



Keeping Tabs

News from The Young Advocates' Standing Committee

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CHAIR CHAT

Ben Kates, Stockwoods LLP



Ugh. February. Wake up in the dark. Leave work in the dark. The holidays are long passed, yet a gauntlet of factums stands between here and patio season. This profession, grueling at the best of times, can be a downright slog in dreary midwinter.

Particularly at this time of year, it helps to feel as though you're a part of something beyond the four walls of your office. The Young Advocates' Standing Committee ("YASC") has many objectives, but one of them is to build a sense of community among young lawyers. Whatever our practice area or background, young advocates face many of the same challenges, and the stresses and anxieties that accompany them. Mixing with and meeting your peers reinforces the fact that we're not alone in these battles. Hot tip: you're also that much less likely to get a nasty email from someone you've met at a pub night.

We had a number of events lined up throughout the country to help counter the winter doldrums. On February 7th, we had our first-ever Peel Region Pub Night in the western GTA. One of my favourite YASC events, a Mentoring Dinner, took place in Toronto on February 8th. For those of you in Ottawa, February 15th provided an opportunity to connect with colleagues even though the Rideau Canal was unfortunately not open for the planned skating portion of the evening. That same night, YASC held a trivia night in Kingston. Finally, we close out the month with a pub night in Barrie on February 28th.

A healthy approach to practice requires more than an opportunity to be social. With that in mind, YASC has identified mental health as an issue of great importance not only to young lawyers but to the legal community at large. We've created a working group dedicated to the issue of mental health and we invite you to our Fireside Chat on Mental Health on March 13th.

You should also read the rest of this issue. Mahdi Hussein walks us through the Supreme Court of Canada's much anticipated decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*, which addresses auditor liability. Josephine L. Comegna enlightens us with eight business development tips derived from her experience as a member of Fasken's

Editor: David Campbell, *Rayman Beitchman LLP* | david@rbllp.com
Assistant Editor: Caroline Youdan, *Fasken Martineau* | cyoudan@fasken.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.



Global Business Development Team, and Jessica K. Kozak reports on YASC's busy January in Calgary. This issue's interview is with Vancouver lawyer Arden Beddoes, who is much more than just a competitive vegan with a questionable wardrobe.

Finally—join YASC! The Young Advocates' Standing Com-

mittee is comprised of some 40-odd lawyers from across the country. In addition to fostering a community for young lawyers, we are involved in virtually everything The Advocates' Society does. If you want to get more involved, this is the place to do it. Applications are open until March 9, 2018 and can be found [here](#). 🐾



TORONTO PUB NIGHT | January 10, 2018



TORONTO MENTORING DINNER | February 8, 2018



OTTAWA SKATE THE CANAL
February 15, 2018

YASC EVENT PHOTOS



ARNUP CUP
February 9-10, 2018
Nicholas Hay & Julia Cecchetto, *Osgoode Hall Law School*, with TAS President Sonia Bjorkquist



CALGARY PUB NIGHT | January 11, 2018



PEEL PUB NIGHT | February 7, 2018



CASE STUDY

Holding the Accountants to Account: The Supreme Court of Canada Affirms Duty of Care of Financial Auditors

Mahdi M. Hussein, *AMR LLP*



On December 20th, 2017, the Supreme Court of Canada released its highly-anticipated decision in *Deloitte & Touche v. Livent Inc. (Receiver of)*.¹ This case attempted to clarify the issue of auditor liability, particularly in situations in which an auditor fails to detect a fraud perpetrated by the directing minds of the company.

The Court was unanimous and ruled

that the auditor was not liable for the work conducted for the purposes of the public offering. However, the Court was split four-to-three on the issue of whether the auditor was liable for the damages resulting from the negligent audit.

Background— The Undetected Fraud

Livent was a theatre production company with operations in Canada and in the United States. To further bolster its apparent success, its directors manipulated the company's financial records.² In 1997, Livent hired Deloitte to conduct an audit and assist with an asset sale as well as

a public offering.

In connection to its work in the asset sale, Deloitte identified several irregularities, but did not uncover the fraud. Instead, in the summer of 1997, Deloitte prepared, and approved, a press release to assist Livent in attracting new investments, which misrepresented the profit of the company.³ After Deloitte finalized the 1997 audit (released in spring of 1998), new equity investors discovered the fraud.⁴

An additional investigation and re-audit was conducted and Livent filed for insolvency protection in November 1998. The company relinquished its assets and went into receivership in 1999.⁵ Livent then sued Deloitte for breaching its duty under tort and breaching its obligations under contract.

