

Writing up the argument

**David Stratas
Federal Court of Appeal**

Writing up the argument

- **Introduction: where we are now**

What goes into the argument?

- **Law**
- **Argument – applying law to facts**
- **Deploying facts for the first time in this section?**

What goes into the argument?

- **You considered this a long ago**
- **Three things to consider:**
 - (1) **What sort of case do you have?
(esp. relevant for appeal courts)**
 - (2) **What arguments maximize your
clients' chances of success?**
 - (3) **How to answer the case against
you?**

1st consideration: what sort of case?

(especially relevant to appeals)

- **An error correcting case? Or a big jurisprudential case?**
- **This dictates how much you write and how many cases you have to cite.**

2nd consideration: what arguments?

- **The controlling idea(s) in the case**
- **Competing controlling ideas: which maximize(s) clients' chances of success?**
- **Appeals/JRs: remember the standard of review**

2nd consideration: what arguments?

- **How many arguments to run?**
- **Be selective**
- **Judges as minimalists: comforted by simplicity, worried about complexity**
- **Simplicity sells: don't make it too intricate**
- **Take issues off table? Concessions?**

3rd consideration: what is the case against you?

- **Never avoid the case against you**
- **When to deal with the case against you**
- **How to deal with the case against you: special tools and techniques**

Structuring the argument

- **Easier than the facts section: law has its own structure**

Structuring the argument

- **“Point first”: often a short overview paragraph at the start is helpful; show order of arguments and why that makes sense**
- **You may have already done this in Part II (“Points in Issue”); if so, maybe no need for an overview here.**

Structuring the argument

- **How to order the arguments?**
- **Strongest first?**
- **Interrelated arguments: some things might have to be established before you can proceed into other subjects**

Writing it up

- **Headings throughout**
- **Make them specific**
 - ▶ **Bad: “The s. 8 argument”**
 - ▶ **Better: “The police violated Mr. Smith’s s. 8 rights”**
 - ▶ **Best: “The police violated Mr. Smith’s s. 8 rights by not getting a warrant”**

Writing it up

- **General assertions repel; concrete demonstrations persuade**

Writing it up

Assertion:

“The accused cannot complain that his s. 11(b) rights were violated because he asked for or consented to the delays.”

Demonstration:

“The accused complains of delay he caused. She agreed to a trial date of June 1, 2007. Then seven adjournments followed: three with the accused’s consent and four on the accused’s insistence – against the Crown’s wish.”

Writing it up

- Clear simple sentences; clear, simple thoughts; go easy on the cases
- The tone (if you can): “This is easy. Decide in my client’s favour and we can all go home.”

Writing it up

- Particular comments regarding cases:
 - ▶ When researching, you went on a long case law tour. Spare the judge the tour. Synthesize and simplify.
 - ▶ Less is more
 - ▶ How to choose
 - ▶ Selecting cases and dealing with bad cases: your ethical obligations

Writing it up

- The relationship between writing and planning/research
- Give the judge some credit for knowing some law sometimes
- Avoid repetition – cross-reference to earlier paragraphs

“Small things”

- In fact are big things
- Accuracy and completeness
- Helpful citations: pinpoint references, official reports (some bilingual), proper font size; reference to physical material; no *supra*, *infra*
- Below the paragraph citations vs. footnotes.

Special tools and techniques

Special tools and techniques

- **The use of the “quote snippet”**

Special tools and techniques

- The use of the “quote snippet”

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)

Special tools and techniques

- The use of the “quote snippet”

14. In *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75 per Sopinka J., the Supreme Court held that the NPB has the power to consider hearsay. Under s. 42, the NPB has the power “to consider all available information that is relevant to a case.” This led the Court (at p. 89) to find that the NPB had “a broad inclusionary mandate,” allowing it to take into account “all available information.”

Special tools and techniques

- **The use of the “quote snippet”**

14. The NPB can consider hearsay.

Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75 *per* Sopinka J. at p. 89 (NPB has “a broad inclusionary mandate” and can consider “all available information”)

NPB Act, s. 42 (NPB can “consider all available information that is relevant to a case.”)

