

# Oral Advocacy in the BC Court of Appeal

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A panel discussion with: Justice Frankel, Richard Peck, Q.C. and  
Geoffrey Cowper, Q.C.

# Outline

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1. The very basic dos and don'ts
2. Know the practice of the Court
3. How to refer to counsel, judges and witnesses
4. Preparing the oral argument
  - What's the point?
  - Preparing your presentation
5. Examples of appellate advocacy in action
6. Delivering your presentation

# The basics

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- Be on time and properly attired.
- Know who is on the division.
- Know where to sit and when to stand and sit.
- Do not put briefcases or coffee cups on counsel table (save coffee for the breaks).
- Silent mobile phones; don't take a call while court is in session (it has happened).

# Know the practice of the Court

## *Appearing before the Court* (Civil & Criminal Practice Directive, 11 October 2019)

British Columbia Court of Appeal  
Practice Directive (Civil and Criminal)  
Title: **Appearing before the Court**

**Issued: 11 October 2019**

**Effective: Immediately**

**Cite as: *Appearing before the Court* (Civil & Criminal Practice Directive, 11 October 2019)**

This practice directive deals with introducing and addressing either a division of the Court of Appeal, a Justice in chambers, or a Registrar. It is primarily for the benefit of more recently called members of the legal profession who are, or will be, making their first appearances before the Court, but may also be of use to those who are self-represented.

The practice before the Court is as follows:

- Counsel are required to gown for all hearings before a division of justices. Counsel are not required to gown for hearings before a single justice. Counsel who are pregnant or have a disability or other reason affecting the ability to fully gown may appear in alternate gowning attire as appropriate to their circumstances;
- The appellant(s) or their counsel sit on the left side of the courtroom (facing the bench) and the respondent(s) or their counsel sit on the right;
- Before the judges enter the courtroom, the appellant(s) or their counsel and the respondent(s) or their counsel advise the court clerk their names, their preferred manner of address (e.g. "Mr./Ms./Mx./Counsel Jones") and the party they represent;
- Parties rise when the Court is called to order and the judges enter the courtroom. Parties bow when the judges bow and then resume sitting;
- After a case is called, the appellant(s) or their counsel stand and make introductions, indicating for whom they act, and then resume sitting;
- If the appellant is represented by more than one counsel, senior/lead counsel introduces himself or herself and then introduces other counsel, who stand while being introduced; senior/lead counsel resume sitting after introductions have been completed;

- If there are separately represented appellants, then the introductions of counsel for each appellant should, in turn, follow, in accordance with the practice set out above;
- The introductions of the respondent(s) or their counsel follow those of the appellant(s), in accordance with the above practice;
- The introductions of the intervenor(s) or their counsel follow those of the respondent(s), in accordance with the above practice;
- After introductions have been completed, the presiding judge will indicate how the Court wishes to proceed; when called upon, parties should move to the podium to address the Court;
- Only one person should be standing and addressing the Court at any given time.

On motions or applications before the Court or on chambers matters, the foregoing should be read with "applicant" replacing "appellant", and "respondent" being the respondent on the motion or application.

As in the Supreme Court, Justices of the Court of Appeal are referred to as "my lord" or "my lady" or collectively in plural form. In a Registrar's hearing, the Registrar is addressed as "your honour."

"Chief Justice R.J. Bauman"  
for the Court of Appeal of British Columbia

History:

Replaces the Civil and Criminal Practice Note titled *Addressing the Court* dated 24 October 2011.

# Referring to counsel, judges, and witnesses

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## Introductions of counsel:

- Know how to introduce yourself and other counsel acting for your client. “Hi” and “Good morning” are not acceptable.
- Don’t introduce your client or others who may be in the public gallery.

## When referring to judges and witnesses:

- Don’t call female judges “My Lord”, or refer to the judges collectively as “You guys”.
- Don’t refer to judges, witnesses, counsel, etc. by only their surnames.
- Don’t refer to another judge of the Court as “Your sister Judge A” or “Your brother Judge B”.

# Preparation: What is the point?

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Most cases have one essential point. Address this point from the outset.

