Reflections on Half a Century in the Commercial Litigation Trenches: Part II

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By

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Arnup Leaves and an Offer Is Made

Shortly after I joined WeirFoulds, John Arnup left the firm for the Court of Appeal. I had been hired as Arnup's junior. Jack Weir came to my office and said he hoped that I would stay at the firm. I said that I appreciated his visit and that, yes, I would be pleased to stay. Some months later, I received a telephone call from John Sopinka. He asked me if I would come to his firm and be his junior. I said that I felt honoured by the invitation and that I would consider it and get back to him shortly. I went to see Jack Weir. I told him of the offer. Jack Weir said: "Bryan, you have to ask yourself this question: most mornings when you wake up, do you want to come into the office? We all have those mornings when we would like not to, but ask yourself that question, whether most mornings you look forward to coming in. If you do, don't be quick to change." I thought about that question and concluded that, yes, I did. As a result, I stayed at WeirFoulds.

A Judge Helps

I was the most junior litigator in the firm when a senior solicitor asked me to act for one of his clients. It was a serious piece of litigation where the dollars involved were considerable. Opposing counsel, of which there were several, were senior and the leading counsel in their respective firms. Filled with the conceit of youth, I did not feel intimidated.

I had learned from Walter Williston that, as plaintiff, putting in your case through reading in from the discovery transcripts without calling a witness was the way to go if you could prove your case that way. And thus I proceeded. I read in from the transcripts, proffering various so proved documents and sat down.

To say that all involved were thunderstruck is an understatement. The defence bar immediately conferred, elected to call no evidence, and advised that they would all be moving the following morning for nonsuits. I remember the trial judge looking at me as we adjourned, as if I were from some other planet. In a flash, I realized that I had just committed suicide, not only professionally, but that I had also taken my client with me. Back at the firm, I asked the senior counsel for advice. They were supportive, but I could tell that some wondered what drug I was taking. The following morning, the senior defence counsel started arguing their motions with elan. The tanks were on the move and headed straight for us. We were on the verge of being overrun.

And then, something strange began to happen. The trial judge started to interject with questions and the attacks started to slow down. And so it progressed. Finally, the judge stated that he was sure that Mr. Finlay would not hold them to their election if they decided to withdraw their motions and call evidence. And that is what happened.

I have often revisited what happened that morning in the courtroom. But for the miracle of the judge's intervention, we would have lost the case. And what I learned from that experience is that a court wants to see justice done as between the parties as opposed to their lawyers, and that it will intervene, to the extent it properly can, to further that goal. The judge saw a spanking new lawyer go into the deep and taking his client with him. His client was entitled to more. Subsequently, I have heard this judicial characteristic referred to as the judicial quality of assistance to ensure a fair trial. At the time, I saw it as a divine intervention and perhaps it was that, too.

An Encounter with the Criminal Law

In the early days, we, civil lawyers, often were trained in courtroom trials through the legal aid system. We put our names on the legal aid lists, both civil and criminal. For some unknown reason, I was retained in a number of criminal cases. All of them went to trial, and several were jury trials. In one of those cases, I was retained by an individual charged with rape. He had only recently been released from Kingston penitentiary, where he had served time for a rape conviction. In the case in which I was retained, the alleged victim had met my client at a mall. He had interested her in possibly buying his bicycle, which he said was in his rental flat. She followed him back to the flat where she said that she was then attacked.

My client denied the attack, saying that she had consented to sex, but that when he suggested oral sex, she went crazy and scratched his face and ran. This, he said, accounted for the numerous deep scratches on his face. The crown was not prepared to negotiate. They wanted a conviction, and then a finding that he was a dangerous sexual offender, which would result in him being committed potentially for life. We had no choice. It would be a jury trial. We consented to the fact of sexual intercourse, which then precluded the crown from leading similar fact evidence. I could not call my client. We were fortunate: in the end, he was acquitted.

I do not think that there is anything in trial work that equals a criminal jury trial. It is replete with tradition and when the jury returns with its verdict, nothing else matches that moment. I have often thought that if my firm had had a criminal law practice, I could very easily have practiced criminal law.

