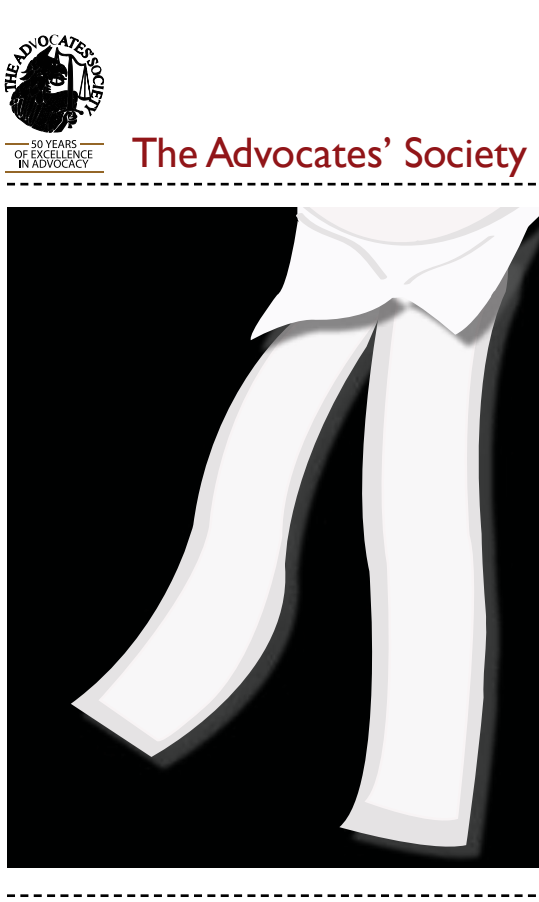


Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Chair Chat

Written by: Tony Di Domenico, YASC Chair

Young advocates are everywhere. Just look around. They practice in large and small communities, in urban and rural areas across Canada. They are government lawyers, in-house counsel, sole practitioners and associates in small, medium-sized and large firms. They advocate for clients in a variety of practice areas, including commercial, civil, family and criminal. It is this group that the Young Advocates' Standing Committee, a standing committee of the Advocates' Society Board of Directors, seeks to assist.

Comprised of lawyers ten years post-call or fewer, YASC is dedicated to promoting excellence in advocacy for young litigators. It is also dedicated to the highest standards of collegiality, professionalism, education and mentorship within the legal profession.

Through our monthly newsletter entitled "Keeping Tabs", we will be providing you with periodic updates of YASC's work. Put briefly, last year, YASC developed a three-year strategic plan. At its core, the strategic plan seeks to provide young advocates with opportunities: opportunities for mentorship and building professional relationships; opportunities to exchange ideas impacting young advocates; opportunities to participate in dynamic educational programs; and opportunities to contribute to the legal and broader community. We look forward to seeing you this year. Stay tuned!

Trivia Challenge

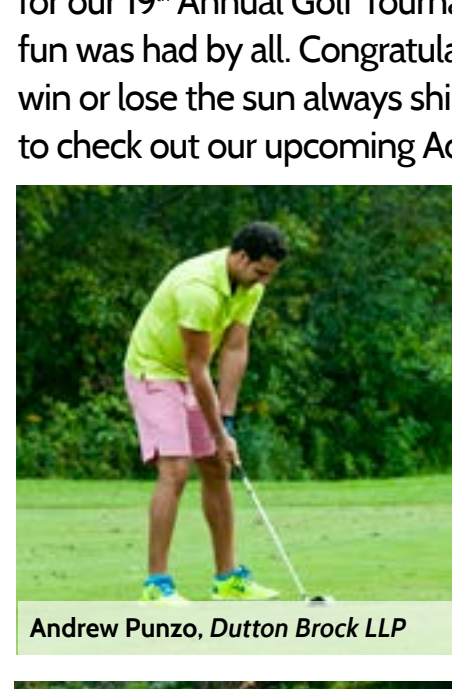
What project is TAS Gives Back raising funds for this year?

Tweet your answer to @Advocates_Soc using hashtag #YASCTriva for a chance to win a **$50 Best Buy Gift Card**

Get ready for this year's YASC Trivia Challenge, happening on March 20th, 2014. Answer the trivia challenge question in each newsletter for a chance to win great prizes and YASC bragging rights!

