Keeping Tabs

News from The Young Advocates' Standing Committee

CHAIR CHAT

Ben Kates, *Stockwoods LLP*

On November 30, The Advocates' Society appeared at the Supreme Court of Canada for the second time that month. On this occasion, the Society intervened in the Trinity Western University matter. For the uninitiated, the case involves the refusal of the law societies in Ontario and BC to accredit graduates of Trinity Western's proposed faculty of law because the university's community covenant effectively excludes members of the LGBTQ2 community. The Advocates' Society argued that accreditation would have a discriminatory impact and undermine the law societies' obligations to the public interest and their professed commitments to promote and protect equality and diversity.

Debate over the concepts of equality and diversity did not confine themselves to the Supreme Court this fall. Indeed, they have consumed our profession's discourse, at least in Ontario. YASC's mandate is to be the voice of young advocates; it can't satisfy that aspiration without reflecting the faces and perspectives of the community it serves. For its part, YASC's commitment to inclusion and diversity remains strong. We are heartened by the efforts of the Law Society of Upper Canada and the wider legal community to promote those important values while leaving space for advocates with various perspectives to be heard.

A continued commitment to diversity is only part of YASC's growth. It's been a busy fall. In October, a number of young advocates were part of a full day consultation at Casino Rama for the *Guide for Lawyers Working with Indigenous Peoples and Issues,* a joint project of The Advocates' Society, the Indigenous Bar Association, and the Law Society of Upper Canada. It hasn't all been work, either! This fall's events included pub nights in Kingston, London, Toronto, and Windsor, Fireside Chats in Calgary, Halifax, Sudbury and Toronto, as well as the inaugural event in Montreal—a Junior Counsel Forum. Coming up, be sure to keep an eye out for Festive Receptions in Halifax and Ottawa, and our first Pub Nights of the new year on January 10 in Toronto, and January 11 in Calgary.

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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.

We hope you get some downtime this holiday season and enjoy this edition of Keeping Tabs when you do. It has something for everyone. For the keen practitioner, Nora Kharouba provides a primer on the changes coming to the *Construction Lien Act* through Bill 142. The champions of black letter law out there, meanwhile, will enjoy the Supreme Court of Canada's latest word on the *Bills of Exchange Act* as summarized by Kavivarman Sivasothy. On the lighter side, Abbas Kassam takes a look at the intersection between *RJR MacDonald* and "The Worst Movie Ever Made," namely the failure to enjoin the release of a documentary about the 2003 classic (and subject of the *Disaster Artist*), *The Room.*

Finally, if you find yourself reflecting over New Year's, I'd urge you to give some thought to joining YASC. Applications for the 2018-2019 iteration of YASC will open in January and are due no later than March 9, 2018. Learn more.

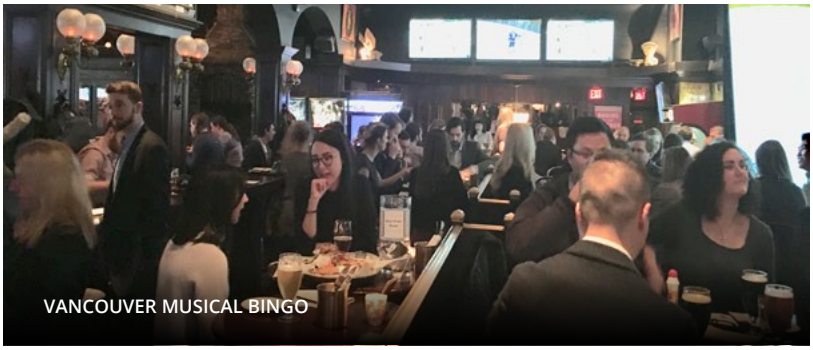
Enjoy your holidays!

