



Keeping Tabs

News from The Young Advocates' Standing Committee

Chair Chat | Labour and Employment Law | YASC Event Photos | Interview | Upcoming Events



CHAIR CHAT

Ben Kates, *Stockwoods LLP*



Amid Tony Hopkins references and #ProudTASMember selfies, End of Term Dinner signaled a new year for the Young Advocates Standing Committee (or, as we tend to call it, YASC). Our largest yet, this year's Committee includes members from Vancouver to Halifax, Windsor to

Thunder Bay, and, for the first time, Montreal and Rama. It's a highly motivated group, and the YASC Executive (consisting of myself, Victoria Creighton and Malik Martin) is excited to see what YASC can do.

In 2017-2018, YASC will focus on living up to its mandate to be a "voice for young advocates". This means doing what we can to improve transparency as to who we are and what we do (see the new website at www.advocates.ca), and also prioritizing ways for young advocates who are not on YASC to get involved with The Advocates' Society. We can't very well be the voice of young advocates without listening to what it is that young lawyers want from us and from our profession, can we?

As far as programming, we'll be looking to build on our existing efforts at community-building, networking and mentoring, and particularly in centres outside of Toronto. I like to think we are off to a pretty great start. Since End of Term in June, YASC and The Advocates' Society have held Pub Nights in Edmonton and Halifax, a Mentoring Dinner in London, a reception for Queens Law Summer Students and the 1st Annual Big Mingle for Students, a new student mixer and mentoring event held at The Advocates' Society's Education Centre in Toronto on August 16. Response to the Big Mingle was incredible and we had over 250 students register for the event.

And then there's this newsletter. In this edition, Lauren Pearce and Caitlin Russell provide a helpful primer on the Ontario government's proposed changes to labour and employment laws in that province, from both the employee and employer perspective. We also have an interview with the terrific Atrisha Lewis of McCarthy Tétrault, who delves into her hopes, fears, inspirations and, well, CrossFit.

YASC is always looking for member contributions for its *Keeping Tabs* newsletter. If you've got something to say about a case, your life as an advocate or a great experience you had at a TAS event or program please get in touch with Editor, David Campbell, at dcampbell@walkerwestlongo.ca. And if you're looking to get involved more generally, our Volunteer Roster is a start. To learn more about it, please email Emily Fan at efan@lerner.ca 🐾

Editor: David Campbell, *Walker West Longo LLP* | Email: dcampbell@walkerwestlongo.ca
Assistant Editor: Emily Pinckard, *Ross Barristers* | Email: EPinckard@rossbarristers.com

The Young Advocates' Standing Committee ("YASC") is a standing committee of The Advocates' Society with a mandate to be a voice for young advocates (advocates who are ten years of call or fewer) within the Society and within the profession. We do this through networking/mentoring events, by publishing articles by and for young advocates, and by raising issues of concern to young advocates as we work with the Society's Board of Directors.

The opinions expressed by individual authors are their own and do not necessarily reflect the policies of The Advocates' Society.



The Changing Workplaces Review and Ontario's Response

Lauren Pearce, *Paliare Roland Barristers*
and Caitlin Russell, *Cassels Brock*



On May 23, 2017, the government of Ontario released the Final Report of the Ministry of Labour's Changing Workplaces Review. The purpose of the Review was to consider how labour and employment standards legislation should be amended to address current trends impacting Ontario's workers and workplaces, including globalization, trade liberalization, technological change, the growth of the service sector, and the prevalence of non-standard employment relationships.

The Review was conducted over the course of two years by special advisors C. Michael Mitchell and the Honourable John C. Murray. During the review process, the special advisors consulted with and received submissions from public stakeholders, including workers, unions and businesses, as well as academics and experts. Following this consultation, the Final Report proposed over 170 recommendations.

On June 1, 2017, the government introduced Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, which, if passed, will significantly alter the labour and employment landscape in Ontario. Bill 148 incorporates some of the recommendations contained in the Final Report.

Below, we highlight some of the important changes coming down the pipe for employment and labour lawyers, and provide some commentary on the same from both the employer and the union/employee perspectives.

Commentary from the Union/Employee Perspective— Lauren Pearce **Scheduling Rules**

The *Employment Standards Act, 2000* ("ESA") does not currently include provisions regulating the scheduling of work by employers.

In the Final Report, the special advisors recognized that uncertainty in scheduling is a key contributing factor in making work precarious. Many low-wage workers have little or no control over the timing of their hours, and receive very little advance notice of their schedules. Such practices make it difficult to plan for child-care, maintain a second job, or undertake further training or education.

