What persuades (or, What's going on inside the judge's mind)

THE HONOURABLE JUSTICE JOHN I. LASKIN

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I want to thank Wendy Matheson and Sandy Forbes for inviting me to speak on this occasion. They, not I, should be giving this talk, for it is they who persuaded a reluctant judge to speak about persuasion.

My reluctance springs from two sources. One is that my audience includes many of the finest persuaders our profession has to offer. The other is that some of our finest judges have already given so much valuable advice on this subject. I think of John Arnup's instructive articles,[1] which have withstood the test of time, though written over twenty years ago, when I was a young lawyer; and more recently of Ian Binnie's Sopinka and Dubin lectures, each a *tour de force*.[2] And I think of Horace Krever and John Morden, who made persuasion seem so deceptively easy by reducing it to two simple propositions: "Make the court want to decide in your favour"; then, "Show it how to do so."[3]

I suppose I can justify this talk in the way any judge can. I am on the receiving end. It is I who must catch what you toss, and so perhaps my suggestions will help you throw better pitches. I suppose, as well, what persuades today and will persuade tomorrow differs somewhat from what persuaded in years gone by, in part because judges are busier now and the pace of life is quicker.

Soon after I was appointed, the Society kindly invited me to a previous fall convention. My stated topic then was: "What I would have done differently if I knew then what I know now."[4] My subtext, however, was the catalogue of errors that I had made as an appellate counsel. A central theme of my talk was that as an advocate I had greatly underestimated the importance of the factum.

Well, seven years later I am certainly older and more experienced, and I hope a little wiser. Though I do not resile from my views about the factum's importance, I have come to appreciate more and more the complementary importance of oral argument. We have so much to read that often the nuances of each side's position are not apparent to us before the hearing. Sometimes it takes the oral hearing to find out what the case is really all about, what the real debate is. Every judge, of course, goes into the hearing of an appeal with some leaning about the case, sometimes strongly held, more often tentatively held. Yet – and though I have no hard data to back it up – I think it a fair anecdotal estimate to say that oral argument has changed my mind in as many as 25 percent of the appeals I have heard. It is oral argument I would like to focus on. So here are six aspects of oral persuasion that have influenced me and that I would like to share with you:

The Honourable Justice John I. Laskin, *Court of Appeal for Ontario*, who thanks his law clerk, Leigh Salsberg, for her research, her insights, and her superb editing of this article.

- Credibility
- Conviction
- Cognitive clarity: how we listen
- Persuasive burden = distance x resistance
- Appeals to emotion and leeways
- Concreteness

I hope that when I have finished discussing these topics you will not feel like the New York state trial judge, who in a recent autobiography of his years on the bench had this to say about his own appellate court: "When the Court of Appeal speaks we are all in danger."

Credibility

Persuasion starts with your credibility as an advocate. In saying so, I am doing nothing more than affirming what the greatest of all rhetoricians, Aristotle, said over two thousand years ago by making *ethos* one of the three modes of persuasive discourse.[5] Your credibility is a hidden persuader. It is not overt, but it permeates your entire presentation. Gerry Spence, the well-known American lawyer, put it this way: "One can stand as the greatest orator the world has known, possess the quickest mind, employ the cleverest psychology, and have mastered all the technical devices of argument, but if one is not credible one might just as well preach to the pelicans."[6]

Credibility translates into this: Are you someone we think can help us find a sensible, reasonable, workable solution to the real-life problem we must resolve? And credibility is built on two pillars: trust and expertise. Hence, my simple equation:[7]

trust + expertise = credibility

First, a word about trust. I tend to trust lawyers who do three things: they come to court prepared, they do not oversell, and they acknowledge weaknesses in their position, even making a concession where appropriate.

Sitting on the other side, we can instantly spot an advocate who does not know the record, no matter how senior or experienced that advocate may be. At the risk of embarrassing him, let me say that one reason Earl Cherniak has such great credibility with our court is that as busy as he is, he always comes to the oral hearing superbly prepared.

