TRANSFORMING ADVOCACY

By Kelly Doyle*

"…what 'justice dictates' but also what 'practicality demands.'"

The Honourable Mr. Justice Farley in *Canada v. Curragh (1994), 27 C.B.R. (3d) 148 at 159*

I. The Search for Effective and Affordable Civil Justice

The Civil Justice Reform Working Group appointed by the BC Justice Review Task Force recently delivered its report entitled *Effective and Affordable Civil Justice*. [1] An overview of the report is attached. A comprehensive review of the report is beyond the scope of this paper. Our comments are directed to the proposed expanded role for lawyers as advocates.

Views on the nature of justice have changed over time. Theories of justice have included judicature, fair trial, natural justice, moral justice, individual utility, social justice, legal justice [2] and more modern schools of thought. Lawyers tend to draw on more than one school of thought to inform their views and advocate their causes. Different theories of justice are dominant for periods and new theories continue to emerge.

Views on the nature of civil litigation have also changed over time. Rules of court change. Dispute resolution alternatives have become more prevalent in litigation practice. Indeed, a decade ago, the 1996 C.B.A. report of the *Systems of Civil Justice Task Force* on reform of the civil justice system observed:

> In a multi-option civil justice system, litigation lawyers must move away from a focus on rights-based thinking and adopt a wider problem-solving approach. This involves a fundamental change in approach and the acquisition of new information and skills to assist clients with dispute resolution…The change in approach urged by the Task Force begins with a new focus on dispute resolution as the goal and a corresponding reduction in the antagonistic nature of the litigation process. [3**]**

The fact of self represented litigants has not changed. Indeed, their number has increased in the courts of British Columbia. Madame Justice Koenigsberg recently made the following observation in striking down the provincial social services tax on lawyer accounts for low income clients:

> In spite of the existence of legal aid, there is an increase in persons representing themselves in our courtrooms. Most are there because they have no choice but to represent themselves since they do not have the financial resources to pay for legal services…Thus, I take judicial notice of the fact that many self-represented individuals in a wide variety of cases are denied effective access to justice when they cannot afford appropriate legal representation.[4]

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II. The Foundation of the Rule of Law

The changes proposed by the Civil Justice Reform Working Group are rooted in, and contribute to, the rule of law. Lord Bingham of the House of Lords recently delivered the Sixth Sir David Williams Lecture on the subject of the rule of law. He identified eight sub-rules during the course of the lecture. His fifth sub-rule was that:

> *…means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.* It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. *This is not a rule directed against arbitration and more informal means of dispute resolution, all of which, properly resorted to and fairly conducted, have a supremely important contribution to make to the rule of law.*…What it does is to recognize the right of unimpeded access to a court as a basic right, protected by our own domestic law, and in my view comprised within the principle of the rule of law.[5] [emphasis added]

He then poses a critical question concerning the need for legal advice and representation and the cost of such advice and representation:

> If that is accepted, then the question must be faced: how is the poor man or woman to be enabled to assert his or her rights at law? Assuming, as I would certainly wish to do, the existence of a free and independent legal profession, the obtaining of legal advice and representation is bound to have a cost, and since legal services absorb much professional time they are inevitably expensive…[6]

Civil justice reform is not a substitute for a properly funded legal aid program. However, it is not simply the poor but the working poor and members of the middle class who need to be enabled to assert rights at law. Civil justice reform can complement a properly funded legal aid program. Regrettably, legal aid reform is not within the mandate of the Civil Justice Reform Working Group. Its report does seek to address the public interest requirements for efficacy and affordability in the advocacy of civil justice.

III. The Evolving Nature of Advocacy

Views of the nature of legal advocacy have changed over time. Advocate is a word derived from the Latin *advocare* which means to call to one's aid or summon to one's assistance [7]. An advocate in a limited sense is one who pleads the cause of another before a court or tribunal. The lawyer is a champion. The Professional Conduct Handbook of the Law Society of British Columbia adopts a traditional view of the role of advocate in the context of litigation. Its Canons of Legal Ethics also exhort lawyers to encourage the client to avoid or end the litigation if the dispute will admit of fair settlement. [8]

The role of lawyer as advocate and adviser are traditionally distinguished. In the plain and ordinary meaning of the term, however, an advocate is also one who renders legal advice and aid

and defends or espouses any cause by argument. An advocate has been defined in dictionaries as an intercessor or a counselor and as "one that supports or promotes the interests of another" [9].