Young Advocates at the 19th Annual Golf Tournament

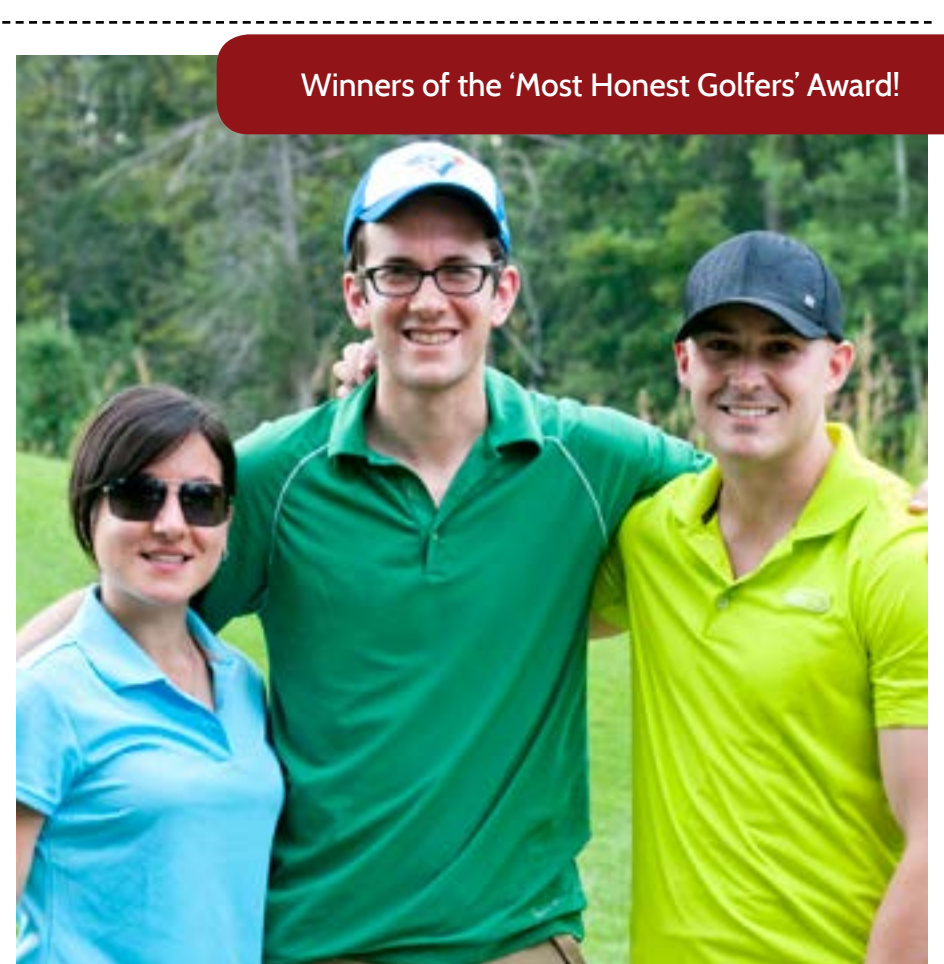
Thanks to all the Young Advocates' who joined us in August for our 19th Annual Golf Tournament. It was a great day and fun was had by all. Congratulations to all teams who played, win or lose the sun always shines on the green! Don't forget to check out our upcoming Advocates' Society events!



Andrew Punzo, *Dutton Brock LLP*

Erin Durant, *Dooley Barristers*

Winners of the 'Most Honest Golfers' Award!



From left to right:
Jennifer Arduini, *Dutton Brock LLP*
Elie Goldberg, *Dutton Brock LLP*
Alexandre Proulx, *Dutton Brock LLP*

Law Firm Sports: A Waste of Time or a Time for Growth?

Written by: Erin Durant, Dooley Barristers

This summer Dooley Barristers, better known as the Dooley "Destroyers", entered the Barrie Slo-Pitch Association to engage in friendly competition against the lawyers at Barriston Law. Unlike my previous experience with the Ottawa legal sports scene, Barrie does not have an exclusive lawyers' softball league. The Destroyers and Barriston squared off this summer against a variety of teams that were generally younger, stronger, and more skilled than what you would likely imagine when you picture a team of lawyers. Despite the talent mismatch, the Destroyers finished the regular season with a record of 5 wins and 9 loses– a better winning percentage than the overhyped but beloved Toronto Blue Jays.