Nothing weakens trust more than overselling. Understatement works far better. Conversely, nothing instills trust more than facing up to your weaknesses. Better to come from you than from your opponent.[8] The right concession not only enhances your credibility, it is itself a persuasive technique and, I may say, an underused technique. A well-timed concession does not merely narrow the focus of the appeal, which judges like, but also makes your strong arguments seem even stronger. A brilliant and highly successful example of this technique is the advertisement for Buckley's cough mixture: It tastes awful but it works great.

The other half of my credibility equation is expertise. More and more we are being called on to consider areas of law, especially regulatory schemes, with which we have little familiarity. We can read the cases and the statutes. But reading does not always give us a feel for how the scheme really works, how it all fits together. We yearn to talk to the regulator. You have to fill that role for us. Demonstrated expertise over the subject matter carries great influence with a judge. I think of recent cases on the federal gun legislation, on the province's effort to regulate flying truck wheels, and on the inspection provisions of the *Occupational Health and Safety Act*, where counsel's mastery of how the legislation was meant to work changed my understanding of the case.

Conviction

In his elegantly written biography of Lyndon Johnson, *Master of the Senate*, Robert Caro describes why Johnson persuaded his colleagues to pass the *Civil Rights Act*: he came to believe – with unwavering conviction – that it was the right thing to do. In Johnson's own words: "What convinces is conviction. You simply have to believe in the argument you are advancing; if you don't you are as good as dead. The other person will sense that something isn't there."[9]

How can you show us your conviction? In oral, unlike written advocacy, judges can see and hear you. In the courtroom, judges process persuasive messages not just by scrutinizing their content, but as well by absorbing the way that content is delivered.[10] Words matter but so do your tone, your pace,[11] your posture, your hands and face, and even your eyes – perhaps more so than one might suppose. A recent study of persuasive elements in an information-heavy context (similar to a courtroom) suggested that the impact of words was 53 percent, body language 32 percent and tone 15 percent.[12] One might quarrel with the percentages, but the point remains.

Alan Lenczner is a great advocate in part because of the energy, passion, and confidence he brings to every argument he makes, and because of his firm but never shrill delivery. When asked a tough question, he and other great advocates don't grimace or fidget; they look composed and confident, like they are trying to help us.

Word choice, of course, plays a role in delivering a convincing message.[13] Romance forceful, active verbs; use affirmative language; and avoid fillers, too many adjectives and adverbs, and the dreaded false intensifiers such as "certainly," "clearly," and "absolutely," which weaken rather than strengthen your point. Above all, use plain language and avoid convoluted sentences. Pretend you are speaking to your well-informed next-door neighbours, who talk about their cars, not their motor vehicles, where they work, not where they are employed, and using their savings to build a cottage, not utilizing the proceeds of their remuneration to construct a summer dwelling-place.

The occasional use of effective repetition also helps. Winston Churchill, one of the greatest persuaders of all time, was a master of wise repetition. Witness his tribute to the Royal Air Force: "Never in the field of human conflict was so much owed by so many to so few." What makes this line memorable is the repeated use of the little word "so" and the little-understood fact that information delivered in chunks of three has a magical effect on people.[14] We remember it. Other examples of the "rule of three" permeate our history: Lincoln's "Government of the people, by the people, for the people," and Julius Caesar's "I came, I saw, I conquered," to name but two.

Cognitive clarity: How we listen

From law school onward we have been trained to worry about clarity, but we have been trained to do so from a substantive point of view. Another kind of clarity is equally important: cognitive clarity. This has to do with how people receive, absorb, and retain information.[15] Cognitive psychologists can teach us a lot about what persuades. Here are a few points about how we listen and what it means for how you should make your arguments.

First, judges absorb and remember new information better when they know it's significant as soon as they hear it, when they know why it matters and how it relates to your overall point. In a word, they understand information better when they have a context for it. Judges do not listen passively; they are always looking to make sense of what they are hearing. As advocates, you have to give them the context. So before you throw a lot of information and a lot of detail at a judge, begin with the point of the detail, the context for it, even your conclusion, not the other way around.