At trial, Livent argued that the negligent audit which did not detect the fraud "artificially extended" the life of the company and exposed it to losses it otherwise would not have suffered.⁶ The trial judge found that the auditor was negligent and awarded damages in the amount of 85 million dollars (Canadian).⁷

This award was the difference between the value of the company on the day that the auditor should have resigned and the value of the company on the date of the

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insolvency— with a 25% reduction for external factors outside the control of the auditor. This decision was upheld by the Court of Appeal.⁸

Public Offering Engagement: Reliance for One Purpose is Not Reliance for All Purposes

From August 1997 to October 1997, Livent retained Deloitte to assist in soliciting investments by preparing a press release and comfort letter. In assessing the relationship of proximity that arose from this transaction, the Court examined the contents of the undertaking.⁹

In short, Livent's reliance on Deloitte's undertaking for *one* purpose, namely the solicitation of investment, did not entitle it to rely on it for *another* purpose, in this instance, the oversight of management.¹⁰

Statutory Audits and the Oversight of Shareholders

The Supreme Court of Canada reaffirmed its decision in *Hercules Managements Ltd. v. Ernst & Young* and confirmed that an auditor owes its corporate client a duty of care in the preparation of a statutory audit.¹¹ The majority of the Court reasoned that the negligent audit impaired the shareholders' ability to oversee and scrutinize management, which exposed the company to business

losses that would have been avoided with the execution of a proper audit.¹²

The minority disagreed and did not find an existence of a duty for two reasons. The first was that there was a lack of evidentiary support for the view that the company relied on the information or would have acted differently if they were alerted to the fraud.¹³ The second reason was not requiring the company to prove detrimental reliance would raise the possibility of indeterminate liability on the part of the accounting firm.¹⁴

Defence of Contributory Negligence

The Court declined to accept several defences advanced by the auditor, including contributory negligence and the corporate identification doctrine. The Court reasoned that:

*The very purpose of a statutory audit is to provide a means by which fraud and wrongdoing may be discovered. It follows that denying liability on the basis that an individual within the corporation has engaged in the very action that the auditor was enlisted to protect against would render the statutory audit meaningless.*¹⁵

Although declining the corporate identification defence in this case, the Court provided guidance for similarly situated defendants in future cases.

The Court confirmed that the principles set out in *Canadian Dredge & Dock Co. v. The Queen* remains the authoritative test on the matter; however, the Court opined that these factors provided a *sufficient*, but not *necessary*, basis to attribute the actions of a directing mind to the corporation.¹⁶

Lessons Learned

The engagement mandate is of utmost importance in pure economic loss cases arising from the performance of personal services. The existence of this duty, if any, and to whom that duty is owed, depends significantly on the contents of the undertaking. Furthermore, as was shown in this case, reliance for one purpose may not be sufficient to demonstrate reliance for another purpose. For this reason, accounting firms may consider scrutinizing the scope of their mandate, lest they be responsible for the malfeasance of management. ▀

Notes

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|---|-----------------------------------|
| 1. <i>Deloitte & Touche v. Livent Inc. (Receiver of)</i> , 2017 SCC 63. | 8. <i>Ibid.</i> at para. 4. |
| 2. <i>Ibid.</i> at para. 116. | 9. <i>Ibid.</i> at para. 53. |
| 3. <i>Ibid.</i> at para. 9. | 10. <i>Ibid.</i> |
| 4. <i>Ibid.</i> at para. 124. | 11. <i>Ibid.</i> at paras. 58–59. |
| 5. <i>Ibid.</i> at para. 125. | 12. <i>Ibid.</i> at para. 61. |
| 6. <i>Ibid.</i> at para. 132. | 13. <i>Ibid.</i> at para. 175. |
| 7. <i>Ibid.</i> at para. 132. | 14. <i>Ibid.</i> at para. 176. |
| | 15. <i>Ibid.</i> at para. 103. |
| | 16. <i>Ibid.</i> at para. 104. |

UPCOMING YASC EVENTS

Barrie Pub Night
February 28, 2018
Barrie

Windsor Pub Night
March 1, 2018
Windsor

Tips for Summering, Articling and Clerking
March 8, 2018
Vancouver

Fireside Chat on Mental Health
March 13, 2018
Toronto

Ottawa Fireside Chat
March 14, 2018
Ottawa

Kingston Wine and Cheese
March 21, 2018
Kingston

Trivia Challenge for Charity
March 22, 2018
Toronto

London Fireside Chat
March 29, 2018
London

Wine and Cheese With the Bench
April 12, 2018
Toronto



TAS Calgary Starts the Year with Two Great Events

Jessica Kozak, *HMC Lawyers*



January was a busy month for The Advocates' Society in Calgary, Alberta, with not only one, but two fabulous events to kick off 2018: the Calgary Young Advocates' Pub Night on January 11th, and the Celebrating Advocacy reception at the Calgary Petroleum Club on January 23rd.