YASC EVENT PHOTOS

TORONTO PUB NIGHT

CALGARY FIRESIDE CHAT

HALIFAX FIRESIDE CHAT



VANCOUVER MUSICAL BINGO

TORONTO SANTA CLAUS PARADE PARTY

MOVIE LAW

An Injunction Full of Material Nondisclosures: The Ontario Superior Court Weighs in on the Terribleness of Cult Classic Movie The Room

Abbas Kassam, ***Bersenas Jacobsen Chouest Thomson Blackburn LLP***

The Room is a terrible movie. The movie is so bad, it's good, or at least popular. It was created/produced/directed by Mr. Tommy Wiseau and Wiseau-Films, who recently sought an injunction to prevent the release of a documentary, Room Full of Spoons. [1]

The documentary explores why The Room has a cult following despite being a movie of abysmal quality. When the plaintiffs initially moved on essentially an ex parte basis for an injunction, they conveniently left out the significant fact that The Room is famous for being a terrible movie. The Ontario Superior Court dissolved the injunction on the basis that the plaintiffs had failed to make material disclosures on the ex parte motion and, regardless, had failed to meet the test for an injunction.

Before jumping into the good stuff, and for helpful background, Mr. Wiseau and his experience in creating The Room is the subject of an upcoming James Franco movie called The Disaster Artist, which hit theatres earlier this month.

On the initial ex parte motion, Mr. Wiseau filed an affidavit in which he painted a picture of himself as a serious filmmaker. He also attempted to reinforce the credibility of The Room by noting that it had become the subject of a non-fiction book and a soon-to-be released movie—i.e., The Disaster Artist.

Mr. Wiseau's affidavit asserted that Room Full of Spoons mocks, derides and disparages The Room; casts aspersions on Mr. Wiseau's character and invades his privacy; and materially breaches copyright law. The Court held that all three complaints were based on material nondisclosures to the Court and that the injunction could be dissolved on that basis alone.

Most significantly, Mr. Wiseau failed to disclose that The Room is a terrible movie. The plaintiffs argued that to make this disclosure would require Mr. Wiseau to denigrate his own work, which would be unreasonable.

The Court held that if the disclosure was material then it needed to be made. The Court also noted that Mr. Wiseau's public persona is based on the denigration of his work. The Court stated that if Mr. Wiseau was sensitive to this, he should consider whether he really wanted to base his complaint on an allegation of mockery and disparagement.

Notwithstanding the material nondisclosure disposition, the Court did a fresh injunction analysis using the three-part RJR-Macdonald test for injunctions, which requires the plaintiffs to establish that (1) there was a serious issue to be tried; (2) they would suffer irreparable harm if the injunction were not granted; and (3) the balance of convenience favoured granting the injunction.

With regard to the first prong, the plaintiffs raised six legal issues: infringement of copyright, misappropriation of personality, breach of moral rights, passing off, intrusion upon seclusion and fraudulent misrepresentation. (Interestingly, and as noted by the Court, the plaintiffs did not argue defamation.)

The Court held that none of the above issues constituted a serious issue to be tried except for fraudulent misrepresentation. The fraud allegations revolved around an unproven contract Mr. Wiseau had with the defendants. Given that this issue could not be assessed as a question of law based on the record, but would turn on credibility assessments, the Court held that the plaintiffs "barely passed" the "low bar" of a serious issue to be tried.

With respect to the second prong, the Court rejected the plaintiffs' allegations of irreparable harm. In doing so, it noted that Room Full of Spoons had already been screened around the world and the plaintiffs were not able to "point to a single instance of harm, confusion or damage being done to them because of any of those screenings."

With respect to the third prong, the Court stated that perhaps the most important factor in assessing the balance of convenience was that of the public interest in freedom of expression, which favoured the defendants.

There are several interesting points to consider from this decision.