Young lawyers are frequently invited or "volun-told" to participate in various law firm sporting events. The larger the firm, the more frequent the sporting endeavors. At my previous firm the articling students and young lawyers were invited to represent the firm on the basketball court, beach volleyball sands, golf tournaments, softball diamond, in long distance races and even a 100 kilometers charity Bike Ride. Participating in these events usually means returning to the office late at night or early in the morning to finish billable work or sacrificing the limited time that we all have with our families and friends.

I have found that sacrificing my time to participate in law firm sporting activities, even in activities where I lack any skill, to be extremely rewarding. The highlights for me include (in no particular order):

1. Team Building

At our busy litigation firm there is not much time during the work day for informal chit-chat. Dan Dooley initially agreed to sponsor a firm softball team as a team building initiative. As unorthodox as this idea seems, it is a trend to be catching on in a variety of industries. According to one report "As you train together and learn about your sport together you will be creating new and more dynamic bonds between your employees. These bonds will spill over into the work environment and help your employees to work as a team at work as well as at play." Learning to work as a team on the softball field, ideally, will translate into lawyers and staff adopted the "team" concept in the office.

2. "Face time" with Partners and Senior Associates

A mentor once told me that as a young lawyer your only clients are the other lawyers at your firm. While senior lawyers go to great efforts to have face time with their clients, it is great marketing for a young lawyer to have dedicated time every week to build internal relationships with other lawyers at their firm. Firm sports teams are great opportunities to meet the partners and senior associates at your firm that you would not otherwise socialize with outside of the office. This is particularly true when you are cycling 100 kilometers with a corporate lawyer twice your age and are struggling to keep up. The cycling was torture but the increased corporate work referred to me afterwards was rewarding.

3. Increased Collegiality in the Profession

Many senior lawyers discuss the "good old days" of advocacy when advocates were more civil with one another. One of the many identified causes of the rise of incivility between counsel is the fact that there are many more litigators and that you can go years without running into the same opposing counsel again.

Law firm sports leagues and tournaments are a great way to meet lawyers from other firms and learn your opponent outside of the courtroom. It is much easier to be rude to someone that you do not know than someone you have to see in person every few weeks at a sporting event.

4. Bragging Rights

The reputation of your law firm is directly connected to how the firm performs in recreational sporting events.

I am a believer that firm sports are not a waste of time but are a remarkable tool for professional growth for young advocates. I hope to see you all next year on the diamond!

Quality vs. Quantity: The Art of Speaking Clearly

Written by: Kim Neeson, Neeson & Associates

Recently, a law clerk called the office to discuss a transcript. She was concerned about the way a couple of undertakings had been expressed in the transcript. (Undertakings is a term in Ontario which brings legal effect to a promise to do something on the record during Examinations for Discovery or Cross-Examinations, which are akin to Depositions in the US context).

After reviewing the portions of said examination, how the undertaking was marked and perceived by the court reporter, the law clerk sighed, "This transcript is just not well worded and the way the undertakings have been given are very hard to follow! Your court reporter should have stepped in."

In a perfect world court reporters would like nothing better than to turn to counsel and say, "You know, the way you are interrupting one another, the long questions and all the back-and-forth is creating a terrible record for you down the road!"

The reality is that such an interjection would go over like a lead balloon. As the law clerk and I discussed, it is up to counsel to create their record, and it is up to the court reporter to faithfully transcribe that record. The two are not, unfortunately, working hand-in-glove. If counsel's dialogue was confusing or complicated, it would be completely improper and unethical for the court reporter to make the transcript readable.

I then read with interest the words of the highly regarded Ontario litigator Harvey Strosberg, who has been recovering recently from a debilitating stroke where he lost his ability to speak. As you can imagine, relearning is a slow, painful and deliberate process that has taken many, many months. Harvey said this about speaking deliberately in a Globe and Mail article January 3rd, 2012

"Many lawyers speak too fast. They think they have a minute or two minutes, and they race to get the most words in a minute. That's wrong. You have to think about the concept of the judge being persuaded. If you take your time, he'll or she'll get the idea simpler and faster."