The Pub Night had a fantastic turnout with over 70 members of the Calgary bar despite the freezing temperatures of a true Canadian winter (-37°C with the wind-chill!). It was an honour to have in attendance both the Honourable Chief Justice Mary Moreau, and the Honourable Associate Chief Justice JD Rooke, of the Court of Queen's Bench.

Two weeks later, we had the privilege of hosting the Honourable Thomas A. Cromwell, former Justice of the Supreme Court of Canada, at our Celebrating Advocacy reception at the Calgary Petroleum Club. Introduced by Mr. Douglas McGillvary, Q.C., Chair of the Alberta Advisory Committee, and the Honourable Justice Peter Martin of the Alberta Court of Appeal, Justice Cromwell's speech highlighted five key insights that are invaluable for both junior and senior counsel alike:

1) Get into (or at least near) the action;

2) Find and keep mentors;

3) Become your own teacher;

4) Learn resilience; and

5) Get outside your practice and your office.

Justice Cromwell's reflections resonated with all of those in attendance, from aspiring to experienced litigators.

The reception was a great success and was attended by a diverse demographic of the Calgary legal community. Attendees included senior members of the Calgary bar, a number of junior counsel just stepping into the world of advocacy, and distinguished members of the Calgary judiciary, including the Honourable Associate Chief Justice Rooke, the Honourable Justice Martin, the Honourable Justice Hughes and the Honourable Justice Jeffrey. We gratefully acknowledge their attendance and various contributions to Society events.

These events have provided a great opportunity to foster collegiality between the Bench and the Bar. Neither would have been possible without the generosity of our sponsor MNP, and we appreciate their support in advancing advocacy initiatives in Calgary. We also recognize the dedication of the Young Advocates' Standing Committee, whose members work diligently to organize and promote The Advocates' Society in Calgary. We are excited by the momentum of The Advocates' Society in Calgary, and are already gearing up for our second annual Trivia Challenge scheduled later this spring! 🎉

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ADVOCACY TIPS

8 Tips Every Litigator Should Have in their Business Development Toolbox

Josephine L. Comegna, *Fasken Martineau DuMoulin LLP*



In 2015, after working as a litigator for three years, I was asked to join Fasken's Global Business Development Team. I took the plunge and for two years I championed the business development activities for seven industry/practice groups at Fasken, both within Canada and internationally. Then, in 2017, I returned to my roots and resumed practicing law as a member of Fasken's Litigation & Dispute Resolution Group. My experience working in business development allowed me gain valuable insights into the business development activities that work for litigators. With this in mind, below are 8 tips every young litigator should have in their business development toolbox.

1

Business Development 101: For starters, it's important to understand the difference between branding, marketing and business development. In a nutshell, branding is strategic and encompasses who you are and how others perceive you. Marketing is tactical and is akin to storytelling—it is through marketing that you build awareness of your brand. Related to branding and marketing is the niche area of business development, which is the pursuit of strategic opportunities to create meaningful and (hopefully) long-term relationships that will drive business to your organization.

2

Get Your Name Out There: Write. Speak. Present. Or do all three. The point is to pick something you're comfortable with, carve out some time and go for it. Don't expect others to build your profile for you; profile building always starts as an individual sport. With this in mind, keep an eye open for ways in which you can contribute to the legal profession. Whether it be a bulletin update, an internal speaking engagement, a national thought-leader piece, an academic paper or an article for Keeping Tabs, just get your name out there.



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ADVOCACY TIPS (CONTINUED)

3

Small Steps Reap Big Rewards: The question is simple: what small steps can you take on a regular basis that will lead to opportunities for you? For example, I know some litigators who spend the first 10–15 minutes of each day going through their social media feeds and commenting as appropriate. Others subscribe to news monitoring services, such as Manzama or Google Alerts, and spend a few minutes each day reviewing same with a view to sending an article of interest to at least one contact. Within my own practice, I aim to connect with at least one new person every week. This can happen in a number of ways, including meeting at a conference, connecting over LinkedIn or attending a cultural or YASC social event.