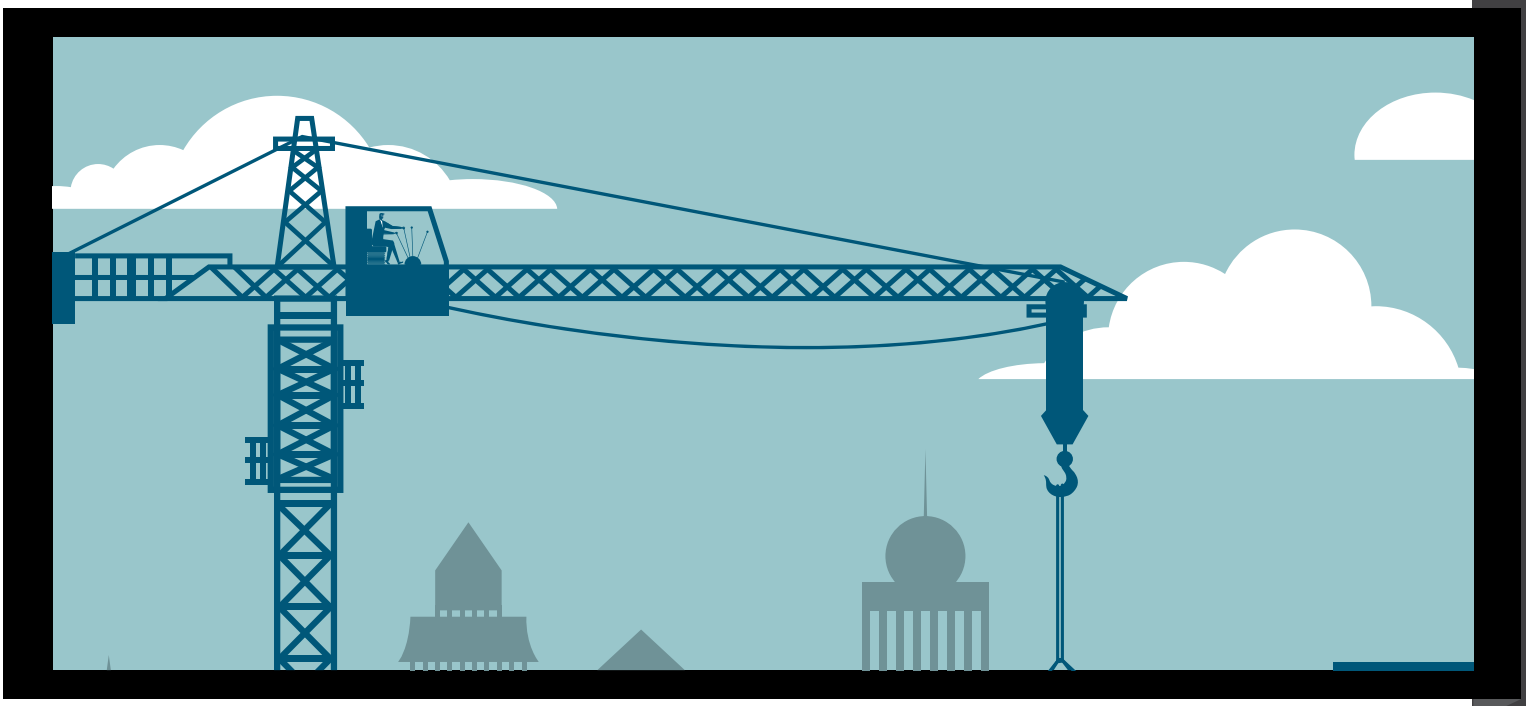
First, with regard to material nondisclosure, Mr. Wiseau does not appear to have argued that it was immaterial that The Room is a terrible movie. In fact, the plaintiffs appear to have acknowledged the materiality of that fact, arguing instead that they made proper disclosure by including an exhibit to Mr. Wiseau's affidavit that contained the comment that The Room is the "Citizen Kane of bad movies". In rejecting the plaintiffs' argument that they made proper disclosure, the Court made clear that if a fact is material to an ex parte injunction, it must be disclosed and clearly. The plaintiffs' characterization of the matter cannot seek to hide the materiality of relevant facts, even if this harms the sensibilities of the plaintiff.

Second, the Court stated matter-of-factly that "fair dealing"—i.e. the exception to the protections of copyright for certain activities such as research, satire and criticism—applies to moral rights and not just economic rights. Moral rights include an author's right to attribution (i.e., to have her or his name attached to the work or remain anonymous), integrity (which allows an author to prevent changes to a work that are harmful to her or his reputation), and association (which allows an author to prevent use of a work in association with something that is harmful to her or his reputation). However, the Court did not opine on whether moral rights could be construed as standalone rights separate from the economic rights referred to in the definition of "copyright" in s. 3 of the Copyright Act.