## **Identifying and sticking to your central point**

- Focus is on error
- Line of relevance:
  - Always keep track of central point
  - Orient your subsidiary points by reference to central point

# Preparing your presentation

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Remember the judges will be familiar with the case; they will have read the factums, reason for judgment, jury charge, etc.

Assess the current state of the case law for any recent developments.

Prepare your speech:

- Write it out
- Rehearse, rehearse, rehearse
- Anticipate questions from the court.
- Have your closing ready

# Preparing your presentation, cont.

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Have short/medium/long version ready.

Opening choices:

- Points
- Issues
- Summarize argument
- Why?



# Making oral argument

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- Begin with a concise opening statement setting out the key issues, and why your client's position ought to prevail; don't begin with "This is an appeal from ..."
  
- If more than one counsel will be making submissions for a party then lead counsel should let the division know who has responsibility for which issues.
  
- Let the judges know what books they will need to have at hand and allow them time to get organized.
  - Consider whether a condensed book might be helpful.
  
- Know the standard of review applicable to the grounds being raised; remember the Court of Appeal does not re-try cases or re-find facts.

# Using your factum and appeal books

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- Start with your strongest point; if there are grounds in the factum you do not intend to deal with in oral argument or are abandoning, then tell the division that at the outset.
- Use your factum as a road map, but don't read it; don't be wedded to any speaking notes you have prepared: **Advocacy is the art of persuasion. The factum is your product. Oral argument is your opportunity to sell your product.**
- Identify the specific passages in the reasons for judgment or the jury charge you say reflect error.
- Know where you are in your factum if asked.

# Tone and delivery

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- Present your argument in a conversational tone; speak clearly in a moderately loud voice; don't be obsequious; good counsel are able to engage the court in a dialogue.
- Don't try to be humorous, at least not until you have had sufficient "face time" to develop a rapport with the Court.
- Don't stray from the podium.
- Maintain eye contact / watch the bench; e.g., if you ask the judges to turn up a page in the transcript, then give them time to find it; if the judges are having a conversation, then stop until they have finished.
- Tell the judges why you have asked them to turn up something, so that they have the context.

# Tone and delivery, cont.

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- Don't make a judge part of an example you are using to illustrate a point; e.g., "Justice X, assume you have just been pulled over at 4 a.m. for impaired driving".
- You are making submission, not expressing personal opinions: do say "I submit" or "I say"; don't say "I believe" or "I think".
- Don't refer to trial judges as "learned" or "experienced"; those terms carry no weight on an appeal.
- If there is something you wish to pass up to the bench during the hearing, then it should be given to opposing counsel beforehand.

# Dealing with questions

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Answer questions directly; judge can tell a non-response when they hear one; “I was not trial counsel” is not a good answer.

If you need time to look something up say so, but then don't forget to come back to it.

Key points when dealing with questions:

- Answer it now
- Answer it first, then comment
- Don't forget the other judges
- Don't change the answer

# Making oral argument responsive

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- Counsel for the appellant should consider addressing some of the respondent's arguments during their principal submission; e.g., explain why a case the respondent relies on does not apply.
- Counsel for the respondent will know what is of concern to the Court and should adjust their argument accordingly. The task for counsel for the respondent will be to be reactive to the dynamics of the courtroom and sensitive to the concerns and focus of the Court.
- Reply should be used sparingly; it is not a reiteration of the initial argument; often the best reply is no reply. Only one counsel is entitled to reply.

# Closing

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- Closings should be short; perhaps a very brief summary followed by a reference to the order being sought.
  
- Don't end with, "Unless the Court has any questions ..."; if the judges have questions, they will ask them.

# Timing of oral argument

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**Work within your allotted time.**

Most appeals are set for a ½ day or a day. The Court convenes at 10:00 am, takes a 15-minute break at approximately 11:15 am, breaks for lunch from 12:30 pm to 2:00 pm, takes a 15-minute break at approximately 3:00 pm, and finishes at 4:00 pm.

Generally on a ½ day appeal, the appellant is expected to finish by the morning break; on a one-day appeal, the appellant is expected to finish by the lunch break. Respondent's counsel is expected to leave 10 minutes for reply.



# Concluding thoughts and questions

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**Practice Estey J's "Three Bs": Be clear, Be concise, Be gone.**