Point-first advocacy, as I call it, important in the factum, is perhaps even more important in oral argument, where we hear your speech only once. The judge is always asking you, notionally or actually, "Why are you telling me all this?" So begin your argument by telling us what the case is all about and why you should win.[16] But don't stop there. Continue giving us the context all the way through your argument. Not surprisingly, teachers of effective communication stress the value of continuous introductions throughout an argument.[17]

In the same way, judges like structure; they like to know where you are going; they like a map. So give them a map. Ensure that the form of your argument matches its substance.

Second, remember that judges, like everyone else, can only absorb so much information and for so long. We too live in our current accelerated culture of sound bites, limited attention spans, and a quicker pace of life. We have or think we have a lot to do, with many competing demands on our time. And, of course, in our court we have time limits on oral argument.

Thus, we constantly want answers to two questions: can you help us, and how fast?[18] What this means for advocates is: do not overwhelm us with unimportant arguments. Do not inundate us with unimportant details. Do not drown us in a sea of words. In brief, do not tax our absorptive capacities.[19] And get to us quickly.

Do not be afraid to choose one argument to emphasize. When you choose fewer arguments, you reduce the risk that we will filter out the points you want us to remember. So have faith and confidence in your choices, and have the courage to be selective. Less is invariably more. The rule of three is a good working rule here: in most appeals, no more than three main points.

What this also means is that you need to uncomplicate your argument for us. People like to reduce big problems into simple sub-problems. Judges are no different. Research on how expert chess players play against the computer, for example, shows that although the computer considers all possible moves, humans consider only a few moves, but invariably the right few.[20]

I don't mean that you should oversimplify your argument. I mean that you should scale down the complexity you have to deal with. We cannot absorb too much complexity, because we hear your oral argument only once. You therefore need to keep your message simpler than you do in writing. This is a sophisticated form of simplicity I am talking about, out of which comes cognitive clarity.[21]

Finally, what all this means is that you should be concise. Concision is a relative term and depends on the nature of the case. But look at concision or brevity as a persuasive strategy, a strategy that adds to your credibility.

Third, in addition to giving context and telling us only what we need to remember, you can persuade by saying the right things at the right times. Research shows that where you position your message affects its influence. Psychologists call these primary and recency effects. We are more likely to absorb and retain what you say first and last.[22] This translates into these suggestions: begin by showing why your client should win, not why the other side should lose. Do not throw away your openings or your closings. Use reply effectively. Most advocates close poorly because they don't save any time for their ending. And many follow the advice of my former principal: "The best place for reply is on the seat of your pants."[23] But a closing that makes your point in a pithy new way, or a reply that effectively answers the main argument against you, can be devastating.

Persuasive burden = distance x resistance

Here I have borrowed from Richard Posner because he has succinctly captured how most appellate judges go about their decision making. In his book *Overcoming Law*, he gives this simple piece of advice to litigators: the best arguments are those that reduce the costs of persuasion.[24] I have reduced his advice to this equation:[25]

IMPORTANT NOTICE

The Honourable Mr. Justice John I. Laskin has been a judge of the Ontario Court of Appeal since January 1994, following a distinguished career as an litigation and appellate counsel in Toronto. He is widely regarded as one of the best judges in Canada. This following article was published in the June 2004 issue of the Advocates Society Journal and is reproduced here with the kind permission of the editor. It is based on a speech delivered by Mr. Justice Laskin to a convention of lawyers in November 2003. This article is not legal advice and no member of our firm is responsible for its content. It is intended solely as information about interesting issues in advocacy. Legal advice is provided only on the basis of specific facts following consultation with a lawyer.

persuasive burden = distance x resistance

Minimize the legal distance we must travel to agree with you, and minimize our resistance to being moved. In practical terms, this equation translates into making the court as comfortable as you can with your position. Aim for a reasonable solution to the dispute. Give the court narrow, not adventuresome, grounds to decide in your favour, and narrower, not broader, rules to adopt.

