Strategic Legal Writing:
50 Do's & Don'ts

by

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To test your reading/proof-reading ability, added herein is a common student/lawyer writing error – first person to spot and email me gets a $50 Starbucks/Bridgehead/Tim Hortons gift card (you pick). *emeehan@supremeadvocacy.ca*

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No. 1: Don't be merely an information-provider – not your job

1. Many lawyers believe they fulfill their role by simply delivering information to their clients or to the court in a written form. All one has to do is write it down. Right? (Write?) They write as if their sole function is to act as a conduit for the raw data their research has unearthed. But lawyers must be more than walking photocopiers and note-takers. They should be accomplished writers – meaning strategic writers, tactical writers.

No. 2: Be strategic & tactical – on the page

2. It's important to be strategic and be a tactician on your feet in the courtroom — it's just as important to be strategic and be a tactician on the page. It takes hard work, but the finished product is worth the effort — we all know a long dictated letter is a lot easier to do than a short one (and we can all recognize a far-too-long dictated letter too).

No. 3: Sometimes "positioning" helps – or, choosing the right box to have the fight in

3. An advertising "correspondent" (Mike Tennant) on CBC Radio's *Definitely Not The Opera* says the following about his profession. Does any of this apply to us as law students/lawyers in how we write? How we write a term paper, an opinion letter, a motion record, a factum?

- "Does positioning work? The short answer is yes.
- But no amount of positioning/marketing will change your mind about:
    - An issue
    - A candidate
    - A headache remedy
    - A salad dressing.
- What positioning can do is:
    - Soften an image
    - Sharpen it
    - Create a favourable first impression
    - Boost momentum
    - Help slow it
    - Trip up a forceful argument with a well-placed "yes but", or a well-placed practical proverb or analogy that a 'normal' (i.e., non-lawyer/non-judge) person can connect with
    - Distract attention from a weakness

- Draw attention to a strength.

- The key is that the ad must have some basis in perception, and perception changes quickly.
- An effective ad is one that doesn't change simply because the public is privy to the strategy/intent behind it.
- In fact, the more you know about the nuts and bolts – the more you understand what it's getting at — the thinking behind it, the more likely are you to be affected and persuaded by it."

No. 4: Be simple, without being simplistic – find the balance

4. Keep your message simple. Ideas still need to be big, but to be effective they must be clear and focused. Try to be simple enough that a stranger, preferably even a non-lawyer, can read and understand it.

No. 5: Best argument – an explanation

5. The best argument is that which seems merely an explanation. Essentially, you know you have created a strong marketing argument when your prospects respond by saying, "That makes sense".

No. 6: Who are you writing for – not you

6. For example, when you become a lawyer & you're applying for leave in the S.C.C. (but the same goes for other courts and tribunals too) time permitting, scan applications over the last several years; what got accepted and what got rejected in the area of your appeal. It's possible to get a clear read on the kind of cases the Court is interested in. If there is a pattern, make sure you draft your application such that it relates to one of these "hot" issues. A related consideration is whether leave has already been granted to a similar case whose coattails you can ride in on. If you're going fishing for trout, don't bait your hook with pike food. If you know who the judge(s)/members of tribunal are going to be, do an electronic search of their name; that may give you an idea of how the wind's blowing.

No. 7: Make the reader part of your team

7. At a basic level (and this can be played out directly or indirectly in a careful way) the story has to make sense to the judges in terms of their personal perceptions and attitudes about life. It has to be consistent with what they think is right and what they think is wrong.

8. Understand that strategically you have to make the judge part of your thinking processes – part of your team. The "deal" you propose to him/her must work for both parties, you and the judge.

No. 8: Many people write to show how smart they are – so don't

9. Legal writing differs from other sorts of writing in that it is singularly directed toward persuading the reader (a trail judge, tribunal member, arbitrator or other decision-maker) to accept a certain position. Everything that counsel submits should put into the reader's mind the information and motivation necessary for a favourable decision. Appeal books, factums and everything else are devoted to that goal and nothing less. You're not writing to entertain, show how smart you are, how many authorities you can cite for one proposition, or even writing to inform. You're writing to **persuade**.

No. 9: People are visual – so look @ how things look

10. Law students and lawyers spend much of their time thinking about what to say and how they should say it. Relatively little time is spent considering how best to organize the material on the page. A good-looking document will help the reader get the point quicker and retain it longer. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well.

No. 10: Reader-friendly writing

11. Legibility (easy reading) is fundamental to readability (easy understanding). Good legibility is determined by font choice and the relationships between type size, line length and spacing (between letters, words, lines and paragraphs). An effective document is one that conveys your message well and quickly. Some simple, but important, rules of thumb include:

- don't rely entirely on standard prosey block paragraphs. Look for alternative methods of formatting (e.g., bullets) that make it visually easier for the reader;
- use sensible paragraphing and numbering. Don't go further than a third level of breakdown (e.g., 1(a)(i)). If you need to go beyond that then chances are you've overused headings (you aren't drafting legislation after all). Avoid roman numerals — they look too much like a foreign language;
- if the items listed have no rank ordering, then bullets are preferable to numbered lists;

- never use a font smaller than 10 or larger than 12 for the main body of the text;
- avoid lines that are entirely capitalized — their uniform size makes them difficult to read;
- avoid underlining — it's a throwback to the days of typewriters. Use italics or boldface to add emphasis;
- there is evidence that justified right margins make text harder to read, so it may be best to use ragged right margins for factums;
- align headings to the left in a larger, bolded font. Use a smaller bolded font for sub-headings;
- readers like "white space", and makes the rest easier to read and remember.

<u>No. 11</u>: Avoid run-on sentences & big words

12. Most law students & lawyers write sentences that are too long. Usually small words work better than big ones.

13. And lawyers, when writing, use words and phrases that nobody (including them) would ever use in normal verbal communication – as Justice Laskin has noted, people:

- don't talk about their motor vehicles, they talk about their cars
- don't talk about where they're employed, they talk about where they work
- don't talk about utilizing the proceeds of their remuneration to construct a summer dwelling place, they talk about using what they saved to build a cottage.

<u>No. 12</u>: Drop the legalese

14. Don't clutter your writing with long literary language that only lawyers can be bothered to decipher. Legalese may now be second nature to you, but it sounds *e*xclusive rather than *i*nclusive.

<u>No. 13</u>: Good writing = reader feels smart; bad writing = reader feels dumb

15. Write in ordinary simple-to-understand language. If you're writing it and it makes you feel smart, it probably makes the reader feel dumb. Good writing makes the reader feel smart. Bad writing makes the reader feel dumb.

<u>No. 14</u>: Use normal language

16. Use ordinary day-to-day language. Don't use any of the following (unless you're applying for a government grant):

- synergy
- paradigm shift
- value-added
- core competency
- strategic alignment
- outside the box
- win-win
- empowerment
- leverage
- benchmark
- knowledge base
- collaborative consultation.

17. Bottom line: good legal writing looks as if someone other than a lawyer has written it.

18. G.K. Chesterton: a *good* novel tells the truth about its *hero;* a *bad* novel tells the truth about its *author*.

<u>No. 15</u>: Avoid the usual cr*p – formulaic qualifiers and phrases

19. They're a waste of space and add nothing to the quality. Classic examples include:

- The appellant respectfully submits... (there's only so much respect even a judge can absorb)
- For all the foregoing reasons...
- We would submit…
- Essentially…

<u>No. 16</u>: And drop the smart sounding lingo too

20. Don't use verbose/fancy-dancy intros/fillers:

Instead of	**Use**
At that point in time	Then
By means of	By
By reason of	Because
By virtue of	By
For the purpose of	To
For the reason that	Because
From the point of view	For
In accordance with	By
In connection with	About
In favour of	For
In order to	To
In relation to	About
In terms of	In
In the event that	If
In the nature of	Like
On the basis of	By
Prior to	Before
Subsequent to	After
With a view to	To
With reference to	About
With regard to	About
With respect to	About
The fact that she had died	Her death
He was aware of the fact that	He knew that
Despite the fact that	Although
Because of the fact that	Because
In some instances	Sometimes
In many cases	Often
In the case of	When
In the majority of cases	Usually
It is not the case that he	He did not
During the time that	While
For the period of	For
There is no doubt but that	No doubt
Whether or not	Whether
The question as to whether	Whether
Until such time as	Until
Attend at	Go to

No. 17: Nothing is absolute

21. Absolute expressions (*all, always, every, invariably, never, none, totally, undoubtedly*) are rarely accurate and should be used lightly.

22. Absolutes tend to trigger a reader's perversity; once told that, "the campaign was a total failure," many readers begin to hunt for signs of partial success.

23. So avoid what Justice Laskin calls "false intensifiers" such as "certainly," "clearly," "absolutely", which actually weaken rather than strengthen whatever you're saying.

24. Understatement works much more strategically than overselling.

No. 18: Your mother was right: "If it doesn't help, don't say it"

25. Don't quote or summarize your opponent's argument. Familiarity doesn't breed contempt, it may breed acceptance, so the less the judge hears about the other side's case, the better.

26. Likewise if you're the appellant, don't repeat a lower court's adverse findings of fact. These facts only emphasize potential problems with your case.

No. 19: Write visually

27. Pictures, charts and diagrams help communicate. Particularly for legislation or complex corporate relationships, consider a foldout chart.

Options include:

- diagram, in phases, of how matter in litigation occurred
- sequencing, in diagram/written "box" form of what happened
- chart of key relationships/key factual findings you want the judge to rule on/make.

No. 20: Making your legal story work

28. Writing a story isn't easy (if it was we'd all be John Grisham and wouldn't have our day jobs). Figure out what your story is, map out the main components, write it down and then build the necessary legal elements around that framework. Include a couple of simple elements:

- setting your story in a particular time and place;

- including a human element;
- some familiar details;
- simple, ordinary and disarming language;
- visual words;
- an event of personal importance that everyone can relate to;
- an absence of argument (the reader doesn't want to feel like you are manipulating them down a garden path).

No. 21: Telling your story in the present tense

29. The present tense is really important. Telling the story in the past tense turns the reader into an observer. In contrast, the present tense makes them a participant, wondering what's going to happen next.

No. 22: Point-first writing – don't write it like a mystery novel

30. Make sure you clearly and explicitly state your **point** or proposition before you start; try and develop or discuss it. Avoid writing the factum (or even a paragraph) like a mystery novel, focusing on the details upfront and revealing only the point or the conclusion at the end. The reader shouldn't have to figure it out. You're trying to persuade the reader to accept your argument, not show how clever you can be at telling a convoluted story. It's better to provide context before detail, tell the reader off-the-bat what issue or idea or topic you're going to discuss in the paragraph, articulate it in the first sentence (usually our conclusion or submission on that issue) and the remainder of the paragraph is there to support your position.

