Ten Do's and Don'ts for *Written* Argument at the Supreme Court of Canada

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1. **DO: Keep it simple and effective.**

    a. Don't write like a lawyer. Try to make it simple enough that a stranger could read and understand it. Remember that your position has to be understood, before it can be accepted.

    b. Ideas can be big, but to be effective they must be clear, concise and focused. Use language that is active, explicit, succinct, all-inclusive, and visual—give your judicial audience a picture with colour, context, ambience and action.

2. **DO: Check out the competition.**

    a. Take the time to obtain and review submissions in other cases that were accepted and rejected to get a flavour for what works and what doesn't.

    b. Try to get an idea of the types of cases the Court is interested in and, if there is a pattern, draft your application to relate to the "hot" issues. If leave has been recently granted in a similar case, consider whether you can ride on its coattails.

3. **DO: Think like a judge and then write it for the judges who are going to read it.**

    a. Change places with the judges and keep in mind that your case is not the only one on their plate. They are overworked and under a lot of time pressure. Don't add to that by giving them boring, hard-to-read materials—write to engage.

    b. Boil it down to basics: right and wrong. Appeal to a judge's sense of reasonableness and fairness. Aim for an explanation that could mesh with their perceptions and attitudes about life.

    c. Anticipate the Court's concerns and provide a persuasive answer. Does it look like an isolated case or can it produce a decision applicable across Canada? What's the Court's power given the particular standard of review?

4. **DO: Start strong and point first (it's not a mystery novel).**

    a. Use a short overview that tells the court in a nutshell what the case is about. It should contain the point you are trying to make, but not all your supporting arguments.

b. Imagine you have to tell someone what your case is about (and why they should care) in the time it takes you to wait in line for coffee.

5. <u>DO</u>: Find a theme and stick to it.

a. Every case should have a central theme or themes that evolve from one or more issues. Find the central theme of your case that on the facts and applicable law creates a strong arguable case.

b. 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.

c. If others are participating, such as interveners, make sure you have a unified theme.

6. <u>DON'T</u>: Ignore the facts and the proper role of the court you're before.

a. On appeal, don't expect the Court to retry your case. However, remember that the facts still do matter and can provide access to broader legal principles.

b. But, as an appellant, make sure to identify the major error that raises issues of (in)justice. The respondent, if strategic, will show that the trial decision rests on specific findings of fact which are reasonably supported by the evidence—i.e. there are no legal issues to care about here, move along.

7. <u>DON'T</u>: Do it all yourself.

a. At a minimum, have a second set of eyes look over your work. Ideally this should be someone who's not afraid to paint your draft red and cut the clutter. (I can almost guarantee your draft is too long).

b. Get the right help. This means that if you're going to the S.C.C., hire an agent who is familiar with the Court and knows what works. You're right, a plug.

8. <u>DON'T</u>: Ignore the aesthetics.

a. Lawyers spend a lot of time thinking about what to say, but forget to consider how to organize it on the page. First impressions count and a good-looking document will help the reader get the point quicker and retain it longer.

b. A well-organized easily-accessible reader-friendly document is simply more persuasive. Cornflakes in grey boxes don't sell well. Few basics:

i. Clear and detailed Table of Contents (reminder to make headings meaningful).

ii. Avoid using only long paragraphs—change up the length and search for places where you can use bullets or other aids to make it visually easier for the reader.

iii. Consider footnotes if in-text references would be distracting.

iv. Don't be afraid of white space – white space is your friend.

9. <u>DON'T</u>: Write too much or too little.

a. Find the balance. Words are key to persuading, but too many and the reader tunes out. Too few and they think you're hiding.

b. Look to the S.C.C. *Rules* and *Guidelines* for guidance as to length (and all other technical requirements). Applications for Leave to Appeal to the S.C.C. to prove the national importance of a case have a 20 page limit (for the memorandum of argument). If you get leave, does your factum need to be 10 times longer?

c. Technical compliance is <u>way</u> more important than you think. If your materials are to be credible and taken seriously, there must not be the slightest error – let the other side make technical compliance errors; this will only serve to make yours more professional. Your name's on the cover, and your firm name, so make it good. The *Rules* govern of course, but the Court's current practice, guidelines and process are also guides (a good S.C.C. agent will keep you straight).

10. <u>DON'T</u>: Use legalese.

a. If you're writing and it makes you feel smart, then it probably makes the reader feel dumb. Good writing should make the reader feel smart. Bad writing makes the reader feel dumb.

b. Use ordinary, simple-to-understand language. Try to think professional, but still conversational and unpretentious.

c. Avoid acronyms, clichés, formulaic qualifiers and phrases, verbose fillers etc.