What Mr. Strosberg opines is very true. Having been a court reporter for 30 years, I have reported and transcribed hundreds of speakers over the years. The ones who speak deliberately, carefully, and thoughtfully always get their point across. Too often lawyers and speakers are trying to cram hours of speech into small time allotments, and the result may be this:

- No one can follow what is being said coherently, or can appreciate the nuances and subtleties of arguments and thoughts
- Long, rambling questions can confuse witnesses
- Not allowing one speaker to finish his or her thought and being interrupted by another creates a very choppy and hard-to-read transcript

This is a case where quantity is not better than quality.

It's time to rethink the "quantity v. quality" argument. I would suggest honing a speaking style that allows everyone to be heard without interruption, one that incorporates brevity but imports meaning into each statement, and speaking deliberately – in the moment, as it were, and not to the next three points – will produce an excellent transcript for future use.

In this time-squeezed world, it's easy to forget that the listener can only absorb so much. If you can remember speak deliberately, carefully, and thoughtfully; you can prevent them from losing the thread completely.

New Program!
Lasting Impressions: Your Guide to Creating an Excellent Court Transcript

Wednesday, October 16, 2013
5:00 pm to 7:00 pm
The Advocates' Society Education Centre

A Members-only event presented by The Young Advocates` Standing Committee

When we are in our normal, everyday conversations, we tend to talk on top of one another, drop our voices and use gestures to communicate our message. In today's legal proceedings, your every word is recorded, and lawyers need to keep a number of things in mind in order to create a verbatim transcript that is readable and clear. This interactive session offers the tips and tricks you need to get you on the right track, compiled from experienced court reporters, who have seen the good, the bad and the ugly! Make your mark and learn how to leave a strong and effective lasting impression. For a preview of what Kim Neeson has to say, see her blogs on "Quality v. Quantity" and "A Great Transcript is Not a Given."

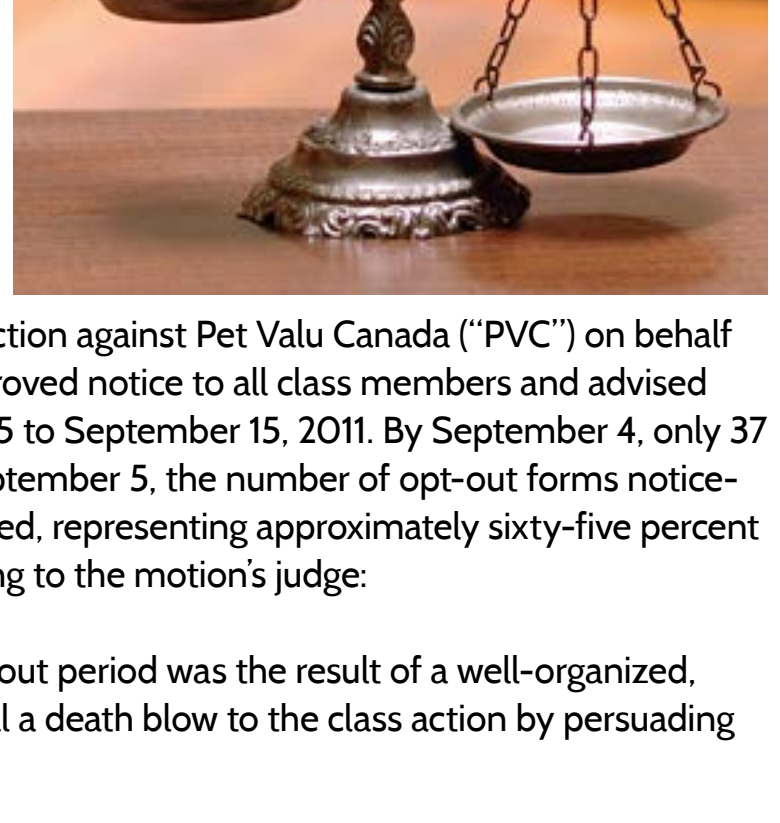
Space is Limited!
Complimentary event for TAS Members only – spaces are limited. Includes post-program reception, sponsored by Neeson Court Reporting.
To RSVP contact Rachel Stewart at rachel@advocates.ca

Click here to read more from Kim Neeson's Blog >>>

Class Action Update: Recent Developments Regarding Communications With Class Members During The Opting-Out Process

Written by: Tony Di Domenico, YASC Chair.

I. Overview



Opting-out is ordinarily the first decision that absent class members must make in a class proceeding. They must decide either to participate in the class proceeding or opt out, typically in order to pursue an individual claim against the defendant.

