'd by *Jones v. Smith* (0000), 0 X.X.X. 000 (Prov. C.A.), but not on this point)" – this is useful when you wish to acknowledge an appeal of the authority but point out that it is not relevant.

- "*Evidence of Jane Smith*, vol. 00, page 00l; *Record*, vol 00, page 00 (the night was 'dark as black ink' and it was 'really stormy, a maelstrom')" – this is useful when you want to capture a snippet of a witness' evidence to establish a key fact, create a key impression or show that an important fact is being drawn from the exact words of the witness. In the case of legal authorities, the same technique can be used to present brief quotations.

Obviously, smart citations can enhance your credibility as an advocate, address the time management needs of the judge, and create an impression of certainty, simplicity and confidence. By preventing the judges from having to turn up an authority, the judges do not need to disengage from the strong case you are presenting, dive into another book and pour through the authority or evidence. Instead, the judges can continue reading about

the strong case, absorbing everything without having to disengage from it. To analogize to oral hearings, smart citations can keep judges in the courtroom, focused on the strong case that counsel is presenting.

Sometimes smart citations can be used to state a fairly clear legal proposition yet deal with some relatively unimportant variances in the case law. For example, suppose there are three authorities with slightly varying expressions of a particular legal point. The slightly varying expressions are not very important in the overall scheme of things, but counsel wants to present the law accurately. One approach is to interrupt a nice, concise exposition of the strong case and insert a series of detail-laden paragraphs that deal with the three authorities. But that would divert the judges from the strong case, inserting plenty of detail of only modest utility. A better approach is to use smart citations to cover off the three authorities without diverting attention from the strong case. In the following passage, a general, likely acceptable proposition is set out in the text of the submission but smart citations are used to acquaint the judge with the subtleties of the three authorities:

> 12. Purely factual statements in legal advice letters are not privileged and must be disclosed. However, factual statements may be privileged if there is a substantial connection between the factual portions and privileged legal advice given in the letter. In fact, even just some overlap can suffice.
>
> > *Smith v. Smith* (0000), 00 X.X.X. 000 (Prov. C.A.) at para. 00; *Book of Authorities*, Tab 00 ("substantial connection" between the legal advice and the factual statements, and so the factual statements were privileged)
> >
> > *Jones v. Jones* (0000), 00 X.X.X. 000 (Prov. C.A.) at para. 00; *Book of Authorities*, Tab 00 (the factual statements were "significantly bound up" with the "legal content of the opinion" and so the factual statements were privileged)
> >
> > *Brown v. Brown* (0000), 00 X.X.X. 000 (Prov. C.A.) at para. 00; *Book of Authorities*, Tab 00 (there was "some overlap" between the factual statements and the legal content of the opinion and so the factual statements were privileged)

To put it another way, the smart citation can be used to achieve compression. As mentioned above, the technique of compression can powerfully achieve credibility persuasion and can address the needs of judges.

(f) Managing block quotations

Some counsel like to use block quotations in their written submissions. They do so in order to accomplish some legitimate purposes.

Block quotations can show the judge that a legal proposition is based on the actual words of the judgments themselves and is not being unfairly paraphrased or made up. The same can be true for the words of witnesses. In other words, block quotations can be good devices for enhancing credibility. Further, sometimes a particularly good quotation can

express a proposition or capture a witness' sentiments better than could ever be expressed by counsel.

In strong factual or legal cases, in an effort to hammer strong points home, counsel often overuse block quotations. The result can be too much irrelevant detail and unhelpfulness to the judge.

Take, for example, the following unhelpful, but all-too-frequent approach.

> 14. Sopinka J. stated in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75:
>
> > These principles apply *a fortiori* to proceedings before the Parole Board in which the subject has already been tried, convicted and sentenced. As stated by the Supreme Court of the United States in *Morrissey v. Brewer*, 408 U.S. 471 (1972), at p. 489:
> >
> > We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. *It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.*
> >
> > Like the basic structure and function of the Parole Board, the language of the Board's enabling statute makes it clear that the Board lacks the ability or jurisdiction to exclude relevant evidence. The language of the *Corrections and Conditional Release Act* confers on the Board a broad inclusionary mandate. *Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case". No mention is made of any power to apply exclusionary rules of evidence. Indeed, such a provision would conflict with its duty to consider "all available information that is relevant".* (our emphasis)

Most judges skip over a block quotation when it is presented in this way. Some will read only the part that has been emphasized.

A bigger problem is that this approach is not particularly helpful for the judges. The judges are thrown into the block quotation without any idea what they are about to read. The writer is implicitly saying, in an unhelpful way, "here's a long quotation; you gather from this whatever you think is relevant".