Following the recommendations in the Final Report, Bill 148 contemplates the introduction of a number of new scheduling rules, including:

- Employees who have been employed for at least

three months could request schedule or location changes. Employers would be required to discuss such requests with their employees and, if denied, provide reasons for the denial;

- If asked to work with less than four days' notice, employees could refuse to accept shifts without fear of reprisal; and
- If a shift is cancelled within 48 hours of its start, employees would be paid three hours at their regular rate of pay.

These proposed legislative changes will have a significant positive impact on the lives of precarious workers. However, it remains to be seen whether the changes will actually accomplish the goal of increasing advance scheduling certainty. Even given the option to refuse work without fear of reprisal, many low-wage and underemployed workers in Ontario may continue to accept last minute shift changes due to their financial and other circumstances. When this state of affairs is coupled with child or elder-care responsibilities, it can give rise to legitimate concerns as to family status accommodation.

Minimum Wage and the Liquor Server Exception

In Bill 148, the government of Ontario proposes to increase the minimum wage from \$11.40 to \$15 per hour by January 1, 2019.

However, Bill 148 maintains an existing exception for liquor servers, who currently earn a minimum wage of \$9.90 per hour. This lower rate is typically justified on the assumption that liquor servers earn enough in tips to meet or exceed the general minimum wage.

In their Final Report, the special advisors recommended abolishing the liquor server exception. They observed that women comprise almost three-quarters of liquor servers in Ontario, and that tip-based remuneration may pressure servers to tolerate sexual or other harassment from customers. Further, since tipping is discretionary, there is no guarantee that liquor servers are even meeting the general minimum wage.

These are significant policy concerns

which suggest that this exception should be eliminated. I would also note that, as tipping is a matter of customer discretion, it can serve as a vehicle for discrimination which is otherwise unacceptable. Clearly an individual's race or gender presentation should not dictate their ability to earn minimum wage.

Exclusions from Collective Bargaining

Currently, the Ontario *Labour Relations Act, 1995* ("LRA")—and the collective bargaining regime it creates—does not apply to agricultural employees, professionals (such as lawyers), and others.

The Supreme Court of Canada has made it clear that the *Charter* guarantee of freedom of association protects the right of employees to associate meaningfully in the pursuit of collective workplace goals, including by engaging in collective bargaining.

On this basis, and in light of the government's constitutional mandate to eliminate barriers to the exercise by employees of their constitutional rights, the special advisors recommended eliminating many of the exclusions from the collective bargaining regime created by the *LRA*.

Unfortunately, the government of Ontario declined to take up this recommendation. Instead, it has indicated that it will "work with affected ministries to consult with stakeholders to review the Special Advisors' recommendation". In the meantime, however, many of Ontario's workers will continue to be denied their fundamental rights under the *Charter*.

Commentary from the Employer Perspective—Caitlin Russell

From an employer perspective, Bill 148 could present serious operational challenges for small businesses and employers who rely on shift workers to deliver goods and services on an irregular or demand-driven basis. In addition to the significant scheduling changes outlined above, some of the key changes affecting employers are as follows.

Equal Pay for Equal Work

Bill 148 adopts the recommendations in the Final Report with respect to

wage parity. It provides that casual, part-time, temporary and seasonal workers will be entitled to be paid equally to full-time employees when performing the same job for the same employer. Helpfully for employers, the equal treatment rule will not apply where the difference in treatment between employees is based on an objective ground such as seniority, merit or where earnings are measured by quantity or quality of production.

Bill 148 goes beyond the recommendations in the Final Report to also guarantee an employee the right to request information about the wage rate paid to another employee and a review of his or her wages if the employee does not believe wage parity has been achieved. In response, the employer must either provide a wage adjustment or a written explanation why there will be no adjustment.

Personal Emergency Leave

The *ESA* currently requires employers with over 50 employees to provide each employee up to 10 unpaid personal emergency leave ("PEL") days per year, which may be used for personal illness, injury or medical emergency, or the death, illness, injury or medical emergency or urgent matter concerning a prescribed family member. Bill 148 makes significant changes to the PEL provisions, including:

- Maintaining the 10-day entitlement, but requiring that 2 of the days be paid;
- Eliminating the 50-employee threshold so that personal emergency leave will apply in all workplaces; and
- Prohibiting employers from requiring an employee to provide a medical note to substantiate any claim for personal emergency leave.

