Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Chair Chat

Brent Arnold

With a cool summer behind us and another polar winter ahead, young advocates are back to work. YASC and the Society have a full slate of social and educational events to fill the coming grey evenings (and to help those of you scrambling for CPD credits). Following successful pub nights in Kingston and Toronto, we will be filling pubs in Thunder Bay, Barrie, Ottawa and London; keep reading Keeping Tabs and watch our website for details. We are looking forward to expanding mentoring events outside Toronto, with an event scheduled for Sudbury in October. Also, keep an eye out for the final installment of our "technology and the law" seminar series early this winter.

There are still a few spots left (but not many!) for Fall Forum at Blue Mountain, Collingwood on October 24 & 25. The theme is profile-building and this year's Fall Forum offers, as always, a great combination of education and networking opportunities for young advocates. Christopher Horkins' piece in this issue of Keeping Tabs focuses on profile-building through social media, to give you a taste of what is on offer at the Fall Forum conference. We hope to see you in Collingwood next month.

I am also pleased to announce that Keeping Tabs is accepting content from its young advocate readers and will start rolling out your articles in coming issues. We have a wide and expanding readership and welcome your submissions.

Best wishes (and keep warm),

Brent

Fall Forum 2014
Profile Building with a Purpose

The Advocates' Society, in conjunction with the Young Advocates Standing Committee, is pleased to present Ontario's premier CLE and networking conference for lawyers one to ten years in practice. Join us this fall at the Westin Trillium House, Collingwood for Ontario's only destination education and networking conference for young advocates. This biennial program offers an extraordinary opportunity for junior and intermediate lawyers to learn from leaders in the profession and take home practical advice to help them build their confidence, their network and, ultimately, their practice. Timely topics, mentoring sessions and social events make this THE conference for today's rising stars.

Limited space remaining.
Click here to register now.

The YASC Interview: Sean Bawden

By: Vanessa Voakes, *Stikeman Elliott LLP*

Called to the Bar in 2008, Sean Bawden is an associate at Kelly Santini LLP in Ottawa. Sean advises both business and individual clients in all aspects of employment law, including discrimination claims, wrongful dismissal, WSIB claims, pay equity and human rights. He has appeared before the Superior Court of Justice, the Ontario Court of Justice, the Court of Appeal, as well as before administrative and professional disciplinary boards. No stranger to emerging forms of social media, Sean also writes his firm's employment law blog: "Labour Pains" and has an active twitter following at @SeanBawden. We think this is #awesome.

Why did you become a litigator or advocate?

A: I think I always wanted to be a litigator; it was probably television and its romanticized portrayals of trial work that lured me in. Now that I am in it, I love the challenge of organizing non sequiturs into a comprehensive story.

Which word do you prefer: litigator or advocate?

A: For what I do, "litigator"; I do my advocacy from within the system.

How would you describe your career so far?

A: Incredibly fortunate.

What do you like most about employment law?

A: That it affords me this intimate look into parts of people's lives that I likely would not otherwise see. What so many of us do for work is far more than a means to an end. For many of us, it is a point of pride to be able to define ourselves by our profession. Seeing what it is that gets people out of bed in the morning still fascinates me.

What do you like most about practicing in Ottawa?

A: The local bar. Ottawa is an excellent place to be a lawyer, especially in civil litigation.

What is your idea of perfect lawyerly happiness?

A: As a litigator, my perfect lawyerly happiness comes with every win. Regardless of the amount in issue or the forum of the claim, I always celebrate a win.

Which living lawyer do you most admire?

A: I don't know that I have just one...

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

A: I always had this idea of running a flower shop. I swept the floors of one as a high school student and thought I had the business model pretty well figured out.

What is your greatest extravagance in your everyday life?

A: Good socks. I am all about the SmartWool, even in the summer.

What is your favourite case?

A: I think it would be cliché to say *Bardal v. Globe & Mail*; although there is something remarkable about a 54-year-old decision that remains the single go-to source for an entire practice area. The decision of the late, great Justice Echlin in *Brito v. Canac Kitchens*, 2011 ONSC 1011 is probably one of my favourites though.

What is your favourite legal word?

A: "Reasonable." It's the source of so much work.

What would you consider to be your greatest achievement?

A: Earning the reputation as someone who can be counted on. It remains so incredibly humbling when others ask me for advice.

How long have you been writing your firm's employment Law Blog "Labour Pains"?