There has not been an abundance of jurisprudence on the issue of communications with class members during the opt-out process. Recently, in *1250264 Ontario Inc. v. Pet Valu Canada,* the Ontario Court of Appeal considered the issue and provided important guidance on the scope of communications permissible during the opt out period.

II. 1250264 Ontario Inc. v. Pet Valu Canada [1]

(a) The Salient Facts and the Motion Judge's Decision

In January 2011, the motion's judge, Justice Strathy, certified a class action against Pet Valu Canada ("PVC") on behalf of its franchisees.[2] The certification order issued on June 29, 2011 approved notice to all class members and advised them that their window to opt-out of the action would run from July 15 to September 15, 2011. By September 4, only 37 opt-out forms had been received from class members. Beginning September 5, the number of opt-out forms noticeably spiked. By September 15, a total of 140 opt-outs had been received, representing approximately sixty-five percent of current franchisees and ten percent of former franchisees. According to the motion's judge:

> … the dramatic increase in opt-outs near the end of the opt-out period was the result of a well-organized, systematic and highly effective campaign by the CPVF to deal a death blow to the class action by persuading other franchisees to opt out.[3]

Concerned Pet Valu Franchisees ("CPVF") is an independent franchisee association, consisting mainly of franchisees, which has actively opposed the class action. The actions of the CPVF included publishing an anti-class action website, posting online the names of those who opted-out of the class action and executing an active telephone campaign, particularly near the opt-out deadline. In the motion judge's view, the CPVF attempted to destroy the class action, mainly through misinformation. It had sought to advance what it perceived to be the interests of franchisees, which it believed aligned with the interests of the franchisor. In light of this conduct, the motion's judge made what His Honour regarded as an extraordinary remedy which included:

- declaring any opt-out on or after September 5, 2011 invalid;
- declaring that any opt-out prior to that date was presumptively valid, subject to the right of any franchisee who opted-out prior to that date to move to set aside his or her opt-out; and
- postponing the opt-out period until after the final disposition of the plaintiff's pending summary judgment motion or other final disposition of the action on its merits.[4]

(b) The Ontario Court of Appeal's Decision

The Ontario Court of Appeal overturned the motion judge's decision. In so doing, it set aside the order invalidating the opt-out notices.

The Court of Appeal noted that the motions judge was rightly attuned to the possibility that the CPVF was attempting to undermine the opt-out process. It also agreed with applying the bright line test set out in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*[5], which found that class members "ought to be free to exercise their right to participate in or abstain from the class action on an informed, voluntary basis, free from undue influence".[6] The Court of Appeal held, however, that there was no evidence before the court that the CPVF's campaign crossed the line described in A&P.

The Court of Appeal further found that the motions judge erred in "imposing on the class members the obligation to communicate in an objective manner and in his interpretation of the campaign as a whole".

The Court of Appeal also held that the motions judge erred by assuming that the survival of the class action depended on the outcome of the opt-out motion. The motions judge's reasons suggested that the survival of the class action was in question because more than half of the class had opted out. The Court of Appeal disagreed, noting that the number of opt-outs should not impact the viability of the class action.

III. "Take-Aways" from the Ontario Court of Appeal's Decision

There are a number of "take-aways" arising from the Court of Appeal's decision:

- Class members are not obliged to communicate with each other in an objective manner during the opt-out period. They may express their views with each other about whether to opt out of the class action as long as the conduct does not amount to misinformation, threats, intimidation or coercion. The question of whether communications cross the line enunciated in *A&P* will depend upon the facts and circumstances of each case.
- The viability of the class action does not necessarily depend on the number of opt-outs and the corresponding number of remaining class members. This includes circumstances where more than half of eligible class members opt-out of the class action.
- The Court of Appeal did not discuss at length the role of defendants in these circumstances. It noted that "the defendant may not sit idly by in the face of such conduct [i.e., conduct that amounts to misinformation, threats, intimidation, or coercion] without running the risk that a court will invalidate opt-outs based on the application of the informed and voluntary test established in *A&P*." The role of defendants in these circumstances will invariably involve a case by case analysis.