Here is another approach which eliminates some of these problems:

> 14. According to Sopinka J. in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75, an administrative tribunal, such as the National Parole Board, may consider hearsay:
>
> > Not only is it not bound to apply the traditional rules of evidence, but it is required to take into account "all available information that is relevant to a case". No mention is made of any power to apply

> exclusionary rules of evidence. Indeed, such a provision would conflict with its duty to consider "all available information that is relevant".

This is better. At least the writer is telling the judges what significance should be drawn from the block quotation (the administrative tribunal can consider hearsay) and the judges are only being directed to the portion that matters.

An even better approach is to avoid the block quotation and, instead, use only snippets from the block quotation:

> 14. According to Sopinka J. in *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75, an administrative tribunal, such as the National Parole Board, may consider hearsay where the statute confers "a broad inclusionary mandate" and the power to take into account "all available information that is relevant to a case".

Under this approach, the judges doe not have to scan a longer quotation to find the relevant parts – counsel has done that work for the judges and has made it easy for them. The purposes of using block quotations – showing that the principle is actually based on words in judgments or using nicely-chosen words of a judge – are still met. But that is accomplished in a manner that is more concise and more helpful.

A final approach, which is most concise and most helpful, is to make use of smart citations:

> 14. The National Parole Board may consider hearsay.
>
> *Mooring* v. *Canada (National Parole Board)*, [1996] 1 S.C.R. 75 *per* Sopinka J. (hearsay admissible because of statute's "broad inclusionary mandate" and requirement that the Board consider "all available information that is relevant to a case")

This is very compact, confident and persuasive. The purposes for using quotations are still being fulfilled, but credibility persuasion is achieved and the needs of the judges are being met.

(g) Clinical exposition and skilful use of detail

Expressing factual and legal propositions using colourful adjectives and bald assertions can detract from the strength of a strong case. On the other hand, the skilful use of clinical detail can persuade.

For example, consider a case where the police set up roadblocks outside of a small town where a motorcycle gang was meeting. The purpose of the roadblocks was to tell the members of the motorcycle gang to act in an orderly way and to make it clear that there was a police presence in order to provide security to the town's residents. The issue in the case is whether the police violated the bikers' rights against arbitrary detention under s. 9 of the *Charter*.

Consider this opening sentence of the submission:

> A. The police heard that an egregious number of motorcycle gang members and others were going to an extremely small town on many weekends.

Compare it with this:

> B. The police obtained information that on four weekends, approximately 400 members, friends and associates of a known motorcycle gang, the Dreadful Riders, were to converge on a small property in the middle of the quiet, rural hamlet of Smithville, population 700.

In sentence A, the word "egregious", like any colourful adjective, does nothing to persuade. It actually jars and repels. On the other hand, in sentence B, the clinical statistic, "400 members", does persuade, especially in juxtaposition with the 700 residents of Smithville. The impression drawn by the judge is: "Wow, that is a large number of bikers, given the small size of the town." The impression is not created or is not created as strongly in sentence A.

The phrase "extremely small town" in sentence A is just a bald assertion with a colourful adjective. Sentence B describes it as the "quiet, rural hamlet of Smithville, population 700". This presents a richer image. Again, the skilful arrangement and deployment of clinical detail, rather than bald assertion, can create impressions that enhance the strength of a strong case.

Similarly, the reference to "motorcycle gang members" in sentence A is a general assertion that is not as persuasive as "friends and associates of a known motorcycle gang, the Dreadful Riders". Also compare "many weekends" in sentence A with "four weekends" in sentence B. In addition, compare the richness of the verb, "converge", in sentence B, with the relatively weak verb, "going", in sentence A. While strong and colourful adjectives do not persuade, strong verbs often do persuade.

(h) Giving judges ownership of an idea

Using the case discussed in the preceding section, let's look at two sentences. The first sentence we have seen before:

> B. The police obtained information that on four weekends, approximately 400 members, friends and associates of a known motorcycle gang, the Dreadful Riders, were to converge on a small property in the middle of the quiet, rural hamlet of Smithville, population 700.

Sentence B causes the judge to say: "Wow, there was a large number of bikers coming to that small town – of course, the police had to act."

The second sentence goes straight to the heart of the message being communicated and does all of the thinking for the judge:

> C. The police had to act because there were 400 bikers converging on the 700-person town.

Sentence C causes the judge to say the same thing as sentence B.

Interestingly enough, however, sentence B is more persuasive. This is because in the case of sentence B, the judges draw the conclusion from the facts. The judges take ownership of an idea that they think they have created. This matters. People tend to hold strongly onto ideas that they think they have developed themselves.

