Judicial Intervention: The "Truth" Theory Versus the "Fight" Theory

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Our system of law is based upon the Anglo-American adversary system whereby it has been thought:

> ... we obtain the fairest decision 'when two men argue, as unfairly as possible, on opposite side', for then 'it is certain that no important considerations will altogether escape notice.'[1]

What is the role of the Judge in an adversary system? Schiff[2] cites Lord Denning to the following effect:

> A Judge (as trier of fact) is not a mere umpire to answer the question "How's that?"... His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C. who said in a noteable passage that, "truth is best discovered by powerful statements on both sides of the question" and Lord Green, M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Green, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict.
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> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage around her eyes. She should be blind indeed to favour and prejudice, but clear to see which way lies the truth; and the less dust there is about the better.[3]

Nadeau and Ducharme subscribe to this view:

> N'y aurait-il pas lieu de craindre notamment qu'un juge inquisiteur ne se départît trop facilement de son impartialité pour épouser la cause d'une des parties? C'est peut-être parce que la neutralité du juge est

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(1) Macaulay referred to in FRANK, J., *Courts on Trial,* Atheneum, New York, 1963, c. 6.

(2) *The Use of Out-of-Court Information in Fact Determination at Trial,* [1963] C.B.R. 335.

(3) *Jones* v. *National Coal Bd.* (1957) 2 Q.B. 55 at pp. 63-6.

la meilleure garantie de son impartialité que notre législateur a préféré laisser audx plaideurs le soin exclusif de réunir les éléments de preuve.[4]

Adherence to the "Nadeau and Ducharme school" or a strict adversary approach is that for the judge to remain neutral he should not:

(i) order proof of facts not invoked by either of the parties;

(ii) demand the appearance of witnesses which neither of the parties thought fit to *subpoena*, although the court can recall witnesses to complete their evidence;[5]

(iii) force the parties to produce a document which had not been produced; although if instead of ordering or compelling the production in these three cases, the judge would merely suggest, this would be "perfectly legal".[5a]

From these statements, it is apparent that while the adversary system is intended to seek out the truth, the means by which it achieves this end is a limited judicial intervention: the trial judge is to remain an impartial observer.

Schiff, in asserting a more activist role for the trial judge, tell us that:

> ... the trial is a compromise involving three elements: the search for truth, the common law adversary procedure, and the necessity that the disputants are satisfied that they have had the opportunity fully to present evidential material supporting their version of the past events before an impartial trier of fact.[6]

This indicates that rather than harmonious forces at work, that the adversary system and the search for the truth are competing forces which, by reason of the system, work for a compromise — but a compromise does not necessarily approximate the ideal. This attitude is further borne out by Judge Jerome Frank's distinction between the adversary system and the truth theory. There is no longer the pretense of a compromise. The two forces are now made to appear to be working at cross-purposes.

The adversary system, according to Judge Frank, by its very nature, glosses over the truth when it does not suit the party's purpose. This can be done in a number of ways:

(i) the lawyer may suggest ways in which the party's or witness' demeanor may be altered, or the system allows

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(4) *Traité de Droit Civil*, vol. 9, (1965), pp. 67-8.

(5) *Poulin* v. *Laliberté*, [1953] Q.B. 8; *McColl Frontenac* v. *McIntosh*, [1956] Q.B. 196, at p. 203.

(5*a*) NADEAU ET DUCHARME, *op. cit.*, p. 69.

(6) *Op. cit.*, p. 335.

the opposing attorney to seize upon a character flaw that has nothing to do with the case, such as hesitancy on the part of the witness, to destroy his credibility;

(ii) in preparing a witness before trial, which is perfectly normal, the lawyer will generally explain what he hopes to prove at trial and if the witness is favorably inclined his testimony will generally fit into the scheme of things suggested by the attorney. This is referred to by Frank as "inadvertent but innocent witness coaching". Obviously, it is not suggested that the attorney advise a witness what to say but this preparation of a witness can easily lead to distortion of the truth;

(iii) the lawyers and the judges are geared to a system whereby each attorney "make his bed" and the judge will assume a passive role — not correcting the error of one attorney so as to appear to be taking sides. Thus, Frank relates the statement of a respected judge who said:

> ...a litigant has the right to expect... that the judge will not interfere in the examination of witnesses, even though he believes he can do a better job than counsel, except to correct patent errors, misconceptions or misrepresentations.

Now, given this background, one can appreciate that the trial is a battle of "wits and wiles". To quote Frank once again,

> As a distinguished lawyer has said, these stratagems are "part of the manoeuvring... to which (lawyers) are obliged to resort to win their cases. Some of them may appear tricky; they may seem to be taking undue advantage; but under the present system it is part of a lawyer's duty to employ them because his opponent is doing the same thing, and if he refrains from doing so, he is violating his duty to his client and giving his opponent an unquestionable advantage..." These tricks of the trade are today the legitimate and accepted corollary of our fight theory.[7]

Given the two views of the adversary or fight theory, it should become a legitimate line of inquiry as to whether the fight theory really does lead to the truth theory, or whether the adversary system should be modified to better lead to the truth theory.