Individual and institutional reasons underlie this advice. As Cardozo reminds us in his famous lectures on "The Nature of the Judicial Process,"[26] each of us has our own philosophy of life, and try as we may to see things objectively we can never see them with any eyes but our own. Many unseen forces guide our thoughts and actions – our likes and dislikes, our moods, instincts, emotions, habits, and convictions.[27] All these forces make judges resist radical change to their beliefs. Judges look for consistency between their existing beliefs and any new information presented to them. The less they have to travel to agree with you and the smoother the journey to get there, the more likely you are to persuade them.

Virtually every provincial appellate judge I know is a judicial minimalist, to use the phrase coined by the Harvard law professor Cass Sunstein in his influential book on decision making in the United States Supreme Court, *One Case at a Time*.[28] Judges like to resolve the dispute in front of them, and they don't mind leaving many things undecided. They prefer to say as little as possible to justify a result.[29]

Why do judges like to say less rather than more? Because they are alert to the problem of unanticipated consequences of their decisions.[30] Because they live in a world of collegial decision making, and they wish to make it easier for their panel members to agree with them. Because they wish to make few judicial errors – and those they do make, less damaging. All judges have had the experience of reading one of their reported cases and recoiling in horror at having said too much.

And finally, judges are minimalists because they do not want to close off options for their colleagues in future cases. My colleagues are among my most important readers. The prospect of having a colleague ask me why I had to say 4*x* when I could have decided the case by saying 2*x* is not a pleasant one.

For all these reasons, judges say less instead of more. So in *Falkiner*,[31] where a group of single mothers challenged the Ontario government's "spouse in the house" rule, we accepted the applicants' argument under s. 15 of the *Charter* and declined to deal with their alternative argument under s. 7, leaving the important issues raised by that argument to a case in which their determination was central to the outcome. In *R. v. Dhillon*,[32] we overturned the appellant's conviction for first-degree murder on narrow grounds and did not decide the broader question raised by the appellant: when, if ever, the defence should be permitted to introduce investigative hearsay evidence to support an allegation that the police's investigation of other leads was inadequate. And in *Maple Valley Acres Limited v. CIBC*,[33] we dismissed the bank's appeal by upholding the trial judge's key factual finding, but stopped short of determining the reach of the trial judge's alternative basis of liability for unjust enrichment. All these examples show judicial minimalism at work.

Appeals to emotion and leeways

"Ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections." These are not the words of some starry-eyed junior judge but of Charles Evan Hughes, the former chief justice of the United States Supreme Court, and echoed (in his autobiography) by Justice William O. Douglas.[34]

There is undoubtedly some hyperbole in the quote. But, as Aristotle said in speaking of *pathos*, appeal to emotion plays a role in persuasion, and I can say that it does even on the Ontario Court of Appeal.[35] Emotion has the power to move hearts and minds, even the hearts and minds of judges.[36] The trick, however, is not to make it appear obvious. Persuasion works best when it is invisible.[37] Beginning your argument by telling the court that you are going to appeal to its emotions is not likely a winning strategy. The skill comes in evoking emotion indirectly, not in invoking it directly.

How do you do that? By a persuasive presentation of the facts. Judges strive to do justice between the litigants, and almost always the facts show where justice lies. I call this the paradox of appellate advocacy. Despite "patently unreasonable," despite *Housen*,[38] and despite deference to discretionary decisions, the facts matter far more than the law in most appeals.[39] Even those facts that are the subject of findings at trial can be put in a different light on appeal. The best advocates are the ones who can best spin the facts, who are the best storytellers.[40] And every story needs a theme, often unstated, and usually about the justice or fairness of your cause. A lawsuit is really a clash of competing stories and competing underlying themes. So think of yourself first as an expert storyteller rather than an expert litigator.