A: "Labour Pains" is actually a new name for what was once known as "The Employment Law Blog for the Suddenly Unemployed." After I joined Kelly Santini in November 2012, and found myself doing more employer-side work, a more balanced name was required. I posted my first blog post on April 1, 2012.

The YASC Interview: Sean Bawden

continued from page 2

How/why did you decide to write it? How do you make time for it?

A: At the time I started "The Law Blog for the Suddenly Unemployed", I was working for a firm that was moving primarily in the direction of personal injury cases. "Suddenly Unemployed" was meant to address those who had recently been fired from their jobs but also those who found themselves unable to work because of a personal injury. The goal of the blog was to position myself as an employment lawyer. The personal injury stuff quickly dropped off and was eventually removed from the blog altogether.

With respect to finding time, I still do most of my blogging on Saturday mornings. It is not so much a function of "making" time to do it, it is now just part of the routine.

Other than "Labour Pains", do you incorporate other forms of social media in your practice? If so, how?

A: "Labour Pains" has been an excellent way to disseminate information; I remain stunned and humbled by how many readers it has. However, to promote that content I have to be where my audience is, so I find myself quite active on Twitter, Facebook and LinkedIn.

Has using social media helped your practice? How?

A: I would say that using social media has helped my practice in two ways. First, it affords me the ability to stay current. I follow a lot of truly excellent resources who are very generous with their time. The ability to not miss something is crucial. Second, from a business perspective, social media has allowed me to establish myself as not only an employment lawyer, but as one that others feel confident enough to make referrals to.

Favourite hashtag?

A: #litigatorproblems

What are some of the top mistakes you've seen professionals make using social media?

A: Not being genuine. Most professionals who are unfamiliar with the "social" aspect of social media tend to use Twitter and Facebook merely as a means to promote themselves or their services. That's not being social, that's a billboard. I don't follow those who are boring.

Do you have any advice for young advocates looking to build their profiles?

A: Step one, I would suggest finding what you are honestly passionate about. In law school, I never thought I would be practicing labour and employment law; I actually had an interest in planning and agriculture. You will not be able to build a profile if you're not passionate about what you're doing. Once you think you have that figured out, sort out what makes you comfortable by way of marketing. For me, that meant being online—but that will not be the case for everyone. The important part is to stand out—in a positive way—from the rest of the crowd.

What is your motto?

A: In law school, I always woke up to the same word on my phone, "Deserve". For me, it was all about earning that which I received; good or bad. It was motivation to get out of bed and trudge through an Ottawa winter to get to class. As a litigator, I am afforded many incredible opportunities; I strive to ensure that I deserve them.

Why are *YOU* going to Fall Forum 2014?

Tweet your answer to **@Advocates_Soc** with #FallForum2014 and you could win a $50 Best Buy Gift Card!

Deadline to enter is September 30, 2014

Sponsored by:

Collins Barrow

LOIS WARREN & ASSOCIATES INC

Fall Forum is October 24 & 25 - Have you booked your spot?

Limited Rooms Available - Register Here

The Westin Trillium House, Blue Mountain, Collingwood

Congratulations to

David Campbell

Winner of the 2014
Stockwood Memorial Prize!

Don't miss David's article in the current Fall 2014 Journal

#Networking: Social Media as a Profile Building Tool for Young Advocates

Chris Horkins, *Cassels Brock and Blackwell LLP*

The intersection between social media and the law is fascinating and ever-changing. We now have an official court protocol on the use of mobile electronic devices in court and, as David Campbell's Stockwood Prize winning article taught us, social media is quickly becoming a vast source of evidence. Another aspect of social media's interaction with the law is how lawyers, and young advocates in particular, can use it to raise their profiles.

On that note, this is a story about how I got a quote in the Law Times because of Twitter.

One afternoon this summer, I was sitting at my desk, working away, when my phone rang with an unfamiliar number. I answered to find a reporter from the Law Times on the other end, explaining that she was working on a piece on the recent appointment of Ontario's new Chief Justice, the Honourable George Strathy. She was interested to know if I had any comments to share. Initially, I reacted the same way that many others would react later when the article was published.

"Wait," I said, "*why are you asking me!?*" After all, I have been licensed to practice law for barely two years at this point and have pretty much figured out where the bathroom is and how to put my tabs on properly.

