

## How to lose an appeal in the Court of Appeal: The next generation

The Honourable Justice David M. Brown

**A**lmost a generation has passed since Justice Marvin Catzman published his groundbreaking article, “The Wrong Stuff: How to Lose Appeals in the Court of Appeal.”<sup>1</sup> In it he offered, in seven succinct tips, surefire ways to lose an appeal. His advice still rings clear and true: (1) Always file an incomprehensible factum. (2) Never begin at the beginning. (3) Never start with your strongest point. (4) Never say the magic words. (5) Always make a speech for the jury. (6) Never answer a question directly or, better still, at all. And (7) Never keep your promises.

Several years’ experience on the Court of Appeal has demonstrated to me the enduring legacy and power of Catzman’s seven tips for losing an appeal. However, I have slowly realized there are other ways to successfully drive down the road to appeal failure. This article offers some additional losing tips that counsel can use at each stage of an appeal.

### Tip #1: Appeal to the wrong court

The fastest way to lose an appeal is to file your client’s appeal in the wrong court.

The novice litigator might be forgiven for thinking that choosing the right appellate court is a straightforward matter: If the civil order of a Superior Court judge is final, the loser trots off to the Court of Appeal; if it is interlocutory, off one goes to the Divisional Court. On its face, a distinction of great simplicity.

But “final” means “final” only to the uninitiated.<sup>2</sup> Those better versed in the labyrinth of appellate jurisdictional jurisprudence know they must consult Hendrickson and Ball, *Final or Interlocutory? Theory, Practice and Frustration*, the definitive three-volume work on the topic.<sup>3</sup>

And why the insistence of judges that litigants must pass this threshold existential test of final or interlocutory before presenting the merits of their appeal to an appellate court? The answer lies in the tactile nature of the remedy granted by an appellate court when an appellant, instead of choosing Door Number One for appeal, wrongly chooses Door Number Two. When that occurs, the appeal is quashed. And “quash” is such a viscerally satisfying word for a judge to write. Few words in the judicial lexicon exude onomatopoeia like “quash.” One can both hear and feel the terminal nature of the remedy, writing “quashed.” And when one’s colleagues ask how the day has gone, what more satisfying answer can one give than to say, “We started our day by quashing an appeal.” So, go ahead. Make our day.

### Tip #2: Forget review and correction – treat appeals as second kicks at the can

Embrace the old saying: “If at first you don’t succeed, try, try



again.” The judge below did not accept the credibility of your client’s witnesses? No problem. The beauty of an appeal court is the judges don’t see your witnesses. Problem solved.

Ignore the whole notion of appellate standard of review. *Housen v. Nikolaisen*?<sup>4</sup> So passé. Palpable and overriding error? An incomprehensible phrase; best to let it go.

Keep your game plan simple: Argue that every minor mistake or misstatement by the judge below calls out for appellate intervention or else *the world will come to an end*. Argue the non-material and irrelevant in painstaking detail. For justice lies in the irrelevant minutiae of a case, not in the big picture.

### Tip #3: Use James Joyce as your model for writing your factum

James Joyce developed the stream of consciousness writing style into a High Art Form, so you should follow his style of writing when putting your factum together, because there is nothing

judges enjoy more, when reading a factum, than participating in an author–reader relationship that incorporates the elements of the High Art Form, even though it may make it difficult for the reader to follow the thread of your argument, but the beauty of the High Art Form, at least in the postmodern world, is that the reader really doesn't matter as much as the writer, and the satisfaction in writing a factum lies not in crafting an argument persuading a judge to your client's point of view on an issue, but in showing the judge you can use the High Art Form and, as such, should be regarded as a cutting-edge, postmodern advocate, even though you don't end up communicating a single idea to the judge, but only put the judge to sleep – no doubt a well-earned sleep – by ensuring that each page of your factum manifests, exquisitely, the High Art Form, and avoids the tainted, bourgeois, but strangely understandable, style associated with the now thoroughly discredited It-Was-Bluebell-Time-in-Kent School of Clear Legal Prose.<sup>5</sup>

#### Tip #4: Turn your factum into a fun game of *Where's Waldo?*

Reject the requirement in the rules that your factum contain a concise overview statement, describing the nature of the case and of the issues, as well as a statement of each issue raised, immediately followed by a concise argument. Adopt, instead, the *Where's Waldo?* approach to factum-writing.

A losing factum, like a *Where's Waldo?* book, buries the object of the quest in gloriously distracting detail. Where an appeal involves a single issue – a legal error made by the judge below – write so that, like Waldo, the error-at-issue merely pokes its head out of the grocer's store window, lost in the riot of the hundreds of people shown milling about the town's marketplace.

Judges read factums carefully in advance of oral hearings. They enjoy the time it takes to find the "Waldo" issue. Where a factum is an especially fine example of *Where's Waldo?*– writing, judges delight in showing their colleagues the factum, so all can enjoy the fun in trying to find the "Waldo" issue and comparing their guesses.

#### Tip #5: Overstate your case

In your written and oral arguments, choose hyperbole and exaggeration over accuracy and balance. Spin the findings of fact below into alternative facts. Ensure the responding party can never accept your statement of facts as accurate. And assert that a case stands for a binding proposition of law which will defy discovery upon an actual reading of the case.