The last case I argued in our court before being appointed was *Adler*,[41] where I sought government funding for Jewish day schools in Ontario, equivalent to the funding of Roman Catholic schools. I had a good story and a good theme: after 1982 the freedom of religion and equality rights of my clients made our position seem eminently fair. But my opponents had a better story: it was only right and just that we respect the bargain made in 1867, a bargain that constitutionalized Catholic funding and immunized it from a *Charter* challenge. So I lost.

In emphasizing the decisiveness of the facts, I do not suggest that judges ignore the law. Appellate judges feel a duty to the law as well as a duty to justice. And we will do our utmost to satisfy both wherever possible. But the truth is, few cases demand that we reach a legal result that seems unjust. Karl Llewellyn – one of the great legal realists – explained this in a path-breaking book about how appellate courts really decide cases. The book, called *Deciding Appeals*, was written in 1960, but Llewellyn's insights remain true today.[42]

In his book Llewellyn stressed that precedent is malleable; many standards are framed in general terms; and many cases fall between precedents. The law guides, suggests, even pressures, but it does not control the result. The law allows judges a lot of scope to emphasize the facts because of what Llewellyn called the

leeways of precedent. Appellate judges have a great deal of leeway to do what they perceive is the right thing. In other words, there is a lot of play in the joints.

Concreteness

Law is replete with abstract words, terms, and expressions that cannot quite be grasped, that cannot be perceived, such as "a free and democratic society," "the administration of justice," "the reasonable person," and many, many others. We cannot avoid using some of these in our discourse. But try not to stay too long on these high levels of abstraction. Where you can, use examples, analogies, even the occasional metaphor to translate your argument into more concrete, more familiar, and thus more persuasive terms.[43]

Activate the judges' senses. Paint word pictures that judges can see, hear, and feel.[44] Do not talk about the effect of a legal rule in the abstract, but about what a person may or may not do. A memorable example is Holmes's sentence showing that the right of free speech is not an absolute right: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater and causing panic."[45] Less memorable but still effective is this simple metaphor in answer to an argument in favour of public funding of parochial schools: "Government funding of religious schools is a bramble patch."[46]

In a related vein, avoid generalities. Generalizations seldom persuade. It is the details, the specifics that persuade, that allow judges to cross the legal path to your position.[47] Of course, you must target the right amount of specificity. Too much detail can turn off your listeners. But the operative message sis: "Show, don't tell."

Do not talk about the general duties of a real estate agent but about those duties that apply to your case. Do not say "she felt sad" when you can say "she had tears streaming down her face." Do not say "Carter tried to mitigate his losses but could not find other employment" when you can say "Carter applied for eight other jobs but did not get a single interview." One effective way of "showing" is to read a compelling excerpt of a witness's testimony so that the court can see and hear the evidence in the witness's own words.

I close with a vignette that my dad used to tell about two members of the legislature who sat outside Queen's Park. One said to the other: "You weren't in your seat today." "No," his friend replied. "I couldn't be there, but what went on?" "Oh," said the other. "I listened to Jones speak vigorously for about an hour." "Well, what did he talk about?" The reply came: "I don't know. He didn't say."

I hope that I have done a little better than Mr. Jones. And I thank you again for inviting me to speak to you.