The friendly Law Times reporter explained that she liked to give some exposure to lawyers who are active on Twitter and she had seen a recent tweet by me about Justice Strathy's appointment, probably this one:

So, with the newly affirmed confidence that I had not been called by mistake, I did my best to string together some coherent sentences on what I hoped Chief Justice Strathy would tackle in his new role—issues like technology in the courtroom, efficiency and access to justice- and, lo and behold, second year associate Horkins is the lead-off quote in the Law Times' article on the new Chief. The other two lawyers quoted in the article have been practicing for over 25 years. They also tweet. Click here for the article. As a result of the quote in the Law Times, I was also recently interviewed by a reporter for CBC-Radio Canada and had a brief sound bite in the newscast during Metro Morning.

Now, the point of this is not for me to brag about my fifteen minutes of legal community fame. I confess that I was not immediately inundated by calls from prospective clients looking to hire me. But I do think it demonstrates something I've been thinking for a while now: social media has the potential to be a great equalizer for young advocates as a profile building tool.

The simple fact is this is one area where we actually have a leg up on senior counsel. We grew up with this stuff. We're more comfortable with it. We know how it works. And if we don't, chances are we can pick it up a lot quicker and use it more effectively. That's not to say there aren't some great senior counsel on Twitter—there are lots. But chances are, the longer you've been in practice, the more likely you are to call it "the Twitter". Social media might just be the level playing field that young advocates need to have their voices heard in a crowded market.

Without professing to be an expert, here are some things I try to do to use Twitter as a profile building tool:

Regular law tweets: I try to do at least one law-related tweet every day (emphasis on "try"). I usually try to post interesting/funny decisions, links to articles and newsworthy events in the legal world.

Mix it up: As a caveat to the above, mix up the law tweets with plenty of other stuff to show your personality and remain interesting. For me, this ends up being a lot of tweets about the circus of Toronto politics and how depressing the Leafs are on a given day.

Interact: Find the legal community on Twitter, follow them, retweet and favourite them when you like their tweets, and join the conversation.

Shameless self promotion: Every time I have an article on my firm website (or, even better, in *Keeping Tabs*), every time I attend a conference, every time I'm organizing or attending a YASC event; I tweet about it.

Finally, if you want to really become an expert in using social media to increase your profile, you've got to come to The Advocates' Society Fall Forum on October 24-25 in Blue Mountain, where we will be running a panel dedicated to profile building using social media. We've got some excellent speakers lined up and it should be a great conference. Don't wait for someone to live tweet it—be there in person!

If this takes off, look out for my next piece on the effective use of emojis in court documents. Until then, catch you in the Twittersphere.

Follow Chris on Twitter at @chorkins.

Young Advocates' Pub Night

Wednesday, November 19, 2014
6:00pm - 8:30pm

Pravda Vodka Bar
44 Wellington St. E, Toronto

RSVP to Johanna O'Brien at johanna@advocates.ca

Your business card is your ticket!

The Refusals Motion: A Necessary Evil?

Hilary Book , *WeirFoulds LLP*

Refusals motions are costly and time-consuming. They are rarely, if ever, dispositive of a claim. Why, then, do counsel bring them so often, almost as a matter of routine, especially when costs, delays and access are such significant concerns for our justice system? Unfortunately, the *Rules* at present mean that in some circumstances, refusals motions are necessary and unavoidable. But this does not mean that it is necessary to move on every refusal. Further, there are some underused options available to counsel, within the confines of the *Rules*, that could go a long way to reducing the number and length of refusals motions.

Must I Move?

Pursuant to rule 31.07(2), if a party fails to answer a question on discovery, the party may not introduce the information that was not provided at trial except with leave of the trial judge. However, rule 53.08 provides that:

> ...leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

The Court of Appeal has held that leave must be granted unless there is prejudice that cannot be overcome by an adjournment or costs[1]. This is not to say that leave will be granted in every case—see, for example, *Lyness v. Wang*, where Hambly J. refused to allow surveillance videos for which privilege had not been waived to be filed as an exhibit, finding that if the videos had been produced before trial, "the plaintiff could have prepared himself to explain his actions in them."[2]

