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Passion and Advocacy in the Supreme Court of Canada

When I think of passionate presentations by counsel, I am immediately reminded of those American movies showing grandiose presentations before juries, or European movies showing counsel plead before a mixed panel of judges and jury members in a French criminal court. In the Supreme Court of Canada, with strict time limits and the reminder that it is not a court of error correcting but of development of the law, advocacy has a somewhat more restricted role in the eyes of the public. Few people would think, at first blush, that there is any room for passion in advocacy at that level. Those who would see room for passion would probably think that it would occur in cases dealing with social issues of great importance or the status of various minorities. We have in fact seen examples of advocacy in our Court that permit me to address the issue in a realistic fashion, I hope.

Before I deal directly with the topic, let me mention two short anecdotes. One day, in a Court of Appeal, a self-represented litigant accused of trafficking appeared. The Crown attorney got up to present his argument, mentioning that the accused was dealing in heroine, insisting on this time and time again. Exasperated, the accused jumped to his feet and said in a loud voice, gesticulating frantically: "This is not fair. He is lying. I never dealt in anything but cocaine!" This is bad advocacy. Rule one, passion and improvisation are a dangerous thing; they are not for everyone, or for every setting. Planning and preparation are always required.

The second anecdote is as follows. One day students working in a community legal clinic were brought to a provincial court to see a hearing; an unexpected event took place. It was Monday morning and the room was very crowded. A number of accused were standing against the wall in back of the room. An old judge walked in, grumpy, gown all crooked; before anyone could say anything, he looked at the sheriff and said: "Bring those criminals up here where I can see them." Rule two: before arguing a case, know the judges you are addressing. All forums are not the same.

What these preliminary remarks lead to is the obvious conclusion that oral advocacy must always be well prepared and adapted to the particular circumstances of the case. Many commentators are of the view that oral advocacy does no longer play the role it once did in appellate courts because written pleadings are much more detailed and judges better prepared than they might have been years ago. I don't know how true that is, but it is clear that written materials are very comprehensive in our Court and that it is all but impossible for us judges to come into a hearing without having a preliminary view of the matter to be heard. This does not mean that oral advocacy cannot make a difference, but it does mean that except in those cases where a judge still thinks there is a good chance of going either way, counsel will have to do a lot more than repeat what they have argued in their factum to persuade him or her; and advocacy is about persuasion. In the Supreme Court of Canada, as I have mentioned, there is the additional difficulty presented by strict time limitations and the obligation to deal with questions from the bench within this restricted time, which will usually begin very early.

Preparing an oral presentation, in my view, requires first to decide on what legal issues one wishes to focus: What are the key questions that, if answered satisfactorily, will lead to the proper conclusion? I agree with my colleague Ian Binnie when he says that inexperienced counsel often go into a courtroom assuming that everybody is agreed on what the exact question is. The unarticulated differences of approach are evidence that this is often not the case. A good advocate wants to control the agenda as much as he or she can. It should also be noted that the complexion of a case can change from trial to appeal court, and from appeal court to Supreme Court. Many lawyers don't approve of this, but there is no avoiding it in many cases.

In *Ocean Port Hotel*, for instance, the initial issue was whether the members of the BC Liquor Licencing Board lacked institutional independence. In our Court, the question had changed: the question was whether the Board (a part of the executive) was independent and whether the Legislature could determine its status freely. Reformulation is acceptable if there is no ambush. Counsel should be able to adapt or to cooperate with this refinement process. One good example of an effort to change the issue before the Court is the Same Sex Reference where many participants wanted to debate whether recognition was a good thing rather than whether the present definition of marriage was discriminatory in light of s. 15 of

the Charter. One counsel started her presentation by showing the Court pictures of same sex weddings and the stories behind them. This was obviously an emotional appeal that one could argue is somewhat disconnected to the role of the Court. If one chooses to make an emotional or passionate plea, he or she should relate it to the legal determination to be made.

Good advocacy also requires that the legal issues be presented in such a way that the Court finds its role to be manageable. If the problem before the Court seems very complicated, if facts and law are so difficult to disentangle that the Court begins to believe that it is mainly being asked to review findings of fact or credibility, it may well tend to defer to the trial judge more than necessary. Clarity is one of the major objectives of the oral presentation.

Another important aspect of the presentation is to address directly the main arguments of opposing counsel. The Court is not going to decide a case on the basis of who made the best presentation without consideration of the interaction between competing positions.

