

Opportunities for Advocacy in the Ontario Court of Justice

Remarks to The Advocates' Society: February 17, 2004

I am pleased to have been invited to address this forum today on the topic of *Advocacy in the Ontario Court of Justice*. Before beginning my text, I should first admit to a long-held personal bias, namely that the proper forum for the practice of law is the courtroom and, further, that advocacy continues to be the highest expression of the lawyer's art.

It would assist in setting the context for my remarks if I could first place what I am about to say in an historical perspective. When I began practice several decades ago, it was the field of criminal law that attracted my attention. It was not then uncommon for young lawyers, whatever their eventual field of interest, to practice initially in the criminal courts in order to gain experience. Legendary advocates such as J.J. Robinette, G. Arthur Martin, Charles Dubin and Arthur Maloney, to name but a few, had made the practice of criminal law respectable and Ontario was developing a strong, specialized criminal bar. Further, the relatively recent development of the Ontario Legal Plan made criminal practice, if not profitable, at least affordable for younger lawyers. The wide variety of criminal cases allowed new lawyers to practice their advocacy skills on cases which, by today's standards, were of little real consequence and offered low risk, both to the defendant, and to the lawyer. Shoplifting charges were in abundance and it was not uncommon for the value of property in issue to be minimal. The introduction of absolute and conditional discharges further lessened the potential impact of a finding of guilt. Young lawyers not only argued these

cases by the thousands, but also sat, watched and learned as their colleagues did the same. Larger firms offered the services of their junior lawyers as a form of loss leader to firm clients or to members of their families who had been charged with minor criminal matters or provincial summary offences.

At that time, the practice of criminal law in the Provincial Courts of Canada was almost entirely oral. In the pre-*Stinchcombe*¹ era, there was no formal requirement of disclosure, which appeared to be entirely within the discretion of the Assistant Crown Attorney. Although such a practice would now likely be considered negligent, it was not unusual for defence counsel to receive disclosure of the Crown's case for the first time by listening to the Crown's witnesses testify in chief. Counsel, both Crown and defence, prided themselves on their ability to adjust quickly to new or changing evidence and to argue in consequence. At a time when the principle ground of admissibility of evidence was relevance (with some notable exceptions, such as the classic rule against hearsay and the *Judges' Rules* on accused statements), legal argument was limited and most arguments were entirely fact-based. If evidence was relevant and material, it was generally admissible. The search warrant provisions of the *Criminal Code* were largely ignored because of the principle of relevance and it was rumoured that, in some jurisdictions outside of Ontario, pre-signed blank search warrants were available to police for the asking. Pre-trial and trial motions were largely unheard of within the provincial criminal courts and it was rare counsel who would ever be obliged to put pen to paper in a criminal trial. Most criminal counsel, both Crown and defence, seemed to subscribe to the view that "There are two things wrong with almost all legal writing. One is its style.

¹ *R. v. Stinchcombe*, [1991] S.C.R. 326

The other is its content.”² The pace of litigation was rapid, the cases generally short in length and large numbers of young counsel took advantage of the ready access to the advocacy experience that the Provincial Court provided. Articling positions in criminal law firms were widely available and generally highly prized. Mentoring was informal and loosely organized, but it did exist and functioned at several levels. Financial pressures seemed to be less present or, at any rate, less compelling. The Crown Attorney system also provided an opportunity for counsel to gain rapid and broad exposure to litigation and to develop and hone advocacy skills. While the position of Crown counsel was then becoming more of a long-term career, for some Crowns the well-worn practice continued of leaving the Crown’s office to embark on a career in private practice, whether in the area of criminal law or otherwise. In short, as the representative of a fading era, I am tempted to say that this was for many the golden age of oral advocacy for young lawyers.