No. 23: Your legal story got a theme?

31. Every case should have a central theme or themes that evolve from one or more issues. It's your job to find that **central** theme of your case that on the facts and applicable law creates for us a strong arguable case. It's your job to strongly articulate such a theme in your factum — and the job of opposing counsel to puncture that theme or frustrate it and take it apart.

No. 24: What the most powerful themes are

32. The most powerful themes go beyond one idea and lock two opposing ideas in conflict, creating a dialogue. For instance "the defendant valued money more than safety." In such instances, it is not the moral of the story that involves the reader so much as the struggle between the two opposing points of view in the theme.

No. 25: Write your theme down – here's how to start

33. For best effect, write down your theme before you start drafting your document. Writing the story or the theme in a paragraph before you start writing lets you add and subtract facts to make the more compelling parts of that story last longer and shorten or delete parts that are simply boring or not in your favour. Start "this case is about…".

No. 26: How to stay on theme – use a thesaurus, & make a list of synonyms

34. Oftentimes, your theme can be tightly articulated by a pithy phrase or even a single word. Reduce your story to a workable outline or a set of topical words and use a dictionary that has synonyms to come up with other words that say the same thing in different degrees of shading, and use these words in painting the picture.

No. 27: Use clichés – you're clichéd

35. Expressions worn thin by countless repetition are not persuasive and should be avoided.

36. Everyone's familiar with the expressions below – familiarity is precisely the problem:

- Add insult to injury
- Bitter end
- Blind as a bat
- Turn for the worst.

No. 28: The importance of the analogy

37. As a practical reality, most people reason from analogy based on their experience. People decide what *feels* right. Many non-lawyers (and judges) cannot easily accept a new proposition unless it's a logical extension of an already-held view. A simple analogy can go a long way toward convincing your listener, either to confirm what they already accept, or move one step sideways from an accepted position.

No. 29: Examples of (actual) analogies used

- Jehovah's Witness religious rights case:

  "A blood transfusion these days is like skating on thin ice"

- A firm of actuaries faced with a Discipline Committee, one of whose members is from a competing firm:

  "The legal equivalent of a cow wandering into an abattoir"

- Products liability:

  "Letting the industry self-regulate according to a voluntary set of standards and guidelines is like letting a shark guard the fish tank/Colonel Sanders babysit the chickens"

  "A smoke detector that's rendered ineffective by an ordinary short-circuit is like a life preserver that keeps you afloat until it gets wet"

  "Before the factory worker could loosen her grip, her hand was yanked into the machinery like a rag doll through an old wringer washer"

- After a rotary power lawnmower had hurled a rock into the eye of a 13-year-old, the analogy used was:

  "Toro had sent a four-wheel cannon into a residential neighbourhood"

- Where the disability of a person or machine is alleged to be small:

  "Like a clock that only loses 5 minutes per hour"

  "Like a chemical plant near your home with only a small leak"

  "A scar is only small on someone else's face"

38. If your analogy or your theme is meaningful and strong – easy to remember, easy to repeat helps too – some judges may use it in post-appeal deliberations to convince others who are on the fence.

<u>No. 30</u>: Hey, be realistic – maybe there's another side to this?

39. Every case has two sides. If you close your eyes to the other side's case your client will suffer. Your credibility will be affected if you ignore, or worse deny, indisputable problems.

40. A good strategy is to be the first to reveal the damaging information. Do not describe it as a "problem", call it a "challenge". Tell the judge before your adversary stands up and does it for you. Sounds simple, but be **fair** — it builds reputation.

41. Justice Laskin: "Nothing instills trust more than facing up to your weaknesses. Better it come from you than from your opponent. 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."

42. For example, your client's an alcoholic. Tell the judge/jury/C.A. about it before you opponent does. Sure you're fearful of bringing up ugly stuff about your client, but better you than your opponent. The decision-maker is less likely (particularly at first instance) to hold a 'weakness' against you if you're up front about it – in fact, they may respect you for being forthright.

No. 31: Adverse authority: put it in & deal with it

43. Confront applicable adverse authority expressly and early — not merely because you're an officer of the court, but because it's more strategic to do so. The other side will probably cite it anyway, and even if they don't, the clerks will find it, or the judge may know it. Not all precedents are created equal. Even if you are faced with adverse authority, consider whether your case is one where you should ask the court to make new law.

No. 32: Argue less, persuade more

44. The harder you argue, the less persuasive you are. The reason is simple. The more you press, the more you hype, and the more you wheedle and urge, the more sales resistance you create and the more you start to sound like the guy from Fred's Water Beds on Saturday night TV.

45. Real persuasion takes place when the reader thinks the conclusion is his or her own idea. Your job as a writer is to help them find the right ideas in themselves that will lead them to decide the case your way.

No. 33: Let go the little stuff

46. Minor misstatements of the law or facts by the Court below aren't going to win your appeal (appeal courts aren't professors grading papers). Don't set out to just whack the Court below or judge below, rather identify major mistakes and criticize the *rationale* of the lower court's decision.

47. Don't whack the other side either — use courtesy (especially when it's tough to do so) as a strategic tool. Advice given to Ed Bayda, former Chief Justice of Saskatchewan, during his first summer job (selling "waterless" cooking pots door to door): "People buy things from people they like".

<u>No. 34</u>: Tick-off-the-Judge no. 1 – cite tons of cases (because you're smart)

48. Only cite the leading case, or, at most, the two leading cases. Safety lies in authority not in numbers. Citing 15 cases for the same point of law tells the judge one of three things:

- there isn't any real authority for your position
- you can't tell the difference between important and pointless precedents (or else you haven't thought enough about which cases really help you)
- you're simply the kind of person who likes making lists (and probably list what clothes you put in the dryer in case you lose a sock).

49. Two options:

- double-L rule
- triple-L rule
- **(explain verbally).**

<u>No. 35</u>: Tick-off-the-Judge no. 2 – put in lots of quotes, long ones (you're smart, remember?)

50. People hate to (and usually don't) read long block quotations. Paraphrasing is usually a better strategy than direct quotation. If you must include a quote, the best approach is to knit it directly into the paragraph, or at a minimum:

- keep it really short
- edit (use three periods…when you edit out)
- add emphasis.

<u>No. 36</u>: Tick-off-the-Judge no. 3 – skip the page/para. no – you've read the whole case, so can they; and, you know the whole case cold (because smart is what you are)

51. Obviously double-check all cites. But also highlight (yup, with a yellow highlighter) each key extract/sentence in your Book of Authorities/ Authorities tab so the judge doesn't have to search for your point. An (acceptable and better) alternative to highlighting is sidelining and underlining the master copy — so you only do it once, it gets copied through to all other copies, and you don't have to highlight in multiplicity.

52. **Always** when citing a case put the actual page/paragraph that your point/quote is on — just giving the judge the standard cite with what page the case

starts on and forcing him/her to go read the whole case to find a single sentence is an unnecessary annoyance to a judge — if you're in for a vasectomy why insult the guy (or gal) with the knife?

<u>No. 37</u>: If you're writing a factum, why it's important – before, during, after

53. Justice Ruth Bader Ginsburg of the U.S. Supreme Court: "As between [factum] and argument, there is a near-universal agreement among federal appellate judges that the [factum] is more important – certainly it is more enduring. Oral argument is fleeting – here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments."

54. Your factum must serve different purposes at the different stages of the appeal process:

- ***Before Oral Submissions***
    - the factum should make a strong first impression that the court will carry throughout the rest of the appeal process;
    - the factum should introduce the issue and the law to the members of the court, who may or may not be familiar with the precise legal problem you are addressing;
    - the factum is the Court's principal source of information about the case and the law.
- ***During Oral Submissions***
    - your factum should act as a blueprint and reference that the Court can follow during your oral argument;
    - the factum should be carefully structured to coincide with your oral argument such that it minimizes the need for note taking by the judges who are then free to follow the logical flow of your argument.
- ***After Oral Submissions***
    - if you have done everything properly, the factum will act as a memory aid for judges writing reserved judgments;
    - ask yourself whether the court is likely to reserve judgment in your case.
    - Oftentimes, judges will lean heavily on a good factum when writing their decision.

No. 38: Openings – crashes, first page, Tim Horton's

55. Mr. Justice Estey used to say most plane crashes happen during take-off. Likewise your opening.

56. "The first page rule". The first page should say it all. Every factum should contain an overview statement (no longer than one paragraph) that tells the reader what the case is about, who did what to whom, what the issues are, and outlines our position on those issues.

57. Tell your story in human terms (my own personal technique is to close the office door, think I'm in a line-up at Tim Horton's, I've just ordered a medium double double, and cashier says "so what's your case about?").

No. 39: Opening paragraph — by definition you've only one chance to make a good first impression

58. Having the reader's attention is a necessary precondition for persuasion. A strong opening statement will grab the reader's immediate attention by:

- leading with strength. Hit the reader between the eyes with your strongest argument right away;
- express the message clearly and in a way that the reader will have no trouble understanding;
- structure the presentation within the framework of the reader's knowledge, beliefs and attitudes. People approach problems from a certain perspective, it is your job to make sure that your factum fits into that judge's perspective.

No. 40: It's OK to be brief

59. Most factums are too long. At rock bottom, most cases really aren't that complicated. Select the facts, events and legal arguments likely to control the outcome of the case (and leave the rest out).

60. Too many factums are puffed up with all sorts of extra arguments. Generally, this reflects the uncertainty of counsel as to which issue is likely to grab the Court's attention and the misguided belief that the client's interest is best served by presenting every conceivable argument, like you're a chef at a hotel putting on the biggest breakfast brunch possible to impress the locals. The put-everything-in tactic generates a large number of 'throwaway' arguments — and may tempt the Court that's what should be done with the rest of your factum.

No. 41: Your table of contents may be your opening – why headings are important

61. In all likelihood, your table of contents will be read first. The purpose of the table of contents is to help the reader navigate through the body of your submissions. Therefore, your headings and subheadings summarize your position; mirroring the logical flow of your argument.

62. Choose headings and subheadings (so they'll show up in the table of contents) that:

- make a positive statement
- develop a logical flow.

No. 42: Drafting points in issue – amongst the toughest things to do well

63. The ability to ferret out the real issues and organize the presentation of evidence and argument according to those issues is indispensable.