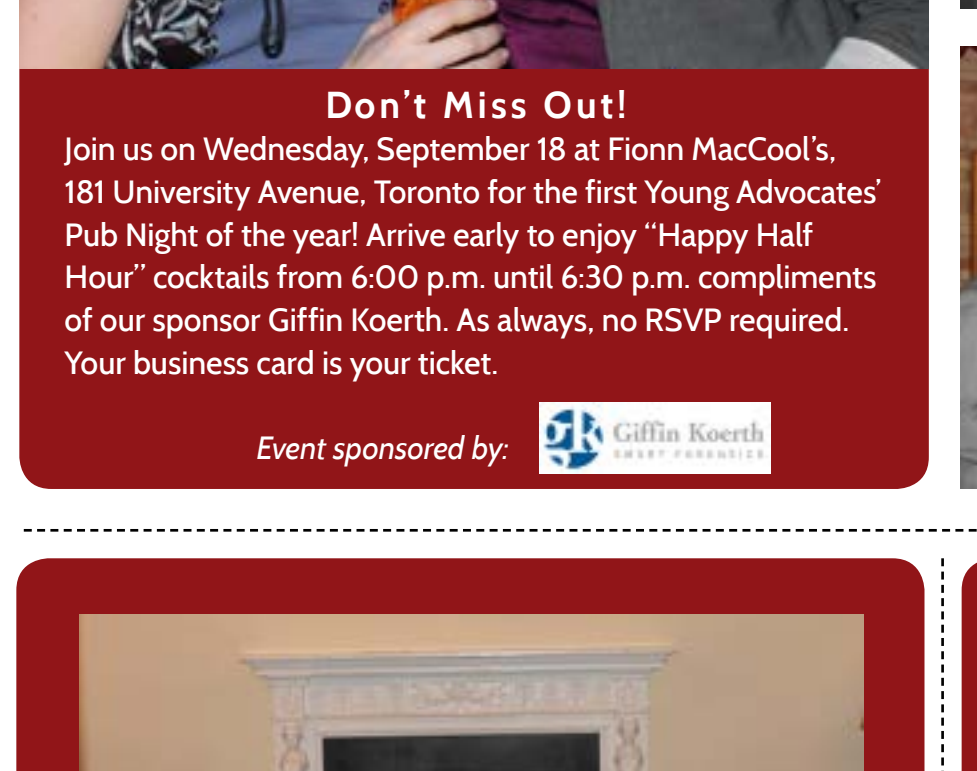
* Partner, Fasken Martineau DuMoulin LLP; Chair, Young Advocates' Standing Committee
[1] *1250264 Ontario Inc. v. Pet Valu Canada Inc., 2013 ONCA 279 [Pet Valu].*
[2] *1250264 Ontario Inc. v. Pet Valu Canada Inc., 2011 ONSC 287.*
[3] *Ibid at 24.*
[4] *Ibid at 83.*
[5] *62 OR (3d) 535 [A&P]*
[6] *Ibid at 75.*

LinkedIn
Click here to connect with The Advocates' Society on Linked in.

Join The Conversation
We want to hear what your opinion is on this recent update. Tell us what you think by tweeting us at @Advoactes_Soc.

Young Advocates' Pub Night Photos

Check out these great photos from past YASC Pub Nights! The next Pub Night will be taking place on September 18 at Fionn MacCool's.