In sentence C, the idea is thrust upon the judge. When counsel thrust ideas upon judges, the judges' reaction is often a critical one. The common reaction is: "Really? Is that so? I will have to consider that." In my view, this is especially the case with judges who, as mentioned above, have to look at submissions critically because they are made by counsel who are being paid by their perhaps one-sided, self-interested clients.

This technique – of expressing information in a way that allows the judges to develop an important idea themselves and thereby cause the judges to take ownership of it themselves – can be a powerful tool of persuasion, particularly on strong points where the judges are certain to develop the idea themselves and hold onto it quite firmly.

For the same reason, to repeat a point made in the previous section, colourful adjectives in sentences repel but understatement can persuade. Compare the following two sentences:

> D. <A few sentences about delay are presented here.> Therefore, the plaintiff's delay in this case was appalling.
>
> E. <A few sentences about delay are presented here.> Therefore, the plaintiff is guilty of following a fairly sedate pace.

In the case of sentence D, the thought that the delay is "appalling" is thrust upon the judge. The judge might ask: "Hmmm, is the delay 'appalling', or is it just 'pretty bad'?" In the case of sentence E, there is understatement: "fairly sedate pace". Assuming that the few prior sentences in fact create the impression of "appalling" delay, the judge is likely to say, "This isn't just a 'fairly sedate pace', this is appalling, egregious, scandalous delay!" That idea, developed by the judge in reaction to the understatement, becomes an idea that the judge has developed himself or herself and now "owns". The judge has fully embraced the strength of the point and will not lightly let it go.

Understatement (like clinical language), when properly used, can be devastating weapon in strong cases.

(i) Writing style: clear direct and brief

Persuasive written submissions are those in which the writing is clear, direct and brief. As we all recall from school, the best educators and lecturers were those that could speak in a clear, direct and brief manner.

Writing clearly, directly and briefly plays directly to credibility persuasion: clear, direct and brief writing tells the judge that the author of the submissions is organized, logical and up to the task.

Clear, direct and brief writing addresses the judges' need for time management and need to decide cases confidently, without fear: clear, direct and brief writing makes them able to understand the strong case easily and quickly. Fuzzy, evasive and rambling writing can detract from a strong case.

In order to achieve clarity, directness and brevity, try to implement the following ideas:

- *Use active, direct verbs.* Active, direct verbs are those that go directly, without evasion, to the concepts that are being expressed. Compare the following two sentences:

  (1) It was said by the Supreme Court that the law must be changed.

  (2) The Supreme Court said that Parliament must change the law.

  The second sentence is superior in that it is slightly shorter and has a less evasive tone. The first sentence reveals who did the saying almost as an afterthought and hides who changes the law. Repeated use of this sort of construction can result in a sense of evasion and imprecision – concepts hostile to persuasiveness.

- *Where possible, replace the verb "to be" with an action verb.* Chances are that if you are using the verb "to be" (or its various forms: am, are, is, were, be, being, been), you are adopting awkward, sometimes fuzzy constructions. Compare the following two sentences:

  (1) Smith's contention is that those shares are worth $50 million.

  (2) Smith values the shares at $50 million.

  The second sentence is superior in that it is slightly shorter and has a less evasive, more confident tone.

- *Use one word where you can.* It is a fact that we are more likely to absorb and be convinced by things that are easy to understand. You would never tell your neighbour that the fellow across the street "underwent three breath tests by means of a breath testing device." Instead, you would point across the street and say, "He took three breath tests."

- *Eliminate "putty" words.* Some writers are uncertain about a particular point, so they qualify their conclusions with words like "generally" or "mostly." Such words often inject uncertainty and unconfident equivocation, thereby rendering fairly clear and easy concepts fuzzy. Some use those words like "putty" to fill conceptual cracks in their sentences. It is far better to be explicit about what qualifications you wish to make. For example, rather than saying, "Generally, the Board will not permit an adjournment unless timely notice to opposing parties is given," it is better to state the rule about timely notice in an unequivocal way and then to be explicit about the rare exceptions that apply.

- *Strive for coherence.* Each sentence should connect to a previous sentence either by repeating a particular key word or concept or through the use of connectives such as "therefore", "however", "moreover", "accordingly", "consequently" and so on.

- *Be reader-friendly.* Readers react better to writing with short paragraphs, with plenty of white space on the page. In this way, try to emulate newspaper writers.

It is true that we are now descending into the architecture of individual sentences. But do not minimize the importance of this. Those that write badly do so in every sentence. The overall effect is that a strong case is presented in an opaque, unclear way. It is the equivalent of speaking too softly, vaguely or unclearly throughout an oral submission in a court hearing.