If I am right with regard to these preliminary considerations, it is obvious that a lawyer who chooses to make a passionate presentation based on social facts without giving too much attention to the underlying legal issues is going to be preaching in the desert.

Oral advocacy is also about the ability to address oral questions in a manner that satisfies the court. And I do think one can prepare for questioning. One thing to remember in this regard is that because of its particular role of clarifying and developing the law, our Court is always concerned with the implications of a decision with regard to other cases, to the legal principles themselves, to economic, political and social repercussions. Questions are often asked to invite counsel to address these issues. Because of this, it is important to consider that the case should often not be argued in exactly the same way as it was in the Court of Appeal. It may, because of the importance of questions, be a lot more difficult to present a passionate plea in the Supreme Court and achieve some success in communicating with the bench on that basis. Still, one must remember that in this day and age it is not realistic to insist on a black letter application of the law if it will lead to an unjust result; our Court looks for complementarity between legality and justice. This leaves so room for passion. It is also clear that in difficult cases

specially, pragmatism will trump dogmatism. In the *Secession Reference* for instance, one argument was that the matter could be dealt with very simply: secession requires an amendment to the constitution and all the Court has to do is apply the amending formula. On the other hand, the amicus curiae brushed aside the constitution and argued that this was a simple question of the right of self determination of the people of Québec and that the Court had no jurisdiction to decide that issue. These were two passionate pleas for formalism. But the Court had a lot of questions to ask. It is not as easy to be flamboyant in answering questions. But there are occasions when questions are used as a springboard to launch into a strong rhetorical presentation. That is not generally a good strategy in our Court; we expect clear and short answers to our questions because they are mostly meant to obtain precision on one's position or point of view on the law, or on the consequences of a particular decision advocated. Here again, a lot of passion can lead to great exaggerations or underestimations. The problem in most cases is that repercussions are not analysed scientifically.

Let me come back to the true object of this presentation, which is to discuss the value or difficulties with passionate presentations made by lawyers in favour of their clients. The first thing to note in this regard is the admonition of our Court in *R. v. Boucher* (1955) 110 CCC 263 at 277 where it said: "It is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case". There are cases where it is difficult not to conclude that the lawyer is personally adopting a particular view and in effect standing in the shoes of his client; this happens mostly in cases where social issues are at the forefront. There was a lawyer who shall remain anonymous who was famous for his personal involvement. One day, defending a person accused of selling marihuana in a high school, he argued that this should not be illegal since it was inoffensive. "After all, he said, I should know since I have been using it regularly for twenty years!" In another case where he was defending a person accused of incest, he argued that there should be a constitutional exemption for the village where he and the accused lived, because "everybody there does it, so it can't be against the mores of that society". This kind of personal plea places the Court in a very awkward position, mainly because the credibility of the lawyer is on the line. A judge in that situation is only one step from questioning the reliability of the evidence relied upon.

In a few cases, in recent years, we were informed that expert evidence had been specifically prepared by experts committed to a cause to support a specific argument in view of a specific appeal. Even scholarly articles had been produced for the purpose of supplementing argument by counsel. One other difficulty in those situations is that lawyers who put themselves in those situations often become very argumentative when questions are put to them. Worst, some have clearly challenged the integrity of the Court with affirmations like: “If the Court truly believes in justice for ..., it must find...”. The Court is not generally interested in emotional arguments of that sort and does not appreciate counsel taking questions posed by members of the Court as arguments in favour of one party or the other.

There are counsel who appear in our Court who are well known for their theatrics. We expect it from them. One whom I will not name is an older gentleman who does a great deal of pro bono work and likes to shortcut legal argument and plead directly for mercy in favour of the disadvantaged. This is not usually very effective, even though it is true that the Court has moved away from a technical application of rules which lead to absurd or unjust results as mentioned earlier. The reason it is ineffective is that it most often leads to great exaggerations by counsel. In *terrorem* arguments are seldom taken seriously unless supported by reliable evidence. One argument sometimes made by the Crown without success is that we can't afford this quality of justice: one example of a case where that argument was successfully rebutted is *R. v. Sheppard* (2002) where, you may recall, our Court decided that sufficient reasons would be required to support a verdict. The Crown argued that forcing all judges who give oral decisions to meet the sufficiency test would tax judicial resources in an unreasonable way. Defence counsel showed the Court how the minimum test could be met in five minutes in the simple case before the Court.

