Supreme advocacy:

Tips and traps on your way to the Supreme Court of Canada

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Appeals to the highest court in the land require a unique approach to advocacy. The Americans recognize this fact and have a highly specialized "Supreme Court Bar," of whom the "elite eight" are the best known. Canadian barristers have not quite cottoned on to this approach and choose, to a large degree, to do it themselves. Fair enough. Here are some guidelines that do-it-yourself advocates should consider when they come to argue before our Supreme Court of Canada.

Test for leave employed by the Supreme Court of Canada

The Supreme Court of Canada grants leave where, with respect to "the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, …"

Lawyers read this passage, but rarely believe it. There are more leave applications that delve into the facts and, by so doing, narrow the case into one that turns on minutiae rather than one decided on broad issues of policy. "This is a case that involves the competition for air space between traditional aircraft and drones." Perfect. Move on to the law.

The next most common mistake made by counsel seeking leave is to attempt to extrapolate from their legal arguments in the lower courts. The leave application requires counsel to look at their matter with entirely fresh eyes and in a new light. The leave court is not a court of error, no matter how egregious the error. Error is a matter entirely between the parties, but the leave court is interested in cases that create an important precedent across Canada. There have been many attempts to define what this means. Ask yourself two questions: (1) What questions in this case would be of interest to a law review in the applicable area of law? (2) What questions in this case impact on the everyday lives of Canadians, either as a whole or as a particular group, industry or profession? Obviously, if there have been case comments, blogs, or newspaper or trade articles about your case, they will be helpful. Put them in your leave application, front and centre.

If your case has involved an area of law that has attracted academic comment or conflicting appellate decisions, that is important, too. Highlight this point.

If your case has raised issues of the proper role of an appellate court as (1) a court of appeal or (2) a court of judicial review which can be answered only by the Supreme Court of Canada, that is of considerable interest to the leave court.

The key is to find an interesting policy issue that needs to be decided by the highest court in the land; or to find something about the case that attracts the popular imagination; or is of crucial interest to a particular industry or group. In this regard, look not only at common-law principles or legislation that needs interpretation but also at the larger social, political and legal milieus in which the question arises. If necessary, you can submit what is known as a "Brandeis brief," a compilation of extrinsic evidence that illustrates how the decision in question impacts a particular group or the public as a whole. Demonstrate that your case involves an important question of law that is relevant to a particular industry or profession on a day-to-day basis, has led to a conflict between courts of appeal of different provinces, involves the application of federal statutes or has been the subject of international disputes.

The key, then, is to abstract beyond the facts of your case and the interests of the litigants and establish the precedential value of the broad issues implicated by the case to determine if it is important to Canadians, or particular groups of Canadians. If you are responding,