Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Chair Chat

Brent Arnold

YASC's busy spring continues. We welcomed young advocates to pub nights in Kingston and Toronto in early May, and our Toronto Mentoring Dinner introduced new lawyers to leading members of the bar in a casual and collegial environment. Young advocates in London will have a chance to share in the experience at our upcoming London Mentoring Dinner (June 22). We have plenty of other great events coming up next month, including the "Your Profession, Your Future" event (June 11), which will feature a panel of leading experts (Jordan Furlong, Monica Goyal, and Mitch Kowalski) addressing what the future of practice holds for young advocates. And as always, the term will end with our ever-popular End of Term After-Party at the Steam Whistle Brewery.

I'm proud to report that YASC played a leading role in putting forth the Society's position on a controversial motion on the future of articling heard at the Law Society of Upper Canada's Annual General Meeting. Our members also took up the pen to make valuable contributions to the Society's forthcoming *Best Practices for Civil Trials*, to be released at the End of Term Dinner. These examples remind us of the profound impact young advocates can have and, in particular, by being active in The Advocates' Society. Interested in getting involved? Come out to our events, meet your peers and future clients, and ask us how.

Brent

Upcoming Events

Summer Trial Advocacy College (Toronto)
June 4 & 5, 2015

Your Profession, Your Future (Toronto)
June 11, 2015

End of Term (Toronto)
June 18, 2015

Mentoring Dinner (London)
June 22, 2015

Welcome to the new Young Advocates' Standing Committee for 2015-2016!

The YASC Interview: Amanda Chapman

By: Vanessa Voakes, *Stikeman Elliott LLP*

Amanda Chapman was called to the Bar in 2009. In 2011, she became the principal of her own law firm, Chapman Law, located in Barrie, Ontario. Amanda assists clients with plaintiff personal injury matters and estate litigation, and provides employment law advice. In addition to the fulfillment she gets from running her own practice and helping her clients through difficult situations, one of the things Amanda likes most about the practice of law is that she gets to do it in really great shoes.

Which word do you prefer: litigator or advocate?

Advocate. I certainly spend more time advocating for clients then I do litigating. Litigating may become part of the process, but seeking the court's assistance at any juncture truly is the last resort; and I have no concern telling my clients this. As an advocate, I intervene into what is usually a difficult or emotional situation for a client, and from the outset I am listening and thinking reasonably as to how we can focus on the work to be done.

Why did you become an advocate?

I feel as though I have always been an advocate or felt an obligation to stand up for people and to do the right thing. However, the real turning point for me was when I was in my final year of undergrad and my father was involved in a head-on collision from which he suffered catastrophic injuries. Going through that event - and the effect it had on our family and my parents' business, as well as the stresses of the insurance claim - really shaped me into the advocate that I am today.

How would you describe your career so far?

Hard work. Perseverance. Taking chances. Great shoes.

What do you like most about practising in Barrie?

We have a great community of lawyers, judges and legal professionals in Barrie. We are collaborative, supportive, and generally look out for one another. I could call on any number of lawyers in the area and they would be there to assist or provide guidance. Believe it or not, there are some great lawyers north of the GTA. The view from our offices is not too bad, either.

If you were stranded on a deserted island, what item would you most like to have with you?

Flint. That's my survivor answer.

If you weren't a lawyer, what would you be?

Any number of things: a teacher, a doctor, maybe a shoe designer. I have a lot of interests.

What do you think is the greatest reward and greatest challenge in running your own firm?

The greatest reward in running my own firm is the flexibility I have in my schedule. It allows me to spend additional time with my family, to work from my home office and to attend my daughter's school events as I choose. Like any working parent, I feel torn between work and family, but under all that angst and worry, we just need to try and do the very best we can and hope it is enough.

The greatest challenge in running my own firm is the amount of time spent on being an entrepreneur and on 'running a business', which takes me away from the practice of law. Over time you learn to delegate, focus, and manage your time better so that you can address those accounting, IT or light bulb issues.