As members of the Advocates’ Society, you are undoubtedly better able than I to identify the declining opportunities for advocacy in its classic sense within the Court system. If I may speak of our Court, the Ontario Court of Justice, in the criminal context; the type of cases which I and others defended in the early days of practice are to a large extent simply no longer prosecuted. Police and Crown diversion have led to the removal from the criminal justice system of large volumes of cases and with them the advocacy opportunities that they represented. Our litigation profile has changed as the cases which we hear have become inherently longer and

² Rodell, Fred, *Goodbye to Law Reviews*, 23 *Virginia Law Review* 38 (1936), quoted in Rosenberg, Alvin B. and Huberman, Marvin J., *Appellate Advocacy*, Carswell, 1996

more complex. The Ontario Court of Justice is now the largest Court in Canada. We have moved far from the Provincial Courts before which I began to practice in 1975. In the area of criminal law, our jurisdiction continues to include the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Youth Criminal Justice Act* and other federal statutes. We continue to deal regularly with the minor thefts and with the drinking driving cases by which some people still erroneously define Provincial Courts. We also deal more and more and in large numbers with break and enter, frauds, serious physical assaults, sexual assault, robberies, attempted murder and manslaughter, whether at trial or by way of plea. If your last appearance in a Provincial Court were 25 years ago, you would probably feel slightly disoriented in the current Ontario Court of Justice; no longer will you see judges dealing with criminal matters and provincial offences on the same court docket; the mix of cases and the nature and range of the issues have changed significantly. To give but one example, while our Court continues to deal with a large volume of drinking and driving cases, it has been years since the average trial could be completed within 30 to 60 minutes. The average length of an ordinary impaired driving trial, is now much more likely to be one half day, and it is not at all uncommon for such a trial to be a day or more in length. In the mid 1990's, the federal government moved to hybridize a number of criminal offences, allowing the Crown to elect to proceed by summary conviction with respect to offences which had previously been strictly indictable, with the result that a significant volume of criminal work migrated from the Superior Court of Justice to the Ontario Court of Justice. The number of preliminary inquiries within our Court has declined and the number of trials in serious matters has increased, as have elections to the Court both by the Crown and by the defence. I would not

want to leave you with the impression that the Ontario Court of Justice does nothing but contested trials. As with all Courts, the vast majority of matters resolve without a formal trial. Nonetheless, the sheer volume of cases dealt with by our Court, somewhere in the neighbourhood of 550,000 criminal charges each year (or approximately 250 to 270,000 cases) and the nature of the subject matter inevitably mean that there will be thousands of trial proceedings. Michael Barrack's text *Discussion Points for the Task Force on Advocacy*, prepared for this policy forum, while it contains data with which I am not familiar, appears to suggest that criminal trials in the Ontario Court of Justice constitute the majority of all trials held before all Courts in Ontario. Further, each criminal case typically gives rise to several opportunities for oral advocacy, however it is resolved. In the absence of a process akin to civil minutes of settlement, virtually all resolutions, at trial or otherwise, require the appearance of counsel and argument or submissions in open court.

There are a number of reasons for the changes that have occurred within our Court. Without attempting to identify them all, four decades of specialization and an appointment process that is second to none in the nation have created a highly qualified and competent provincial judiciary in whom the bar has a great deal of confidence; diversion has substantially reduced the in-court prosecution of relatively minor offences; the elimination of the trial *de novo* in summary conviction matters long ago increased the importance of the summary conviction trial; the ongoing professionalization of the justice of the peace bench within the Ontario Court of Justice has for all practical purposes meant that virtually all provincial offences are now dealt with by justices of the peace rather than judges,

contrary to historical practice; the hybridization that I mentioned earlier has certainly had its impact and finally, the 1982 proclamation of the *Canadian Charter of Rights and Freedoms* has changed forever, not only our polity, but also our trial Courts.