(j) Responding to the other side's weak case

Sometimes counsel whose clients have strong cases hurt their cases by failing to respond to the other side's weak case.

When faced with unsupported statements of fact or inaccurate statements of fact, counsel must deal with it, but only if it matters and only to the extent it matters. Offering too much detail on this runs the risk of diverting the judges from the strong case into a blizzard of trivia. At the same time, if too little detail is offered on this, counsel fails to maximize the client's case. A good strategy is one short paragraph, such as the following:

> The appellants' statement of facts is comprised of evidence the appellants offered but which the trial judge rejected. [Or if the problem is an inaccurate submission: The appellants' statement of facts often is not accurate.] There are many examples, but the most significant are:
>
> - The appellants say X – in fact, the trial judge found Y;
>
> (citation)
>
> - The appellants say M – in fact the trial judge found Y;

(citation)

- The appellants say M – in fact the trial judge found Y;

(citation)

Another frequently-arising issue is how to respond to an adversary who has not submitted a particularly clear submission. For example, a self-represented adversary who is not legally trained might draft a submission that is difficult to understand. Counsel receiving the submission might be able to guess about what is being said, but counsel is far from sure.

Some hurt their strong cases by making the guess. All they accomplish is expressing the adversary's case in a clear and perhaps compelling manner, suddenly setting the bar for themselves much higher than it should be and hurting their strong case.

Far better is for counsel to avoid stating what they think the adversary means to say. Instead, state what the requirements for the adversary's success are and then submit that the adversary has not proven that it has met those requirements.

(k) Remember the weak spots

Some counsel get so carried away with the strong points of the case that they forget to acknowledge and deal with the weaker points in the case that the other side has dealt with or is sure to deal with. Lack of candour, the appearance of evasion, and unfairness in presenting the case can destroy credibility persuasion more effectively than anything else. It can cast into doubt everything strong that counsel is trying to communicate about the case.

F. The challenges posed by weak cases and how to manage them

(1) The basic problem

Weak facts or weak law have to be dealt with. If not, there will be lack of candour, the presence of evasion and unfairness in presenting the case. There will be no credibility persuasion.

At the same time, if the entire focus of the written submission is dealing with the weak facts or weak law, the overall appearance is one of defensiveness. The overall impression is that the case is a weak one. The ice in weak cases is very thin and jumping on it too much is not advisable.

This situation calls for complete candour, honesty and fairness, without killing the client's case.

Many of the techniques already canvassed above are of assistance. Skilful use of them can maximize the client's chances of success even in a relatively weak case. All of them maximize the ability to persuade on all three levels of persuasion.

Fortunately, there are some other techniques, particularly well-suited to weak cases, that can assist. There are fewer techniques for weaker cases, but in the right cases, they can make a difference and get the client safely across the thin ice to shore. These techniques are largely aimed at reducing or eliminating the advantage the other side enjoys in the areas of intellectual persuasion, emotional persuasion and credibility persuasion.

To some extent, these techniques can be used in certain strong cases. I mention them here because they are resorted to more often in weak cases. In weak cases, there are fewer effective advocacy techniques and often these are the only tools counsel can use.

(2) Selling the weak case

(a) Present the strengths first

It is a mistake to begin to address the weak facts and weak law in a case before the strengths of the client's case are described. It is a bigger mistake only to respond to the other side's strong case.

If the client has a case, albeit a weak case, that case must be set out. The best possible case on intellectual persuasion and emotional persuasion must be set out in a manner consistent with credibility persuasion.

This reflects a basic lesson of persuasion: positive arguments are better received than defensive, responding arguments. The positive case must be made before holes are poked in the other side's case.

(b) Managing bad facts: the technique of juxtaposition

Omitting, evading or misstating the bad facts is suicide. All credibility is lost. The bad facts must be dealt with. But bad facts can be effectively managed, with candour.

One useful technique is juxtaposition. Juxtaposition can achieve emotional persuasion by raising the moral standing of the client above where it might otherwise be. There are several methods of juxtaposition, all of which, in appropriate cases, can be deployed in a written submission at the same time:

- State the bad facts relating to the client in the best possible, yet accurate, light and present them just after the few good facts relating to the client. This juxtaposition in effect says to the judge, "My client did a bad thing, but do keep your perspective: my client did good things too." This may lessen or neutralize any advantage the other side has in the area of emotional persuasion.