Do you have any advice for young advocates who may be thinking about hanging their own shingle?

My advice would be to take the risk. Seek guidance and take advice from colleagues who have also taken that risk. Truly, what is the worst that can happen? If it doesn't work out, then you pack it in and return to a firm or to an in-house position. As scary as it was to go out on my own I do not regret it for one second.

Practical Tips for Communicating with Experts

Shane C. D'Souza, *McCarthy Tétrault LLP* and Justin H. Nasseri, *McCarthy Tétrault LLP*

Much ink has been spilled dissecting the reasons of the Court of Appeal for Ontario in *Moore v. Getahun*[1]. But what are its practical implications? Consulting with experts is arguably one of the most challenging tasks for young advocates. Lawyers must fulfill their duties as zealous advocates for their clients without interfering with experts' obligations of independence and impartiality when providing evidence. This article provides young advocates with practical tips to work effectively with experts without crossing professional lines.

The Outset

Let's assume that the expert you want to retain is qualified, available and has no conflicts. During your initial discussions with the expert, consider the following points:

1. **Review the expert's obligations under Rule 4.1.01(1) of the *Rules of Civil Procedure* ("*Rules*")**, which the expert will need to abide by if a report is written. If the expert is retained as a consultant only (i.e. will not write a report that you intend to rely on at trial), then the expert is not specifically governed by that Rule.
2. **Fairly summarize the allegations.** To minimize the risk of biasing your expert, consider the extent to which summarizing the underlying facts is helpful. It is reasonable to provide the expert with a general understanding of the material that the expert will review, although you should emphasize the importance of reviewing everything.
3. **Confirm the initial question(s) that the expert is being asked to opine on.** It is important to recognize that the exact opinion being sought may evolve as the expert and you become more familiar with the underlying evidence.
4. **Ensure that the expert has all relevant material needed to reach an informed opinion** such as pleadings, documents, and discovery transcripts. In some instances, it may be advantageous to disclose the material to the expert in stages. For example, sometimes it may be beneficial for the expert to arrive at an untainted opinion first, without seeing any 'legal documents' such as the pleadings or the other side's expert reports. Of course, it is important for the expert to review all relevant material before the expert report is finalized.
5. **Consider discussing whether the expert should conduct research and rely on secondary resources.** Any information the expert relies on to reach an opinion must be disclosed.

It is prudent to understand the expert's preliminary views before the expert is instructed to draft a report. In fact, to minimize the nature and scope of revisions to an expert's draft report, you should consider having a fulsome discussion with the expert about her or his conclusions prior to instructing that expert to draft a report.

Commenting on Draft Reports

The Court of Appeal in *Moore* accepted the widespread practice of counsel consulting with experts in the preparation of Rule 53.03-complaint reports, but observed that such consultations must occur "within certain limits".[2]

Although no specific limits were enunciated by the Court of Appeal, the Moore *dicta* suggest that it is appropriate to review an expert's draft report with him or her to ensure that it:

1. complies with the *Rules* and the rules of evidence;
2. addresses and is restricted to the relevant issues;
3. is written in a manner and style that is accessible and comprehensible;
4. does not reference any erroneous facts or assumptions;
5. does not contain any typographical or grammatical errors;
6. does not express an opinion that is beyond the expert's expertise; and
7. does not usurp the Court's function as the ultimate arbiter of the issues.

It is inappropriate to interfere with the expert's duties of independence and objectivity. Although you may challenge the expert's opinion to better understand or test it, you should not attempt to persuade the expert to articulate opinions that they do not genuinely hold. There is a difference between asking the expert "Is it fair to say X in your report?" and saying "You need to say X in your report" if "X" is an opinion the expert does not share. The latter interferes with the expert's duties.