64. Some counsel operate under the mistaken assumption that everyone will agree on the principal issue of a case. In reality, the ability to define the issue and thereby control the agenda is invaluable since it's the way that the question is framed that may ultimately determine the ultimate judgment.

65. Don't start with the word "whether". If possible, do *not* ask a question.

66. Weave concrete facts into the way you write the issues, so (if at all possible) you tell the story in miniature.

67. Write the issues so the answer you want is highly suggested — in some cases directly suggested, in other cases it may be more strategic not to be so direct.

No. 43: Hold something back for oral argument? (This isn't Hollywood)

68. Put all your best arguments into the factum. In the past some counsel would save the best part (or a good part) for oral argument. Today written submissions are much more important than they once were and so this is no longer an advisable strategy (if it ever was). It's possible to overcome an inadequate factum during oral argument but it's an uphill battle. Why put yourself in that position if you don't have to?

69. Jon Fauld, Q.C.'s "Series of Dots Theory of Advocacy": in some cases it may be strategically better to hold something back in written argument **[explain verbally]**.

No. 44: When you're the respondent – play your own game

70. A factum should be a self-contained, comprehensive argument. It should review all of the essential facts, summarize the legal issues and present the arguments in a complete and methodical form. Cross-referencing over to the appellant's factum is a pain in the butt. Give the judge the ability to take your factum home and read it on his/her knee without having to jump around. Even if an authority is in the appellant's factum and you're referring to it, still put it in yours. If you absolutely must refer to something in the appellant's factum, include the full quotation.

No. 45: Conclusions – make sure there is one

71. Make sure there is a conclusion. Don't just end by outlining the relief requested; remind the court why relief is required in your case.

No. 46: Conclusions – relief requested

72. Occasionally, the relief requested can be tricky. Although there is a tendency to simply ask that the application or appeal be allowed or dismissed, it's obviously worthwhile to carefully consider all of the alternatives before deciding.

No. 47: Conclusions – Option #1; tell the court why

73. A good closing will encapsulate two or three compelling reasons for the court to adopt your position. In brief, make your conclusions clear and make your reasons explicit. What you are really trying to do is draft the judge's decision.

No. 48: Conclusions – Option #2; answer your own questions

74. Writing the conclusion is simple if the opening was well-drafted. A good advocate will close by answering the questions posed in the issues section. However, it isn't enough to simply give the answers, a good conclusion will also outline the reasoning that leads inevitably to the answer provided.

No. 49: Conclusions – Option #3; finish where you began

75. Pick up the theme of your opening. Restate it, refine it, re-develop it. It can build a logical solidity, can close the circle.

No. 50: And last, the power of simplicity

77. The speaker before Abraham Lincoln at Gettysburg on Nov. 18, 1863 was Congressman Edward Everett, who was also a senator, governor of Massachusetts, minister to Great Britain, secretary of state, and also president of Harvard. Some considered him a spell-binding orator – perhaps he did too,

because he spoke for two hours. Does anyone remember what he said, or even that he said anything at all? Few. The speaker after – Lincoln – spoke for less than 3 minutes. A total of 272 words. A single paragraph really. Here's that paragraph:

> "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But, in a larger sense, we can not dedicate -- we can not consecrate -- we can not hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth."

Lincoln was mistaken in saying "the world will little note, nor long remember what we say here." A century and a half later, we do note, we do remember – the power of simplicity.

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SELECTED BIBLIOGRAPHY[1]

Online Articles

Meyers, Bev, *Effective Legal Writing Techniques: Draft Clear & Persuasive Legal Documents*, July 3, 2024

Williams, Carolyn V., *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the NextGen Bar Exam,* February 15, 2024

9 Relevant Ideas for Writing Legal Articles for Your Law Firm [Updated – 2024], March 1, 2024 – Content Whale

Guberman, Ross, *Case Study: Fry v. Napoleon Community Schools—Five Ways to Write Like Justice Kagan*, June 3, 2023 – Brief Catch

Guberman, Ross, F*ive Ways to Write Like Warren Buffett*, June 3, 2023 – Brief Catch

Books

Aldisert, Ruggero J. *Winning on Appeal: Better Briefs and Oral Argument* (New York: Thomson Legal Publishing, 1992), c. 2, 8.

Berry, Edward. *Writing Reasons: A Handbook for Judges* (Emond Montgomery Press, 1998).

Butt, Peter & Richard Castle. *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge 2001)

Cromwell, Thomas. *Preparation of Factums* (Canada Law Book, 1996). Cromwell, Thomas. *Effective Written Advocacy* (Canada Law Book, 2008)

Greene Ian et al. *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Lorimer, 1998).

Hendricks, Mary. *Court Motions Handbook*, 2nd Ed. (Carswell, 1996).

Kolb, Harold. *A Writer`s Guide; The Essential Points* (Harcourt Brace, 1980). Meehan, Eugene *et al*. *Supreme Court of Canada Manual: Practice & Advocacy*

(Canada Law Book, 2015), Chapter 10.

Morton, James C. & Freeman, Michael E. *Written Advocacy* (Butterworths, 2001). Morton, James & Iacovelli, Michael. *Procedural Strategies for Litigators*

*(*Butterworths, 1998).

Mowat, Christine. *A Plain Language Handbook for Legal Writers* (Carswell, 1998). Rosenberg, Alvin B. & Huberman, Marvin J. *Appellate Advocacy* (Carswell 1996).

[1] Updated September 26, 2024

Ross-Larson, Bruce. *Go It Yourself: A Manual for Everyone Who Works With Words*

(New York: W.W. Norton & Co. Ltd., 1996).

Sopinka, John & Gelowitz, Mark. *The Conduct of an Appeal* (2nd ed. Butterworths, 2000).

Stark, Steven D. *Writing to Win* (Doubleday 2000).

Stuesser, Lee. *An Advocacy Primer* (4th Ed. Toronto: Carswell, 2015).

White, Robert B. & Hon. Joseph J. Stratton. *The Appeal Book* (Canada Law Book, 1999).

Zinsser, William. *On Writing Well*, 5th ed. (New York: HarperCollins, 1994).

Articles in Books, Journals and Conference Materials

Steinfeld, Mikel, "Use Dialogue, Not Quotes. Legal Writing That Compels Reading", *Arizona Attorney*, June 2024.

"Why legal writing is so awful", *The Economist*, May 31, 2023.

Strathy, Chief Justice George, "Advocacy in the Court of Appeal for Ontario", *The Litigator*, Dec. 2017, pp. 14-21.

Siegel, Martin, "How to Winnow Arguments on Appeal", *ABA Litigation*, Winter 2014.

Kennelly, Hon. Matthew, "Over-Arguing Your Case", *ABA Litigation*, Winter 2014.

Bastarache, Hon. Michel. "Supreme Advice to the Successful Litigator: Advocacy in the Supreme Court of Canada", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Nov. 7, 1998.

Binnie, Hon. Ian. "Random Thoughts About Charter Advocacy", County of Carleton Law Association, Civil Litigation Updated, Mont Tremblant, Québec, Nov. 7, 1998.

Conway, Thomas. "Getting Your Motion" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association- Ontario, 1994).

Cooney, Mark. "The Dating Game", *Trial*, Aug. 2005, p. 60.

Cooney, Mark. "Snap, Crackle, Pop" 2013, Vol. 92, No. 12 *Michigan Bar Journal* p. 40.

Doody, Peter. "Rule 20 Motions - A useful tool for the practical litigator" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Foy, Patrick. "The Factum in Civil Appeals – 1994". C.L.E.S. B.C., May 1994. Garner, Bryan. "The Deep Issue: A New Approach to Framing Legal Questions" in *The Scribes of Legal Writing*, Vol 5, 1994-95 3-4.

Garner, Bryan A. "Issue-framing: the upshot of it all". *Trial*, April 1997, p.74.

Garner, Bryan. "10 tips for better legal writing" *ABA Journal*, Oct. 1, 2014 http://www.abajournal.com/magazine/article/10_tips_for_better_legal_writing/.

Gilbert, Lyon. "Motions and Pre-trials - The Importance of Preparation" in *Winning in Small Claims Court* (Toronto: Canadian Bar Association-Ontario, 1994).

Ginsburg, Justice Ruth Bader. "Remarks on Appellate Advocacy," 50 S.C.L. *Rev.* 567, 567-68 (1999).

Koeltl, John G. "Brevity" (2003) 30 *Litigation (Journal of the A.B.A Section of Litigation*) 3.

Laskin, Hon. John I., "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums", *The Advocates' Society Journal*, Summer 1999. http://www.ontariocourts.on.ca/court_of_appeal/speeches/forget.htm

Laskin, Hon. John I., "What persuades (or, What's going on inside the judge's mind)", *The Advocates' Society Journal*, June 2004, page 3.

Lepofsky, M. David, "The unsung art of written advocacy: Strategies, tips, and a call for unorthodoxy", *The Advocates' Society Journal*, Summer 2004, page 10.

McElhaney, James, W. "Close with a Big Finish" (November 2002) *A.B.A. Journal 56*.

McElhaney, James, W. "Good words for writing" (May 2002) *A.B.A. Journal 50*. Meehan, Eugene. "Intervening in the S.C.C." (1994) 16 Advocates' Quarterly 137.

Murnyka, Daniella. "Give Me One Good Reason: The 'Principled Approach' in Canadian Judicial Opinion" in *Queen's Law Journal 2015*, p. 40 Queen's L.J. 609

Robinson, Sandy. "Injunctions" in *Avoiding Motion Sickness* (Canadian Bar Association-Ontario, 1995).

Rutherford, The Hon. Douglas. "Judging a Summary Judgment Motion: A View from the Bench" in *The Pragmatic Litigator: Practicing Efficiently and Effectively in Hard Times* (Toronto: Canadian Bar Association-Ontario, 1994).

Rutherford, The Hon. Douglas. "Just Write for Reading", C.C.L.A. New Lawyers & Articling Students Group, Ottawa (March 8, 2001).

Newspaper/Magazine Articles

Bailey, William. "Tie Your Case Together With A Good Theme" in *Trial*, (February 2001) 58-63

Bell, Judith. "Avoiding Motion Sickness - Effective Advocacy on Motions" in *Civil Litigation Updated* (Toronto: Canadian Bar Association-Ontario, 1995).

Binnie, The Hon. Ian. "A Survivor's Guide to Advocacy in the Supreme Court of Canada" in *The Advocates' Society Journal* (August 1999) 13-19.

Blair, The Hon. R.A. "Oral Advocacy before Superior Court Judges" in *The Advocates' Society Journal* (August 1999) 26-29.

Blue, Lisa & Hirschhorn, Robert. "Lessons From the Campaign Trail", *Trial*, July 2005 p. 26.