Special tools and techniques

- **Juxtaposition (viewing in context)**

(great for dealing with other side)

Special tools and techniques

- **Juxtaposition (viewing in context)**
 - ▶ My client stole \$500 but they stole \$50,000 (my bad with their worse)
 - ▶ My client stole \$500 but then gave \$50,000 to charity (my bad with my better)
 - ▶ My client gave \$50,000 but other side gave nothing (my good with their bad)
 - ▶ My client gave \$50,000 but the other side gave only \$500 (my better with their good)

Special tools and techniques

- **Juxtaposition (viewing in context)**
 - ▶ Sask. CA case X is against my client but CA cases from ten jurisdictions are against them. (my bad with their worse)
 - ▶ Sask. CA case is against my client, but it can be distinguished – Alta. Q.B. decision is on all fours with the facts here (my bad with my better)

Special tools and techniques

- **Juxtaposition (viewing in context)**
 - ▶ B.C.C.A. case supports my client. Their position has been rejected in ten jurisdictions. (my good with their bad)
 - ▶ B.C.C.A case supports my client. All they can find is a Man. Q.B. case. (my better with their good)

Special tools and techniques

- **Collection and exhibition**

3. Three members of this outlaw motorcycle gang now complain that they were improperly singled out and that these limited stops were detentions in a "temporary, but very real 'police state'", under practices which are "institutionalized in authoritarian and totalitarian states", in order to be "identified and subjected to police dominance". They submit that the detentions infringed their rights under s. 9 of the Charter.

4. This Court has already upheld vehicle stops, verifications of licence and insurance, vehicle inspections and CPIC checks under the Charter. It has upheld such activities even when conducted on a random basis. In this case, however, the stops were not random: the Respondent

Special tools and techniques

- Lists

Special tools and techniques

- Lists

[314] This principle finds voice in many areas of our law:

- *Review is constitutionally guaranteed.* As a matter of constitutional law, courts must be able to review the decisions of administrative decision-makers for defensibility and acceptability on the facts and the law: *Dunsmuir v. New Brunswick*, [2008 SCC 9 \(CanLII\)](#), 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-31.
- *Federal Courts have a plenary power to supervise administrative decision-makers.* This power can even survive legislative attempts to oust it: *Canadian Liberty Net*, *supra* at paragraphs 35-38; *Derakhshani*, *supra* at paragraphs 10-11; *RBC Life Insurance Company*, [2013 FCA 50 \(CanLII\)](#), 2013 FCA 50 at paragraphs 35-36.
- *Privative clauses are read down.* Parliament, wielding its constitutional power to make laws, sometimes tries to block the courts from reviewing administrators' decisions. Nevertheless, the courts can review administrators' decisions, albeit with appropriate deference: *Dunsmuir*, *supra* at paragraph 31; *Executors of the Woodward Estate v. Minister of Finance*, [1972](#)

Special tools and techniques

- **Compression**

Special tools and techniques

- **Compression**
(not recommended):
 - Set out the dry legal test: “For X, there are three branches...”
 - Then plaintiff’s position on branch one, branch two, branch three.
 - Then defendant’s position on branch one, branch two, branch three.
 - Then why each branch is in plaintiff’s favour, going branch by branch.

Special tools and techniques

- **Compression**

(recommended):

Plaintiff wins on the X test:

- (1) *Branch one.* (put all the branch one stuff here)
- (2) *Branch two.* (put all the branch two stuff here)
- (3) *Branch three.* (put all the branch three stuff here)

Special tools and techniques

- **Pictures**

Special tools and techniques

● Pictures

The Corporate Structure

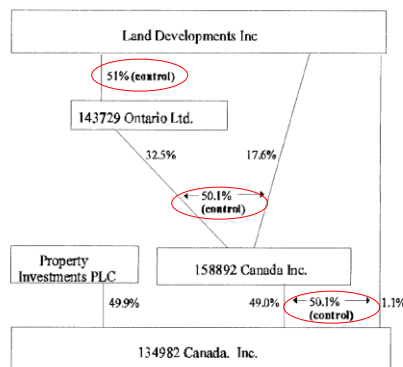
3. Before November 21, 1994, 134982 Canada Inc. was owned 51.0% by Property Investments PLC and 49.0% by 158892 Canada Inc.
4. At all material times, 32.5% of the shares of 158892 Canada Inc. have been owned by 143729 Ontario Ltd., which in turn has been 51.0% owned by Land Developments Inc. At all material times Land Developments Inc. has owned 17.6% of 158892 Canada Inc.
5. On November 21, 1994, Property Investments PLC sold 1.1% of its shares to Land Developments Inc.
6. Therefore, at the present time, 134982 Canada Inc. is effectively controlled by Land Developments Inc.

