

# Reflections on Half a Century in the Commercial Litigation Trenches – Part I

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## Articling Year

I think that it is safe to say that I started my professional life as a commercial litigation lawyer the day I began my articles at the Fasken Calvin Law firm in Toronto. The very first day, I was passing Walter Williston's office on my way to the articling students' office for the first time when I was stopped by his secretary. She told me that I would be going to Ottawa to the Supreme Court with Mr. Williston that afternoon and that I was to meet him at the airport. She further stated that I was to take with me his favourite scotch, Old Grouse. I asked what the case was and she said that it was the Posluns appeal. On my way to the liquor store, I passed our law library and asked the librarian to get me a couple of articles on the Posluns case. So, equipped with the scotch, articles and an overnight bag, off I went to the Supreme Court. If any of you want to hear the story of that appeal, you can ask me. It is best not to put it in writing...

The lawyers with whom I worked in my articling year were mainly Walter Williston, John Sopinka and Tony Kelly. And what I learned made an indelible impression upon me. I learned that to be a litigation lawyer was more than just a job. It had to be a passion. A relentless pursuit of excellence. And I caught the dream.

At the end of the articles, we, the students, were told that as a group, we were the worst students in the history of the law firm. And the sooner we could vacate the premises, the better for all concerned. Since then, I have always had an affinity for those students not asked back.

I went and said goodbye to Walter Williston and the others. Mr. Williston took me aside and asked me whether I would be interested in a clerkship at the Supreme Court of Canada. I said I certainly would be. He said Justice Spence was looking for his first law clerk and if I was interested, he would speak to him on my behalf. I said I would be thrilled and delighted if he would do so.

## Life as a Law Clerk at the Supreme Court of Canada

It is difficult to properly describe my reaction to arriving at the Supreme Court to start work. I had just been called to the bar and here I was, in the apex of our legal life. Perhaps "privileged" sums it up best.

Let me describe Justice Spence. He had been educated at Osgoode Hall and Harvard. From there, he had practised for a short while in Toronto and then had become a trial judge. His reputation as a trial judge was that he brooked no nonsense and was tough. He had gone straight from the trial bench to the Supreme Court of Canada.

When I entered his office for the first time as his law clerk, he handed to me a bundle of appeal material in a criminal case. It had been a jury trial. He sent me away to review the material so that I could let him have my thoughts. I returned, ready to discuss what I thought might be helpful. I had only spoken for a few minutes when he interrupted me and asked me whether I had "timed the

charge". No, I had not. He said that he had and in a case of such complexity, no proper charge could have been made in the limited time this charge had taken.

I can advise without qualification that my contribution to the jurisprudence during my one year at the court was nonexistent. But I can say that the education I received in the ways of the law and in advocacy were without parallel.

The story about the length of the charge is a case in point. I became aware that it is impossible to foretell what a judge may find dispositive. Or that the case may spin away on some completely unforeseen development. One simply must be prepared for the case to take a dog's leg turn without warning.

Here are a few other examples that have never left me.

I remember two events involving Chief Justice Cartwright, who had been an eminent counsel in Toronto. He had vast experience and had also served in the First World War, being wounded twice and being awarded the Military Cross. He was a true gentleman: very polite, even-tempered and approachable. A highly respected Chief Justice. The first event was an appeal at which he presided and in which a leading counsel was glossing over a case of the Supreme Court that was against him. However, if the Court were to find in favour of his client, it had to come to terms with its earlier case. It was towards the end of the day and I could see the Chief Justice becoming disturbed. Then, I saw the Chief Justice uncharacteristically lean forward and address the counsel. With an edge in his voice, he said: "This is not good enough, take time tonight and come back in the morning and argue this case properly." And with that, court was adjourned. What was etched into my soul was to never gloss over a key weak point.

The second event was an appeal that was argued by J.J. Robinette and John Arnup, two of the giants at the bar. Again, the Chief Justice presided. It was a tax case and, to this day, I remember that John Arnup in one sentence said that the tax attracted what went on at the surface but not at the bottom of the well. At the end of the argument, I was standing where the judges come out of the courtroom. The Chief Justice said to me as he came out: "Did you hear those arguments?" He looked as if 1000 flash bulbs had gone off in his face. "Remarkable, outstanding," he uttered. There I could see in the face of the Chief Justice, in his reaction, the power of the spoken word, of well-crafted sentences and simple English – the power of good advocacy.

My last story is about an appeal that was to be heard the next day and John Sopinka was one of the counsel. As I had known him from my articling, he phoned and asked whether I would join him and his team for dinner the night before the appeal. I went to Justice Spence and asked what my response should be. He said to me: "Bryan, I have never become a hermit as a judge and if you wish to have dinner with Mr. Sopinka, feel free to do so and I know you will not discuss the case."

I leave one further bit of wisdom from Justice Spence. He said to me: "It is all very well what we do here in the Supreme Court, but where justice must really work and be seen to work is in the lowest courts of the land."

When it became time for me to prepare to leave the Court, I sought Justice Spence's advice as to where I should apply in Toronto. I had a short list which I went over with him. He said if you can get a job with John Arnup, look no further. In fact, he said that he would speak to John Arnup if I so wished. I so wished.

To be continued ... I move into the trenches.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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