Notably, Bill 148 again goes beyond the recommendations in the Final Report to not only drop the 50 employee threshold for PEL, but to require all employers to provide 2 paid sick days per year for which no corroborating medical documentation is required. The provision of paid sick days, along with the increase in minimum wage and paid vacation entitlements,



will have a significant impact on small businesses in Ontario.

Further, Bill 148 will significantly limit the ability of employers to ensure that personal emergency leave is taken for appropriate reasons. Given the persistent attendance issues in many workplaces, this could be a frustrating change for a number of employers.

Unfortunately, Bill 148 does not provide any clarity on how an employer's existing leave policies will be affected by the new minimum standards. For example, it is not clear if employers who already provide for paid sick days will be required to provide an additional 2 day entitlement under these changes.

Independent Contractors

Under Bill 148, employers will be prohibited from "misclassifying" employees as independent contractors and could be subject to prosecution and monetary penalties as well as a conviction under the legislation. In the event of a dispute regarding an individual's employment status, employers will bear the onus of proving that the individual is not an employee.

The misclassification prohibition in Bill 148 is consistent with the recommendations of the Final Report to make worker misclassification a priority enforcement issue. These changes are aimed at reducing the use of independent contractor relationships which have the effect of excluding these workers from the protections of the ESA, including vacation, overtime and termination pay.

Bill 148 will require employers to carefully review their contractor relationships to determine whether those workers should properly be characterized as employees. The key question in this analysis is whether the worker is economically independent on the employer, or truly in business for him or herself. In this process, it's important to note that the terms of the contract will not be determinative.

This change will present significant challenges for employers in contracting with workers who prefer to be classified as independent contractors to trigger their own preferential tax treatment.

Next Steps

Bill 148 passed First Reading on the day that it was introduced and was referred to the Standing Committee on Finance and Economic Affairs. The government has indicated that it will use the summer months to engage in public consultation on the draft law and its potential impacts on provincial workplaces. 🏠

YASC EVENT PHOTOS





Interview with Atrisha Lewis, *McCarthy Tétrault LLP*

1. Q: Why did you become a litigator or advocate?

A: When I was younger, I did not feel like people considered my thoughts and views seriously. I felt marginalized and powerless. I saw being a lawyer as a way of overcoming that feeling. I was right.

2. Q: Which do you prefer: litigator or advocate?

A: Litigator (mostly because it lends itself well to an excellent hashtag, #litigatorlewis).

3. Q: What do you like most about the practice of law?

A: The ability to dive deep into complex topics is thrilling. Like a 'bathtub', I fill my mind so that I am an expert in an area and empty the bathtub once the case is over and move on to the next topic.

4. Q: What inspired you to write your recent article on the Top 10 Habits of a Leading Litigator that appeared in *Canadian Lawyer Magazine*?

A: I aspire to be a leading litigator. In pursuit of this goal I decided to interview litigators who have a strong reputation on the street to gather their insights. The subsequent conversations were so productive that I wanted to share what I learned with my peers.

5. Q: Which of those habits is one that you ensure that you maintain?

A: #10 is the most important one – to be happy, enjoy what you do, and stick with it. We have chosen a demanding profession and you cannot operate in the field long-term (let alone be excellent at it) unless you are having fun.

6. Q: What is your greatest fear in practice?

A: My greatest fear is that the bar and the bench will look the same in 10, 20, or even 30 years as it does now. It is no secret that the legal profession does not represent Canadian society, but my greatest hope is that the profession is changing.

7. Q: What would you consider your greatest achievement?

A: The nominations I've received from multiple students and associates at my firm for mentor of the year. It is an honour to inspire and teach those coming up behind me. I am especially thrilled that I can mentor and support women and visible minorities to develop professionally and personally.

8. Q: What is the greatest extravagance in your everyday life?

A: My crossfit membership. Physical health is important to me and thanks to the amazing trainers and team I love my time spent there and am in the best shape of my life.

9. Q: How would your colleagues describe you?

A: Fiercely loyal, fun, and hard-working.

10. Q: Which living lawyer do you most admire?

A: Marie Henein: she has built an empire for herself based on her exceptional advocacy skills.

11. Q: What talent would you most like to have?

A: It would have to be doing a one arm pull up.

Interview continued on page 6

12. Q: What is the latest non-legal book you've read?

A: *Americanah* by Chimamanda Adichie. An incredibly powerful book about race and identity spanning three continents.

