

**Canadian Institute's 4th Annual Conference
Aboriginal Law: Consultation & Accommodation**

**Notes for Luncheon Address of The Honourable Karen Sharlow
February 23, 2010**

**Appellate Advocacy in the Federal Court of Appeal
Regarding Aboriginal Law**

Simplicity • Context • Focus

1. I thank the Canadian Institute for inviting me to address this important conference.
2. Let me begin by acknowledging a fact that is well known to every person in this room. Aboriginal law in Canada, and particularly the law relating to the subject of this conference, is in its infancy. Just like any infant, it is rapidly developing. It is continually taking unexpected twists and turns. It sometimes falls down. It sometimes achieves remarkable progress.
3. Everyone here knows this. Indeed, I expect that is why you are here, to educate yourself and to arm yourself for the challenges of consultation and accommodation in the context of Aboriginal law disputes.
4. When I was first contacted with the idea of addressing this conference, it seemed that I was being asked to comment on the substantive legal principles of consultation and accommodation. That was a most daunting prospect. Of all people to ask to give a learned dissertation on the law of consultation and accommodation, a judge may well be the worst choice. Why do I say that?
5. It is not, I assure you, because I think that judges cannot deal with this most difficult topic. They can and must do so.

6. But you are here to learn about the cutting edge of this subject. That will not be found in any court room. It is found among the leaders and decision makers of the Aboriginal peoples and the government, and their advisers who examine and analyse the jurisprudence to guide their advice.

7. The substance of consultation and accommodation – the really creative and important work that affects people where they live and where they work – is done at the decision making stage – involving many of the people in this room, and those they advise.

8. Of course, the decision making process of Aboriginal leaders and government leaders must necessarily be informed and guided by what the courts have decided. Leaders must listen to what the courts say about consultation and accommodation. The key cases, and no doubt you know them as well as I do and probably better, are critically important. They establish many of the key aspects of the framework for any decision made in relation to the consultation process.

9. But Aboriginal and government decision makers must also bear in mind that every court decision is addressing the past – a situation that occurred years before – sometimes many years or even decades in the past. And every court decision has a particular history, and a particular judicial or procedural history, that is unlikely to be repeated exactly.

10. Aboriginal leaders and government leaders who are considering how to deal with a particular problem in today's world, and who are trying to give practical form to the legal principles embodied in judicial decisions, must be alive to the world as it is, not only as it was when a court crafted a solution to a particular problem in the past.

11. Viewed from this perspective, the law of consultation and accommodation in the Aboriginal context must be seen as something of a moving target – or a tectonic plate as I have heard it described recently. Judges and courts are never at the leading edge of these vast movements – they come along after the tectonic plate has shifted, when an earthquake or a volcano threatens.

12. That happens when a dispute has gone wrong and the parties cannot resolve it themselves, and they feel they must ask the courts to express the rights and wrongs. By that time the people – the Aboriginal people or the government people who are closest to the dispute – may be angry, hurt and intransigent, so much so that the dispute requires an objective adjudicator.

13. And so you see, it is not judges who are the architects of the law of consultation and accommodation. They are the forensic analysts and the archaeologists. The architects are you – the leaders, the decision makers and their advisers.

14. That is why I was reluctant to come to this conference and speak about the substantive law. I cannot be much help to you in dealing with the practical problems that are facing you today. Except, of course, in one respect – and that is the specific problem you face when your dispute about consultation and accommodation has already reached that unfortunate point where litigation is necessary.

15. What I will try to do today is give you some guidance about how to speak to an appellate court, just in case you one day find yourself there. In particular, I wish to make a few remarks about the art of advocacy in an appellate court.

16. Here is the question: What is the goal of advocacy? The answer is this. The goal of advocacy is to persuade – to convince the audience of something.

17. In appellate advocacy, the audience is the panel, the three judges assigned to hear the appeal from the trial court or the court of first instance. The lawyer for each side is advocating a position – typically the opposite of the position taken by the other side.

18. So the advocate must figure out how to persuade these judges to accept what she is saying to them. How is that done?

19. The starting point for the advocate is to remember that all judges started life as human beings. In fact, even after they become judges, they are still human beings. They are just like you in many respects, even though they have a different job.