Bobb, Patricia. "Remember the no-no's of openings" in *Trial*, (April 1998) Stephen B. Bight. "Developing Themes in Closing Argument and Elsewhere:

Lessons from Capital Cases" in *Litigation*, (Fall 2000) 40-44.

Catzman, The Hon. Marvin. "The Wrong Stuff: How to Lose Appeals in the Court of Appeal" in *The Advocates Society Journal* (August 2000) 3-5. Cohen, David. "Writing Winning Briefs" in *Litigation,* (Summer 2000) 46.

Daisley, Brad. "'Focus' the Key to Winning Cases, Binnie tells Seminar" in *The Lawyers Weekly* (July 21, 2000) 6.

Drummond, The Hon. Mark A. "Hollywood Help for Opening Statements" in *Litigation News*, Vol. 25 (July 2000) 8.

Finlayson, The Hon. George D. "Appellate Advocacy in an Abbreviated Setting" in *The Advocates' Society Journal* (August 1999) 22-25.

Garner, Brian A. "Issue-Framing: The Upshot of it All" in *Trial* (April 1999) 74-76.

Hamlin, Sonya. "Who Are Today's Jurors and How Do You Reach Them?" in

Litigation (Spring 2001) 11.

Keenan, Don. "When a client is your child" in *Trial* (September 2002) 38-40. Kimble, Joseph. "A Modern Wish List for Legal Writing" in *Trial* (January 2000) 89-92.

MacInnes, Norman. "Laskin lists habits of effective appellate advocates" in *The Lawyers Weekly*, (March 1, 2002) 12.

Maxx, D.T. "How 2,988 Words Changed a Presidency", *Ottawa Citizen,* Oct.13, 2001, B4-6

McElhaney, James. "Balanced Persuasion: Let the Facts Characterize the Case, Without Adding Your Spin" in *American Bar Association Journal*, (March 2002) 60-61.

Nolan, Kenneth. "More Than Just Words" in *Litigation*, (Spring 2001) 66.

Perdue, Jim. "Starting Strong" in *Trial* (July 2002) 34-36.

Perlman, Peter. "Analogies in Summation" A.T.L.A. pamphlet, Summer 2000. Schneiderman, Simon. "Helping Pleadings Speak Visually" in *Canadian Lawyer* (March 2000) 35-37.

Stolley, Scott. "Vital Transitions" in *Writer`s Corner*, (May 2000) 61.

Stolley, Scott Patrick. "Aphorisms to Write By" in *For the Defence*, May 2000. Trognitz, Laura C. "Bench Talk" in *ABA Journal* (March 2000) 56-107.

Vigil, Jacob. "Good Counsel" in *Trial*, (February 2001)109.

Watts, Shelley. "Technology creates winning visual evidence" in *Trial* (September 2000) 68-73.

Vesper, Thomas J., Orr, Richard. "Making time palpable by using per diem arguments" in *Trial* (October 2002) 59.

Law Student/Articling Student/New Lawyer Articles

Beckman, Joseph, "Starting Your Law Career 101". *American Bar Association Litigation News,* Vol. 30, No. 5, July 2005.

Cleveland, Grover E. "Helping New Grads Be Better Lawyers Faster". *Law Practice Magazine*, 2013, Volume 39 Number 3.

Gruenke, Peggy "Tech Tips for Young Lawyers to Get and Stay Organized" In *GPS Solo*, Vol. 32 No. 3 May/June 2015.

Harvey, Ian "Step Up And Listen – 24 Things You Won't Have Learned In Law School". *Canadian Lawyer Magazine,* Oct. 2015

Hernandez, Andres "5 Tools For Attorneys On The Go". In *Arizona Attorney*, *Well Oiled Office Machine*. October 2015.

Kennedy, Dennis "Smooth Sailing". *Canadian Bar Association*, 2006.

Kramer, Jeffrey "Kramer's 51 Tips for the Successful Practice of Law". The *Advocates' Society Journal*, June 2002.

Pfeifer Jr., William L. "Practical Advice for New Law School Graduates". In *GPS Solo*, May/June 2015.

Maurer, Matt "Articling Interview Advice From an Interviewer". *Slaw* August 9, 2015 (Posted in: Education & Training Education & Training: Law Schools).

Reno, Janet "Lawyer as Salesman". In *Arizona Attorney*, *Well Oiled Office Machine*, October 2015.

"Student to Lawyer – 20 Tips For A Successful Transition". *LAWPRO Magazine, Student Issue #1, 2012*.

Van Dyke, Susan "The Ten Most Important Tips for Articling Students and New Lawyers", in *SLAW*, Aug. 2013.

TAB 2

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for
the Province of Ontario)

BETWEEN:

ACME BUILDING AND CONSTRUCTION LIMITED

APPLICANT
(Plaintiff)

-and-

THE CORPORATION OF THE TOWN OF NEWCASTLE

RESPONDENT
(Defendant)

MEMORANDUM OF THE RESPONDENT ON APPLICATION FOR LEAVE TO APPEAL

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TAB 3A

(EXTRACT)

FIRST DRAFT

STATEMENT OF FACTS

1. On Thursday, July 1, 1999, the accused, Donna Cora Lawrence, was convicted following trial before a Supreme Court Judge sitting with a Jury of two charges of criminal negligence causing death/bodily harm and two charges of impaired causing death/bodily harm.

2. On May 28, 1997, the Appellant, Donna Cora Lawrence, was involved in a car collision with a motor vehicle driven by Barbara Marie MacRae. The passenger in the MacRae vehicle, Marjorie MacRae, subsequently died of the injuries she suffered in the accident. Barbara MacRae also suffered from injuries amounting to bodily harm. [See Agreed Statement of Facts, Exhibit No. 5, Tab 4, p. 319, lines 2-18; p. 320]

3. The trial commenced in Baddeck, Nova Scotia on June 12, 1999. Crown witness Scott MacLean testified that he came upon a car that was parked across the yellow line just past the Englishtown turnoff and that he had to come to a complete stop [Tab 4, p. 332, Q. 10]. The vehicle blocking his course backed up and Mr. MacLean was able to pass. He observed the vehicle, later identified as the Appellant's vehicle, following behind him and that it was weaving between the yellow line and the white line in its own lane [Tab 4, p. 334, Q. 16; p. 349, Qs. 62-63]. He further testified that it appeared as if the driver was lost and was consulting a road map [Tab 4, p. 350, Qs. 69-70].

4. Crown witness Frank MacRae testified that he was driving behind the vehicle driven by his sister-in-law, Barbara MacRae, and that both vehicles were travelling at approximately 80-90 kilometers an hour [Tab 4, p. 359, Q. 37]. Both the witness's car and Barbara MacRae's car were travelling in the same lane. Just before the St. Ann's turnoff, Mr. MacRae noticed a car coming into their lane [Tab 4, p. 359, Q. 38-40]. Mr. MacRae testified that he had a good view of the oncoming vehicle, that he saw Barbara MacRae swerve from her lane into the opposite lane and that he then noticed that the oncoming vehicle did the exact same thing, returned to her own lane, and the vehicles collided [Tab 4, p. 365, Q. 50, p. 373, Qs. 100-103; p. 374, Qs. 104-108; p. 375, Q. 109; p. 376, Q. 112; p. 377, Qs. 113-116]. He testified that he checked the Lawrence vehicle, that the Appellant did not appear to be injured, and that he did not smell any alcohol emanating from her [Tab 4, p. 378, Qs. 120-123].

5. Barbara MacRae testified that she had no recollection of the accident [Tab 4, p. 385, Q. 17-18]. However, neither could she explain the full bottle of rum in her vehicle [Tab 4, p. 389, Q. 38]. The rum had not been seized by Officer Towle as an exhibit [Tab 4, p. 848, Q. 209; p. 849-850, Qs. 216-222]. Ms. MacRae also testified that the vehicle she had been driving the day of the accident was uninsured [Tab 4, p. 392, Qs. 61-62]. She confirmed that she had not been charged with operating a vehicle without insurance, nor had she been charged with operating a vehicle left of the centre line [Tab 4, p. 395, Qs. 82-86].

(EXTRACT)

MIDDLE DRAFT

PART I – STATEMENT OF FACTS

(a) Test Case

1. This test case is about juror bias and whether the presumption of juror impartiality is rebuttable at law under the current test for determining judicial bias. It is also about lost evidence and the right to counsel; and whether an accused person can be convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of facts are as follows:

- **On Wednesday, May 28, 1997, Donna Lawrence, the Applicant herein, a 47 year-old working mother of two arose at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Department and Tourism Department for the Province of Nova Scotia she was scheduled to give a presentation, at 3:30 p.m., on economic development to more than 100 women at the Gaelic College, St. Ann's Bay, Cape Breton, Nova Scotia. Mrs. Lawrence gave herself at least two hours to make the trip as she had not been to St. Ann's before. Her presentation along with the networking session and dinner to follow meant that she would not return home until 10 p.m. that evening.**

  Ref.: Trial Transcript, pp. 1114-1118, paras 42-62 [Tab E.26]

- **As part of her employment, Mrs. Lawrence was enrolled in a correspondence course with the University of Waterloo and her final paper was due the following day. She worked on her paper at home throughout the morning as her office computer was not functioning. Mrs. Lawrence made several calls to her office to collect messages. She left home around 12:30 p.m. and drove to her office to pick up material for the presentation and proceeded on to the Gaelic College at about**

TAB 3C

(EXTRACT)

S.C.C. No.

FINAL DRAFT

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

DONNA LAWRENCE

Applicant
(Defendant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Crown)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended

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C. Notice of Motion for Stay of Proceedings re: Jury Bias

D. Notice of Motion in the Matter of: An Application for a Stay of Proceedings pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* and Exclusion of Evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms* re: Lost Evidence and Breach of the Right to Counsel (Authorities not included)

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(a) Test Case: Effect of Police Losing Evidence, Right to Counsel, Juror Bias and Duplication of Charges
(b) Brief Chronology of Facts

Part II: Points in Issue

(a) Where Juror Bias at the Very Beginning of the Trial Makes the Trial Unfair
(b) Jurisdiction of the Superior Court
(c) Key Evidence Lost
(d) Breach of Right to Counsel is Never of "No Effect"
(e) Duplicity/Multiplicity of Charges

Part III: Argument

(a) Where Juror Bias at the Very Beginning Makes the Trial Unfair
(b) Jurisdiction of the Superior Courts
(c) Key Evidence Lost
(d) Breach of Right to Counsel is Never of "No Effect"
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G. *R. v. Sheratt*, [1991] 1 S.C.R. 509

H. *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

PART I - STATEMENT OF FACTS

(a) Test Case: Effect of Police Losing Evidence, Right to Counsel, Juror Bias and Duplicitous/Duplicative Charges

1. This test case is about:

- key evidence lost by police
- the right to counsel
- juror bias
- whether a person can be charged and convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of the facts are as follows:

- On Wednesday, May 28, 1997, Donna Lawrence, a 47 year-old married working mother of two woke at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Development Department for the Province of Nova Scotia she was to give a presentation, at 3:30 p.m. that day, on economic development to 100 women at the Gaelic College, St. Ann's Bay, Cape Breton. Donna gave herself at least 2 $^{1}/_{2}$ hours to make the trip as she had never been to St. Ann's before.