13. Q: What is your favourite case?

A: *Bauer et al. v. Kilmurry et. al*: <http://canlii.ca/t/gwjl1>. Not only did we win, but Justice Hambly referenced me by name in the decision. It was also a special case for me because it was full of many 'firsts:' first expert cross-examination, first multi-week trial, first out of town trial. The cherry on top was a great trial team!

14. Q: Who or what is the greatest love of your life?

A: It's a group of "who" but I would have to say my girlfriends, who I would do anything for and who have held my hand at the hardest of times.

15. Q: If you weren't a lawyer, what would you be?

A: A surgeon. Having done a lot of medical negligence work, I have great respect and admiration for the work that surgeons do.

16. Q: What is your favourite drink?

A: Wine. The exact varietal is up for debate.

17. Q: Who has taught you the most about the practice of law?

A: My incredible mentors at the firm, including Darryl Cruz, Geoff Hall, Sarit Batner, and Tom Sutton.

18. Q: What is your most distinctive characteristic?

A: Unfortunately, I think I stand out on Bay Street mostly for the colour of my skin. That being said, I would say I am distinctive because of my confidence and energy.

19. Q: What unique knowledge have you gleaned in your practice that you can share with other young advocates?

A: Everything can be fixed (except a missed limitations period!). 🐼

"We cannot hope to be great advocates without learning from the masters of our craft."

-Sonia Bjorkquist



The Advocates' Society has a new website that features an online mentoring portal where members can connect quickly and easily. To volunteer as a mentor visit www.advocates.ca



UPCOMING YASC EVENTS



**Young
Advocates' Pub
Night**

September 7, 2017
Toronto



**Seventh
Annual
Securities
Symposium**

September 11, 2017
Toronto



**Estates
Litigation
Mentoring
Lunch**

September 13, 2017
Toronto



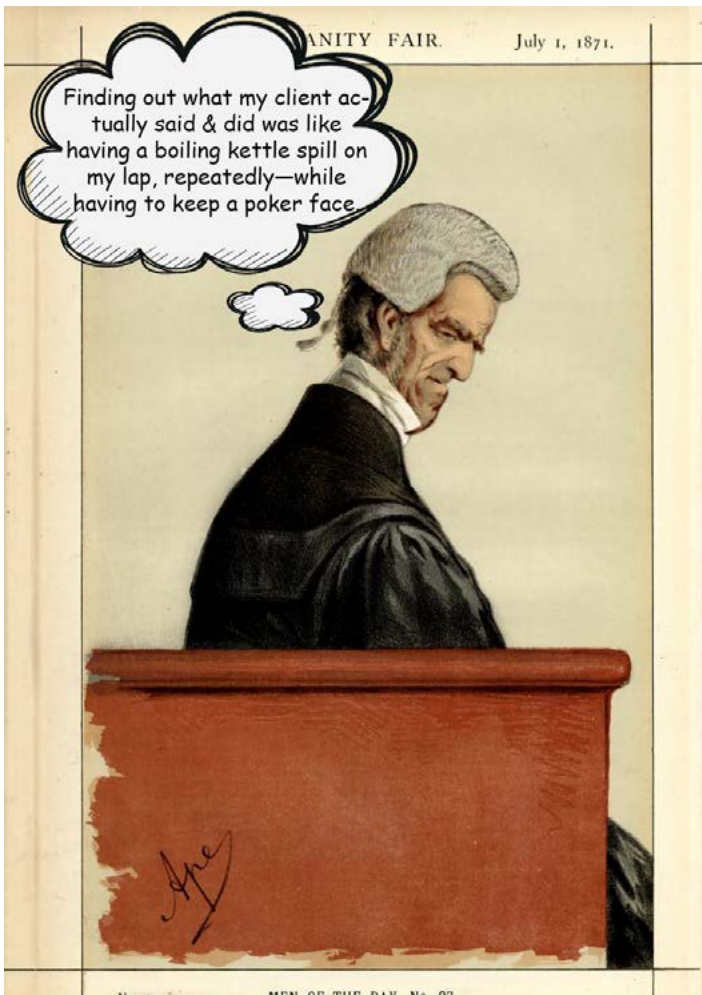
**Sudbury Trivia
Challenge**

September 14, 2017
Sudbury



**Vancouver Fall
Social**

September 19, 2017
Vancouver



Your Next Career Is Here

The Advocates' Society Career Board is the only legal job board created just for the litigation bar. Access notices for litigation, ADR and judicial vacancies that are exclusively listed for advocates across Canada.

To find your next career click here.
www.advocates.ca

