Taking the long way home

(with apologies to Supertramp)

Joseph Groia

"To be an effective criminal defense counsel, an attorney must be prepared to be demanding, outrageous, irreverent, blasphemous, a rogue, a renegade, and a hated, isolated, and lonely person – few love a spokesman for the despised and the damned."
~ Clarence Darrow

When Stephen Grant kindly offered to let me have the last word about my case,[1] I was delighted to take him up on his offer for three reasons:

1. I could express in print my heartfelt thanks to Earl Cherniak, now Justices Jasmine Akbarali and Alice Woolley, my family and the many others who supported me on the long way home. In cases like these, you really do find out who your friends are.
2. I could express my admiration and respect for six judges of the Supreme Court and one brave judge of the Court of Appeal for Ontario. More than anyone, I understand the importance of the surprising and fortuitous ending to my long journey. The only thing worse than a sore loser is a sore winner – a role I am determined to avoid playing at all costs.
3. I would get to make a few comments about Bre-X Minerals, Clarence Darrow and the importance of having someone prosecute you, threaten to sue you or complain about you on a regular basis.

First, a bit of the now forgotten story of Bre-X Minerals.

Bre-X Minerals Ltd. was founded in 1989 by David Walsh and, in 1990, was listed on the Alberta Stock Exchange at 30 cents a share. Before it collapsed in 1997, it traded at $270 a share.

In 1993, following the advice of geologist John Felderhof, Bre-X acquired its first stake in a property in the middle of the jungle near the Busang River in Kalimantan, Indonesia (Busang). Mr. Felderhof became the general manager in charge of Bre-X's Indonesian exploration and would later be appointed vice-president of exploration for the company. He assembled an experienced team to drill for samples. He also hired Michael de Guzman as his exploration manager. The drilling results were positive. On October 19, 1995, Bre-X announced that drilling uncovered a deposit with about 2.7 million ounces of gold. These estimates rose rapidly in subsequent press releases – to 70.95 million ounces of gold on February 17, 1997.

Large mining companies clambered to acquire, merge or expropriate Bre-X's assets. Bre-X entered into a joint venture agreement with Freeport-McMoRan in February 1997. As part of its due diligence process, Freeport drilled several scissor holes on the Busang property. In March, Freeport began receiving negative assay results that showed almost no gold. On his way to Busang to examine

Freeport's results a few days later, de Guzman allegedly fell or was pushed to his death from a helicopter (I personally believe he is alive and well, living in seclusion in the Philippines). The Toronto Stock Exchange halted trading in Bre-X stock that same day.

In response to Freeport's results, Bre-X retained Strathcona Mineral Services to conduct a confirmation drilling program. Strathcona's drilling results were also negative. On May 4, Bre-X issued a press release confirming Strathcona's negative results. Bre-X's share price plummeted to 90 cents, erasing a market capitalization of about $6.1 billion in a single day.

After an investigation, Strathcona concluded that the Busang ore samples had been salted with gold dust. Investors and authorities were desperate to hold someone accountable for the worst fraud in Canada's securities history. After the RCMP elected not to lay charges, and Walsh died, the Ontario Securities Commission filed

four counts of insider trading and four counts of authorizing misleading press releases against Mr. Felderhof. It is always worthwhile recalling what Justice L'Heureux-Dubé said in her dissent in *R v Curragh*: that "[w]hen the Crown allows its actions to be influenced by public pressure the essential fairness and legitimacy of our system is lost. We sink to the level of a mob looking for a tree."[2]

I do not intend to set out in any detail the securities law issues that took Justice Peter Hryn 640 pages to do justice to in his decision to acquit Mr. Felderhof on the merits of all the charges. I will say, however, that one regret I have is that my case has always sullied Mr. Felderhof's victory. While hoping that one day your client might get his career and good name back is the hallmark of most defence lawyers, this never happened for Mr. Felderhof. And that makes me very sad.

I will not even begin to attempt to describe the acrimony, document fights, evidentiary arguments and "incivility" that occurred during Phase One of the trial, the first 60 days. Justice Campbell found that there "was no monopoly over incivility" in the case. Justice Rosenberg harshly criticized my conduct. At my discipline hearing Stan Fisher testified, however, that he thought Justice Rosenberg would be turning over in his grave if he knew that his comments were being used by the Law Society of Upper Canada (LSUC, now the Law Society of Ontario) to argue that I had no right to defend myself at my misconduct hearing, and that my misguided attempt to do so amounted to an abuse of process. For having the temerity to actually fight the charges against me, I was found by the Hearing Panel to be such a menace that I was deserving of a two-month suspension.

I also suspect a whole book could be written about the 16-year path I travelled from when I was first cautioned that I was under investigation by the LSUC (based on stories in the newspaper) to the final chapter written by the Supreme Court in June 2018. Instead, what I propose to do is to reintroduce Clarence Darrow to this audience and to tell a short story about how, in the course of his long, illustrious career he too ended up in trouble with the law for "fighting fire with fire." Reading Irving Stone's biography of Clarence Darrow when I was 10 years old is a major part of the reason I became a trial lawyer.