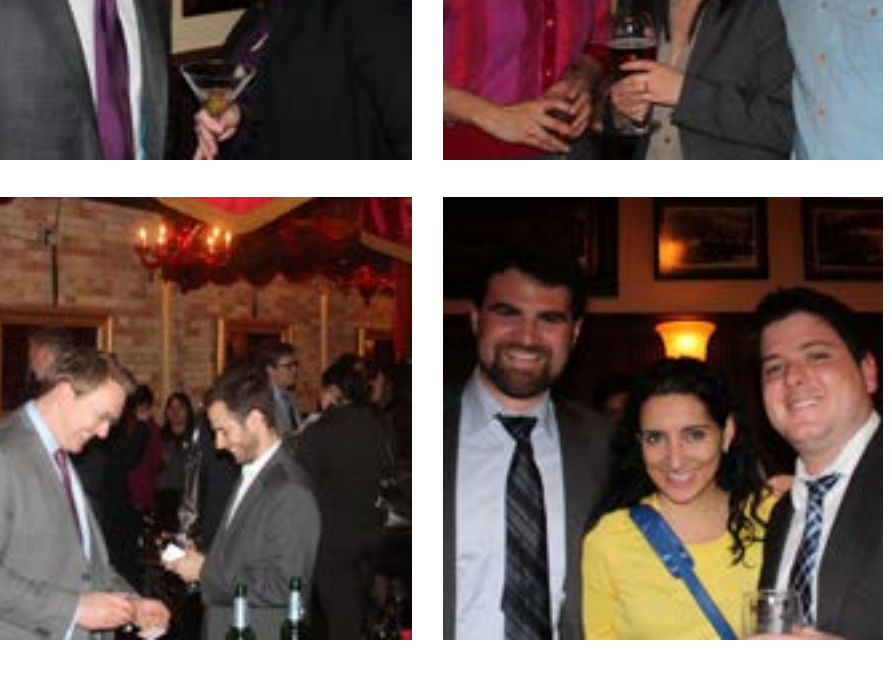


Don't Miss Out!

Join us on Wednesday, September 18 at Fionn MacCool's, 181 University Avenue, Toronto for the first Young Advocates' Pub Night of the year! Arrive early to enjoy "Happy Half Hour" cocktails from 6:00 p.m. until 6:30 p.m. compliments of our sponsor Giffin Koerth. As always, no RSVP required. Your business card is your ticket.

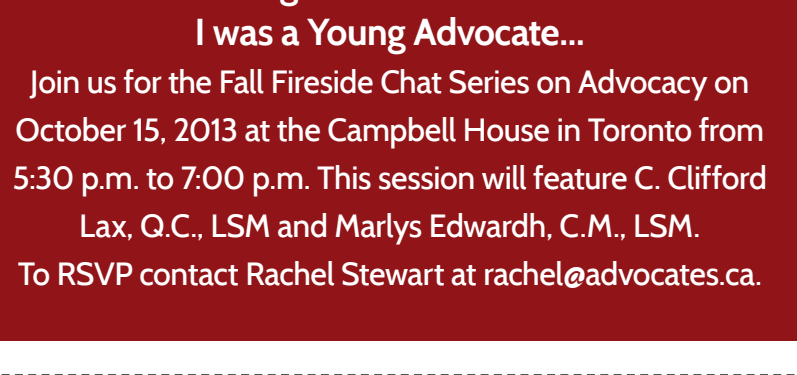
Event sponsored by: Giffin Koerth

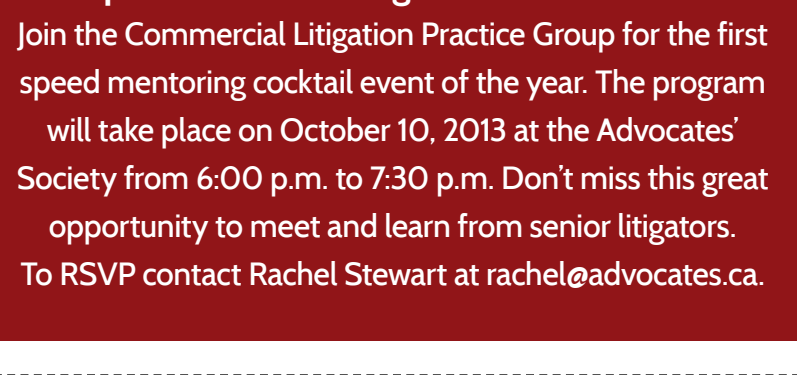
Show us your pictures from YASC events on Instagram, using the hashtag #YASCevent



The Things I Wish I Knew When I was a Young Advocate…

Join us for the Fall Fireside Chat Series on Advocacy on October 15, 2013 at the Campbell House in Toronto from 5:30 p.m. to 7:00 p.m. This session will feature C. Clifford Lax, Q.C., LSM and Marlys Edwardh, C.M., LSM.
To RSVP contact Rachel Stewart at rachel@advocates.ca.





Speed Mentoring Cocktail Event

Join the Commercial Litigation Practice Group for the first speed mentoring cocktail event of the year. The program will take place on October 10, 2013 at the Advocates' Society from 6:00 p.m. to 7:30 p.m. Don't miss this great opportunity to meet and learn from senior litigators.
To RSVP contact Rachel Stewart at rachel@advocates.ca.

We invite your comments and feedback. E-mail us at: jessical@advocates.ca.