By itself, there is likely no impropriety with an expert finalizing a report after an iterative consultation process that goes through a number of drafts. Similarly, by itself, the length of a consultation is likely not a compelling benchmark of impropriety. In *Moore*, the Court of Appeal did not consider it "improper" that an expert finalized his report after "an hour and a half conference call with counsel" because the final report reflected the expert's "genuine and unbiased opinion".[3]

The Golden Rule? Assume Everything is Disclosable

Although communications between a lawyer and expert are subject to litigation privilege, the Court in *Moore* was clear that this privilege cannot be "used to shield improper conduct."[4] This is all the more reason for lawyers to be cautious when communicating with experts. As a means of self-discipline, you should assume that your discussions with the expert, and drafts of expert reports, could be disclosed at trial.[5]

The Advocates' Society's *Principles Governing Communications with Testifying Experts*, which the Court cited approvingly and appended to its reasons, offer important guidance on the appropriate limits around communications with experts. Read the *Principles* here.

Sources

[1] *Moore v Getahun*, 2015 ONCA 55.
[2] *Ibid.* at para. 49.
[3] *Ibid* at paras. 50 and 78.
[4] *Ibid* at para. 77.
[5] In *Moore*, the Court of Appeal clarified that the disclosure of draft reports or notes of interactions between counsel and an expert witness will follow when a "factual foundation" is established to support "a reasonable suspicion that counsel improperly influenced the expert".

Photo Gallery

Kingston Pub Night - May 5

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Toronto Pub Night - May 7

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Breakfast Near Tiffany's - May 22

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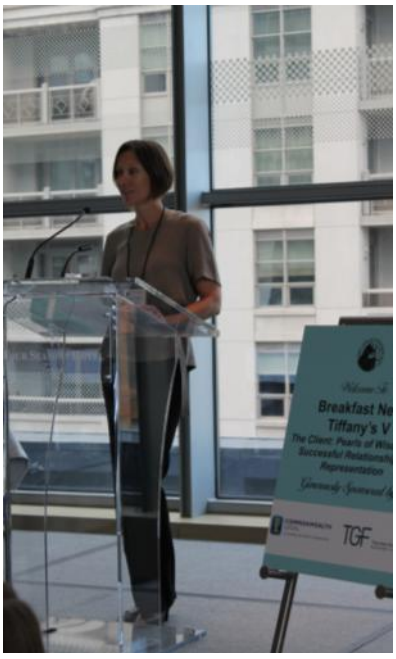


The Supreme Court Reinforces Honesty, Transparency and Good Faith Obligations

Nicole Simes and Katelyn Weller, *MacLeod Law Firm*

In the last six months, the Supreme Court of Canada has emphasized protections for vulnerable parties throughout the entirety of a contractual relationship. Two decisions, while factually very different, highlight the Court's emphasis on honesty, transparency and good faith dealings, especially for employers. *Bhasin v. Hrynew*[1] and *Potter v. New Brunswick Legal Aid Services Commission*[2] are likely to affect the way employers treat employees in Canada.

In *Bhasin*, the plaintiff was contracted by the Canadian American Financial Corporation ("Can-Am") to sell education savings plans. His three year contract was to be automatically renewed unless six months' notice was provided. Through a series of events, Can-Am began dealing with Bhasin's competitor, pressuring Bhasin to merge his sales operation with that of the competitor. Can-Am further misled Bhasin that certain information would be kept confidential. When Can-Am and the competitor were unsuccessful in forcing the merger, Can-Am provided Bhasin with notice of non-renewal of the contract. Consequently, Bhasin lost the value of his business and he commenced legal action claiming Can-Am failed to act in good faith.

The Supreme Court of Canada reiterated that there is a general organizing principle of good faith in contractual performance at common law. The Court then went on to establish a new common law duty as a manifestation of the duty of good faith. That is, a duty "to act honestly in the performance of contractual obligations." The duty of honest performance requires the parties to a contract not to lie or knowingly mislead each other and to generally perform contractual duties reasonably and not capriciously.