Indeed, the assumption that advocacy is solely rights-based in the context of litigation has been subjected to scrutiny. It was recently observed:

> The problem-solving approach ascribes a meaning to "advocacy" that goes beyond rights-based representation in a litigation context. The advocate's role is more diverse and complex and is not solely concerned with the legal dimension of the client's situation. The advocate may be concerned with the interests dimension including what is important to the client and his or her actual needs and desires; the procedural dimension including the financial, opportunity and other costs of achieving entitlement; and the relational dimension including the impact of conduct on the dynamic that may make settlement more or less likely. [10]

The roles of legal adviser and advocate often merge in the cause of client advocacy. The realities of practice dictate that a lawyer give consideration to client interests as well as client rights. Trial is certainly a means to an end but not the inevitable end nor necessarily a desirable end. This is reflected in the C.B.A. Code of Professional Conduct, Chapter IX (The Lawyer as Advocate) which not only encourages settlement but directs the lawyer as advocate to consider the use of alternative dispute resolution for every dispute and to inform the client of such options. Alternative dispute resolution processes typically focus the parties on interests rather than rights alone.

IV. The Evolving Role of the Advocate

Historically, the philosophy of lawyering in Canada has been driven primarily by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law. [11] It is an ethic that many have traced back to Lord Brougham's speech in an infamous 1820 case involving Queen Caroline. Lord Brougham stated:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedient, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. [12]

Lord Chief Justice Cockburn, in a response given at a dinner where Lord Brougham repeated his speech from the trial, placed limitations on such unqualified individualistic zeal. The ethos of adversarialism on behalf of individual or group was subjected the competing societal interests in truth and justice. He offered the image of the warrior in contrast to the assassin and stated:

> My noble and learned friend Lord Brougham said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and restriction – that the arms which he wields are to be the arms of the warrior and not the assassin. It is his duty to strive to accomplish the interests of his client per fas; not per nefas; it is his duty to the utmost of his power, to

> seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice. [13]

Truth and justice are perpetuated as symbols associated with the law. The entrance to our highest court in Ottawa is guarded by two statues bearing the Latin words "veritas" and "justitia". They remind judges and lawyers alike of the perpetual need for watchfulness in advancing the theory and practice of each in our courts. Our success in the circumstances of individual cases remains the subject of ongoing professional and public debate. These arise in part from the nature of adversarial litigation; controversies over the proof of truth and the definitions of justice; and the principled and unprincipled subordination of truth to the perceived interests of justice.

The principle of zealous advocacy is related to the duty of undivided loyalty. A lawyer owes each client a duty of undivided loyalty. This means that lawyers must act in the client's best interests at all times. The lawyer's duty of loyalty includes the duty to avoid conflicting interests, the duty of candour in dealing with the client, and a duty of commitment to the client's cause (sometimes referred to as "zealous representation") from the time counsel is retained[14].

The legitimate role of the zealous advocate is well established. Justice Rosenberg of the Ontario Court of Appeal recently affirmed: "Zealous advocacy on behalf of a client, to advance the client's case and protect the client's rights, is a cornerstone of our adversary system." [15]

Zealous advocacy and zealous representation are restrained by rules of professional conduct, the court's control of its process, evidentiary rules and laws of general application. There are limits on what may "properly" be done to advance a client's case or protect a client's rights. The recognition of limits on the ethos of adversarialism is crucial to appreciating the fundamental difference between a zealous advocate and an advocate who is a zealot. A zealot knows no boundaries and is prepared to do whatever is required to advance his or her cause. For a zealot, the end always justifies the means. [16]

The legal profession has many members who subscribe to the warrior tradition. Most adherents would consider it a disservice to themselves and their clients to fall prey to the temptations of improper adversarialism. Further, all advocates must be attentive in recognizing, addressing and overcoming the challenges of improper practices by opposing counsel in the guise of zealous representation.