Before Judge Frank advanced his theory that the adversary system did not of itself lead to the truth and was in need of change, Chief Justice L. Tremblay had come to the same conclusion. In an article published in 1962, the Chief Justice did not subscribe to the theory of the passive role of the judge as

(7) *Op. cit.*, footnote 1.

part and parcel of the adversary system. The question was put as follows:

> ... si le juge peut intervenir au cours de l'enquête et de l'audition et, dans l'affirmative, quelles limites il faut assigner à ses interventions.[8]

The Chief Justice rejected the "fight theory" as the sole basis of our system; rather he adhered to what Judge Frank called the "truth theory" and he set his sights on how to achieve this goal:

> Il faut rappeler d'abord qu'une cause n'est pas un concours entre deux avocats où le plus habile doit réussir. Une cause, c'est une controverse entre l'Etat et un citoyen ou entre deux citoyens, une controverse concernant la vie, la liberté ou les biens des citoyens. Le jugement ne décidera donc pas quel avocat mérite de gagner la joute, mais à quelle partie la loi donne raison.
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> Ensuite, il ne faut pas oublier que les citoyens ont un besoin absolu d'avoir confiance dans l'administration de la justice. La loi leur défend de se faire justice à eux-mêmes. Si l'on veut qu'ils observent ce précepte, ils doivent avoir la certitude d'obtenir justice s'ils s'adressent aux tribunaux. Il ne suffit donc pas que le peuple reçoive une bonne justice, il faut encore qu'il soit persuadé qu'il reçoit une bonne justice.[9]

In this underlying theoretical approach we can discern a fundamental difference in approach as to the role of the judiciary between what we may call the "Nadeau and Ducharme school" and the "Tremblay school".[10]

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(8) *La Discrétion Judiciaire*, (1962) 8 McGill L.J., 239 at p. 240.

(9) *Ibidem.*

(10) This was not the first jurisprudence or doctrinal statement of the "truth theory" in Quebec. Mr. Justice Roger Ouimet recounted, with approval, previous similar statements, a paper for the 1964 Meredith Memorial Lectures entitled *The Conduct of a Damage Action: A Judicial Appraisal*, at page 45, as follows:

> Mr. Justice Challies, as he then was, has expressed the law on this matter in no uncertain terms: (in the case of *Dame Poulin* v. *Laliberté*)
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> It is not only the right but the duty of a trial judge to put any relevant questions to any witness during the *enquête* the answers to which may assist in the decision of the case.
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> He was unanimously confirmed by the Court of Appeal, ([1953] B.R. 8). Mr. Justice Rinfret's notes on the subject are illuminating; I quote among others, the following:
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> *Un juge doit-il, sans mot dire, écouter les témoignages, entendre les arguments et se restreindre à décider uniquement sur la preuve et les arguments que veulent bien lui soumettre les avocats au dossier?*
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> *Un juge doit-il, s'il s'aperçoit que, par inadvertance, incapacité ou ignorance, un avocat oublie de faire une preuve ou de présenter*

From this theoretical approach, the role of the judge in seeking out the truth becomes evident:

> Le juge n'étant pas un arbitre entre les avocats mais un arbitre entre les justiciables, je crois qu'il peut et doit intervenir quand son intervention est nécessaire pour assurer une meilleure justice.[11]

The example given by Mr. Justice Tremblay is the case where one of the attorneys omits an essential element of the proof. In such case it is for the judge to point out this omission. Likewise, if there is a defect in the proceedings, the judge should point this out. One could argue, within the same theoretical framework, that if there is a defect in the proof, *i.e.* testimony is being introduced which is inadmissible but not as a matter of public order, then the role of the judge is to intervene. If it is his duty, then there must be a sanction for the breach. And the sanction would have to be the setting aside of the judgment on appeal because of the judge's failure to intervene. At the moment this can only happen where a question of proof of public order is involved, but it can be argued that a logical consequence of Mr. Justice Tremblay's theory is the application of this rule to all rules of evidence, irrespective of the rules of public order. The trial judge becomes an enforcer of all the rules of evidence. This is one possible logical result of full implementation of the "truth theory". Whether the judiciary would ever want to impose upon itself such an all-emcompassing role of protector is doubtful; but what does emerge from such a pronouncement as Chief Justice Tremblay's is the realization that the role of the judiciary is to become more activist.

Moreover, this is in line with current American thinking:

> Not only may the judge examine witnesses called by the parties, but in his discretion he may also, for the purpose of bringing out needed facts, call witnesses whom the parties might not have chosen to call.[12]

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un argument, rendre une décision qu'il sait inéquitable pour les parties?

Le client doit-il souffrir de la maladresse de son avocat?