The Court applied this duty of honesty in the employment context in the recent *Potter* case. In *Potter*, the working relationship between the New Brunswick Legal Aid Services Commission and its Executive Director deteriorated four years into a seven-year contractual term. The parties began to negotiate terminating the contract. Potter subsequently went on sick leave before any concrete terms of the buy-out had been established. Before Potter was able to return to work, the employer placed him on a paid indefinite administrative suspension and surreptitiously asked the Minister of Justice to fire Potter for cause. The employer refused to tell Potter why he had been suspended. He resigned and sued for constructive dismissal.

The Supreme Court confirmed the two means by which constructive dismissal can be established. The Court also focused on communication, holding that an administrative suspension will generally not be justified where the employer has not communicated the reason for the suspension. Applying *Bhasin*, the majority noted that "at a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright."

The duty of good faith had applied to the termination of an employee for some time, as an employer could not be misleading or excessively insensitive when terminating an employee. However, these decisions illustrate that the duty to act in good faith is evolving. This will impact the employment context as well as quasi-employment relationships such as those of dependant and independent contractors. *Bhasin* has broadly expanded the good faith obligation to include honesty and honest performance of all contracts. *Potter,* applying *Bhasin*, has established that the duty of good faith and honesty is required throughout all aspects of the employment relationship.

The Supreme Court appears to be emphasizing its eagerness to protect vulnerable parties in a contractual relationship, who are often employees. The duties established in these cases are broad and we expect to see an increase in cases invoking a breach of the duty of good faith, both in and out of the employment relationship.

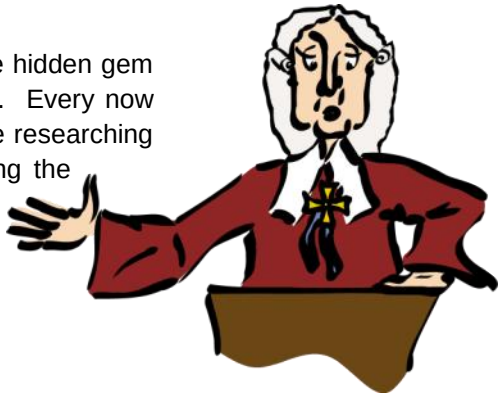
Sources

[1] 2014 SCC 71 [*Bhasin*].

[2] 2015 SCC 10 [*Potter*].

Poetic Justice

Erin Durant, *Dooley Lucenti LLP* and Chris Horkins, *Cassels Brock & Blackwell LLP*



Young advocates spend countless hours reviewing case law, searching for the hidden gem that will elevate our not-so-brilliant legal arguments in the minds of the court. Every now and then, we stumble upon a case that is completely irrelevant to what we are researching but which causes us to laugh and waste several non-billable minutes sharing the case with colleagues on Twitter. Below are some of our favourites.

Do you know the judge and case name for the classics below?

"Are civil trials the legal equivalent of green eggs and ham? Is Green Eggs and Ham an allegory in which Sam-I-am represents the bench, and the interlocutor the bar?" [i]

"Mr. G has filed a grievance seeking the right to wear Bermuda Shorts." [ii]

"With the changes in competition law and the chilling effect of *Fairview Donut Inc. v. The TDL Group Corp*., *supra,* the Class Members have come to their Dunkirk, and it is time to beat a strategic retreat from the litigation battlefield." [iii]

"In reality what the plaintiff is arguing here is that in certain circumstances the law ought to be that there should be an award for verbal insult. I think a children's couplet states the legal position: "Sticks and stones may break my bones but names will never hurt me." [iv]

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i Justice D.M. Brown (as he then was) in *George Weston Limited* v. *Domtar Inc.*, 2012 ONSC 5001 at para. 33.

ii Lorne Slotnick, Arbitrator in *Ottawa Hospital* v. *CUPE, Local 4000*, 2013 CanLII 643 (On LA).

iii Justice P.M. Perell in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, 2014 ONSC 5812 at para. 45.

iv Justice Cavanagh in *Dobson* v. *T. Eaton Company*, 1982 CanLII 1221 (ABQB) at para. 15.