  Ref.: Trial Transcript, pp. 1114 -1118, paras 42-62 [Tab 2A]

- Donna is very good at her job, very seldom has a drink, and is highly thought of and respected by supervisors, colleagues and others, as noted below.

- Donna's supervisor in the Nova Scotia Department of Economic Development is Mr. Ron Kennedy, and of the 14 years he knew Donna was her supervisor for the last 9. He says he "is not aware of any alcohol use by [Donna], either during or after work hours, other than on one occasion in fourteen years when she had one glass of wine with a meal."

  Ref.: Presentence Report, p. 4 [Tab 2B]

5. As to difficulty walking/staggering:

- Three days after the accident Donna went to emergency because she still had difficulty walking. Dr. MacLean said she had a painful foot, sore knees and a bruise on her head. X-rays confirmed that Donna's foot was broken in two places and that the particular nature of the breaks would have made walking difficult. The doctor also testified that Donna, still three days later, had a positive neurological sign called the Dabinsky sign indicating an injury to the central nervous system - in layperson's terms, that Donna had suffered a concussion. Dr. MacLean also testified that the doctor who saw her right after the accident may not have been able to diagnose the concussion because that diagnosis is often formed after the fact.

Ref.: Trial Transcript, p. 933, paras. 7-8, p. 934, paras. 11-12, p. 935, paras. 19-21; p. 941, para. 49, p. 948, paras. 92-94 [Tab 2A]

6. In summary:

Who Testified Confused/Disoriented	**Who Testified Difficulty Walking**	**Who Testified No Smell of Alcohol**	**Who Testified Smell of Alcohol**
Osborne Burke	Osborne Burke	Osborne Burke	-
-	-	Ronald Bonnar	Austin MacKenzie
Shane MacFarlane	-	Janet MacCuspic	Shane MacFarlane
Roland Genge	Roland Genge	Frank MacRae	Roland Genge
Duncan MacLean	-	-	Duncan MacLean
-	-	-	-
-	Lynn Dunlop	-	Travis MacNeil
-	Sally MacDonald	-	Lynn Dunlop
-	-	-	Sally MacDonald
Michael Towle	Michael Towle	-	Patricia Nicholson
-	Travis MacNeil	Travis MacNeil (initially)	Michael Towle

7. Donna took the stand in her own defence, and testified:

- She drank no alcohol that day.
- She was not impaired.

Ref.: Trial Transcript, pp. 1130-31, para 125; p.1131, paras 126-127 [Tab 2A]

8. Donna was convicted on all four counts:

- Criminal negligence causing death.
- Causing death in the operation of a motor vehicle.
- Criminal negligence causing bodily harm.
- Causing bodily harm in the operation of a motor vehicle.

9. The day after the trial, Donna's lawyer happened to be in Baddeck near where the trial was, and was approached by a man he happened to know who'd been told what one juror said to another juror in court before the trial started. As a result of that conversation, Donna's lawyer hired an investigator to take statements from persons concerned. Those statements - involving Juror No. 12 - were used as a basis for the Donna's Application under s. 24(1) of the *Charter*. In that Application, Donna's lawyer raised the issue of juror bias and its impact on the *Lawrence* trial.

Ref.: Notice of Motion for Stay of Proceedings re: Jury Bias [Tab 2C];

Trial Transcript at pp. 1374-1382 [Tab 2A]

10. What happened was that before the trial, Juror No.12 told another prospective juror, while both were sitting in the courtroom waiting for the judge to enter: "**I don't know why they would be having a trial over this**, the woman was drunk and on the wrong side of the road". The Court of Appeal said this comment did not give rise to any reasonable apprehension of bias.

Ref.: Reasons of Court of Appeal, at par.97-131 [Tab 3B]

11. Donna said she "feels awful and wishes she had died rather than the victim".

Ref.: Presentence Report, p. 7 [Tab 2B]

12. Donna now lives at home with her (retired) husband. They live on Canada Pension ($800 her, $465 him; their total family income). Their two boys attend local universities (Chris 3rd year, Acadia; Jessie 2nd year U. N. B.). They have a

house worth $120,000, and debts of $125,000). Donna now sees a psychiatrist for depression; and long term disability payments of 70% of her previous income from a previous accident have been cancelled because of this accident. Her husband says "He loves his wife and family very much and the complete family is very close."

Ref.: Presentence Report, pp. 3-5, 7 [Tab 2B]

PART II – POINTS IN ISSUE

13. This case raises the following issues of public importance that warrant the consideration of and guidance of this Honourable Court:

(a) Where Juror Bias at the Very Beginning of the Trial Makes the Trial Unfair

- Is the test for partiality applicable to cases where it is argued that trial fairness has been compromised by juror bias at the outset of the trial?

(b) Jurisdiction of the Superior Court

- Does the judge presiding over an accused's trial before a judge sitting with a jury have the jurisdiction to declare a mistrial, on the basis of juror bias, once the jury has rendered a guilty verdict but before the judge has given sentence?

(c) Key Evidence Lost

- Where the evidence (here mouthwash containing alcohol) is seized by police then lost by police (absolutely critical evidence because the officer at the scene used the apparent smell of alcohol to both arrest and charge) such evidence is pertinent and crucial.

(d) Breach of Right to Counsel is Never of "No Affect"

- A breach of a person's right to counsel at the time of arrest on the basis that the person did not know the full extent of her legal jeopardy, is never of "no affect" as claimed by the Court of Appeal.

(e) Duplicity/Multiplicity of Charges

- Where on the basis of one motor vehicle accident the indictment charges two death-causing charges to one individual (criminal negligence causing death and causing death in the operation of a motor vehicle), and two bodily-harm causing charges to another individual (criminal negligence causing bodily harm, causing bodily harm in the operation of a motor vehicle), is this duplicitous/multiplicitous in that one person has in law been charged (and here, convicted) of killing one person twice, and causing bodily harm to another one person twice?

PART III – STATEMENT OF ARGUMENT

(a) WHERE JUROR BIAS AT THE VERY BEGINNING MAKES THE TRIAL UNFAIR

14. Is the test for partiality applicable to cases where it is argued that fairness has been compromised by juror bias at the outset of the trial?

TAB 4

S.C.C. File No.:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

CLAUDE JOHN and ROSE JOHN

Applicants
(Plaintiffs)

- and-

SHAWN FLYNN, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, EATON YALE LTD., ROBERT BLAKE and WALLACEBURG GLASSWORKERS INC.

Respondents
(Defendants)

APPLICATION FOR LEAVE TO APPEAL
Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended
VOLUME ONE Pages 1-200

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PART I – STATEMENT OF FACTS

(a) TEST CASE: Employer liability for known conduct of employee on premises, causing harm to third party off premises.

1. This test case is about an employer's liability for the actions of its employee that injure a third party, where the employer controls the circumstances leading to the harm, and the harm occurs just after the employee leaves work.

(b) Brief Chronology of Facts

2. A brief chronology of the facts is as follows:

The Company's Control Over The Workplace and Employee

3. Eaton Yale ("the company") operates a leaf spring manufacturing plant in Wallaceburg, Ontario. It is a large, heavy manufacturing facility that makes leaf springs for trucks. It is a multi-national company.

   Ref.: Court of Appeal below, para 3, per Finlayson, J.A. [Tab 4E]

4. Sean Flynn works there since 1984. His job is in the forge, where he operates and sets up the machinery that forms large, heated metal sheets into shapes. Some of the machines are two and three times the height of the operator. His job has multiple steps, some of which are:

   - "Check set up by operating eye machine and punch press, check for proper eye closing, eye size that eyes are parallel…Read detailed prints showing eye size and type centre bolt hole position material necessary."
   - "Training: Know lock out procedure [turning off the machine and then locking]…Identify safety hazards…SPC locking and charts."
   - "Potential Risk: loss of finger or hand…Slips and falling on walking beam."

   Ref.: Court of Appeal below, para 4, per Finlayson, J.A. [Tab 4E]
   Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 (excerpts only – index) [Tab 2B]

5. The company imposes safety procedures on its employees, to prevent injuries in the moving equipment and machinery, including

   "safety glasses, safety shoes, ear plugs, long sleeved gloves, shop coats or overalls. Lockout procedures, is a seven-step process, shuts the machine down during repair, setup and like activity."

   Ref.: Trial Exhibit 91 [Tab 2B]
   Trial Exhibit 3 [Tab 2B]

6. The plant is noisy, hot and covers a number of acres. It is divided into sections, each supervised by a foreman. A general foreman is in charge of the entire plant floor operation.

   Ref.: Trial Transcript, p. 568, lines 18-20 [Tab 2A]

7. The company employs 500-600 people, and operates three shifts of 150 employees each, to maximize production. Employees "swing" from – days (7 am to 3 pm) – to afternoons (3 pm to 11 pm) – to nights (11 pm to 7 am) on two-week rotations. Breaks over the night shift are at 1 am, 3 am and 5 am. The company lets employees take their breaks in their cars in the company lot.

   Ref.: Trial Transcript, p. 560, lines 18-24; p. 43, lines 15-20 [Tab 2A]
   Court of Appeal below, para 5, per Finlayson, J.A. [Tab 4E]

8. Flynn works in an area known as the "backend" of the plant. The backend area gives on to the company lot. The Trial Judge found that the "company had absolute control over that work place and the company parking lot."

   Ref.: Trial Transcript, p. 159, lines 16-31; p. 160, lines 1-31; p. 369 lines 13-30 [Tab 2A]
   Trial Exhibit 16 [Tab 2B]
   Decision on Application, para 7, per Donnelly, J. [Tab 4B]

9. The company lot runs the entire length of the plant. At the rear of the lot, opposite the building, it abuts a farm, leased by an employee of the company, Al Bishop. The back of the company lot is "virtually in darkness prior to the installation of those lights" according to the maintenance supervisor, Doug MacLennan.