Lastly, the Court appeared to be inviting freedom of expression arguments. Koehnen J. noted that there is not a constitutional right of freedom of expression between private actors; however, no argument was advanced to suggest that considerations about freedom of expression should not animate courts when determining what limits to place on the tort of appropriation of personality. The Court did consider the interests of free expression by examining the distinction between sales and subject (i.e., a celebrity's identity being used merely to sell a product vs. being used to educate the public about the subject). Room Full of Spoons was held to fall into the "subject" category, making it the sort of artistic expression that courts have been concerned to protect.

Notes

1. *Wiseau Studio et. al* v. *Richard Harper*, 2017 ONSC 6535



CONSTRUCTION LAW

Major Renovations Underway for the Construction Lien Act

Nora Kharouba, *Fasken Martineau DuMoulin LLP*

The *Construction Lien Act* ("***CLA***") is now one step closer to its first major renovation since its creation in 1983. On December 12, 2017, Bill 142, *Construction Lien Amendment Act, 2017* ("**Bill 142**") received Royal Assent, which means that changes to the *CLA* are imminent (including a change to the name of the act, which will just be the "*Construction Act*"). From an advocacy perspective, Bill 142 will have a major impact on the practice of construction litigation in Ontario.

By way of background, the goal of Bill 142 is to modernize and improve the *CLA* to ensure that it continues to serve its policy objectives. Bill 142 originates from an expert review of the *CLA* prepared for the Ministry of the Attorney General and the Ministry of Economic Development, Employment and Infrastructure. The expert review draws on the views of many stakeholders in the construction industry.

The *CLA* is a legislative regime designed to provide financial protection to those who supply services or materials to construction projects. When disputes arise, they often center on payment issues, which inevitably stall and complicate those projects. Generally speaking, the *CLA* currently provides three main vehicles for addressing payment issues: lien rights, holdback rights, and trust provisions. While Bill 142 proposes to amend some of these existing rules, it also introduces new avenues for addressing and preventing payment disputes. For example, Bill 142 includes a mandatory prompt payment regime, which provides clear timelines for payment (unless the parties wish to agree otherwise), and allows construction workers to receive mandatory interest on late payments.

Most notably, however, Bill 142 implements a mandatory adjudication regime, which will undoubtedly change the landscape for construction disputes and the practice of construction litigation.

This adjudication regime was proposed in response to stakeholder frustrations with the current dispute resolution regime under the *CLA,* which is largely court-based and often lengthy, inefficient, and costly. The industry wanted more cost-effective means of resolving disputes quickly and efficiently in order to minimize disruption to construction projects.

The adjudication regime would be an interim binding

dispute resolution method available as of right to any party to a construction contract/subcontract that wishes to adjudicate disputes such as the valuation of services/materials provided under the contract, payment issues and any other matter that the parties agree to refer to adjudication. Parties would be able to agree on a procedure to govern the adjudication process; otherwise, a statutory default scheme (to be set out under a regulation to the *CLA*) would apply. The adjudicator would be a professional with ample experience in the construction industry and would be required to render a decision within 30 days of the parties submitting their documents. The decision would be binding on an interim basis until the parties agree in writing that the decision is final, or until the dispute is finally determined by the court or by arbitration. The parties would be able to file a certified copy of the adjudicator's decision in order to enforce it, and then the decision would be treated as an order of the court.

The proposed adjudication regime is likely to be especially useful for disputes that are not overly complex and can benefit from a quick determination of minor issues. It will be interesting to see how the proposed adjudication procedure fares for larger projects with many players and more cash flow at stake. In such cases, agreement may be less likely, and parties may find themselves looking to the court process anyway to either enforce an adjudicator's decision or finally dispose of issues.

In any event, the proposed adjudication regime will surely revamp construction litigation practice in Ontario, as advocates may soon find themselves navigating an entirely new forum for dispute resolution.

The Advocates' Society has made submissions on the proposed changes to the construction law regime throughout the expert review and legislative process. See The Advocates' Society's submissions here.