Counsel is not supposed to supplement the record through argument. He or she is not allowed to supplement it by exaggerating its value or scope either. The same is true of unwarranted analogies. It is also true of dramatic emphasis on some part of the expert evidence real aloud for instance. It is true of cases where the argument is made that the law should not apply evenly because of the better public good in protecting an otherwise valuable institution; this was the argument made by churches facing important damage awards following actions for sexual abuse by clergymen.

I want to say at this point, however, that our Court gives leave because it believes that there is a question of national importance at issue and that there is a need to clarify or develop the law in the context of the case. It is therefore important, in many cases, for counsel to consider why he or she thinks leave was given and explore the impact of the decision on the legal, social, economic or political order, as the case may be. This is an opportunity to invoke history and all sorts of extrinsic materials that usually are used in making grandiose presentations. Some lawyers however seem to believe that all that is needed is a common sense approach. They forget that common sense is in essence about drawing inferences. It is not about introducing a larger amount of subjectivity in decision-making. Prejudices, myths and changes in values suggest the necessity of real evidence and the need to question many popular conceptions. Still, common sense is particularly present in the Oakes test - what is rational, proportional, minimal? Section 1 of the Charter is about the rationality of value judgments. Justifications must therefore be informed and reasonable in view of the principles involved. Counsel should understand the methodology of s. 1 before embarking on an analysis based on common sense reasoning without more than passion.

A passionate counsel is simply trying to catch the attention of the Court, to convince the Court by denouncing an injustice, insisting on context, forcing the Court away from technical legal issues, warning against repercussions of a particular decision. The danger is that this counsel may be getting too far away from the Court's working hypothesis and unable to bring it to change it. A good observer of the Court should be able to discern the working hypothesis from the questions asked by the judges. He or she must look out for fear of being overtaken by events during the hearing, ie the momentum that develops and leads the Court in a particular direction. To be effective, counsel must test the hypothesis, challenge the assumptions upon which it is founded. In other words, counsel must show flexibility and have good command of the record. Without really knowing, my impression is that emotional and passionate pleas are often made by counsel who are arguing a case in parallel to the one around which the hypothesis of the Court evolves and that he or she may not feel the necessity to master the file he or she does not intend to deal with in detail.

In saying this, I should note immediately that I do not consider that all theatrics are the same. In fact I remember a speech given by my colleague Ian Binnie to the Advocates Society two years ago where he described his experience

as a young lawyer working with the famous John Robinette. Speaking about Robinette's presentation in the Patriation Reference, Justice Binnie said: "However, his antennae had quickly picked up on the court's interest in the Saskatchewan theory of substantial consent, and he grasped the potential of that theory to divide and rule his opponents in the provinces. At one point in his argument he paused theatrically, looked sorrowfully at the ranks of provincial counsel... and said words to the effect that while it was no part of his brief to argue the point, he simply could not refrain from observing that Saskatchewan's position knocked the Confederation pact theory of the other provinces into a cocked hat". I agree that this is an example of theatrics without the bad characteristics that I alluded to earlier; it is also an example of adjusting to the development of the case and the hypothesis coming to the fore. Theatrics can be used effectively when it permits counsel to attract the attention of the Court and to make a new argument. A gesture, a silence, a grin can be important. Spontaneity is possibly a talent that is hard to develop, but it surely helps when trying to make a passionate plea.

I mentioned earlier how important it is to know your court. A long time ago, in rural New Brunswick, a lawyer who had been a small businessman, but also the mayor of his little municipality for 25 years, was appointed to the bench. He had not been in a court of law for all that time and had no idea how to apply the rules of Court. As a matter of fact, he did not remember what the rules were. Asked to preside over a criminal trial, a curious village filled the courtroom to witness the event. The judge relied on the clerk for all procedural decisions. Once the trial got going, however, he was faced with the need to decide what to do when defence counsel requested a voir dire. With no one to tell him what to do, the judge turned to the audience and said: "Does anyone second the motion?" An old lady rose her hand. The judge then asked: "Anyone opposed? No. OK, lets get on with it...". Now if one was to argue a case in front of that judge, he or she should think hard about the approach to be taken. My view is that one should think hard about the composition of the court in all circumstances.

Some things work in one court and not the other. Some counsel can do something that will be repelled in the case of others. I remember hearing a case in the New Brunswick Court of Appeal where counsel kept making the same fishing analogy which I found ridiculous and distracting, while one of my colleagues found it amusing. There are the "get on with it" judges, the patient judges, the chatty judges and the quiet judges. Some are not likely to let you go on making