   Ref.: Trial exhibit 16 [Tab 2B]
   Trial Transcript, p. 170, lines 24-26; p. 819, lines 2-9 [Tab 2A]

10. Drinking in the company lot has gone on since at least 1978, when the company posts a notice to its employees that read:

    > "Apparently, some employees are drinking alcoholic beverages in the parking lot during their lunch and rest breaks – this must cease immediately".

    It did not stop. The company did not stop it. Because they did not, the applicant cannot walk today.

    Ref.: Trial Exhibit 11 [Tab 2B]
    Charge to the Jury by Donnelly J. at p. 863 [Tab 4A]
    Decision on Application, paras 2 and 4, per Donnelly J. [Tab 4B]

11. The company lot drinking is described by forge employee, Mike Paolone:

> "I'd say close to 30 to 40 percent of the work force at the backend would be probably participating in drinking either before work or during work…Well it was pretty…I'd say rampant…"
>
> *Ref.*: Trial Transcript, p. 159, lines 20-31 [Tab 2A]

12. General foreman tells the company about the drinking:

    - Ivan Bilodeau, retired general foreman, speaking of 1980:
      "When I told him [Personnel Manager] about the problem he instructed me and Mr. Bedell to go outside and check this problem out; and he says: Bring me back some evidence. [So what did you do]. I went and got a box…a cardboard box, two feet by a foot and a half by two feet deep…towards the back of the parking lot…I filled the box right up…(with) whisky bottles, beer bottles, gin bottles, rum bottles…just plain alcohol bottles."
    - Mr. Bilodeau concludes that employees must have had a drinking problem: "Well they must have…like, you know…what are all these bottles doing there? Why else would the bottles be there?"
    - Mr. Bilodeau proposes solutions to the problem, like " restricting access to the lot, fencing the lot, increased security, checking lunch pails"

    There is no company response. No restricted access, no fencing, no increased security, no checking lunch pails.

    - Bev Howard, retired general foreman, finds alcohol bottles in the company lot:
      "Well I've seen them myself when I'm out".
    - Mr. Howard reported this to the Personnel Manager.

    No company response.

    Ref.: Trial Transcript, p. 73, lines 13-30, p.74, lines 1-14; p.80 lines 14-29; p.81, lines 1-10; p. 85, lines 14-30; p.86, lines 1-23 p.128, lines 7-10 [Tab 2A]

13. Security personnel hired by the company reported finding evidence of drinking in the company lot. No company response.

14. The current personnel manager, Vincent Vlamink, says this about Bilodeau's concerns and proposed solutions:

    > "If I had a member of management coming forward saying: I think there's incidence of drinking going on…? (yes?) And here are some solutions that I have to address those? That would be something that would have to be taken seriously."

    Even then, no company response.

    Ref.: Trial Transcript, p. 777, lines 17-30, p. 778, lines 1-19 [Tab 2A]

15. Al Bishop, the employee of the company who farms the adjacent lot for 20 years has to clear a case of twenty-four beer bottles and other liquor bottles from the field each spring and fall, when he cultivates his land to avoid fouling his equipment.

    Ref.: Trial Transcript, p. 169, lines 1-31 [Tab 2A]

16. The company rarely patrols the company lot. Security is not responsible to supervise company employees in the company lot or elsewhere. Because the company has not lit its lot, the lot's in darkness, and as a result in darkness along the fence adjacent to the farmer's field. Employees' vehicles at the back of the company lot are not supervised, nor visible.

    Ref.: Trial Transcript, p. 764-8 and 819, lines 2-13 [Tab 2A]

17. The company posts notices, or puts notes in pay envelopes from time to time about not drinking on the premises. Flynn, his co-workers Paolone, and Robert Blake, knew it wasn't allowed.

    Ref.: Trial Exhibit 16 [Tab 2B]
    Trial Transcripts, p.145, lines 8-13; p.164, lines 8-31;
    p.165, lines 1-19; p.427, lines 10-18; p.429, lines 30-430, line 4 [Tab 2A]

18. Flynn, Paolone and Blake said that's why they drink in the back of the company lot, so as not to get caught.

    Ref.: Trial Testimony, p. 162, lines 1-10; p. 166, lines 23-30;
    p. 167, lines 1-9; p. 145, lines 19-28; p. 433, line 7; p. 434
    line 8 [Tab 2A]

19. Ron Beckett is a foreman who supervises Flynn from time to time. He says the company makes it clear that foremen are evaluated according to their production numbers and those numbers are very important. The company makes "it tough on him" to make a decision to send an employee home, even if drinking, since that could reduce production, and reduced production could affect his evaluation and pay raises.

    Ref.: Trial Transcript, p. 595, lines 5-30; p. 596, lines 1-31 [Tab 2A]

20. Beckett agrees

    > "… if Mr. Flynn had been drinking that night, with all that stuff on him [safety glasses, gloves, boots] and all that noise around him the only way you'd have been able to have a chance to pick up on whether he was impaired is if he was staggering".

    Ref.: Trial Transcript, p. 597, lines 12-30 [Tab 2A]

21. The company participates in an Employee Assistance Plan (EAP) directed at and designed to deal with drinking by employees on and off the premises, and having two goals:

    - increase productivity lost by absenteeism due to drinking, and
    - offer assistance to the employee to stop.

    Absenteeism is a "red-flag" of alcohol abuse by an employee.

    Ref.: Trial Exhibit 2 [Tab 2B]

22. Part of the EAP is a "Last Chance Contract" that outlines specific return-to-work requirements for an employee who has been off work because of alcohol abuse. A positive prognosis from a dry-out centre is needed for the employee to go back onto the line and operate machinery.

    Ref.: Trial Exhibit 2 [Tab 2B]

23. The Learned Trial Judge states the company "had a claimed policy of zero tolerance for alcohol in the workplace. It had a policy of intervention to supervise known alcoholics. It gave mouth honour to those policies by sporadic postings on notice boards. In relation to Flynn both policies were disregarded."

    Ref.: Decision on Application, para 4, per Donnelly, J. [Tab 4B]

24. The company toxicologist, Dr. Kalant, says availability of alcohol in the company parking lot, combined with lax enforcement, could actually encourage workplace drinking by an alcoholic.

    Ref.: Trial Transcript, p. 687-90 [Tab 2A]

25. Company policy requires an employee who is caught drunk to be sent home in a taxi, or with a union representative, other than in his own car. Vlamink, the personnel manager says,

    > "Oh, the reason we send them home in a cab is, if we deem them not to be fit for work, we also would take that step to make sure that they get home safely."
    > "They're a safety hazard, possibly to themselves or to other employees".

    Ref.: Trial Transcript, p. 742, lines 23-31; p. 743, lines 1-13 [Tab 2A]

26. Beckett, the foreman agrees the system of leaving the employee's car in the parking lot is a "safe system".

Ref.: Trial Transcript, p. 589, lines 5-16 [Tab 2A]

27. Howard, the general foreman said employees are not sent home in their own cars because:

> "… if anything happened to him on the way home you could be in a lot of trouble [Anything like?] An accident."

Ref.: Trial Transcript, p. 140, lines 2-11 [Tab 2A]

28. None of this happened in Flynn's case, if it did, Claude John wouldn't be in a wheelchair now.

Sean Flynn's History At The Company

29. Flynn lives 20 to 25 minutes from the factory.

Ref.: Trial Transcript, p. 878, line 25; p. 396, lines 6-8 [Tab 2A]
Decision on Application, para 9, per Donnelly, J. [Tab 4B]

30. He has a long-standing pattern of absenteeism and coming in to work late. His absentee record is described as "not very good" by the general foreman, Howard.

Ref.: Trial Exhibit 1 [Tab 2B]
Trial Transcript, p. 131, lines 19-21, 132-143 [Tab 2A]

31. The company knows Flynn is an alcoholic because

- Flynn tells the personnel manager;
- Flynn has long-standing absenteeism problems;
- Flynn participates, with the support of the company, in a dry-out program for 90 days starting on May 15, 1990;
- The dry out program's prognosis given to the company on August 22, 1990 (i.e. three months later) was that **"His chances for continued sobriety are poor"**;
- He does not "graduate" from the dry-out program. He would "have to attend Chatham Brentwood meetings at least three times per week for three months…" in order to graduate. He does not.
- Flynn, the company and a union representative sign a "Last Chance" contract. It has alcohol abstinence requirements;
- The company takes no steps to ensure Flynn doesn't drink on the job or in the company lot after he gets back on the line.

Ref.: Trial Exhibit 1 [Tab 2B]; Trial Transcript, p. 377, lines 23-378, 13;
p. 379, lines 12-26; p. 380, lines 10-382, 19; p.388, lines 25-386, 8;
p. 390, lines 5-7 [Tab 2A]; Trial Exhibit 19 [Tab 2A]

32. After attending the dry-out program so he can return to work (August, 1990), Flynn's absenteeism pattern resumes. The company writes him up twice, the second

time in September of 1992. A written record of absentee problems is preceded by a number of informal and formal verbal "counselling" sessions.

Ref.: Trial Exhibit 1 [Tab 2A]
Trial Transcript, p. 713, lines 28-31; p. 714, lines 1-6 [Tab 2A]
Trial Exhibit 19 [Tab 2B]

33. The September 1992 counselling report states there is room for "100% improvement" and that "if he needed it, there was an Employee Assistance Program available." Flynn does not access it. The company takes no steps to monitor Flynn.

Ref.: Trial Exhibit 2 [Tab 2B]
Decision on Application, para 4, per Donnelly, J. [Tab 4B]

Claude John

34. Claude John is a married man with two children. He and his wife Rose have an 11 year old daughter, Stephanie, and a 6 year old son, Michael. Claude is a former heavy-equipment operator who is unable to work in that capacity since an industrial accident. He continues to do contracting locally and is a wood lot operator and hunting and fishing guide around their home on Walpole Island.

35. In 1992, Rose John is taking a university degree at the University of Windsor as a full-time student, while working full-time in Windsor at the Federal Business Development Bank, over an hour from their home. This leaves Claude with the primary responsibility of caring for their two children, taking them to school, activities, preparing meals, laundry and cleaning. They drive a blue Econoline family van.

Ref.: Trial Transcript, p. 10, line 18 [Tab 2A]

The Last Shift Before The Crash

36. Flynn works the night shift on December 8-9, 1992. By his own evidence, he drives home, sleeps briefly and then drives back to Wallaceburg where he picks up a high school transcript, attends a dental appointment, and drops off the transcript off at the company. He starts drinking at 2:30 that afternoon. He drinks

- five 8-oz beers at the Glassworkers Union Hall which is across the street from the factory;
- three to four 2-oz shots of vodka/Clamato at a friend's home;
- one bottle of beer at home;
- four to six 8-oz beers, ordering two at a time, in the 45 minutes immediately before he reports for work, again at the Union Hall, after parking his pickup truck in the company lot.

