ADVOCACY MATTERS

TAS visits Iqaluit, Canada's most northern capital city
From left to right: Tamara Fairchild, Justice Lucille Shaw, Justice Neil Sharkey, Justice Patricia Hennessey, Emily Cole, Bradley Berg

TAS TRUE NORTH

Ulaakut![1]

Bradley Berg, *Blake, Cassels & Graydon LLP*

This year, The Advocates' Society has continued our national outreach to better include and serve litigators across the country. The "Toronto club" that was founded in 1963 is very different today, with entrenched programming outside of Ontario and more than 5,800 members from coast to coast to coast. Whether it be through our interventions in court or submissions to government, or our 150+ education and collegial events annually, we are increasingly the national voice and community of the litigation bar in Canada.

One aspect of that outreach has been our focus on northern and Indigenous issues - a project we call TAS True North. Among other things, we raised over $90,000 to fund scholarships for Indigenous law students at four law schools (UBC, Saskatchewan, Lakehead and Dalhousie) and we are in the process of developing a Guide for Litigators dealing with Indigenous Peoples and Issues. The Truth and Reconciliation Report included a call to Canada's lawyers, and TAS will be part of that response. If you want to contribute, please holler!

One special mission within TAS True North this year was a mentoring and trial skills program held in April in Iqaluit, Canada's most northern capital city. Four TAS faculty, including our guest Madam Justice Hennessy of Sudbury, and more than 25 lawyers from across Nunavut participated. Our hosts were Nalini Vaddapalli, CEO of the Law Society of Nunavut, and Senior Justice Neil Sharkey - many thanks for their generosity and hospitality. Participants included the first Premier and Justice Minister of Nunavut and the first Inuk woman to be called to the bar in Canada, as well as junior counsel and a court services worker just entering law school in the fall. There was no shortage of collegiality or passion for advocacy in this group. Without question, the faculty learned as much as the participants about reading your witness and our special duty as counsel to make justice more accessible and culturally respectful.

For those who haven't yet visited Iqaluit, you will find a welcoming and energetic bar and broader community. April temperatures of minus 20°C are taken in stride, with a vibrant arts and cultural scene to keep you warm. If you are lucky, you will be able to celebrate Inuit traditions like throat singing and seal tasting, as we did, not to mention a spontaneous rock concert at the Legion Hall. We figured that advocacy may matter, but so does cross-cultural learning for advocates.

With my year as President of the Society now over, I want to thank the staff and many volunteers of The Advocates' Society for your hard and often unrecognized work for our members. You are the DNA of this enterprise and the reason for our continued success. Good luck to next year's board and keep it going.

Nakurmiik![2] Megwich![3]

[1] Good morning! [2] Thank you! [3] Thank you very much!

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INTERNATIONAL COMMERCIAL ARBITRATION

Ontario Just Became a Lot More Attractive for International Commercial Arbitrations

Lauren Tomasich and Eric Morgan, *Osler, Hoskin & Harcourt LLP*

It's not often the case that a highly influential piece of legislation survives for three full decades without substantive amendment. In the case of Ontario's *International Commercial Arbitration Act*, that nearly happened (it was three years short of the mark). And when there is a change to a statute that falls squarely within the bailiwick of an advocacy practice, we really get excited!

In March of this year, the Government of Ontario repealed and replaced that Act with the new *International Commercial Arbitration Act, 2017*. This new Act incorporates updates made to the international source material of the old Act in 2006, expressly incorporates the international convention on the enforcement of arbitral awards into Ontario law, and makes certain other amendments to the regime.

Why should you care? Because the new Act just made it a lot more attractive to conduct international commercial arbitrations in Ontario:

1. **No longer any doubt as to the enforceability of foreign arbitral awards in Ontario and vice versa** – the new Act expressly incorporates an international convention on the cross-jurisdiction enforcement of arbitral awards, which operates on the basis of reciprocity. Previously, because the international convention was not expressly adopted into Ontario law, there was a degree of confusion surrounding whether arbitral awards made in Ontario would be recognized and enforced in other convention jurisdictions, and vice versa. The new Act thereby eliminates any doubt that Ontario is a convention jurisdiction.

2. **Detailed interim measures regime** – the new Act contains a detailed interim measures regime that reduces the need for parties to seek interim remedies before a court. The provisions now provide that arbitral tribunals may order injunctive relief, preservation of assets, and preservation of evidence.

3. **Limitation period clarified** – although local limitation periods likely applied to the enforcement of arbitral awards in the past, this was not clear under the old Act. Under the new Act, the limitation period is now 10 years from the date the award was made. Equivalent amendments to the domestic arbitration act have also been made.