In 1982, it was initially possible for some to hold the view that the *Charter* would have minimal impact on our criminal justice system. However, as the progression of *Charter* cases began to emanate from our Courts of Appeal and the Supreme Court of Canada, *Hunter v. Southam*³, *Therens*⁴, *Big M. Drug Mart*⁵, *Collins*⁶, *Morgentaler*⁷, the litigation landscape changed irrevocably. Few people would have been able to predict the nature or the magnitude of the *Charter's* massive and fundamental impact on all aspects of the law: substantive, procedural and evidentiary. In 1990, within 60 days of the creation of the Ontario Court (Provincial Division), the Supreme Court of Canada's judgment in *Askov*⁸ sparked a flood of *Charter* applications with which the Courts were ill prepared to deal. In 1991, *Stinchcombe*⁹ formalized the obligation of Crown disclosure and brought further changes to the practice of criminal law. With the changes effected by the *Charter* in criminal proceedings, the nature of advocacy within our criminal courts has been significantly altered. There has been a proliferation of motions and applications, often relating to disclosure, the right to counsel, the exclusion of evidence and unreasonable delay. As *Charter* law evolved in the late 1980's and early 1990's and practice within our Court became

³ *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145

⁴ *R. v. Therens*, [1985] 1 S.C.R. 613

⁵ *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295

⁶ *R. v. Collins*, [1987] 1 S.C.R. 265,

⁷ *R. v. Morgentaler, Smoling and Scott* [1988] 1 S.C.R. 30

⁸ *R. v. Askov*, [1990] 2 S.C.R. 1199

⁹ See 1 *supra*

more complex, the Court created Rules for Criminal Proceedings closely following the Criminal Rules of the then Ontario Court (General Division). One of the consequences of the creation of the Rules in Criminal Proceedings has been the development of a form of written record which, although not the equivalent of pleadings, nonetheless bears some resemblance to them and would undoubtedly appear familiar to lawyers involved in civil practice. The essential nature of the criminal proceeding remains, however, oral advocacy.

In contrast to my earlier remarks, relevancy is now no longer the dominant criterion for admissibility in criminal law; the classic rule against the admissibility of hearsay and its pigeon-hole exceptions has largely given way to the principled approach to exceptions to the hearsay rule with its emphasis on necessity and reliability; the *Judges' Rules* regarding the admissibility of an accused statements have largely ceded their place to constitutional arguments on admissibility and the law of search and seizure has itself become a veritable growth industry. From being one of the least academic of pursuits, the criminal law is often now dominated by legal and technical arguments that challenge even the most experienced jurist. At the same time as the practice of criminal law has become intrinsically more demanding and more intellectual, the number of articling positions in criminal law has greatly diminished, as has the mentoring that those positions provided. With the economic imperatives of modern practice and the increasing cost of a legal education, the practice of criminal law is probably less attractive to a young lawyer today than it was a number of years ago, despite the unparalleled opportunities that it continues to offer for advocacy. Unfortunately, given the importance of legal aid to the practice of

criminal and family law, it is significant to note that, in 2001, Legal Aid Ontario reported that there had been a decline of over 25% in the number of counsel accepting legal aid certificates over the preceding five years. This decline was accompanied by a significant aging of the Legal Aid bar, with a smaller number of new lawyers being prepared to accept legal aid certificates.

Up to this point in my remarks, I have focused on the criminal jurisdiction of the Court, in large part since that is the area in which the evolution of our Court and its practice is most readily observable. In the remainder of my text, I will speak to the provincial offence and family jurisdiction of the Court.

Violations of provincial statutes and regulations as well as municipal by-laws are prosecuted under the *Provincial Offences Act* in the Ontario Court of Justice, customarily before a justice of the peace. There are approximately 1.7 million charges laid under the *Provincial Offences Act* each year, 1.3 million under the *Highway Traffic Act* alone. While many of these offences are regulatory in nature and considered by some to be relatively minor, the consequences of conviction for an individual defendant are often significant and trial proceedings are not infrequent. Three provincial statutes in particular warrant special attention, the *Occupational Health and Safety Act*, the *Environmental Protection Act* and the *Securities Act*. The nature of the prosecutions under each of these three statutes is unique and charges are often aggressively defended. In each of the *Acts*, the prosecutor has the ability, as of right, to require that the proceedings be presided over by a judge of the Court rather than by a justice of the peace and the penalties