The David Stockwood Memorial Prize

The Advocates' Society and Stockwoods LLP established the David Stockwood Memorial Prize to honour the contribution of David Stockwood, Q.C., LSM, who served as the editor of The Advocates' Society Journal from 1991 to 2008. A prize of $1,000 will be presented to the author of a previously unpublished, advocacy-related article judged for its merit by a panel, and the winning submission will be published in The Advocates' Journal. The Prize will be presented on June 7, 2018 at the End of Term Dinner.

Submission Deadline: March 31, 2018

Please forward submissions electronically to:
Rachel Stewart, Senior Events & Marketing Coordinator, at rachel@advocates.ca

Read the 2016 winning article:

All's fair in love and court:

The use of wrongfully obtained evidence in civil proceedings

Erin Pleet, Thornton Grout Finnigan LLP

"It matters not how you get it; if you steal it even, it would be admissible in evidence."
~ Crompton J., R. v. Leatham (1861)

Your client is in a dispute with her sister about the future of the family business. She sends you a note: "Good news! I swiped my sister's cell phone, cracked the password and read her texts. They prove she knew all along that I am supposed to inherit the company!" But is this good news? It appears your client has stolen evidence. As a lawyer, you may instinctively find stealing troublesome. But, luckily for your client, the state of evidence law allows... Read more.

Learn More about the Stockwood Prize

CASE STUDY

How to Succeed in Bank Fraud without Really Trying[1]

Kavi Sivasothy, *Gowling WLG (Canada) LLP*

The risk of a loss should lie with the party in the best position to mitigate it.[2] It's almost axiomatic, a reflexively intuitive articulation of how law should aim to limit future loss. As an articling student, I expected to see this more often. However, I have recently come to learn that, in the commercial context, where certainty and predictability should be prioritized, risk allocation is not always fair.

On its face, the Supreme Court of Canada's decision in *Teva Canada Limited* v. *Bank of Montreal "Teva"* is unremarkable. *Teva* deals with a narrow provision in the *Bills of Exchange Act*[3] ("*BEA*"), and upholds a precedent the Court set over twenty years ago.[4] In *Teva*, the Court was asked to consider which innocent party bore the loss in a cheque fraud scheme. More specifically, the Court considered whether the collecting banks could rely on a *BEA* defence to treat a cheque as payable to bearer if made out to a "fictitious" or "non-existing" payee. Yes, those are distinct categories. No, I'm not sure I fully understand it either.

But the prevailing judgment, deeply contested as evidenced by the 5–4 split, is far from uncontroversial. It brings into question whether the risk ought to lie with the party that benefits most or the party that is best positioned to prevent the loss from occurring in the first place.

The Fraud

Teva Canada, a pharmaceutical company, sued two collecting banks for money it lost in a scheme devised by one of its own employees. The employee siphoned millions of dollars from Teva's accounts over several years by requisitioning cheques payable to invented payees and then depositing them into accounts that the employee had set up at the two banks. The banks were innocent parties to the fraud.

Teva alleged the banks were liable for conversion, a strict liability tort where a party interferes with the owner's possession of a good. Teva argued that the banks converted its property when they allowed the cheques to be deposited into the fraudster's accounts. Upon establishing that, the banks were presumptively liable for the loss save for a defence under the *BEA*.

The Banks' Defences in the *Bills of Exchange Act*

Section 20(5) of the *BEA* states that a "bill" (a negotiable instrument such as a cheque) can be treated as "payable to bearer" when the payee is "fictitious or non-existing". If a bill is payable to bearer, banks can lawfully negotiate its value with whomever is holding it. The banks argued the fraudulent cheques fit into section 20(5), and thus no conversion occurred since the banks became the lawful holders of the funds when the bearer delivered to the banks.

A motions judge held that section 20(5) did not apply and that both banks were liable for conversion, a decision overturned by the Ontario Court of Appeal. *Teva* appealed the decision to the Supreme Court of Canada on the question of how to interpret section 20(5). The majority restored the motions judge's decision, upholding a two-step framework for determining when a payee is fictitious or non-existing and finding neither category applied in this instance.