Views of the role of advocates have changed. The ethic of client-centered zealous advocacy has slowly begun to be replaced in Canada over the last fifteen years by a justice-seeking ethic which sees lawyers pursuing the role of facilitators of justice. One law professor recently observed:

> …the emphasis of lawyering is slowly shifting away from zealous pursuit of the client's cause within the bounds of the law to the pursuit of the cause of justice. That pursuit demands that lawyers engage in behaviour that will enhance a fair, other-regarding, and non-discriminatory process of problem-solving and that will protect the right of the client to obtain the remedy he or she is entitled to under the law properly interpreted. [17]

The proposed changes to civil justice offer opportunities to accommodate the warrior tradition while recognizing other manifestations of legitimate lawyering. Indeed, in addition to the developing justice-seeking ethic, a purposive focus on dispute resolution also brings to mind the advice of Abraham Lincoln, a trial lawyer and advocate of considerable talent. In notes for a law lecture in 1850, he wrote:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser- - in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will be business enough.[18]

Not all zealous warriors will be transformed into effective justice facilitators or peacemakers. Many already possess such attributes. Others could readily acquire such professional dimensions if encouraged. Some will have little or no desire to do so. The failure of pre trial dispute resolution or its inappropriateness in the circumstances of particular litigation will afford continued opportunity for effective trial advocacy.

The proposed changes are consistent with the Canons of Legal Ethics of the Law Society of British Columbia which state that (1) "it is a lawyer's duty…to serve the cause of justice" and (2) "whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation" [19]. In serving justice or resolving disputes, lawyers and clients often choose to give weight and consideration to business, family, personal and other interests in addition to the relevant legal rights involved. Effective lawyers assist clients to make informed decisions concerning their cause and its advocacy.

V. The Implications for Practice

Young advocates often learn two competitive rules of practice that they assume will stand them in good stead. The first is to always take control of the lawsuit. Never be passive. You tend to get where you want to go if you know where you want to go and drive the lawsuit. The second is to always outwork opposing counsel. No matter how experienced or bright opposing counsel might be, you can always outwork them and level, if not tilt, the playing field in one's favour. Such zeal is career enhancing with the billings it commonly produces.

Another rule of practice is rooted in the duty of loyalty. If not self evident, it will typically emerge with the experience of dry judgments, adverse results and the taxation of accounts by unappreciative clients. The third rule is that an advocate must never lose sight of the client's best interests in the pursuit of his or her own. This calls for vigilance and sound judgment together with creativity and practicality. This third rule tempers and even transforms the unreflective or thoughtless application of the first two.

With the emergence of a problem or dispute, there is opportunity to weigh and consider the potential value of alternatives for seeking a final solution or resolution. There are presently a continuum of choices which include negotiation, early neutral evaluation, mediation, med-arb and arbitration together with court-annexed "tracks" or "streams", case management conferences, dispute resolution mechanisms and trial. The proposed changes will accelerate a consideration of such options with the required formulation of a resolution plan with case initiation and the required attendance at a judicial case planning conference.

The proposed changes seem to be intended to address the potentially ineffective and unaffordable focus by advocates on control and hard work and purposively harness from case initiation the legal imagination, ability and zeal of counsel to the objective of possible dispute resolution in the best interests of the client. Comfort can be taken from the fact that litigation remains a court supervised process. The potential for abuse in particular cases can be the subject of appropriate remedy. The vitality of the traditional litigation process is reserved for those cases that require robust, principled and proper adversarialism. Its ritual or unnecessary application to inappropriate cases is managed. The activist judge envisaged by the proposed changes will necessarily rely on activist counsel if the objectives of the changes are to be realized.

VI. Conclusion

Well over 90% of civil cases do settle. Many could settle earlier and less expensively with more flexible and conducive civil processes. The assumptions of more effective and affordable legal services for clients seem reasonable with the elimination of potentially unnecessary civil procedures and the active encouragement of earlier dispute resolution. The proposed changes however do not guarantee equal justice. They will potentially be the subject of criticism for doing too much and doing too little.

At one extreme, some will resist any change. The familiarity of the status quo is comfortable. At the other extreme, some may say by way of example that the proposed changes focus on efficacy and affordability in the interests of access to justice but do not do enough to advance the disclosure of truth in the interests of justice. There are no revolutionary recommendations such as requiring the lawyer as advocate (1) to disclose all relevant evidence and prospective witnesses, even when the lawyer does not intend to offer that evidence and those witnesses; (2) to prevent or report any untrue statement by a client or witness, or any omission of material fact, that makes other statements misleading; or (3) at trial, to examine witnesses with a purpose and design to elicit the whole truth, including supplementary and qualifying matters that render evidence already given more accurate, intelligible or fair than it would otherwise be. [20] There would no doubt be practical concerns with such radical innovations. To adopt Mr. Justice Farley's quoted phrase from another context, the object of the recommendations appear to be not only "what 'justice dictates' but also what 'practicality demands'".