4. **To be or not to be… "international"** – the old Act contained a prohibition against parties which were not otherwise "international" from opting into the international commercial arbitration regime by express agreement. The new Act does not contain this prohibition, meaning that parties in similar circumstances can now choose between the international commercial arbitration regime or the domestic arbitration regime.

This new, state-of-the-art Act will surely be welcomed by arbitration practitioners throughout the province. Moreover, commentators have said that Ontario's update to its international arbitration statute comes at a perfect time given that uncertainty south of the border may make Ontario even more attractive as an arbitration venue. It will be interesting to see whether this plays out…and whether other Canadian provinces follow suit.

TAS ACROSS CANADA

Alberta Advisory Committee

Tamara Prince, *Osler, Hoskin & Harcourt LLP*

The Alberta Advisory Committee continues its drive to promote and increase membership in The Advocates' Society in Alberta. To that end, Advisory Committee members from both Edmonton and Calgary have joined together, and all are working together to ensure quality program offerings, as well as signature social events in each city.

Membership numbers in Alberta continue to rise. There were 161 members at the end of 2015, and 203 by the end of 2016. As of June 5 Alberta membership had risen to 245. Increasing local awareness about The Advocates' Society and the benefits of membership is a primary focus for the Committee.

2017 is shaping up to be a busy year for The Advocates' Society in Alberta. On April 21 a very successful program on Mastering Winning Questioning Techniques (examinations for discovery) was held in Calgary, and on May 30, also in Calgary, an exceptional trial advocacy program, "Trial from A to Z" was held. More CPD programs are being planned for the fall in both Edmonton and Calgary.

The Alberta section of the Young Advocates Standing Committee has also been busy with very successful pub nights, and on May 25 in Calgary they hosted the 1st Annual Trivia Challenge for Advocates for litigators, young and old alike. The event sold out well in advance and was a great success.

The Advisory Committee members were also proud to hold a new Women's event on June 20 in Calgary called "Celebrating Women in Advocacy". This event was a celebratory cocktail networking event to kick off the summer, and was open to TAS members and non-members alike. We were honoured and delighted that Madame Justice Rowbotham of the Court of Appeal of Alberta agreed to be our Special Guest Speaker. We were also pleased to have TAS President Sonia Bjorkquist at the event. It was the start of a wonderful new tradition!

Alberta Advisory Committee Members

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Rose LLP

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Dentons Canada

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Scott Venturo LLP

BILINGUAL ADVOCACY

Voulez-vous...Legal Services in French?

Marie-Andrée Vermette, *WeirFoulds LLP*

French is not only *de rigueur* on the menus of *chic* Toronto restaurants. It is also one of the official languages of the courts of Ontario. Under section 106 of the *Courts of Justice Act*, a party to a proceeding who speaks French (including individuals, corporations and partnerships) has the right to require that it be conducted as a bilingual proceeding. This is a substantive right. A bilingual proceeding must be presided over by a judge who speaks both English and French. Evidence can be given and submissions can be made in either language. Documents and pleadings can be filed in French in most (but not all) regions.

Access to justice has been a topic *du jour* in Ontario for some time, but the issues regarding access to justice in French are not well known outside the Francophone *milieu*. The problems faced by French-speaking litigants who seek access to justice *en français* have been discussed in a number of reports and decisions.[1] They recognize that "[t]he legal profession has a critical role to play in ensuring that French speakers are able to access the justice system in Ontario in their own language. [...] Lawyers play a fundamental role in raising awareness of, and explaining language rights in the justice system, and in advocating those rights before the courts. The bar must play a leadership role in this regard if access to justice in the French language is to be fully realized."[2]

The *Rules of Professional Conduct* impose obligations on lawyers in this regard. They provide:

> 3.2-2A A lawyer shall, when appropriate, advise a client of the client's language rights, including the right to proceed in the official languages of the client's choice.
>
> 3.2-2B When a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer shall not undertake the matter unless the lawyer is competent to provide the required services in that language.

But when is it "appropriate" to advise a client of his or her language rights? A lawyer is required to advise a client of the right to receive legal services in French if the lawyer believes or knows that the client speaks French. For this right to apply, French does not have to be the client's first language, and fluency in English is irrelevant.

Proper advice must be given to allow the client to make an informed decision on whether to proceed in French. This requires lawyers to educate themselves about language rights, as well as the practical and tactical considerations related to bilingual proceedings.

If, despite your *joie de vivre* and certain *je ne sais quoi*, you are unable to provide legal services in French, the Law Society Referral Service can assist you in finding someone who can.

Notes

1. See, e.g., the 2012 report "Access to Justice in French" prepared by a Committee chaired by Rouleau J.A. and Paul Le Vay ("**Rouleau-Le Vay Report**"), and *Belende v Patel*, 2008 ONCA 148.