Under the two-step analysis, a court must first consider subjectively if there was a general contemplation by the owner to transfer funds or satisfy a debt. If not, the payee is "fictitious". Failing that, the court must consider objectively whether the payee had a legitimate relationship with the owner, or could reasonably be mistaken to have had such a relationship. If not, the payee is "non-existing." If either step in the analysis is met, the cheques are payable to the bearer.

Implications of *Teva*

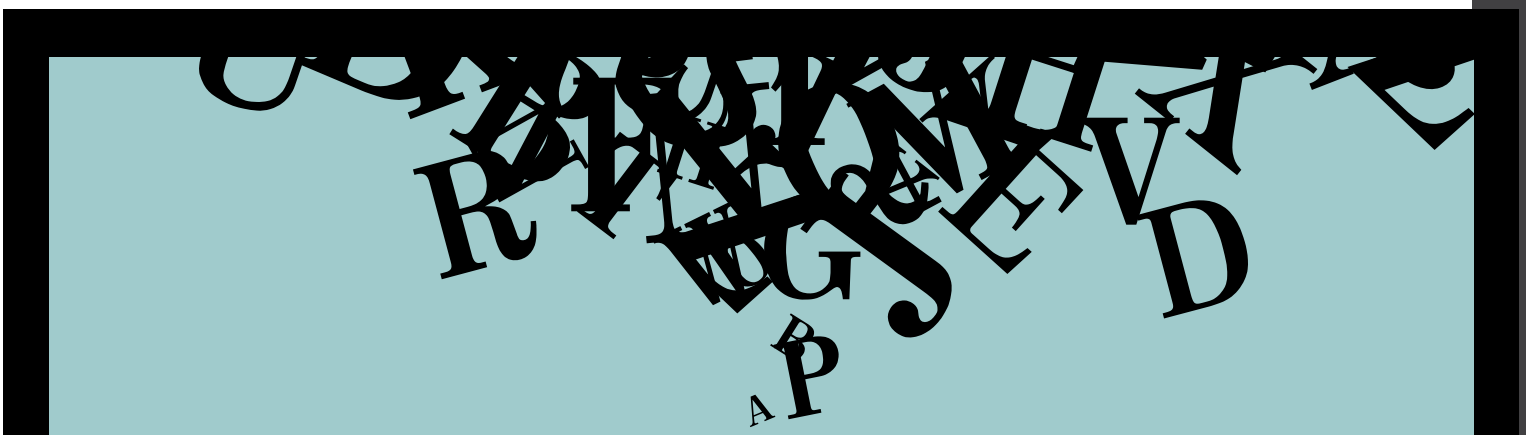
Despite its ostensible simplicity, affirming a test on which two levels of court reached different conclusions foreshadows future uncertainty. As the Supreme Court's dissent notes, a purely objective two-step analysis that considers (1) if the payee exists or, (2) of there is nevertheless a debt rationalizing the transaction, would have been easier to replicate and yield more predictable results for commercial parties.

More troubling for me than the test was how the majority rationalized placing the risk of loss with the banks. While acknowledging there is no optimal way to assign liability among innocent parties, the majority goes on to suggest banks, as "the more significant beneficiaries of the bills of exchange system," should bear the risk.[5] Setting aside how this might tip the scales in future cases, assigning liability based on who benefits rather than who is best able to mitigate the risk does little to reduce the likelihood of it happening again. Collecting banks, who often do not have a contractual relationship with a drawer, will never be in a better position than the drawer to scrutinize a transaction and identify fraud.

Assigning liability between innocent parties puts the justice system in a difficult position. The emphasis should be to incentivize reducing such circumstances. By declining to put the onus on the party best able to do so, the majority in *Teva* has left it open for future courts to have to make similarly difficult decisions on losses that could have been avoided.

Notes

1. Credit owed to Brent Arnold for this gem.
2. *Teva Canada Limited* v. Bank of Montreal, 2017 SCC 51 at para. 128 ("*Teva*").
3. *Bills of Exchange Act*, R.S.C. 1983 c. B-4
4. See *Boma Manufacturing Ltd* v. *Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727.
5. *Teva*, 2017 SCC 51 at para.68.