Special tools and techniques

● Pictures

The Corporate Structure

1. The following diagram illustrates the corporate structure. Land Developments Inc. effectively controls 134982 Canada Inc.:



Special tools and techniques

● Charts

	<i>S.P. Gupta et al. v. President of India</i> , AIR 1982 Supreme Court 149 (Applicant's authorities, Tab 38)	<i>Criminal Lawyers' Association v. Ontario (Ministry of the Solicitor General)</i> Ontario Superior Court of Justice (Divisional Court), court file no. 730/000
Statutory provision(s) in issue	No express discretion in the <i>Indian Evidence Act</i> to recognize the public interest in disclosure and override secrecy: see s. 123 of the <i>Indian Evidence Act</i> .	No express discretion in the <i>Freedom of Information and Protection of Privacy Act</i> to recognize the public interest in disclosure and override secrecy in these circumstances: see ss. 14(2)(a), 19 and 23 of the Act
Constitutional guarantee of freedom of expression?	Yes. Articles 19(1)(a) and (2) of the Indian constitution.	Yes. Sections 1 and 2(b) of the <i>Charter</i> .
Right of access to information?	Yes. It is inherent in the art. 19 guarantee of freedom of expression: see para. 66 of the majority judgment of Bhagwati J. at p. 234. It is also inherent in the concept of "democracy": see paras. 63-66 of the majority judgment of Bhagwati J. at pp. 232-234.	This is for the Divisional Court to decide. The CLA's submissions echo much of the reasoning in the majority judgment of Bhagwati J.

Special tools and techniques

● Dealing with uncertain law: take a stab

12. The case of *Smith v. Smith* (1999), 2 R.F.L. (3d) 324 (Que. C.A.) is highly relevant to this case. In that case, the Court of Appeal considered whether a document was covered by solicitor-client privilege. A lawyer was retained to conduct an interview of various witnesses, assess liability and then give a legal opinion. The lawyer performed these tasks, wrote his opinion and delivered it. In the opinion was a summary of what the witnesses told him. The opposing side argued at discovery that he should obtain the letter with all legal advice excluded. His aim was just to get the summary of what the witnesses had said. The Court ruled that the summaries of what the witnesses had said were so inextricably bound up with the legal advice that they should be excluded. The test was whether there was a "substantial connection between the advice given and the facts set out in the advice".

13. The case of *Jones v. Jones* (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) is also relevant. In that case, a lawyer summarized the contents of a number of documents in her opinion to her client. The documents later disappeared in a fire. The opposing side argued that the summaries should be produced. The Court ruled that the summaries were "significantly bound up with the legal content of the opinion and should not be produced".

14. Finally, in *Brown v. Brown* (2001), 4 R.F.L. (3d) 451 (Man. C.A.), the Manitoba Court of Appeal considered a reporting letter written by a lawyer to a client. The reporting letter set out a number of facts, some of which were relevant to the conclusions in the letter and some of which the other side thought were not relevant. The other side production of the portions of the letter setting out the facts. The Court declined to rule on the issue of relevance, holding that it was not necessary. It held that all of the facts should not be produced, stating that "it is enough that there be some overlap between the facts set out and the privileged opinion component of the letter".

15. Therefore, the test to be applied in this case is whether there is some overlap or some substantial connection between the facts set out and the privileged, "legal opinion" part of the letter.

Special tools and techniques

- **Dealing with uncertain law: take a stab**

12. There is no obligation to produce purely factual portions of an opinion letter if there is substantial connection between those portions and the advice portion of the letter, or even just some connection.

Smith v. Smith (1999), 2 R.F.L. (3d) 324 (Que. C.A.) ("substantial connection between the advice given and the facts set out in the advice" so no production)

Jones v. Jones (2000), 3 R.F.L. (3d) 239 (Ont. S.C.J.) (summaries were "significantly bound up with the legal content of the opinion" so no production)

Brown v. Brown (2001), 4 R.F.L. (3d) 451 (Man. C.A.) ("some overlap between the facts set out and the privileged opinion component of the letter" so no production)

Special tools and techniques

- **Dealing with the confused adversary**

In order to succeed, the Appellant must establish all three of the following:

- (a) the Board erred;
- (b) the error is patently unreasonable; and
- (c) the Appellant is entitled to the relief sought.

The Appellant has not established any of these matters

Special tools and techniques

- **Dealing with the inaccurate adversary**

12. The Appellants' statement of facts is comprised of evidence they Appellants adduced, but which the trial judge did not accept. There are many examples, but the most significant examples are:

- The Appellants say X – in fact, the trial judge found Y;

<reference>

- The Appellants say M – in fact, the trial judge found N;

<reference>

- The Appellants say R – in fact, the trial judge found S;

<reference>

Oral argument

- **What to do?**
- **Tough times**
- **Good times**