$976,046.36. Collateral benefits from the no-fault policy total $355,993.68. The Learned Trial Judge gives equal benefit to both the company and Flynn of a deduction for those benefits from the damages awarded.

Ref.: Reasons of Judgment of Donnelly, J. dated March 16, 2000 [Tab 4C]

56. After hearing literally no evidence, the Court of Appeal reverses the jury, saying "There is no duty of care on the part of [the company] to members of the driving public…and if there was such a duty, it did not extend beyond the point where Flynn left the company premises…any suggestions as to how [the company] could have controlled Flynn's activities beyond that point are hopelessly speculative".

Ref.: Court of Appeal below, para 50, per Finlayson, J.A. [Tab 4E]

PART II – POINTS IN ISSUE

57. This case raises three issues of public importance that warrant the consideration of and guidance of the Honourable Court;

Issue No.1: Is there a general duty of care on employers because of what happens at work?

58. Is there a general duty of care owed by employers to third parties where employers are negligent because of what happened at work, and the work negligence damages someone else within 15 minutes of the end of the shift?

Issue No. 2: Is there a special duty of care because of special workplace knowledge?

59. Is there a special or new duty of care on employers where employers have specific workplace knowledge of problem employees' negative behaviour in the workplace, then do nothing about it?

Issue No. 3: Is a tortfeasor who does not contribute to the collateral benefit scheme entitled to deduct those benefits from damages awarded to the plaintiff?

60. Where one of two tortfeasors does not participate in a provincial no-fault insurance scheme, and the tort victim is given some immediate medical and other care from the

Response to a Leave to Appeal, **First Draft** of Facts
section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

1. The Orders of the Honourable Mr. Justice V.W.M. Smith dated May 25, 1993 under appeal (the "1993 Order") were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Applicant's Appeal was unanimously dismissed by the Honourable Madam Justice C.A. Fraser, Chief Justice of Alberta, Mr. Justice R.P. Kerans and Madam Justice M.J. Trussler (ad hoc) of the Alberta Court of Appeal following two hours of oral argument by the Applicant and a detailed review of the evidence and authorities on the issues.

2. Following the granting of the Decree Nisi on March 10, 1983, the chronology of events is as follows:

a)	January 31, 1986	-	Applicant's Motion to vary support Dismissed without costs August 8, 1986
b)	November 10, 1986	-	Applicant's Motion to vary support Abandoned by Applicant
c)	April 7, 1988	-	Applicant's Motion to vary support Substantially dismissed without costs May 17, 1988
d)	September 8, 1989	-	Parties consent to vary custody and support
e)	December 11, 1991	-	Respondent's Motion for child support Order of the Honourable Mr. Justice D.W. Perras consented to March 23, 1992
g)	February 8, 1993	-	Applicant's Motion to cancel child support and arrears Dismissed with costs May 25, 1993

1395Response to a Leave to Appeal, **Final Draft** of Facts section (------ v. ------, S.C.C. file no. 23937)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT

PART I: STATEMENT OF FACTS

A. Present circumstances of the parties.

1. The Applicant is a Corporal with the R.C.M.P. earning a gross annual income of $53,000.00. The Respondent is a letter carrier with Canada Post earning a gross annual income of approximately $35,000.00. Corporal ------ was required to pay $200.00 per month child support for the one remaining child of the marriage, Raymond, under an Order granted March 23, 1992. In February 1993, Corporal ------ applied to cancel both ongoing child support and arrears.

(Applicant Motion Book, Tab 2, pp. 201-202)

B. Corporal ------'s motion to cancel child support and arrears dismissed.

2. The Orders of the Honourable Mr. Justice V.W.M Smith dated May 25, 1993 under appeal (the "1993 Orders") dismissed Corporal ------'s motion to cancel ongoing child support and arrears. Mr. Justice Smith granted Ms. Banso ------'s cross-application to increase child support for Raymond to $600.00 per month, increasing to $750.00 per month upon the termination of a monthly Canada Pension Plan Disability Benefit of approximately $150.00 now being received by Raymond as Corporal ------'s dependant.

(Applicant Motion Book, Tab 2, pp. 202-203)

C. Corporal ------'s Appeal unanimously dismissed.

3. The 1993 Orders were granted after a lengthy chambers application during which the evidence and authorities were carefully reviewed by the learned Chambers Justice. The Orders of Mr. Justice Smith were upheld by a unanimous Court of Appeal, and Corporal ------'s Appeal was unanimously dismissed by the Honourable Madam Justice

TAB 6

Court File No.:

IN THE SUPREME COURT OF CANADA

(On appeal from the Supreme Court of Newfoundland and Labrador, Court of Appeal)

BETWEEN:

ARCHEAN RESOURCES LTD.

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND AND LABRADOR, AS REPRESENTED BY THE HONOURABLE THE MINISTER OF FINANCE FOR THE PROVINCE OF NEWFOUNDLAND AND LABRADOR AND HER MAJESTY'S ATTORNEY GENERAL FOR NEWFOUNDLAND AND LABRADOR

Respondents
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(Archean Resources Ltd., Applicant)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26, as amended)
VOLUME I – Pages 1 - 220

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18. Confusion as how statutes should be interpreted is evident in recent Court of Appeal cases that emanate from different provinces - no consensus exists as to whether the purposive or pragmatic methodology of statutory interpretation should be favoured or whether the plain meaning approach should be applied.

Purposive or Pragmatic Approach	**Plain Meaning Approach**
Approach: • the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament **Court of Appeal below:** • the Court favoured the purposive or pragmatic methodology of statutory interpretation	**Approach:** • statutory language is given its plain ordinary grammatical meaning -in the absence of ambiguity resort to other interpretive devices or principles, or to extrinsic aids, is unnecessary and inappropriate **Court of Appeal of Newfoundland and New Brunswick:** • the Court of Appeal of Newfoundland in *R. v. Wonderland Gifts Ltd.* and the New Brunswick Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)* applied the plain meaning approach. Ref: *R. v. Wonderland Gifts Ltd.* (1996), 140 Nfld. & P.E.I.R. 220 (Nfld. C.A.), para. 28 [TAB 7S] *Parlee v. New Brunswick (Workers' Compensation Board)* (1991), 82 D.L.R (4^{th}) 764 (N.B.C.A.), para. 10 [TAB 7P]

19. The inconsistency in interpretative approach has extended to appellate tax cases. The approach of the Court of Appeal below may be contrasted with the plain meaning approach to the interpretation of a logging tax statute adopted and applied by the British Columbia Court of Appeal in *Slocan Forest Products Ltd. v. British Columbia*.

Reference: *Slocan Forest Products Ltd. v. British Columbia* (2002), 142 B.C.C.A. 315 (C.A.) [TAB 7Y]

(ii) Divergent Interpretation Approaches in this Honourable Court

20. Divergences of views as to the appropriate interpretative approach to statutory interpretation may be found in the decisions of this Honourable Court. In her concurring judgment in *2747-3174 Québec Inc. v. Québec (Regie des permis d'alcool)*, L'Heureux-Dubé J. suggested that this Honourable Court was "wavering at random" between the purposive or pragmatic approach and the plain meaning approach.

Reference: *2747-3147 Québec Inc. v. Québec (Regie des permis d'alcool)*, [1996] S.C.R. 919 at para. 170 [TAB 7A]
Will-Kare Paving & Contracting Ltd. v. R., [2001] 1 S.C.R. 915, per Binnie J. (dissenting) [TAB 7DD]

Purposive or Pragmatic Approach	**Plain Meaning Approach**
• in *Stubart Investments Ltd. v. The Queen* and *Bell Expressvu Limited Partnership v. Rex et al* this Honourable Court cited from *Driedger on Construction of Statutes* : Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Ref: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 at 578 [TAB 7Z] *Bell Expressvu Limited Partnership v. Rex e* 26 [TAB 7C] • the Driedger formulation of principle has also been identified with the plain meaning interpretation approach. Ref: *Canada v. Antosko*, [1994] 2 S.C.R. 312, pp. 326-327 [TAB 7D] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Alberta (Treasury Branches) v. Canada*, [1996] 1 S.C.R. 963, paras. 14 and 15 [TAB 7B]	• in *R. v. Multiform Manufacturing Co*, (which O'Neill J.A. in the Court of Appeal below said might appear to support the Archean argument) this Honourable Court applied the plain meaning rule, as follows: ….When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament has clearly expressed its intention in the words it has used in the statute. Ref: *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at p. 630 [TAB 7R] • the plain meaning rule has also been applied in a number of recent tax cases – in *Shell Canada Ltd. v. Canada*, this Honourable Court stated: …It is well established in this Court's tax jurisprudence that a searching enquiry for either the "economic realities" of a particular transaction or the general object and spirit of the provision at issue can never supplant a court's duty to apply an unambiguous provision of the Act to a taxpayer's transaction.

	Where the provision at issue is clear and unambiguous, its terms must simply be applied…Finding unexpressed legislative intentions under the guise of purposive interpretation runs the risk of upsetting the balance Parliament has attempted to strike in the Act. Ref: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622 at paras. 40 and 43 [TAB 7W] *Singleton v. Canada*, [2001] 2 S.C.R. 1046 paras. 24-31 [TAB 7X] *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082 paras. 38 and 39 [TAB 7J] *Friesen v. Canada*, [1995] 3 S.C.R. 103 at para. 15 [TAB 7H] *Canada v. Antosko*, [1994] 2 S.C.R. 312 (S.C.C.), pp. 326-327 [TAB 7D]

B. Confusion as to recourse to extrinsic interpretative aids

21. Inconsistency also exists in appellate courts regarding the extent to which there may or may not be recourse to extrinsic interpretative aids in statutory interpretation cases – can interpretive aids be used in all cases or only in cases of ambiguity?