Anagrams

Did you know that George Bush Is an anagram of He Bugs Gore? Or, David Letterman an anagram of Nerd Amid Late TV ? Someone once said, "All the life's wisdom can be found in anagrams. Anagrams never lie." Can you figure out the answers to these Supreme anagrams?

1. I'll Calm Every Bench
2. A Maroon Inlet
3. A Silk Baron
4. Kind Sir Bacon
5. Argue Date Flux

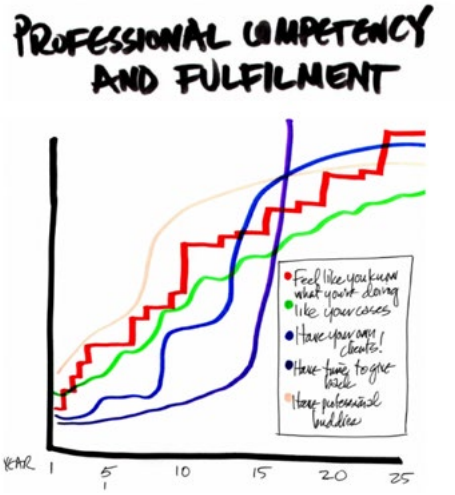
Need a hint? The Honourable...

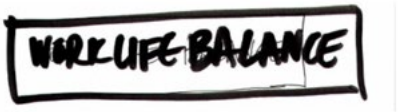
Answers: 1. Beverley McLachlin 2. Antonio Lamer 3. Bora Laskin 4. Brian Dickson 5. Gérald Fauteux

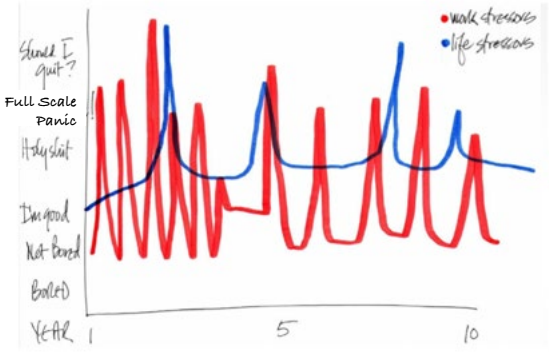
Infographic Lessons on Life as a Litigator

Caroline Youdan, ***Fasken Martineau DuMoulin LLP***

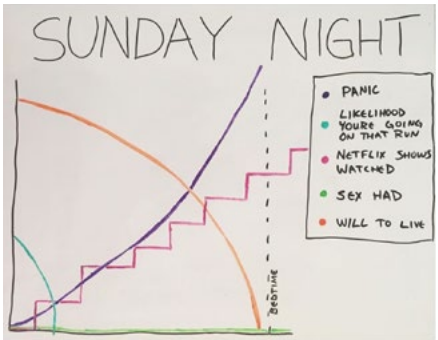
The Advocates' Society's 7th Biennial Women in Litigation Symposium, which took place last month at the Carlu, had a lot of things going for it—a ballroom full of eager participants, an impressive roster of panelists, and a keynote speech from criminal courtroom superstar Marie Henein. One of the best parts of the program, in my opinion, was when the esteemed Linda Rothstein of *Paliare Roland Rosenberg Rothstein LLP* gave her two cents on the highs and lows of a career in litigation - using infographs! I am delighted to share with you a leading advocate's tongue-in-cheek take on the at-times-terrifying vicissitudes of life as a litigator.







Rothstein's hand-drawn graphs were inspired by her favourite Instagrammer, @mattsurelee. Here's one of his graphs, which Rothstein also shared with the crowd:



IN THE NEWS

Young Advocates in the News

In this new feature, we will highlight TAS young advocate members in the news. All of the lawyers profiled have been called to the bar in the last ten years.

If you or a fellow young advocate have had a recent brush with the media about your/their work on a case, please forward the news story link to:
Andrew Eckart, andrew@eckartmediation.com; or
Louis Century, lcentury@goldblattpartners.com

Last man standing: Compensation sought for living next to parkway construction, *Windsor Star*, November 16, 2017. TAS Member David Sundin of McTague Law Firm LLP discusses a dispute between his client, a homeowner, and the Ministry of Transportation regarding the construction of the Herb Gray Parkway in Windsor.