20. Let me ask you this: What do you do when you are faced with the problem of making a choice between two alternatives? You consider your options as carefully as you can, and maybe you ask the advice of someone that you hope is more knowledgeable and wiser than you are, and you try to make the choice that best fits your own objectives.

21. Well, judges are no different. Judges do the same thing.

22. Judges must decide the case that is presented to them, to decide which party will succeed and which will not. They want to get the best result – by which I mean the result:

- that best respects the constitution of Canada, the laws enacted by Parliament and the provinces, and the legal principles that emerge from the jurisprudence,
- that is based on the best possible understanding of the facts, and
- that comes as close as possible to doing justice between the competing parties.

23. It is a tall order, and judges are well aware of that, and how difficult it can be to achieve these objectives.

24. And what judges always hope for is that they will have the assistance of advocates who are knowledgeable, wise and trustworthy. The role of the advocate, from the judge's perspective, is to advise the judges how to reach a result that favours their client and is also lawful, fair and just.

25. Judges always hope to hear from advocates they can depend on:

- advocates who can be depended on to state the facts accurately,
- advocates who can be depended on to state the legal principles fairly,
- advocates whose advice is clear,

- advocates whose objectives are clear.

26. Knowing that, what should the advocate do? How can the advocate enhance the likelihood that he or she will be recognized as someone whose advice to the Court is trustworthy?

27. Much has been written on this subject, and in the time available to me I cannot distil all of the available wisdom.¹ I will, however, offer my three tips from my own experience. My three tips relate to: (1) simplicity, (2) context, and (3) focus.

Simplicity

28. If you learn nothing else today, please remember this.

29. Every court case – and I mean EVERY court case – no matter how big and important, and no matter how long the trial or how complicated the facts and issues – in the end will turn upon one single point (sometimes two or three, rarely more).

30. You want to win that one winning point, or those two or three winning points. It is a lot of work to figure out what that one point is – the linchpin of your case – but your success may depend on finding it, and the sooner you find it the better. If you are smart and lucky, you can find that one point well before the appeal, before you even plan for trial, so that you can plan your litigation strategy to aim at your winning point.

31. Here is a red flag. If you find yourself writing a notice of appeal alleging that the trial judge made 57 errors of law, think again. More likely, if the trial judge made any error at all, he or she made one critical error that justifies the decision being set aside, or maybe two or three.

¹ There are numerous excellent books and articles on advocacy, and on appellate advocacy. I will just give a plug for one such resource – the journal of the Advocates' Society called, not surprisingly, the Advocates' Society Journal. Nearly every issue has an article with useful tips for advocates. My personal favourites are the series of articles by the late Mr. Justice Marvin Catzman of the Ontario Court of Appeal, each giving a "losing tip". And, anything written on advocacy by Mr. Justice John Laskin is always worth a read. I have appended a partial list of those articles. Those articles in turn will lead you to many other useful resources.

32. I will share a secret with you. When I started preparing this paper I planned to do a top ten list of tips for advocates. The more I worked, the smaller the list got, until I was at five. A little more work, and it was three. If I had more time, maybe I could get it down to one.

Context

33. This one goes to clarity – and it is based on something we all should know, which is how people learn.

34. Judges are like every one else in how they learn. Judges, like all of you, are more likely to understand and remember something if, when they hear it, they know immediately that it is important. That is why context is essential.

35. Set your context at the very beginning. Start your written submission (your factum or memorandum of fact and law) with a short introduction that says as clearly as possible, and as plainly as possible, what the case is about and why you should win. Begin your oral submission the same way.

36. A good introduction sets your context. And keep reinforcing that context throughout – tie your more detailed submissions to your main point, and keep the context alive.

Focus

37. Judges are minimalists. What does that mean? It means that they decide one case at a time, and they prefer to say as little as possible about anything that need not be decided right then.

38. What that means for the advocate is that the emphasis should be on the facts of the case – the particular problem facing the court at that moment.

39. Legal principles are important, but they are abstractions – they are tools – a means to an end and not an end in themselves. The law guides but rarely controls the result, and

a persuasive rendition of the facts from your client's perspective, if stated fairly and without hyperbole, may help sway the judge in your client's favour.

Conclusion

40. Those are my three tips. What they amount to is this. The best advocates have mastered the art of story telling – purposive story telling – story telling that guides and that persuades.

41. This concludes my prepared remarks. Thank you for your attention. I now invite your questions, and I will try to answer as best I can.

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