upon conviction are markedly different from those traditionally associated with provincial offences. Indeed, many consider the potential penalties to be at least as severe as those applying to conduct under the *Criminal Code*. Convictions under the *Occupational Health and Safety Act* may carry fines of up to \$500,000 and/or imprisonment for up to 12 months. Under the *Environmental Protection Act*, individuals are liable to a fine of up to \$20,000 for each day or part of a day on which the offence occurs and corporations up to \$100,000 per day, for a first offence. For certain offences, the maximum fine may be up to \$6,000,000 for a corporation and up to \$4,000,000 for an individual, with a maximum potential jail sentence of five years less one day. Similar penalties are provided under the *Securities Act*. Given the potential penalties and the other indirect consequences of a successful prosecution, it is not surprising that a number of proceedings under these three statutes are strenuously defended in trials that are both complex and challenging.

The area of family law continues to represent a significant part of the work of the Ontario Court of Justice. As you are no doubt aware, our Court was created in 1990 out of a merger of the Provincial Court (Criminal Division) and the Provincial Court (Family Division). Since that time, successive expansions of the Family Court of the Superior Court of Justice in 1995 and 1999 have reduced the geographic area in which the Ontario Court of Justice has family law jurisdiction to the point where our Court now retains family law jurisdiction in about 60% of the province, including most of the GTA. The bulk of our family law work consists of proceedings under the *Child and Family Services Act*, the *Children's Law Reform Act* and the *Family Law Act*. The model upon which the Court has operated has been and

remains one of specialization. Despite the fact that we no longer have any family law jurisdiction in the equivalent of two of our seven court regions and in a number of other court locations, we have over the past five to seven years seen our child welfare cases under the *Child and Family Services Act* increase by 45%, a phenomenon that is also occurring within the Family Court of the Superior Court of Justice. Part of the explanation for this increase can be found in the legislative redefinition of the circumstances giving rise to the need for protection of a child as well as in the increased funding for Children's Aid Societies across the province. Whatever the causes, child welfare cases, especially where they involve Crown wardship, are highly litigious, and involve elements both of individual and of social significance. In order to deal with them and with family law cases in general, the Family Law Rules of the two trial courts provide for intensive pre-trial case management of family law cases. Over the past several years, we have also moved to better manage our criminal cases, largely through mandatory pre-trial conferences. Our aim, both in criminal and in family cases, has never been to change the outcome of the proceeding, but rather the timing of that outcome. While the number of cases set for trial has been reduced by such practices, it is generally felt that the impact of case management on the number of actual trials and on the trial rate has been less significant.

If I may be permitted to summarize, the Ontario Court of Justice offers a wide variety of advocacy opportunities for counsel at all stages of their professional development and in all aspects of the jurisdiction of the Court. As is the Advocates' Society, so too is the Court concerned about the longer-term impact of declining opportunities for advocacy on the quality of representation and ultimately on the quality of justice. We are increasingly

experiencing within our Court the phenomena of the self-represented, the unrepresented and the under-represented defendant/litigant. We welcome the creation of the Task Force on Advocacy and would be pleased to work with the Advocates' Society to create opportunities for advocacy. A large part of the reason for our interest can be found in the words of the Honourable Ed Bayda, Chief Justice of Saskatchewan:

“Good advocacy not only wins lawsuits, but it saves valuable court time, produces a more effective and less expensive system of dispute resolutions for clients, improves the public perception of our legal system and advances the quality of our justice. In addition, as those who practice it know (*and, to this I would add, “as judges, who are its principal consumers know”*) good advocacy is so much more enjoyable and life-enhancing than poor advocacy.”¹⁰

Thank you.

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Ontario Court of Justice

¹⁰ Forward by the Honourable E. D. Bayda, Chief Justice of Saskatchewan to *Manes Organized Advocacy*, 2nd edition, 1988, Ronald D. Manes, Valerie Edwards, Carswell