Sweep the (inevitable) weaknesses in your client's case under the rug. Pretend they are not there. Or bury them in an obscure footnote in your factum. Follow the adage, "out of sight; out of mind." But do not take offence when the panel does not call on the other side to respond to your submissions. Remember: The object is to lose your appeal, not to win.

#### Tip #6: Forget the pitch – dazzle them with your wind-up

The conventional wisdom for factum-writing is: Forget the Wind-up and Make the Pitch.<sup>6</sup> Wrong, wrong, wrong.<sup>7</sup>

Losing an appeal is all about dazzling the panel with your wind-up and ensuring you never make the pitch that really counts – identifying where the judge below made the Really Big Reversible Mistake. Emulate Eddie Feigner, the king of "The King & His Court, whose wind-ups dazzled crowds for decades.<sup>8</sup>

Make sure your factum leaves the panel guessing: So, just what is the real issue in this case? Rely on the High Art Form of stream


of consciousness factum-writing to work its obfuscating magic.

#### Tip #7: Talk to the court, not *with* the court

Court of Appeal judges have time built into their schedules to prepare for the oral hearing. They use it. They come prepared to a hearing with specific questions about specific issues. They want to focus on those questions and issues. They want to talk with counsel about them.

Rebuff the panel. Stick to your script. Talk to the court, not *with* the court. Remind the panel that your client was allocated a certain amount of time for oral argument and you want to use it as you see fit. Stick to your guns on this point. Don't relent. Your client is entitled to no less.

## C onclusion

Let me finish by repeating Justice Catzman's final piece of advocacy wisdom: "I hope that you will find these tips helpful in significantly lowering your batting average in the Court of Appeal. If they do, console yourself by remembering that winning isn't everything." 

#### Notes

1. Justice Marvin Catzman, "The Wrong Stuff: How to Lose Appeals in the Court of Appeal," in 19:1 *The Advocates' Society Journal* (Summer 2000).
2. Watch the Monty Python "Argument Clinic" sketch on YouTube, substituting the word "final" for "argument," and "interlocutory" for "contradiction."
3. Hendrickson championed the School of Simplicity: A final order finally disposes of the rights of the parties. *Hendrickson v Kallio*, [1932] OR 675 (CA) 680. By contrast, Ball championed the Issue-by-Issue School, which enjoys multiple trips up to the Court of Appeal during the life of a lawsuit. For Ball, final orders include those that finally dispose of an issue raised by the defence, even if they do not finally dispose of the rights of the parties. *Ball v Donais* (1993), 13 OR (3d) 322 (CA) 324.
4. [2002] 2 SCR 235 at paras 8, 10, 23, 36.
5. From the judgment of the master of the style, Alfred Lord Denning, in *Hinz v Berry*, [1970] 2 QB 40 at 42.
6. Justice John Laskin, "Forget the Wind-up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums," in 18:2 *The Advocates' Society Journal* (Summer 1999). Available online on the Court of Appeal website: <<http://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>>.
7. Of course, it is right, right, right. But only if you want to win an appeal. This article strives to teach you how to lose your appeal. So ignore the right advice.
8. On reflection, perhaps not the best example. I saw *The King & His Court* (three other players; The King always used a four-man team) at work in Iron River, Michigan, one summer at the local rodeo. The King's dazzling wind-up always led to a devastating pitch. In a 1960s celebrity charity softball game, The King struck out, in order, Willie Mays, Willie McCovey, Brooks Robinson, Roberto Clemente, Maury Wills and Harmon Killebrew. To enjoy The King, watch the YouTube clip labelled "Eddie Feigner Newsreel."



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Justice Jasmine Akbarali sits on the Superior Court of Justice in Toronto. Prior to her appointment she was an appellate lawyer in Toronto.



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Justice David Brown sits on the Court of Appeal for Ontario. When the mysteries of final and interlocutory orders become too impenetrable, he retreats to outport Newfoundland to seek wisdom from the cod.



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Lara Draper is an associate at *Dentons Canada LLP* in Edmonton, practising commercial insolvency law and civil litigation. She has appeared before the Provincial Court of Alberta and the Alberta Court of Queen's Bench and is secretary of the Board of Directors and member of the Advisory and Human Resources Committee of the Kids Kottage Foundation.



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**Ken Jull**

Ken Jull is counsel at *Gardiner Roberts*, practising corporate compliance, and is presently on an interchange as general counsel with the Competition Bureau. Ken used to be an amateur triathlete, but as they say with judges, "as he then was."



**Anna Loparco**

Anna Loparco is a member of *Dentons' Litigation and Dispute Resolution* group. As a general commercial litigator, she has a wealth of experience in insurance law, professional liability, administrative and privacy law, product liability, intellectual property and contractual disputes. Anna has appeared before every level of court, including the Supreme Court of Canada.



**Matthew Milne-Smith**

Matthew Milne-Smith is a partner and the Litigation Practice Group Coordinator at *Davies Ward Phillips & Vineberg LLP* in Toronto. He practises commercial litigation and is already regretting writing an article that advocates for fewer trials.



**The Honourable Joseph W. Quinn**

The Honourable Joseph Quinn took an early retirement from the Ontario Superior Court of Justice in 2016, following which he and his wife acquired a lively puppy. His Honour is now seeking a reappointment to the bench. He needs the rest.