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HENRY LORD BROUGHAM AND RESOLUTE LAWYERING

Monroe H. Freedman*

In preparing to speak at the recent conference on Ethics in Judging in Ottawa, sponsored by the National Judicial Institute, I was surprised to see references in Canadian articles and judicial opinions disparaging Henry Lord Brougham's famous quotation on the role of the advocate. Here is what Lord Brougham said in defending Queen Caroline at her trial in the House of Lords in 1821:¹

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

That statement inspired admiration at the time, and it continues to be the dominant standard of lawyerly excellence among lawyers in both Canada² and the United States.³ For example, as written by David

* Professor of Law, Hofstra University Law School; Visiting Professor, Georgetown University Law Center; author, *Understanding Lawyers' Ethics*, 4th U.S. ed. (New Providence, New Jersey: Matthew Bender/LexisNexis, 2010) (with Professor Abbe Smith).

1. 2 *The Trial of Queen Caroline* 3 (1821).
2. Alice Woolley, *Understanding Lawyers' Ethics in Canada* (forthcoming), c. 2, citing Trevor Farrow, "Sustainable Professionalism" (2008), 46 *Osgoode Hall L.J.* 51 at p. 63; Alan C. Hutchinson, "Calgary and Everything After: A Postmodern Re-Vision of Lawyering" (1995), 33 *Alberta L. Rev.* 768 at p. 770; and David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005), 28 *Dalhousie L.J.* 267 at p. 271.
3. *Report from the Center for Philosophy and Public Policy*, V(1) (Baltimore, Maryland: Center for Philosophy and Public Policy, 1984), pp. 1 and 4. "The

Tanovich in the *Dalhousie Law Journal*, "There is no question that historically, the philosophy of lawyering in Canada has largely been driven by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law."⁴

At the outset, we should be clear on three points. First, Queen Caroline was a defendant on trial. She had been charged with adultery by King George IV, and her conviction would have resulted in her divorce from the King and her loss of the throne. Second, Lord Brougham's statement of the advocate's duty was not only most carefully considered at the time, but he reaffirmed it half a century later in his autobiography.

Third, neither Brougham nor anyone else has ever suggested that there are no lawful limits on zealous, or resolute, advocacy.⁵ On the contrary, in the words of Rule 4.01(1) of the Rules of Professional Conduct of the Law Society of Upper Canada, "a lawyer shall represent the client resolutely and honourably within the limits of the law".⁶ And the commentary adds, in words reminiscent of Lord Brougham:

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

The context of Lord Brougham's statement is important. In 1820, as noted above, Queen Caroline had been charged with adultery by George IV, and her conviction would have resulted in her divorce from the King and the loss of her title. In his opening statement on behalf of the Queen at her trial, Brougham delivered a fearsome

prevailing notion among lawyers seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer." Patterson, "Legal Ethics and the Lawyer's Duty of Loyalty" (1980), 29 *Emory L.J.* 909 at pp. 918 and 947. *Accord*, Charles F. Wolfram, *Modern Legal Ethics* (St. Paul, Minnesota: West Publishing Co., 1986) at p. 580, citing *In re Griffiths*, 413 U.S. 717 at p. 724 note 14, 93 S.Ct. 2851 at p. 2856 (1973).

4. See *supra*, footnote 2.
5. Whether one uses the word "zealous" or "resolute" is a quibble. As Professor Woolley has noted: "In general Canadian Codes of Conduct refer to lawyers as 'resolute' advocates. However, Canadian cases often refer to the lawyer's duty as one of zealous advocacy — *R. v. Neil*, [2002] 3 S.C.R. 631 at para. 19." Woolley, *supra*, footnote 2.
6. Similarly, the American Bar Association's Model Code of Professional Conduct, Canon 7, says that zealous advocacy must be conducted "within the law and the disciplinary rules".

threat—or, as he described it afterwards, a “menace”.⁷ As Brougham explained in his autobiography, this threat was “neither more nor less than impeaching the King’s own title, by proving that he had forfeited the crown”.⁸

The ground for the King’s expulsion from the throne was that “[h]e had married a Roman Catholic . . . while heir-apparent”, and such a marriage was “declared by the Act of Settlement to be a forfeiture of the Crown, ‘as if he were naturally dead’”.⁹ Therefore, to drive his threat home, Brougham had prefaced it by making it clear that, if exposure of the King’s illicit marriage were necessary to protect the Queen, he would not “hesitate one moment in the fearless discharge of [that] paramount duty”.¹⁰

Brougham’s threat was particularly potent because of the dangerous social and political unrest at the time.¹¹ Many members of the army, like a large proportion of the English people, enthusiastically favoured the Queen over the King, and one cavalry regiment vowed that they would “fight up to their knees in blood for their queen”.¹² Other troops mutinied, and in daily demonstrations by mobs of people, “the soldiers showed plain signs of being with the multitude”.¹³ Also, there were nights of mob violence against the residences of the King’s ministers and intimates.¹⁴ In Brougham’s own view, if it had become necessary to carry out his threat, it could have meant that “civil war was inevitable”.¹⁵ In the face of Brougham’s threat, the charges against the Queen were subsequently dropped.