North Vancouver filmmaker who criticized aquarium wins appeal, *North Shore News*, November 17, 2017. Commenting on his client's successful appeal of an order prohibiting him from including certain footage in a documentary, TAS Member Arden Beddoes calls the ruling an important decision for freedom of expression that will impact other people who want to criticize institutions.

Cheers from supporters as activist Desmond Cole appears in court to fight trespassing charge, *Toronto Star*, November 23, 2017. TAS Member Annamaria Enenajor of Ruby Shiller & Enenajor, Barristers, is representing Desmond Cole in relation to a trespassing charge after Cole disrupted a police board meeting by demanding that he be allowed to speak about the high-profile case of Dafonte Miller. Enenajor is challenging the charge on freedom of expression grounds.

Corrections found negligent for beating, *Law Times*, November 20, 2017. James Sayce, TAS Member and associate at Koskie Minsky LLP, comments on a recent summary judgment decision in which the Correctional Service of Canada was found negligent in respect of the beating of an inmate, James Fontenelle.

The debate on consultation, *Canadian Lawyer*, November 6, 2017. TAS Member Nader Hasan, a partner at Stockwoods LLP, discusses the Crown's duty to consult with Indigenous peoples following two significant Supreme Court of Canada decisions. Hasan was lead counsel for the successful appellants in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*

Interview with Monty Dhaliwal, *Pallett Valo LLP*

1. **Why did you become a lawyer?**
I read an embarrassing number of John Grisham novels as a kid.

2. **Which word do you prefer: litigator or advocate?**
Advocate. We advocate first, and litigate second.

3. **What do you like most about the practice?**
It's a privilege to work with people you like while helping people who need you.

4. **What is your year of call?**
2014

5. **What is your most distinctive characteristic?**
I can be empathetic to a fault.

6. **What is your pre-trial ritual?**
Whistling the theme song from Bridge on the River Kwai.

7. **If you weren't a lawyer, what would you be?**
Fighter pilot.

8. **Which living lawyer do you most admire?**
The Notorious R.B.G., Ruth Bader Ginsburg.

9. **What is your greatest extravagance in your everyday life?**
I still smile when I start my car in the morning. It's not flashy, but it was my childhood dream car.

10. **What would you consider your greatest achievement?**
This is a tough one, because I think my greatest achievement is still ahead of me.

11. **What is the latest non-legal book you've read?**
Black Hole Blues and Other Songs from Outer Space, by Janna Levin. I love anything to do with space.

12. **What unique knowledge have you gleaned in your practice that you can share with other young advocates?**
The secret to avoiding needless conflict, getting answers quickly and making clients happy is... picking up the phone and calling.

Continued on page 12

13. **What is your favourite case?**
At the moment, it's the Louisiana Supreme Court case in which the Court ruled that when Warren Demeseme told the police "... just give me a lawyer, dog....", he was asking for an actual lawyer dog. Astonishingly, the decision was upheld on appeal.

14. **How would your colleagues describe you?**
I believe the words "beard" and "funny" would be used. Hopefully in different sentences.

15. **Which talent would you most like to have?**
The ability to slow down time. That applies to my professional and family life.

16. **Who or what is the greatest love of your life?**
I'm tempted to say Ruth Bader Ginsburg, but my girlfriend would kill me. I'll go with fantasy football.

17. **What is your favourite drink?**
Margarita, one full lime, stirred, no salt.

18. **From whom have you learned the most about the practice of law?**
I am a collection of every lawyer I've ever worked with or against. Mostly everything I learned from John Grisham was a lie.

UPCOMING YASC EVENTS

Toronto Pub Night

January 10, 2018
Toronto

Calgary Pub Night

January 11, 2018
Calgary

Peel Pub Night

February 6, 2018
Mississauga

Motions Advocacy

February 7, 2018
Toronto

Mentoring Dinner

February 8, 2018
Toronto