2. Rouleau-Le Vay Report, section 4.3.7(A).

AN ADVOCATE'S OPINION

The Award (Which May Or May Not Be) Formerly Known As Aggravated Damages

Andrew C. Lewis, ***Paliare Roland Barristers***

The English language is a messy, wonderful, ever-expanding lexical extravaganza of metonymic[1] and synonymic[2] creativity.[3] Generally speaking, that's a good thing. However, there are instances where, broadly speaking, the use of metonyms and synonyms is less than ideal. One, as I previously pointed out in this space, is when describing Nazis or white supremacists. Another, discussed below, is where there exists multiple descriptions of the same legal concept.

A particularly egregious example of synonymic sprawl in Canadian law pertains to describing the thinger[4] that arises from the manner in which an employee is dismissed from their employment. Everyone who practices even a bit of employment law knows that if an employer is unduly harsh or insensitive in dealing the Queen of Spades[5] to an employee, there's probably going to be some extra damages to pay. However, off the top of my head I can think of at least five ways of describing this type of award:

- Aggravated damages;
- Moral damages;
- Damages for breach of the duty of good faith and fair dealing in the manner of dismissal;
- Damages for bad faith conduct during the course of dismissal; and
- Modified Wallies.[6]

Some very recent goings on at the Court of Appeal are illustrative.

On June 30, 2016 in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.* the Court of Appeal described this thinger[7] repeatedly as "*aggravated damages*", without once using the term "*moral damages*".[8] Then, on February 15, 2017, in *Doyle v Zochem*, a different panel of the Court of Appeal relied heavily on the *Strudwick* analysis, but also rather cheekily stated (emphasis added):

> "Initially the award, ***now known as moral damages*** involved compensation through an addition to the period of notice. However, in *Keays v. Honda Canada Inc.*, 2008 SCC 39 (CanLII), [2008] 2 S.C.R. 362, at para. 59, the Court essentially did away with the distinction between aggravated damages and moral damages and held that these damages should be recognized through a fixed monetary award rather than through an extension of the notice period [cites omitted]"[9]

Since the award was called "*aggravated damages*" by the same court seven months earlier it probably would have been more accurate to state: "*the award now known as moral damages unless another panel of this court uses the term 'aggravated damages' again*'". However, I appreci-

ated the attempt to standardize the nomenclature.

But the attempt was quixotic. Just two months later, on April 12, 2017, in *Tim Ludwig Professional Corporation v BDO Canada LLP,* yet another panel of the Court of Appeal cited *Strudwick,* ignored *Zochem*, and upheld an award of "*aggravated damages*" to a defenestrated[10] accounting firm partner based on *Keays v Honda* principles.[11]

To be clear: I really don't care what we call this. We just need to call it one thing. Just one. Perhaps, in honour of Prince, we could simply use an unpronounceable symbol for "*the cause of action formerly known as aggravated dismissal damages*". I propose: ₳

Notes

1. Metonym (noun): A word, name, or expression used as a substitute for something else with which it is closely associated. Washington is a metonym for the US government. Suit for business executive, or the turf for horse racing. (source: Oxford Living Dictionaries: https://en.oxforddictionaries.com/definition/metonym)

2. Synonym (noun): A word or phrase that means exactly or nearly the same as another word or phrase in the same language, for example shut is a synonym of close. The 'East' was a synonym for the Soviet empire. (source: Oxford Living Dictionaries: https://en.oxforddictionaries.com/definition/synonym)

3. Hey, now that I think of it, metonym and synonym are synonyms of one another, but not really metonyms. Deep.

4. It's hard to know what to call this before setting out what it's called, so I'm going with "thinger".

5. Okay, I know "dealing the Queen of Spades" isn't exactly a term of art, and maybe I could have just said "terminates their employment", but you have to admit it's a pretty evocative term. Plus, it's a metaphor, not a metonym or synonym. So get off my back.

6. Fine, "Modified Wallies" is just a metonym that I made up myself after *Keays v. Honda Canada Inc.*, 2008 SCC 39 came out, which modified the approach to bad faith dismissal established in *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC). But I've been using it for years, just waiting for someone to tell me, definitively, what to call this thinger.

7. I'm trying not to pre-judge.

8. *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras.88-92.

9. *Doyle v. Zochem Inc.,* 2017 ONCA 130 at para.12

10. "Defenestrated" is such a great word, don't you think?

11. *Tim Ludwig Professional Corporation v BDO Canada LLP*, 2017 ONCA 292 at paras.58-71

Interview with Afshan Ali, *CIBC Legal Department*

Jessica Amey, *College Of Physicians & Surgeons Of Ontario*

1. **Q: Tribunals/Boards/Courts you most often find yourself advocating before [or, if this isn't relevant, where do your advocacy skills most come in handy as in-house counsel?]**
A: OSC, IIROC, Corporate Boardrooms.