4

Make a Habit of Reaching Out: You should aim to stay in touch with your top 5–10 contacts at least once per quarter. This doesn't have to be an elaborate lunch or entertainment event. A quick "check-in" phone call, or short personalized email, can go a long way toward making a contact feel valued and appreciated.

5

Communication is Key: Several recent business development studies on the legal sector have shown that responsiveness and communication from counsel are the most important factors clients (especially in-house counsel) consider when choosing a lawyer. This may come as a surprise, but these factors consistently outrank considerations such as price, deep specialist expertise, size of firm and international reach.

6

Choose Your Referees Wisely: If your firm participates in legal rankings (*i.e.*, *Chambers*), and you've been asked to put forward client referees in support of a matter, don't brush this request aside. When it comes to rankings, referees matter. In fact, they sometimes count for as much as 50% of your overall ranking. For this reason, it's important to submit referees that you've had meaningful conversations with, who know your work and are available to speak positively on your behalf. More often than not, this means a mid-to-senior level decision maker, but not the CEO of a company.

7

Ask the Big Questions: When speaking to a prospective or current client, remember to be an active listener and don't be afraid to ask questions such as, "What keeps you up a night?", "Are there any particular challenges you (and/or your business) might be facing right now?" or "How can I help you?".

8

Be Prepared: Never go anywhere without at least 10 business cards on you. It may seem obvious, but I'm often surprised by the number of young advocates who come up empty-handed when asked if they have a business card on them. Yes, we live in a digital age, but within business circles, including law, the time-honoured tradition of exchanging business cards is still very much alive. For this reason, I make it a habit to keep small stacks of my business card everywhere: in my briefcase, in my attaché, in my handbag, in my gym bag, in every piece of luggage, and even at home. In fact, select close friends and family also have copies of my business card to give out to their contacts because you never know where your next file might come from. 📌

Join the Young Advocates' Standing Committee

Be a voice for Young Advocates. Applications for the 2018-2019 iteration of YASC will open in January and are due by March 9, 2018.

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IN THE NEWS

Young Advocates in the News

In this 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 has 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

[\\$90M settlement approved for indigenous communities hit by Manitoba floods](#), *Canadian Lawyer*, January 18, 2018. Sabrina Lombardi of Mackenzie Lake Lawyers discusses her clients' class action settlement with the Manitoba government over flooding of four Indigenous communities in Manitoba.

[Supreme Court says Livent auditors liable but sets conditions](#), *Globe and Mail*, December 20, 2017. Garth Myers of Koskie Minsky LLP explains the implications of the Supreme Court of Canada's recent decision in *Deloitte & Touche v. Livent Inc. (Receiver of)* concerning the liability of auditors in cases of negligent misrepresentation or performance of a service.

[CNN, Anderson Cooper trying to force hospital to hand over files on Canadian surgeon suing network for libel](#), *National Post*, December 30, 2017. Julia Wilkes, a partner at *Adair Goldblatt Bieber LLP*, is counsel to CNN in a defamation lawsuit filed by a Toronto heart surgeon following a report on Anderson Cooper's show.

[Court gives Ontario teen green light to sue both Starbucks and staff over scalding incident](#), *Toronto Star*, January 6, 2018. Brooke MacKenzie, a partner at *Mackenzie Barristers*, was co-counsel in a recent Ontario Court of Appeal case concerning the liability of employees for negligent acts done in the course of their employment.

[NPCA, activist square off in court](#), *St. Catharines Standard*, November 21, 2017. Erin Pleet, *Thornton Grout Finigan LLP*, represented the defendant Ed Smith, who was sued by the Niagara Peninsula Conservation Authority and its former Chief Administrative Officer after Mr. Smith published a report critical of the NPCA. As reported [here](#), the court dismissed the lawsuit against Ms. Pleet's client. 🏠



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Interview with Arden Beddoes, *Arvay Finlay LLP*

Compiled by Shannon Beddoe, *Martha McCarthy & Company*

1. **Q. Why did you become a litigator or advocate?**
A. It fit my personality. For better or for worse, I tend to be argumentative, and I actually enjoy the adversarial process. When I started law school I didn't even know what "litigation" referred to (although I pretended I did). But once I figured it out and got a taste of it during a summer rotation at a firm, there was really no question that that's where I was headed.