Extrinsic Interpretive Aids All the Time	**Extrinsic Interpretative Aids Only When Necessary**
Court of Appeal below: • the Court of Appeal below applied the purposive or pragmatic interpretative approach: it considered all indicators of legislative meaning, including a 1974 Report of the Royal Commission on Mineral Revenue regarded to be the impetus for the *Mining and Mineral Rights Tax Act*. Ref: Judgment of Court of Appeal below, paras. 27, 45 [TAB 4D]	**Court of Appeal of Saskatchewan and New Brunswick:** • appellate courts from different provinces have held that recourse to extrinsic interpretative aids is appropriate only in cases of ambiguous language • the Saskatchewan Court of Appeal in *Parlee v. New Brunswick (Workers' Compensation Board)*, and in *Sunnyside Nursing Home v. Builders' Contract Management Ltd.*, the Saskatchewan Court of Appeal stated that: …Courts must be guided by the language of the statute to determine the intent of the legislators, and only in the event of ambiguity is there justification for seeking the

TAB 7B

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

Respondent
(Respondent)

APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as amended

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Ottawa Agent for the Applicant

TAB 7B

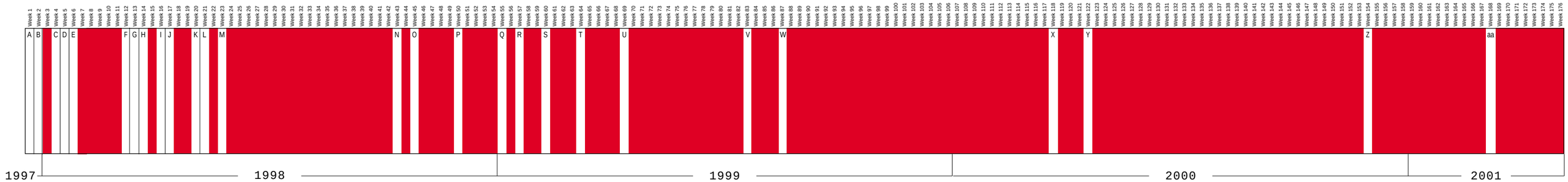
= Nothing happened

= Something happened

Delay Diagram: Procedural History Timeline*

Date Charged
December 17, 1997

Still No Trial
May 2001



Week 1
A. December 17, 1997 - Mr. Sapara charged.

Week 2
B. December 22, 1997 - Counsel for Mr. Sapara requests disclosure.

Week 3
Nothing happened.

Week 4
C. January 7, 1998 - First appearance. Plea entered.

Week 5
D. January 19, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 6
E. January 15, 1998 - Preliminary disclosure.

Weeks 7-11
Nothing happened.

Weeks 12-14
F, G, H. March 5, 13, and 18, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 15
Nothing happened.

Week 16
I. March 30, 1998 - Other co-accused's counsel withdraws.

Week 17
J. April 1998 - Other co-accused finally retains.

Weeks 18-19
Nothing happened.

Week 20
K. April 25, 1998 - Other co-accused and Crown discuss adjourning the Preliminary Inquiry.

Week 21
L. April 29, 1998 - Fixation of new date for Preliminary Inquiry adjourned to May 13, 1998.

Week 22
Nothing happened.

Week 23
M. May 13, 1998 - The Preliminary Inquiry rescheduled for November 2, 1998 and the pre-preliminary conference is set for September 11, 1998.

Weeks 24-42
Nothing happened.

Week 43
N. October 23, 1998 - Counsel for Mr. Sapara requests disclosure.

Week 44
Nothing happened.

Week 45
O. November 2, 3 and 4, 1998 - The Preliminary Inquiry.

Weeks 46-49
Nothing happened.

Week 50
P. December 10 and 16, 1998 - Preliminary inquiry.

Weeks 51-54
Nothing happened.

Week 55
Q. January 5, 6 and 20, 1999 - The Preliminary Inquiry.

Week 56
Nothing happened.

Week 57
R. The other co-accused's counsel withdraws.

Weeks 58-59
Nothing happened.

Week 60
S. February 10, 1999 - First arraignment delayed by a month.

Weeks 61-63
Nothing happened.

Week 64
T. March 10, 1999 - Second Arraignment - Other co-accused is still unrepresented . Matter is adjourned.

Weeks 65-68
Nothing happened.

Week 69
U. April 14, 1999 - Third Arraignment - Other co-accused is still unrepresented . Trial scheduled for September 27, 1999.

Week 70-82
Nothing happened.

Week 83
V. July 19, 1999 - Pre-Trial Conference - Other co-accused is still unrepresented. Sometime after, counsel is appointed for the co-accused. Trial is adjourned. August 11, 1999 set to fix new trial date.

Week 87
W. On August 11, 1999, Fourth Arraignment. Trial is rescheduled to April 3, 2000.

Weeks 88-117
Nothing happened.

Week 118
X. March 10, 2000 - Pre-trial conference.

Weeks 119-121
Nothing happened.

Week 122
Y. April 3, 2000 - Trial. Judicial stay granted for unreasonable delay.

Weeks 123 -153
Nothing happened.

Week 154
Z. November 29, 2000 - Appeal heard.

Weeks 155 -167
Nothing happened.

Week 168
aa. March 5, 2001- Reasons of the Court of Appeal filed.

Weeks 169 -176
Nothing happened.

*All references as to "Nothing Happened/Something Happened" taken from Judicial Stay Hearing or C.A. Reasons, para. 4 of both judicial reasons.

TAB 7A

S.C.C. No.

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

JAMES SAPARA

Applicant
(Applicant)

-and-

HER MAJESTY THE QUEEN

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APPLICATION FOR LEAVE TO APPEAL

Pursuant to Section 40 of the *Supreme Court Act,* R.S.C. 1985, c. S-26, as amended

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control over the process and fulfill it's constitutional duty to protect Mr. Sapara's individual rights and to ensure his trial takes place within a reasonable time.

- **Brief Procedural Chronology**

14. The following is a brief chronology of the delays in the proceedings:

- **Day 1** – Mr. Sapara charged December 17, 1997.
- **Day 5** — Counsel for Mr. Sapara requests disclosure on December 22, 1997.
- **Month 1** — First appearance on January 7, 1998. Mr. Sapara enters election and plea without the benefit of disclosure. Counsel for Mr. Sapara again requests disclosure on January 19, 1998. The availability of the other co-accused's counsel causes delay in scheduling the Preliminary Inquiry.
- **Month 1** — January 15, 1998 — Preliminary disclosure sent to defence counsel.
- A series of delays due to the co-accused requesting later court dates.
- **Month 3** — March 5, 13, and 18, 1998, counsel for Mr. Sapara requests disclosure again.
- **Month 3** - March 30, 1998 – The other co-accused's counsel withdraws.
- Counsel for Mr. Sapara continues to express concern over delays and requests advice and direction from the Court.
- **Month 4** — The other co-accused finally retains counsel sometime in April 1998.
- **Month 4** — The other co-accused and Crown discuss adjourning the Preliminary Inquiry on or around April 25, 1998. Mr. Sapara and his counsel, were neither consulted, nor participated in these discussions.
- **Month 4** — April 29, 1998, Counsel for the other co-accused seeks an adjournment, and fixing of a new date adjourned to May 13, 1998.
- **Month 5** — May 13, 1998 – The Preliminary Inquiry finally rescheduled for November 2, 1998 for three days, and the pre-preliminary conference is set for September 11, 1998.
- **Month 10** — October 23, 1998 — Counsel for Mr. Sapara requests further disclosure.
- **Month 11** — November 2, 1998 — The Preliminary Inquiry begins. However, it takes longer than three days because of the complainant's behaviour on the witness stand and because the Crown decides to call more witnesses.
- **Month 12** — Preliminary inquiry continues.

- **Month 13** — The Preliminary Inquiry finally concludes January 20, 1999, more than 13 months after Mr. Sapara was charged.
- **Month 13** —The other co-accused's counsel withdraws.
- **Month 14** — February 10, 1999 – First arraignment delayed by a month.
- **Month 15** — March 10, 1999 — Second Arraignment – The other co-accused is still unrepresented and the matter is adjourned again.
- **Month 16** — April 14, 1999 — Third Arraignment — The other co-accused is still unrepresented and the trial is scheduled for September 27, 1999 and the co-accused is cautioned by the Court to get a lawyer quickly so the lawyer can prepared for trial.
- **Month 19** — July 19, 1999 — Pre-Trial Conference — The other co-accused is still unrepresented despite numerous warnings form the Court.
- **Month 19** — Counsel is finally appointed for the other co-accused after efforts from Mr. Sapara's counsel and the Crown. The trial is adjourned and August 11, 1999, was set to fix a new trial date.
- **Month 20** — More delays — On August 11, 1999, fourth arraignment. Counsel for the other co-accused requests a new trial date. Trial is rescheduled to April 3, 2000, more than 28 months after Mr. Sapara was charged.
- **Month 27** — Pre-trial conference on March 10, 2000.
- **Month 28** — Trial on April 3, 2000. A judicial stay is granted to Mr. Sapara after he brings a *Charter* motion pursuant to s.11(b) of the *Charter* before the Learned Trial Judge who enters a judicial stay of proceedings. The trial judge concludes that the delays were unreasonable which constituted an unjustified violation of Mr. Sapara's constitutional right to a trial within a reasonable time.
- The Crown appeals the stay.
- At the same April 3, 2000 trial, the other co-accused successfully argues section 8 violation of the *Charter* based on the fact the Authorization for interception of private communications was not lawfully obtained as the RCMP had omitted key facts from the affidavit which were never presented to the judge who granted the Authorization. The Trial judge concludes that the Authorization was invalid and all the evidence obtained through it excluded. The Crown calls no further evidence, advising the Court that there

was no reasonable likelihood of conviction without the excluded evidence. And then the Crown appeals this too.

Ref. Judicial Reasons at par. 4 [Tab 3A]
Reasons of Court of Appeal at par. 4 [Tab 3C]
Pull-out Delay Diagram [Tab 2]

15. There was a preriod of approximately 34 months from the time of the arrest and the time the trial would likely conclude.

Ref. Judicial Reasons at par. 35 [Tab 3A]

16. So in other words, through all of 1998, all of 1999, all of 2000, and half of 2001, and the Crown can still not give the applicant a trial. To date, a total of 41 months.

PART II – POINTS IN ISSUE

a) Are serious Delays Caused by a Co-Accused "Neutral" Delays

17. Whether or not delays resulting in denial of an accused person's right to trial within a reasonable time caused by a co-accused's failure to properly instruct and retain counsel, are "neutral delays".

b) What is the Extent of the Crown's Obligation to Bring an Accused Person to Trial Within a Reasonable Time when a Co-Accused Causes Serious Delays in the Proceedings

18. Where multiple accused persons are jointly charged and where one co-accused steadfastly asks the Crown to be tried in a speedy fashion, and another co-accused consistently fails to return and instruct counsel thereby occasioning delays, and the other co-accused consistently fails to retain and instruct counsel, what duty is there on the Crown to protect the 11(b) rights of the co-accused to a trial within a reasonable within time?