His Lordship's answer is clear:

Il est du devoir du juge de faire le plus de lumière possible sur la question, de rectifier la situation et de suppléer à la maladresse ou à l'ignorance de l'avocat, si besoin est. C'est ainsi que je comprends la justice.

Me Philippe Ferland, Q.C. (as he was then), has given a similar opinion in La Revue du Barreau, ([1952] 12 R. du B. 127).

(11) Op. cit., p. 240.

(12) CLEARY, E.W., *McCormick's Handbook on the Law of Evidence*, 2nd ed., West Publishing Co., 1972, pp. 12-14.

This is backed up by another American reference, as follows:

> While a court room is not a laboratory for the scientific pursuit of truth, a trial judge is surely not confined to an account, obviously fragmentary, of the circumstances of happening, hear the meagre testimony of Johnson, when he has at his command the means of exploring them fully, or at least more fully, before passing legal judgment. A trial is not a game of blind man's bluff; and the trial judge — particularly in a case where he himself is the trier of the facts upon which he is to pronounce the law — need not blindfold himself by failing to call an available vital witness simply because the parties, for reason of trial tactics, choose to withhold his testimony.[13]

Not only is increased judicial activism or intervention desirable as a goal, but it is now more easily ascertainable in Quebec with the new Code of Procedure.

Art. 318 C.P. now provides that:

> The judge may ask the witness any question he deems useful according to the rules of evidence.

Before 1966, according to Mr. Justice Watt, the judge could ask leading questions since the witness was not called by the judge.[14] With the addition of the phrase "according to the rules of evidence" to art. 318 C.P. in 1966, the question now arises as to whether or not the trial judge may continue to ask leading questions. The reasoning of Mr. Justice Watt, in his article, was that leading questions were permitted by the trial judge since he had not called the witness. In a sense, he was cross-examining. The same reasoning would dictate that the judge could continue to ask leading questions today notwithstanding the change in art. 318 C.P. This amendment would seem to justify further judicial intervention in that it provides a basis for judicial questioning and a sanction for a breach thereof by the trial judge. But the article is still restricted to the questioning of those witnesses called by the parties. It would be more in keeping with the search for truth if the trial judge were given the same powers as his American counterpart and empowered to call witnesses "whom the parties may not have chosen to call." [15]

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(13) *Johnson* v. *U.S.*, (1948) 366 U.S. 46, at p. 54 cited in SCHIFF, footnote 6, at pp. 336-7.

(14) *The Trial of Civil Cases in Quebec,* [1960] R.L. (n.s.) 65, at p. 136.

(15) The Law Reform Commission has suggested a similar amendment and for the same reasons:

Manner of Questioning Witnesses

3. The judge or other person presiding at a process may:

(a) with or without a request from one of the parties that

That a greater initiative has been granted to the trial judge is born out by the introduction of two new articles in 1965 — Arts. 290 and 292 C.P.

As pointed out by Mr. Justice Watt [16] under the old law it is probable that the trial judge could not take a view, but by art. 290 C.P. the judge was authorized to adjourn the court to the scene "in order to make observations which may assist in the determination of the case."

Article 465 C.P. removed any doubt as to the right of the judge to discharge the *délibéré* and reopen the *enquête* on his own initiative. In particular, art. 292 C.P. specifically provides that:

> At any time before judgment, the presiding judge may draw the attention of the parties to any gap in the proof or in the proceedings and permit them to fill it, on such conditions as he may determine.

In this writer's opinion this article is not only related to art. 465 C.P., but should apply at any time during the trial. But Mr. Justice Watt did not agree and it was in his observation as to the applicability of this article that one can see the adherence and consequences thereof to the "Nadeau and Ducharme school":

> This leads one to the conclusion that this power (to discharge the *délibéré* and reopen the *enquête*) should be used with restraint and only after the *enquête* has been closed when it is certain that there is a gap that is not going to be filled without the intervention of the judge. It should not be used during the *enquête* to suggest the calling of evidence because then the judge runs the risk of appearing to be partial and of acting as counsel to one of the parties.

It is submitted that a proper appreciation of the "truth theory" would suggest that not only should the judge intervene but he must whenever it is necessary to seek out the truth. Certainly art. 292 C.P. is the juridical basis for a "truth theory" but by adding the phrase "and permit them (the parties) to fill it (the gap in the proof)", it still leaves the seeking out of the truth to the parties themselves, *i.e.* the attorneys, instead of approaching the American school which allows the trial judge to intervene directly and call such proof as may be necessary. To achieve the full implications of the "truth theory", after the phrase

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he do so, call any witness, but each of the parties may examine such a witness;

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(16) *Lectures: The Code of Civil Procedure, Articles 274 to 331*, Bar of the Province of Quebec, 1966, p. 31.

"permit them" there should be added to art. 292 C.P. the phrase "or the presiding judge".

In order for public confidence to reside in a judicial process, not only must the courts search out the truth but they must give every appearance of searching out the truth. A passive role for the judiciary does not bear out this necessity.