2. **Q. Which word do you prefer: litigator or advocate?**
A. I prefer "advocate" because it is broader and more inclusive. Plus, as is sometimes said, the advocacy doesn't end when you leave the courtroom. It continues in lots of ways, such as during without prejudice haggling with opposing counsel or, in some cases, in public in the media.
3. **Q. What is your year of call?**
A. 2012 in Ontario, 2015 in BC.

4. **Q. Which talent would you most like to have?**
A. Flying.

5. **Q. What do you like most about the practice?**
A. Winning. But perhaps I should give a better answer than that. I also like having an impact, however great or small. Sometimes the mere possibility of legal action can make a public decision-maker behave differently—ideally in accordance with the rule of law. And of course many cases can contribute to the development of the law. I like feeling that something about the world is better than it would be otherwise because of what I've done as a lawyer.

6. **Q. What is your greatest extravagance in your everyday life?**
A. Gorging at all the new plant-based restaurants. The veg food scene in both Vancouver and Toronto is exploding. And since I believe in the cause, I can guiltlessly stuff my face. It's awesome. I call it "consumption activism". Others call it "eating too much". Whatever.
7. **Q. Which living lawyer do you most admire?**
A. I've been extremely fortunate to work with, and have the benefit of mentorship from a lot of excellent lawyers in my career so far. I admire and respect all of them. But if forced to choose one, I would have to go with Joe Arvay. Not only do I really enjoy working with Joe, I especially admire his consistent willingness to take difficult cases—whether or not they're popular, and whether or not the clients pay. It's easy to shy away from hard cases that are intimidating, especially when there is plenty of other easier and more familiar work to do. But I think part of our role as members of the bar and officers of the court is to take those hard cases that further the rule of law and liberal-democratic principles, and protect the vulnerable.

8. **Q. If you weren't a lawyer, what would you be?**
A. Someone who argues a lot—but not in a courtroom, and not very well.
9. **Q. What is your most distinctive characteristic?**
A. My understated—and under-considered—wardrobe.

Continued on page 10



10. Q. What is your favourite case?

A. Well here I must toot my own horn. My esteemed co-counsel, Ben Oliphant, and I managed to have the BC Court of Appeal overturn an interlocutory injunction that had required a filmmaker to remove 15 segments from a documentary that is critical of the Vancouver Aquarium's practice of keeping dolphins and whales in captivity (2017 BCCA 395). The case recognized that the debate about the ethics of how we treat animals is very much alive in our society, and that expression on that topic should not be lightly interfered with. My other favourite case right now is *Wiseau Studio et al v. Richard Harper*, 2017 ONSC 6535. Seriously ... just read it.

11. Q. What would you consider your greatest achievement?

A. In a past life I was a rower. I got pretty into it and rowed in university and a bit internationally. There's no single rowing achievement that stands out for me—rather, what I'm proud of is simply developing the mental fortitude to push myself as hard as I could to be the best I could be.

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

A. Honestly I haven't finished any book of any kind for years. But what I read about most for leisure these days is the Mueller investigation in the US. It has to be one of—if not the—most important investigation/prosecution ever, and I just find it fascinating. For others interested, I'd recommend following Seth Abramson on Twitter, and listening to Preet Bharara's podcast, *Stay Tuned with Preet*.

13. Q. What is your greatest fear in practice?

A. Perhaps it's a common one, but I'm most afraid of missing a limitation period or some similar mistake that prejudices a client.

14. Q. How would your colleagues describe you?

A. Good question ... I should ask them. I'd guess loud, poorly dressed, and sometimes smelly.

15. Q. What is your favourite drink?

A. Coffee. Many times a day.

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

A. My partner Anna Pippus who I brag about below!

17. Q. From whom have you learned the most about the practice of law?

A. So this is where I'm going to brag about Anna. Anna has influenced me in a ton of different ways that have affected my personality and how I practice law. She's taught me a huge amount about humility, patience, and frankly just general communications skills. In fact, if it weren't for Anna, all of these answers would be much worse than they already are. Anna is especially skilled at reading interpersonal situations and using empathy to understand people's perspectives and motives. I think those are extremely important skills to have as a lawyer and mine are far better than they would be if it weren't for Anna.

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

A. One thing that has struck me in practice, and that I didn't appreciate in law school, is how often different lawyers or judges can have very different perspectives on how a case should be resolved. In law school it's all about appellate decisions and sometimes one thinks, "Wow—this seems so obvious, how could anyone have gotten it wrong or thought differently in the first place?" But I appreciate far better now how difficult the earlier stages of litigation are—for counsel and the court. It's very difficult to take a messy set of facts and to not only organize them but situate them in the proper legal context. ▀