The proposed changes are a constructive development in the search for civil justice. They are not a complete remedy. There will be a continuing need to lobby for political remedies and to pursue available judicial remedies with a view to securing a properly funded legal aid program. There will be a continuing need for lawyers to serve in the best traditions of the profession as pro bono advisers offering summary advice and as pro bono counsel offering full representation to disadvantaged people and worthy causes. The nature and effect of the proposed changes is perhaps accurately captured as follows: "Equal justice is an implausible ideal; adequate access to justice is less poetic but more imaginable."[21]

ENDNOTES

1 the report may be found on the B.C. Justice Review website at www.bcjusticereview.org.
2 this article arises out of the article's participation in the CLE's *Surrey Bar 2007 Conference*, February 2007 and is adapted from his conference paper on access to justice developments.

3 F.E. Dowrick, *Justice According to the English Common Lawyers* (Butterworths: 1961)
4 **a**s cited in M. Jerry McHale and Gordon Sloan, "Defining Lawyer as Problem Solver" in *Dispute Resolution Conference 2006* (Continuing Legal Education Society of B.C.: May 2006) at 1.1.1.
5 *Christie v. AG of BC et al* 2005 BCSC 122 at para. 74.
6 <http://cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript> (date accessed: December 3, 2006)
7 ibid
8 Lloyd Paul Stryker, *The Art of Advocacy: A Plea for the Renaissance of the Trial Lawyer* (Zenger Pub Co: 1979) and the definition of "advocate" in Black's Law Dictionary , Revised Fourth Edition (West Publishing Co.: 1968).
9 L.S.B.C. Professional Conduct Handbook, Chapter 1 (Canons of Ethics) and Chapter 8 (The Lawyer as Advocate).
10 the quote is from the third definition of "advocate" in Merriam-Webster's Collegiate Dictionary http://search.eb.com/mwu/popup?/book=Collegiate&va=advocate (date accessed: December 29, 2006)
11 M. Jerry McHale and Gordon Sloan, "Defining Lawyer as Problem Solver" in *Dispute Resolution Conference 2006* (Continuing Legal Education Society of B.C.: May 2006) at p. 1.1.4.
12 David Tanovich, *Law's Ambition and the Reconstruction of Role Morality in Canada* [2005] 28 Dalhousie Law Journal 267 at 271 and *R.v. Neil* 2002 SCC 70 at para. 12.
13 as cited in David Tanovich, *Law's Ambition and the Reconstruction of Role Morality in Canada* [2005] 28 Dalhousie Law Journal 267 at 271-272.
14 as cited in G.V. LaForest, "Integrity and the Practice of Law" (1987), 21 Gazette 41 at 42 and in The Hon. Paul de Jersey, Chief Justice of Queensland, "The Common Good and Legal Practice" (Institute of Ethics Seminar, St. John's College: 24 July, 1999) http://www.courts.qld.gov.au/publications/articles/speeches/dj240799.htm (date accessed: January 1, 2007)
15 *R. v. Neil* 2002 SCC 70
16 *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.)
17 Jay Naster, "Divided Loyalties" (Chief Justice of Ontario's Seventh Colloquium on the Legal Profession: October 2006) at p. 4 http://www.lsuc.on.ca/media/seventh_colloquium_naster.pdf (date accessed: December 29, 2006)
18 David Tanovich, *Law's Ambition and the Reconstruction of Role Morality in Canada* (2005) 28 Dalhousie Law Journal 267 at 308.
19 Abraham Lincoln and the Rule of Law http://papersofabrahamlincoln.org/curriculum/AbrahamLincolnandtheRuleofLaw.pdf (date accessed: December 29, 2006)
20 L.S.B.C. Professional Conduct Handbook, Chapter 1 (Canons of Legal Ethics)
21 Daniel Walfish, *Making Lawyers Responsible for the Truth: the Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, (2005) 35 Seton Hall Law Review 613 at 613-614.
22 Deborah L. Rhode, *Equal Justice Under the Law: Connecting Principle to Practice*, 12 Wash. U.J.L. & Pol'y 47, 61 (2003) cited in Russell G. Pearce *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help* 2004 Fordham Law Review 969.

