CIVILITY: A MEANS TO AN END

BY ERIC FINN

In a recent court proceeding involving the prosecution of an individual for breaches of security legislation, after seventy days of trial which had involved numerous confrontations relating to the disclosure of documentation and left the nerves of opposing counsel frayed, the defence counsel pointed the finger at the prosecution and declared that "their promises aren't worth the transcript paper they are written on." Not to be outdone, in a subsequent exchange, the prosecutor referred to the submission of the defence counsel as "a bald-faced lie."[1]

By the very nature of their work, lawyers are often placed in adversarial positions, and it is not surprising that, at times, their verbiage may cross the line of civility. Most of the time, such outbursts are heard in the boardrooms or on examinations where no judge is present. It is very unusual for such comments to be heard in open court where the wrath of the judge or the disrespect of a jury may be felt. However, even with that limitation, legal groups and associations have considered whether there is any room for uncivil behaviour in any aspect of the profession. For example, the Advocates Society of Ontario, an association which has as its members a large majority of the litigators practicing in the province, has authored a 16-page set of guidelines entitled "Principles of Civility for Advocates"[2] and has instituted a civility training workshop which is available for firms and legal departments.

Although lawyers are often faced with highly charged situations where civility may be lost from time to time, they are, of course, not the only profession where manners and appropriate behaviour might give way to rudeness, sarcasm and unrestrained diatribe. All one has to do is think of the scenes that we witness daily on our nightly news channels – environmentalists ranting at the latest projects of big business and in response the questioning of the lack of scientific support for such opposition; individuals challenging the government's choice of action in foreign countries and in reply the questioning of such individuals' patriotism; either side in the abortion debate has had its moments where civility was lost.

Civility and the Right of Way Professional

It is also not difficult to imagine many other situations where right of way professionals may find themselves aggressively championing the position of their clients or on the receiving end of such behaviour. Those negotiating easements for hydro-transmission corridors are often faced with opposition that goes beyond uncivil words. Imposing a transmission line on property that may have been owned as a family farming operation for many years can have traumatic consequences for the present owner. Everyone involved in the industry could probably match stories of surveyors being met by the barrel of a gun or a negotiator having his convertible smeared with manure. The acquisition of property rights, especially when done without the consent of the owner, like the forceful

implementation of any other government activity, generally gives rise to strong opposition regardless of what compensation may be available to assuage the wounds.

Such occurrences can easily give rise to incivility, and for those who come across such activity, there is some merit in attempting to diffuse an attack by keeping the discussion on an even keel. Remember that in any dispute — whether in a barroom, on the hockey rink, in the boardroom or in a court — it takes two to make a fight. One antagonist cannot do it alone.

A Case in Point

Consider the following situation which occurred recently and is only slightly less than a true accounting. Of course, all names have been omitted to protect the uncivil.

A large utility had decided that some land it had acquired (many years before for a transformer station) had become surplus to its needs. The property was located immediately adjacent to a very affluent area of the city and had been used for many years as a place for residents to walk their dogs and commune with nature. The property was zoned for residential uses but the density requirements only permitted one residence. The property department of the utility was of the view that the site was suitable for a townhouse development containing up to 16 units. Attempts were made to dispose of the property without success. It was even offered to the city, which would have paid $1.00 rather than the true market value. As a result, the decision was made by the utility that it would apply to the municipality for a zoning amendment to permit the greater density and, hopefully, make the property more marketable.

The re-zoning process involved a formal application which was circulated to the relevant stakeholders for comment. In addition, the process also called for one public meeting where residents would have the opportunity to express their views with regard to the proposed amendment. The public meeting was scheduled for a weekday evening, and those present included a municipal planner as Chair, a property agent from the utility, two solicitors representing two ratepayer groups and a roomful of unrepresented residents. So far as the utility was concerned, the mood was somewhat glum to say the least.

The meeting opened with the utility representative giving a presentation on the proposal with graphic demonstrations of the 16-unit townhouse complex. This was followed by the Chair giving anyone in the room who wanted to speak the opportunity to do so. The first lawyer for one of the ratepayer's groups rose and posed the question whether the utility had lost its marbles by making such a proposal. How dare it try to impose a multi-unit project into an area of single family residences. Not to be outdone, the utility representative responded by pointing out that the lawyer had a lovely tan and perhaps had been spending too much time in the sun. The lawyer for the second ratepayer's group joined the fray and wondered whether the utility had done its research into where the dogs in the neighbourhood were to relieve themselves once the trees and parkland were removed and replaced by such a horrendous eyesore.

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After the lawyers had their say, the floor was opened to the general public, and the meeting proceeded downhill from there. The general opinion appeared to be that it was no wonder that electricity rates were rising with incompetents like the property agent running the show. The property agent responded by pointing out that the reason electricity rates were rising was because legitimate attempts by the utility to increase revenue were being thwarted by the uninformed residents who didn't know a good project when they saw one.

After a couple of hours of this type of discussion, the Chair adjourned the meeting commenting that no one at the meeting appeared to be making sense and, as he was unable to rely on anyone's opinion, he would just have to use his own resourcefulness.

As indicated, this situation, while only slightly less than truthful, is a good example of how a public meeting, which should proceed on a rational basis to a productive conclusion, can be derailed by incivility. The issue at the meeting was the viability of the project, and there should have been no place in the discussion for personal comments on the sanity of the utility's representatives, the nature of the lawyer's tan, the lack of knowledge of the ratepayers and the reasons for electricity rate increases. Subjective comments on the need for a pet sanctuary and the impression of the proposed building would have been much more convincing if framed in the nature of objective questions relating to the environmental and visual impact of the project. The end result, of course, was that the municipal

planner chairing the meeting also lost his objectiveness and joined the melee of name calling and, in the end, had to concede that there had been nothing beneficial achieved at the meeting.