- State the good facts relating to the client in the best possible, yet accurate, light and present them just after the few bad facts relating to the other side. This juxtaposition in effect says to the judge, "My client did a good thing, and this was really good in light of the nasty things the other side did." This is an aggressive play for advantage in the area of emotional persuasion and should not be done unless it is credible and maintainable.

- State the good facts relating to the client in the best possible, yet accurate light and present them alongside some of the good facts of the other side. The juxtaposition in effect says to the judge, "My client does good things too." This is often used as an attempt to achieve a relative stalemate in the battle for emotional persuasion.

- State the bad facts relating to the client in the best possible, yet accurate light and present them alongside some of the bad facts of the other side. The juxtaposition in effect says to the judge, "My client did some not so nice things, but the other side was worse." Even if it is impossible to show that the other side was worse, the juxtaposition may lead the judge to conclude that neither side occupies the moral highground. With both sides in the moral gutter, so to speak, any advantage enjoyed by the other side in area of emotional persuasion is blunted. With any luck, the battle for emotional persuasion will be a stalemate.

As you can see, the general strategy behind juxtaposition in each case is to neutralize whatever advantage the other side has in emotional persuasion. Then there may be advantages in the area of intellectual persuasion and credibility persuasion that can be exploited. Many of the techniques canvassed above, such as careful selection, smart quotes, persuasive use of detail, charts and diagrams, can all be used to this end.

(c) Managing bad law: the techniques of issue characterization and concentration

It may be that the other side has a strong legal case and will win in a battle of intellectual persuasion. But that may be the case only on the basis of the particular issues that they have selected. Perhaps the battle must be shifted to different issues.

For example, suppose that in a judicial review, the other side has demonstrated that a particular tribunal's decision is quite wrong, both factually and legally. It may be that

you cannot show that the decision is correct. If that remains the key issue in the case, it will not be possible to prevail on intellectual persuasion. The law is against the client.

So see if the key issue or controlling idea in the case can be shifted. Maybe there is another issue on which the case is strong on the level of intellectual persuasion. Using the example above, although the decision is wrong, must it still stand because the standard of review is patent unreasonableness, not correctness? Although the decision is wrong, must it still stand because the application for judicial review is out of time? Although the decision is wrong, must it still stand because it is premature to review it? Although the decision is wrong, must it still stand because there was an internal appeal process that must be followed.

What this shows is that in drafting a written legal submission in a weak legal case, it can pay to do some further legal research and assessment outside of the issues canvassed to date and to "think outside of the box". There may be more favourable issues on which to fight the battle.

If there are no good issues on which to fight and you are forced to deal with the difficult issues on which you are likely to prevail, the best strategy is to concentrate on your very best argument and nothing else. This strategy of concentration enhances credibility persuasion. There is no sense trying to tear a hole in the other side's sweater when there is just no hole. But if there is one small hole and it potentially matters, the best strategy is to concentrate on it and tear it as wide as you can while maintaining credibility.

(d) Recognizing and exploiting gaps

It may be that the client has a particular legal point that is weak because no cases can be found that support it. However, the real situation may be that there is no authority against the particular point. When seen in that way, it is no longer a "weak point" but instead is a "novel point". Suddenly, by recognizing and exploiting a gap in the case law, what was once a disadvantage in the area of intellectual persuasion is suddenly transformed into something winnable.

Gaps can be exploited in the area of the factual record. It may be that the client has a factual case that is weak but, upon careful scrutiny, it is seen that there is an important gap in the evidence. Too often, counsel concentrate on what is in the record, but forget to exploit what is not in the record. While the other side has proven some bad facts, what have they failed to prove?

For example, while the other side may have proven some misconduct, they may not have proven that your client benefited from that misconduct. Suddenly, by exploiting the gap in the evidence, it may be possible to blunt or remove some of the sting of the misconduct. Pointing out important gaps in the evidence may go some way toward minimizing or neutralizing the other side's advantage in the area of emotional persuasion.

G. Some concluding comments

Strong cases and strong points in cases call for care in written submissions. They can be mishandled, with the result that these strengths are frittered away.

Weak cases and weak points in cases also call for care. Managed properly, the weaknesses can be reduced and success can be in reach.

As we have seen, a common approach to each is a sophisticated and creative deployment of the three levels of persuasion, particularly credibility persuasion, in ways that are ever mindful of the judges' needs. It is like treading carefully, properly, and astutely across thin ice, always moving forward, but always aware that a clumsy step can cause things to go awry.

In strong cases, you always want cross the thin ice and reach the shore exactly as everyone expects. In weak cases, the shore may be reached to everyone's surprise. By following the suggestions in this chapter, you will improve your chances of meeting expectations and causing surprises, to the delight, and sometimes even the gratitude, of your clients.