Clarence Darrow was a notably successful American lawyer who practised from 1878 to 1932 and spent the majority of his career fighting for the rights of the oppressed. He is perhaps best known for his defence of John T. Scopes in the famous "monkey trial" that became the basis for the play and later the movie *Inherit the Wind*. Many critics, however, have questioned Darrow's professional ethics. Darrow represented members of labour unions at a time when corporations were fiercely resisting their promotion. Two of those cases placed Darrow "in the center of ethical storms" and resulted in prosecutions against Darrow himself.[3] In the first case, Darrow was hired by the Western Federation of Miners in 1906 to represent its leaders who had been charged with conspiring to murder the former Governor of Idaho, Frank Steunenberg, in 1905. After two-years of trials, all the defendants were either acquitted or had the charges against them dropped. In the second case, Darrow defended John and James McNamara, who were charged with the bombing of the Los Angeles Times Building in 1910 – a bombing that killed 21 people and injured a further 100.[4]

The McNamara brothers were organizers for the Iron Workers Union, which was in a desperate fight for unionization in the Los Angeles area. After a prospective juror reported to the police that the defence had offered him a bribe, the police began to monitor members of the defence team. The defence team's chief investigator was then observed delivering a large sum of money to a prospective juror in the vicinity of Darrow's office. The chief investigator was arrested, and Darrow was accused of orchestrating the bribe. The McNamara brothers pled guilty and were spared the death penalty.

In early 1912, Darrow was charged with two counts of attempting to bribe jurors in both cases. His trials are covered in a wonderful book by Geoffrey Cowan called *The People v. Clarence Darrow: The Bribery Trial of America's Greatest Lawyer*.[5] In his closing address at his trial on the bribery charge for the McNamara case, Darrow told the jury that they should acquit him even if they believed he had arranged for jurors to be bribed – because the prosecution had done the same thing:

> Suppose you thought I was guilty, suppose you thought so – … would you dare to say by your verdict that scoundrels like [the district attorney] should be saved from their own sins, by charging those sins to someone else?[6]

Darrow's rhetorical question to the jury likely saved him from conviction. Although there was substantial evidence that Darrow's defence team had been involved in bribing prospective jurors, the fact that the prosecution had also engaged in similar bribery efforts made it difficult for the jury to convict him. In fact, the prosecution's misconduct went much further than juror bribery. The evidence later showed that the prosecutions were funded by private interests; private detectives were hired to lead the investigations; the defendants were kidnapped to face charges in different states; spies and informants were used by the prosecution to report on defence strategy and tactics; and prosecution witnesses were compensated for their testimony.[7]

In this little note I am not taking sides. In defending the union members, Darrow had to make an impossible choice – vigorously defend his clients in the face of prosecutorial misconduct or abide by his basic professional obligations and surely lose the cases. In weighing these two options, Darrow also had to decide whether to prioritize his interests over those of his clients. You should read Gerald Uelmen's article in the *Fordham Law Review*, "Fighting Fire with Fire."[8]

The trial on the second count of attempting to bribe jurors ended in a hung jury. As a result, the district attorney made a deal with Darrow that he would not retry Darrow if Darrow gave up his licence to practise law in California. It was reported that Darrow said he was never so glad to be kicked out of any place as he was the State of California.

While obviously much less dramatic, I have come to realize that

the seeds of my own prosecution were planted in 2001 when, on the very good and wise advice of Brian Greenspan (who I retained to act on the judicial review for Mr. Felderhof on the issues related to my alleged misconduct), we made the strategic decision not to defend the allegations that were being directed at me as Mr. Felderhof's lawyer. That was not easy advice to swallow, and as Brian later testified at my hearing, "[i]t was better for Felderhof and, quite frankly, worse for Joe Groia."[9] I never really recovered from the narrative that was written by Justices Campbell and Rosenberg, or from some very long days in those courts listening to harsh statements about my conduct and not fighting back. No matter how hard Earl Cherniak later tried, we could not move the LSUC off its view that I was a "party in substance" (whatever that means) and not just counsel to Mr. Felderhof while I was defending him in front of Justice Hryn, Justice Campbell and the Court of Appeal.

So, in closing, let me make three small, but hopefully helpful, comments:

1. As I found out about a hundred years after Clarence Darrow, being a zealous, loyal and resolute advocate is not an easy job. Sometimes it involves making hard ethical choices and taking the proverbial bullet for a client. On the other hand, the experience is good for your soul.
2. To do our jobs with the conviction our clients deserve, we must be prepared for criticism, complaint or even a brush with the law. If that never happens to you, you need to ask yourself "why?"
3. What makes a good lawyer a great one is "grit": a unique combination of passion and perseverance. And as Supertramp said, you take the long way home.

Notes

1. Stephen Grant, "Will That Be Whisky or Wine with Your Trial?" (2018) 37:2 Adv J 3 at 3.
2. *R v Curragh Inc.*, [1997] 1 SCR 537 at para 120.
3. Gerald F Uelmen, "Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow" (2002) 71 Fordham L Rev 1543 at 1543 [Uelmen].
4. I note only for posterity that one of the OSC prosecutors said of me, in the months after 9/11, "[H]e is someone who drops a bomb and runs."
5. Cowan, Geoffrey. *The People v Clarence Darrow: The Bribery Trial of America's Greatest Lawyer* (Omaha: Gryphon Editions, 1995).
6. Uelmen, *supra* note 3 at 1543.
7. *Ibid* at 1545–1554.
8. *Ibid.*
9. *Law Society of Upper Canada v Joseph Groia*, Proceedings before the Hearing Panel, Transcript, 18 August 2011 at 183.