For those who like to change the facts to determine how the outcome might be altered, think of what the result might have been if one of the lawyers had presented an informed and rational argument on the impact of the project, or if the utility representative had not risen to the bait of name calling and had continued to provide informative comments. With the way the meeting in fact proceeded, the opinion of any one of the unrepresented residents, who chose to make a logical argument, would probably have been given more weight than any of the comments of the lawyers or property agent. However, no one seemed to want to act in a sufficiently responsible manner so as to provide the Chair with any useful information.

Dealing with Uncivil Behaviour

One approach to diffusing incivility is having the offending conduct noted for the record. If one individual is going too far in a public meeting or any venue where a transcript or minutes are being taken, the party receiving the brunt of the comments can merely state for the record that the other party is being uncivil or is bullying a client or witness and that the meeting should be adjourned while tempers calm down. With this on the record, the offending party will, in all likelihood, be too embarrassed to continue the tirade. In a court proceeding some time ago, one lawyer "accidentally" spilled his coffee on the notes and documents of an opposing counsel. The opposing counsel stated on the record what the other lawyer had done. This may not have saved his sopping notes, but it eventually was used to have the offending lawyer reprimanded by the bar association.

Another trick for the bombastic offender when the statements are being recorded is to simply point out that a shouted response still appears the same in the transcript as one given at a normal volume. An alternative retort might be "shouting your responses does not give further weight beyond higher noise."[3] There is not always the luxury of a record upon which to make a statement but, in any confrontation, it is surprising how far you can get by just telling the offending party that a lack of civility is not acceptable and discussions will cease if it continues.

There may also be a benefit to your client. In the face of aggressive behaviour where there is a third party listening to the debate, it is often more beneficial for the opposing party to keep the discussion calm and to the point. Observers of judges and juries generally agree that aggressive behaviour can lead to an adverse decision from the trier of fact. But it is not only in courts where this has application. Debates take place in any number of settings where there is a third party listening and weighing the positions. Right of way professionals may appear at municipal council meetings, before mediators and arbitrators and at meetings of any number of interest groups and stakeholders. It is worthwhile to keep in mind that the person you are trying to convince is more likely to accept a well reasoned calm presentation than an argument that seeks to succeed on the basis of its decibel level.

Rules of Professional Conduct

As can be seen, the benefits of civil behaviour can be well documented; however, in addition to the logical support that can be given for such behaviour there is also regulatory support. As noted above lawyers have now developed codes of civility in order to stem the tide of unwelcome behaviour. While there is not a specific rule dealing with incivility in the Rules of Professional Conduct of the IRWA, consider the following:

Ethical Rule 1 – "Members of the Association pledge to conduct themselves in a manner that is not detrimental to the public, the Association, or the right of was profession…"

Ethical Rule 1.1 – "It is unethical for a member:
(a) to conduct himself/herself in a manner which will prejudice his/her professional status, the reputation of the Association, the right of way profession, or any other member;"

Ethical Rule 1.6 – "It is unethical for a member to:
(f) Engage in any other conduct that is detrimental to, or has a substantially adverse effect upon, the right of way profession or the International Right of Way Association;"

Ethical Rule 6 – "Members pledge to maintain a high professional relationship with his/her client or employer. The duty of a member to serve the client or employer in a professional manner does not relieve the member of the responsibility to treat with consideration all persons involved in or with the right of way profession and to avoid the infliction of needless harm"

Ethical Rule 6 raises the concern some right of way professionals have relating to the duty to represent their clients in a vigorous manner so as to protect the rights to which they may be entitled. Indeed, they may have a professional responsibility to do so. In 1820, Lord Henry Brougham of the British House of Lords made the following statement:

"An 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 among them, to himself, is his first and only duty; and in performing that duty he must not regard the alarm, the torments, the destruction which he may bring to others." [4]

Such words would seem to be somewhat strong in today's climate of civility, but the role of the professional in representing the client should not be forgotten. Recent codes of ethical conduct, such as the IRWA Rules referred to above, and regulatory statements on civility, in general, recognize the role of the representative in supporting the client's interests but draw the line at conduct that becomes offensive, harmful or prejudicial. The Canadian Bar Association has stated that "civility is the hallmark of our best Counsel."[5] Such words are equally applicable to anyone who has the mandate to represent a client.

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Civility: Toeing the Line

Oftentimes, there will be the need to find that imaginary line between representing the client in a vigorous and outspoken manner and carrying on in such a way as to belittle your opponent and use rude and boorish behaviour. The line does exist. As discussed above, civility can be used as a tool to frustrate the uncivil and benefit your client in front of third parties. Those that are most successful are those that know which side of the line to walk on and how close they can get to it without being offensive and antagonistic.

References

[1] R. v. Felderhof, [2002] O.J. No. 4103 (Ont. Sup. Crt. of Justice), at paras. 110 and 264; see also: Marron, K., ***Uncivil Law***, Canadian Lawyer, May 2006, p. 16.
[2] The Advocates Society, ***Principles of Civility for Advocates***.
[3] Marron K., ***Uncivil Law***, Canadian Lawyer, May 2006, p. 16. at pp. 19 - 20.
[4] Marron K., ***Uncivil Law***, ibid., at p. 20.
[5] The Canadian Bar Association, ***Code of Professional Conduct***, adopted by Council , August 2004 and February, 2006.