Referring to that historical context, Brougham later remarked that his statement had been a “menace”, rather than “a deliberate and well-considered opinion”.¹⁶ What Brougham meant, in context, was that he had not been making a dispassionate legal argument, but, rather, that he had been leveling a threat of what today we call

7. William Forsyth, *The History of Lawyers Ancient and Modern* (1875), pp. 380-81.

8. Henry Lord Brougham, *The Life and Times of Henry Lord Brougham, Written by Himself*, vol. II (New York: Harper and Brothers Publishing, 1871), p. 309.

9. *Ibid.*, at pp. 309-10 (emphasis in the original).

10. *Ibid.*, at p. 309, note *.

11. *Ibid.*, at pp. 307-10; Flora Fraser, *The Unruly Queen: The Life of Queen Caroline* (New York: Alfred A. Knopf, 1996), pp. 382-83.

12. Brougham, *supra*, footnote 8, at p. 307.

13. *Ibid.*, at p. 308.

14. Fraser, *supra*, footnote 11, at p. 382.

15. Brougham, *supra*, footnote 8, at p. 311.

16. Quoted in Forsyth, *supra*, footnote 7, at pp. 380-81 (emphasis in the original).

graymail. The term refers to a threat by a criminal defendant to reveal, as part of a legitimate defence, information that is harmful or embarrassing to the government, in order to induce the government to drop the charges. As Brougham explained:¹⁷

I was prepared, *in case of necessity*, that is, in case the Bill passed the Lords, to do two things — first, to resist it in the Commons *with the country at my back*; but next, if need be, to dispute the King's title . . . What I said was fully understood by Geo. IV [and others], and I am confident it would have prevented them from pressing the Bill beyond a certain point.

Thus, the fact that Brougham's statement had been delivered as a "menace" was precisely what made it so powerful and that, at the same time, demonstrated just how far a lawyer should be prepared to go on behalf of a client. In short, the statement itself constituted the ultimate in zealous advocacy.

Moreover, writing half a century after having delivered his graymail threat, Brougham proudly reiterated and defended his statement with modifications that did not diminish either its substance or its force.¹⁸ As his final assessment of his role in the matter, Brougham wrote: "On looking back to that time of anxiety [and] serious hazards, I feel that I had nothing wherewith to reproach myself . . .".¹⁹

The principal point I want to stress here is that Brougham's threatened action was entirely lawful. Having been charged with adultery, the Queen had the right to prove that she was not lawfully married to the King because of his bigamy and that she therefore could not have committed adultery.

17. *Ibid.*

18. Brougham, *supra*, footnote 8, at pp. 309-10. There, Brougham rendered it this way: "[A]n advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, *that client and none other*. To save that client by all expedient means — to protect that client at all hazards and costs to all others, and among others to himself — is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection! The changes, clearly, are stylistic — the addition of capital letters to emphasize '*that client and none other*,' the addition of an exclamation point after '*... his client's protection!*', and some variations in phrasing."

19. Brougham, *ibid.*, at pp. 315-16.

Lord Brougham's opening was "a masterly performance".²⁰ As he finished, "the aged Lord Erskine, former Lord Chancellor, [was so moved that he] rushed from the chamber in tears".²¹ Another barrister declared that Lord Brougham's opening statement was "one of the most powerful orations that ever proceeded from human lips".²²

Although Brougham's client, Queen Caroline, was undoubtedly guilty as charged (and was widely believed to be guilty), she was ultimately exonerated by the House of Lords.

Not everyone was favorably impressed with Brougham's performance. Lord Chancellor Eldon (a supporter of the King) later "rebuked Brougham most weightily for his threats to the House"²³ — that is, for what Eldon saw as Brougham's overzealousness on behalf of his client. Nevertheless, Brougham was "the hero of the hour",²⁴ and he subsequently succeeded Eldon as Lord Chancellor of England.²⁵

I return to where I began. Inspired by Henry Lord Brougham, the traditional aspiration of zealous representation²⁶ remains the dominant standard of lawyerly excellence among lawyers in both Canada²⁷ and the United States.²⁸ That is our tradition, and that is as it should be.

20. Fraser, *supra*, footnote 11, at p. 433.

21. *Ibid.*

22. *Ibid.*

23. *Ibid.*, at p. 438.

24. *Ibid.*, at p. 443.

25. *Ibid.*, at p. 465.

26. *Restatement Third of the Law Governing Lawyers*, §16, Cmt. d (2000).

27. Alice Woolley, *Understanding Lawyers' Ethics in Canada*, *supra*, footnote 2, c. 2, citing Trevor Farrow, "Sustainable Professionalism", *supra*, footnote 2, at p. 63; Alan C. Hutchinson, "Calgary and Everything After", *supra*, footnote 2, at p. 770 and David Tanovich, "Law's Ambition", *supra*, footnote 2, at p. 271 ("There is no question that historically, the philosophy of lawyering in Canada has largely been driven by principles of partisanship, zealous advocacy, and morally unaccountable representation within the bounds of the law.")

28. *Report from the Center for Philosophy and Public Policy*, *supra*, footnote 3, at p. 4: "The prevailing notion among lawyers seems to be that the lawyer's duty of loyalty to the client is the first, the foremost, and, on occasion, the only duty of the lawyer." Patterson, *supra*, footnote 3, at pp. 918 and 947. Accord, Wolfram, *supra*, footnote 3, citing *In re Griffiths*, *supra*, footnote 3, at p. 724 note 14 U.S.