However, the criminal law has another aspect. About six months after the trial, the student who had appeared with me on the case came to my office, shaking, holding up the front page of the Toronto Sun. Our former client had just been charged with attacking women at knifepoint.

Asking for Advice

I, again on a legal aid certificate, was retained by the principal of a medical laboratory charged with defrauding OHIP. The charge was the result of someone giving to a member of the provincial legislature documentation that apparently incriminated my client. My theory was that my client was embroiled in a matrimonial dispute and that his wife was the one who, out of spite, had handed in the documents. Needless to say, I would also have to prove that, in any event, the documents were suspect.

At the preliminary hearing, the MPP was called by the crown. I asked from whom he had received the documents. He refused to answer on the basis that this was information protected by legislative privilege. The judge ruled that he did not need to answer. I then moved in the Superior Court with the result being that the question was to be put again to the MPP and he was required to answer. He again refused and was committed to eight days in jail for contempt. He was to return at the end of the eighth day to answer the question.

The public outcry was deafening: a public servant goes to jail while the accused is free. Editorials, cartoons, etc., filled the front pages and the news programs. At the end of the eighth day, we went back to court. City Hall Square was full of demonstrators: there was a donkey covered with a sheet on which was written: "The law is an ass." I had trouble even getting into the packed courtroom. Again, the question was put, and again, refused, and down went the MPP for another eight days.

To say I needed some advice is, again, an understatement. A man was going to jail again and again because of my theory. It was only a theory. The most that I could say was that it was at least consistent with the few known facts. But the administration of justice was taking a beating in the public forum. I felt that I was way in over my head. I needed advice.

The senior counsel in our firm were no longer there. Appointments and untimely death had wiped them out. I phoned J.J. Robinette's office and asked if I could come and see the great man. His secretary excused herself, returned to the phone and said that, yes, he would see me. Over I went. I was ushered into his office. I said that I was in a very difficult situation and I needed help. I told him my story. He listened and, when I finished, he smiled and said: "You are doing just fine." He then stood up, shook my hand and I left. What I saw in that short interview was the strength of counsel. A huge weight was lifted from my shoulders and on we went. The story ended with the Attorney General preferring the indictment and referring to the Court of Appeal the issue of the scope of the legislative privilege, if any, in the circumstances.

The lesson that I learned was that being counsel can be very tough at times, but that counsel must be strong. And that, most importantly, counsel is never alone.

Snakes and Ladders

I soon came to the conclusion that civil litigation is much like a game of snakes and ladders. An early example of this for me was the case of *Multiple Access*, which was a paramountcy case. We acted for an individual who was alleged to have breached the insider trading provisions of the Ontario *Securities Act* and, therefore, to be liable to compensate for the amount made from the unlawful trades. We argued that since the company was a federal corporation, the federal act applied and that the Ontario act had no application, based on the doctrine of paramountcy. The issue wound its way up through the courts. I felt very much like a mountain climber moving from ledge to ledge upwards, sometimes losing a foothold and falling, only to restart the climb again. We finally reached the Court of Appeal where we were successful. The appellant then retained J.J. Robinette, and off we climbed to the Supreme Court of Canada.

While certainly nothing was said, the Court seemed delighted to see the great man and beamed at him as he made his submissions. I thought that they would have offered to drive him out to the airport for his return to Toronto if that had been allowed.

Not surprisingly, we lost. In the words of the simile, we stepped on the snake and went right to the bottom of the board. The only consolation one can find in stepping on the snake is if the case enters the lawbooks. This case did.

Off to Ottawa

In the early 1980's, I was approached by the Department of Justice in Ottawa to come up for two years on an executive interchange. I was to do counsel work for the Competition Bureau and for the Justice Department generally. While I initially said no, Ian Binnie changed my mind. He was already in Ottawa on such an exchange and spoke highly of his experience. So, after a discussion at home since it meant moving our entire family to Ottawa, we decided to go. I remember looking around my office to decide what books to take. I settled on only one: Peter HOGG, *Constitutional Law of Canada*.

To be continued… now as a Justice lawyer.

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