OVERVIEW OF THE CIVIL JUSTICE REFORM WORKING GROUP REPORT

EFFECTIVE AND AFFORDABLE JUSTICE

The Vision

- Integrated information and services to support people seeking solutions to legal problems

- Streamlined, accessible Supreme Court
  - Quick, affordable access to trial for the cases that require trial
  - Quick, affordable processes for the 98 per cent of cases that currently do not go to trial

The Principles

- Respect the rule of law
  - This is to remain the foundation of the legal system
- Proportionality
  - Process proportionate to the problem
- Matching
  - Right kind of process for the problem
- Judicial intervention
  - Active case management

Key Components

- The Hub – a single, problem solving entry point

- New Court Rules
  - Proportionality as the overriding objective
  - A new case initiation and defence process
  - A case planning conference attended by the parties
  - Limits on discovery
  - Limits on experts
  - Streamlined motion practice
  - Streamlined trials

Pre-Action: the Hub

- Single place for information and services for people to solve their legal problems
- Coordinate and promote existing services
- Provide legal information
- Establish multidisciplinary assessment/triage service to diagnose legal problems and provide referrals
- Access to legal advice and representation through clinic model

New Objective of Court Rules

- All proceedings must be dealt with justly and pursuant to the principles of proportionality
- Whenever the court exercises any power under the rules or interprets any rule, it will consider the case's
  - Monetary value
  - Importance with respect to the public interest
  - Complexity
    - Number of parties
    - Nature of the issues

A New Case Initiation and Response Process

- Dispute Summary and Resolution Plan
  - Accurately and briefly state the facts and issues
  - Formulate a resolution plan
- Simplify procedures
  - Replace the writ and statement of claim
  - Reduce the time for service
  - Provide blueprint for case planning conference
  - Certify facts by a statement of truth
  - Eliminate the appearance

The Case Planning Conference

- Require the parties to personally attend a case planning conference to review with counsel and a judge:
  - Settlement possibilities and processes
  - Narrowing of the issues
  - Directions for discovery and experts
  - Milestones to be accomplished
  - Deadlines to be met
  - Setting of the date and length of trial

Limited Discovery

- Eliminate interrogatories
- Eliminate the *Peruvian Guano* rule – produce documents
  - referred to in the party's pleading
  - to which the party intends to refer at trial
  - used by any party to prove or disprove a material fact
- Eliminate oral discovery without leave or consent for cases valued at $100,000 or less
- For other cases, absent leave, require each party to be available for oral discovery for a maximum (in total) of one day (parties may consent to one additional day)
- Exchange "will-say" statements

Limit Experts

- The duty of an expert is to help the court — overrides any obligation to the person paying or instructing the expert
- Require the CPC judge to provide directions on experts
  - Which issues require expert testimony
  - Whether a joint expert is appropriate on one or more issues
  - Court appointment of an expert
  - Deadlines for early disclosure of information & reports
  - Whether the opposing experts should meet and confer
- For cases under $100,000 limit each party to one expert plus rebuttal
- Disclose only the facts upon which the expert relied

Streamline Motion Practice

- CPC judge may order an application to be resolved based on written materials only
- Limit volume of written materials that may be filed in relation to motions and the amount of time allotted for the hearing of motion
- Base limits on:
  - Proportionality
  - Whether motion disposes of some or all issues

Streamline Trials

- Set maximum lengths of trial - proportionality
- Require trial management conference (TMC)
- Assign the trial to the judge who conducted the TMC
- Provide TMC judge with powers similar to Rule 68
- Limit jury trials to matters over $100,000
- Provide trial judge with powers to increase fairness and efficiency of the trial process

Conclusion: Keys to Success

- Integrated approach to legal problem solving
- Strong leadership from the profession to overcome cultural inertia
  - Judges
  - Lawyers
  - Court administrators
  - Legal educators
  - Mediators

More Information/Comments

- JRTF Website: http://www.bcjusticereview.org
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