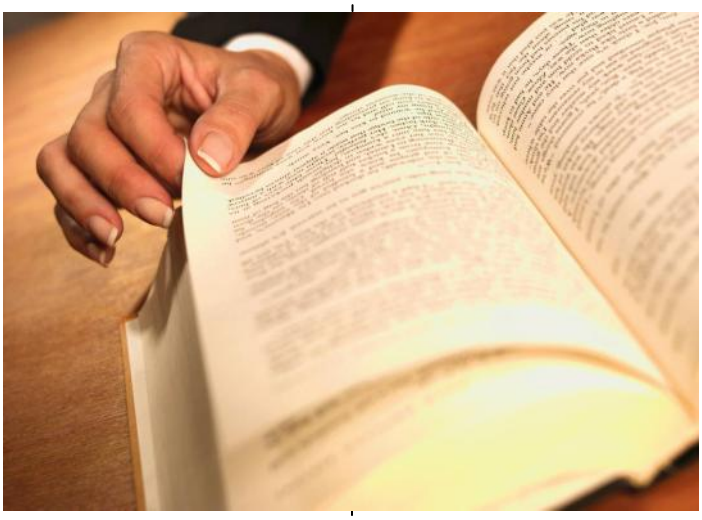
Nonetheless, there is a real risk that if an examining party fails to move on a refusal, the refusing party will still be able to rely on the evidence at trial and/or that a long-awaited trial date will be adjourned in order to permit the examining party to properly respond to the newly disclosed evidence.

Where the refusing party persists in failing to disclose relevant information, rather than bringing a motion, counsel may ask the Court to draw an adverse inference from the failure to disclose. This can be risky strategy, though. Whether or not an adverse inference will be drawn depends on the facts of the case, and it can be difficult to predict how a trial judge will treat a refusal. Indeed, at least one judge has gone so far as to say that a Master had erred in law by drawing an adverse inference "merely because objections are taken to questions on an examination on the grounds of relevance" where

[1] *Marchand (Litigation Guardian of) v Public General Hospital Society of Chatham* (2000), 51 OR (3d) 97, leave to appeal refused, [2001] SCCA 66 at para 81.
[2] *Lyness v Wang* (2009), 84 CPC (6th) 144 at para 12.

no motion had been brought to determine relevance.[3]

In short, there can be good reasons to bring a refusals motion. This does not mean, however, that a refusals motion should be brought in every case. Counsel have an obligation to conduct a case in a manner that is proportionate to the importance and complexity of the issues and the amount involved, especially when it comes to dealing with discovery.[4] If the refusal is on a point of minor importance, or if in the circumstances of the case the failure to answer is unlikely to cause any prejudice to the examining party at trial, counsel should think thrice before brining a motion to compel an answer.



Alternative Means

Although in some ways the *Rules* may encourage refusals motions, counsel do have some options for reducing the likelihood that a refusals motion will be brought.

One option is rule 34.12(2), which provides:

> A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

Answering a question under objection may be ill-advised where the objection is based on privilege, or where answering an irrelevant question would require substantial effort by the party being examined. However, where a question can be answered easily and without disclosing privileged information, there is little or no reason not to answer it under objection.

A second option stems from a series of decisions of D. Brown J. on the Commercial List. In those decisions, Justice Brown gave the parties two options:

> Option A: He would write an endorsement as case management judge stating that the parties agreed that they would not submit at trial that the failure to move on a refusal would work against the party who did not move, and that if the trial judge concluded the refusal was improper, an adverse inference would be drawn against the refusing party (although the trial judge could opt to take a different course to prevent an injustice);
>
> Option B: The parties would proceed with the refusals motion, but with the risk of cost consequences, which in some cases, Justice Brown set before the motion at $1,500/refusal. (For example, if a party moved on 8 refusals but was only successful on 2, it would face an adverse costs award of $6,000.)[5]

Obtaining such directions from the Court will not be possible in most cases, particularly in cases that are not being case-managed, but the parties could agree on similar terms without an endorsement, in a discovery plan, for example.

It may be that the *Rules* will have to be amended and/or that the Court will have to start making stronger costs awards against parties who bring unsuccessful or successful but unnecessary refusals motions before we see any real reduction in their volume. But an eternal optimist could be forgiven for hoping otherwise, especially in light of the ever-increasing number of articles, speeches and reports raising the alarm about the ever-increasing costs of civil litigation.

Have something to say?

Keeping Tabs is now accepting article submissions for upcoming issues.

Contact Erin Durant, Editor:
edurant@dllaw.ca

[3] *Perara v Pierre*, 2010 ONSC 1858, rev'ing [2009] OJ 4241, at para. 39.
[4] See rules 1.04(1.1) and 29.2.
[5] See, for example, *Bank of Montreal v Faibish*, 2013 ONSC 5876 and *Farrell v Kavanagh*, 2014 ONSC 905.