Notes

1. John D. Arnup, "Advocacy" (David B. Goodman Memorial Lecture) (1979) 13 L. Soc. Gaz. at 27; John D. Arnup, "Advocacy on Appeal" (Bar Admission Course lecture, 1971).
2. Ian Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (First John Sopinka Advocacy Lecture) (Summer 1999) Advocates' Soc. J. 13; Ian Binnie, "In Praise of Oral Advocacy" (Third Charles Dubin Lecture on Advocacy) (Spring 2003) Advocates' Soc. J. 3.
3. John W. Morden, "The Partnership of Bench and Bar" (David B. Goodman Memorial Lecture) (1982) 16 L. Soc. Gaz. 46 at 72.
4. (Spring 1998) Advocates' Soc. J. 16.
5. Edward P. J. Corbett, *Classical Rhetoric for the Modern Student*, 3rd ed. (Oxford: Oxford University Press, 1990) at 22–24, 37. Aristotle's other two means of persuasion are *logos* (reason) and *pathos* (emotion). I deal with the appeal to emotion later in this paper.
6. Gerry Spence, *How to Argue and Win Every Time* (New York: St. Martin's Press, 1995) at 4; quoted in Harry Mills, *Artful Persuasion* (New York: AMA Publications, 2000) at 14.
7. This equation is taken from Mills, *ibid.* at 14.
8. In his Goodman Memorial Lecture on "Advocacy" at 34, Arnup quotes Chief Justice Cartwright's advice on facing up to your difficulties: "Nail it up on the side of the barn for everyone to see. Then proceed to show that it is neither as large nor as immoveable as it first appeared."
9. Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York: Alfred A. Knopf, 2002) at 887. My friend Paul Pape told me about this quotation. Paul, an excellent advocate, always argues with great conviction.
10. See Peter F. Jorgenson, "Affect, Persuasion, and Communication Processes," in Peter A. Anderson and Laura K. Guerrero, eds., *Handbook of Communication and Emotion: Research, Theory, Applications and Context* (San Diego: Academic Press, 1998) at 405ff.; see also Robert B. Cialdini, *Influence: The Psychology of Persuasion* (New York: Quill/ William Morrow, 1993).
11. Mills, *supra* note 6 at 89, says that most speakers average 120 to 180 words per minute. He suggests that most listeners prefer a slightly faster than average speaking rate to a slower than average rate. But don't go too fast: a rapid-fire delivery is a judicial turnoff. The right pace? Slow enough to follow; quick enough to be interesting.
12. *Ibid.* at 41–43, 59. See also Andrew Ellis and Geoffrey Beattie, *The Psychology of Language and Communication* (New York: Guilford Press, 1986); Jorgenson, *supra* note 10 at 416. Jorgenson says that facial expression and tone are the most important parts of appeals to emotion.
13. Word order matters, too. Compare "Socrates was old, but wise" with "Socrates was wise, but old."
14. Mills, *supra* note 6 at 102, 135.
15. Stephen V. Armstrong and Timothy P. Terrell, *Thinking Like a Writer*, 2nd ed. (New York: Practising Law Institute, 2003) at c. 2.
16. And if you can, try to do so in a way that sparks our interest. We appreciate counsel who make their arguments interesting.
17. Armstrong and Terrell, *supra*, note 15 at c. 3; Jonathan Baron, *Thinking and Deciding*, 2nd ed. (Cambridge: Cambridge University Press, 1994) at 102–103.
18. Armstrong and Terrell, *ibid.* at p. 5
19. Remember Shakespeare's line: "It is better to be brief than tedious." *King Richard III*, Act I, Scene 4.
20. Alan J. Parkin, *Essential Cognitive Psychology* (East Sussex: Psychology Press, 2000) at 282–286; Baron, *supra* note 17 at 102–103.
21. Steven D. Stark, *Writing to Win* (New York: Doubleday, 2000) at 194–195; Armstrong and Terrell, *supra* note 15.
22. Mills, *supra* note 6 at 137–138.
23. I was fortunate to article and junior for Walter B. Williston, in his day a legendary counsel.
24. Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995) at c. 24, "Rhetoric, Legal Advocacy and Legal Reasoning" at 500–501. Posner relies on Akira Yokoyama, "An Economic Theory of Persuasion" (1991) 71 Public Choice 101.
25. See Armstrong and Terrell, *supra* note 15 at c. 12, "The Art of Persuasion," at 274–275.
26. Benjamin N. Cardozo, "The Nature of the Judicial Process" (The Storr Lectures) (New Haven, CT: Yale University Press, 1921).
27. *Ibid.* at 11–13.

28. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).
29. *Ibid.* at ix–x, 3–4.
30. *Ibid.* at 259–263.
31. *Falkiner v. Ontario (Director, Income Maintenance Branch)* (2002), 212 D.L.R. (4th) 633 (Ont. C.A.).
32. (2002), 166 C.C.C. (3d) 362 (Ont. C.A.).
33. Unreported, November 21, 2003 (Ont. C.A.).
34. William O. Douglas, *The Court Years*, *1939–1975* (New York: Random House, 1980) at 8, 33.
35. Aristotle, *On Rhetoric – A Theory of Civil Discourse*, trans. G.A. Kennedy (New York: Oxford University Press, 1991). Many rhetoricians have emphasized the important role of emotional appeals in persuasion. See *e.g.* Corbett, *supra* note 5 at 86–94, citing the eighteenth-century Scottish rhetorician George Campbell's treatise *Philosophy of Rhetoric*, Book I at c. 7: "So far, therefore, it is from being an unfair method of persuasion to move the passions, that there is no persuasion without moving them." Mills, *supra* note 6 at 106, put it more simply: "[I]n most persuasive situations, people buy on emotion and justify with fact." In our profession, Paul Perell has done a marvellous job of telling us what rhetoricians – ancient and modern – can teach us about advocacy. See, for example, Paul M. Perell, "Aristotle's Advice to Advocates" (January 2000) [unpublished]; Paul M. Perell, "Written Advocacy" (1993) 27 L. Soc. Gaz. 5.
36. Corbett, *ibid*. at 86–94.
37. Armstrong and Terrell, *supra* note 15, c. 12, at 273–274.
38. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, where the Supreme Court amplifies the meaning of "palpable and overriding error," the very stringent standard of review of fact and credibility findings.
39. The great American attorney John W. Davis had this to say about the importance of the facts in the argument of an appeal: "[I]n an appellate court the statement of the facts is not merely a part of the argument, it is more often than not the argument itself ... [I]n many, probably in most, cases when the facts are clear there is not great trouble with the law": "The Argument of an Appeal" (1940) 26 A.B.A. J. 895 at 896.

    My father similarly believed that the facts drove the result in most appeals. In reflecting on his years on the Ontario Court of Appeal in a 1975 speech to the Lawyers' Club, he said, "The cases coming before us were open-ended, with the ultimate decisions being very much at large. What my short experience at that time suggested, and what my longer experience since then has confirmed is the degree to which appellate adjudication provides a choice of result, even if not as often a choice of legal principle": Bora Laskin, "The Common Law Is Alive and Well ... and, Well?" (Lawyers' Club of Toronto, February 20, 1975). See also Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960).
40. For the importance of storytelling in written advocacy, see Stark, *supra* note 21 at 80.
41. *Adler v. Ontario* (1997), 140 D.L.R. (4th) 385 (S.C.C.); (1994), 116 D.L.R. (4th) 1 (Ont. C.A.).
42. See Llewellyn, *supra* note 39 at 62–120, 219–222.
43. See Mills, *supra* note 6 at 111, 123. Martin Luther King was a master of the use of metaphor. Here is a brilliant example from his famous "I Have a Dream" speech, delivered on August 23, 1963, at the Lincoln Memorial in Washington, D.C.: "I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood. I have a dream that one day, even the state of Mississippi, a desert state sweltering with the heat of injustice and prejudice will be transformed into an oasis of freedom and justice." Quoted in William Safire, ed., *Lend Me Your Ears: Great Speeches in History* (New York: W.W. Norton, 1992) at 499.
44. The same advice applies to written advocacy. See Stark, *supra* note 21 at 83–86; Thomas S. Kane, *The Oxford Essential Guide to Writing* (Oxford: Oxford University Press, 2003) at 262–266.
45. *Schenck v. United States*, 249 U.S. 47 (1919).
46. This metaphor is taken from Corbett, *supra* note 5 at 444.
47. See Stark, *supra* note 21 at 87; Mills, *supra* note 6 at 135–136.

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Artwork to come