2. **Q: Person or people who have had the greatest influence on you as an advocate**
A: My dad. He challenges and questions everything. He's not a lawyer, but he lives life like it's a courtroom drama.

4. **Q: Best advocacy war story or fact pattern in ten words or less...**
A: Winter, 2008. Running between the FCA (Ottawa) & my hotel in heels while very pregnant. (11 words if you don't count "the" "my" and "in").

3. **Q: Best thing about being in-house counsel?**
A: The nature of the work and the people I work with (both internally and externally).

5. **Q: When you were a kid, you wanted to be...**
A: A hairdresser.

6. **Q: Exercise: what, when, where, how?**
A: Cardio/Strength training/Bootcamp. Every day. At home, the gym, or in the basement of a church. And walking or running to/from work.

7. **Q: Kids?**
A: Three too many.

8. **Q: Tattoos?**
A: Never.

9. **Q: Extracurriculars (Boards, volunteering, ultimate league, pottery master? You name it, I'm interested)**
A: BOARD OF BARBRA SCHLIFER COMMEMORATIVE CLINIC, exercise, baking, dancing and singing in public for the sheer joy of seeing the horror on my kids' faces, Instagram.

10. **Q: Last best book you've read?**
A: Born a Crime by Trevor Noah.

11. **Q: Favourite charitable cause?**
A: Barbra Schlifer Commemorative Clinic.

12. **Q: Most embarrassing song you will admit to liking...**
A: "Rhythm Nation" by Janet Jackson.

END OF TERM 2017 PHOTO GALLERY

President Sonia Bjorkquist with former President Bradley Berg

New Executive Committee –
Alexandra Chyczij, Guy Pratte, Sonia Bjorkquist, Brian Gover, Scott Maidment.

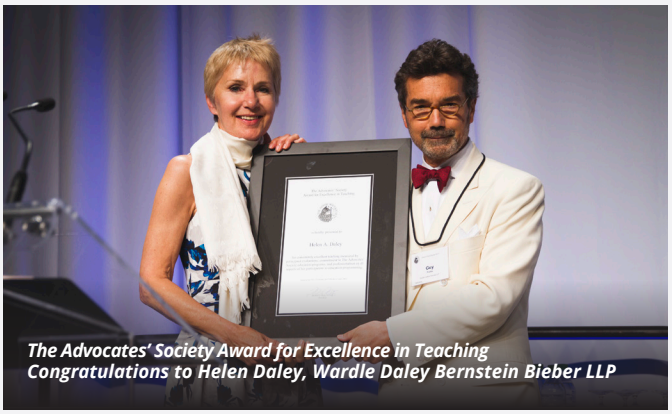
President Sonia Bjorkquist

The Advocates Society Term End Dinner! #proudTASmember #selfie
- @kristenslai

END OF TERM 2017 PHOTO GALLERY

The Douglas K. Laidlaw Medal for Excellence in Advocacy presented to Monique Jilesen, Lenczner Slaght by The Hon. Colin L. Campbell, Q.C. and Tom Curry

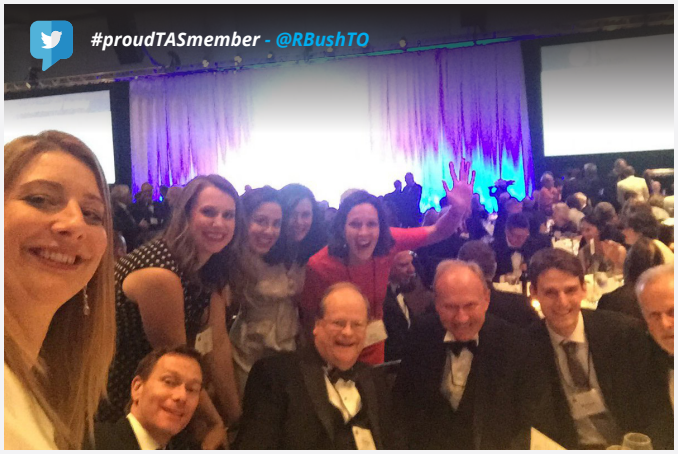
.@LencznerSlaght #summerstudentlife #wherethebestgetbetter @Advocates_Soc - @sanahalwani



The Advocates' Society Award for Excellence in Teaching Congratulations to Helen Daley, Wardle Daley Bernstein Bieber LLP

Keynote Speaker- Colm Feore

Steam Whistle After Party



#proudTASmember - @RBushTO