

ADVOCACY MATTERS



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EDITOR'S NOTE



EDITOR: PETER J. HENEIN,
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I want to talk about access to justice and the open court principle, by which I mean I want to talk about cameras in the courtroom, by which I mean I want to talk about the folly of rhetoric divorced from practical implications. And let me say from the outset, I'm neither for nor against. Just troubled by where the dialogue is pitched.

The question of cameras in the court room comes up from time to time in our justice system, most often in the context of constitutional rights and criminal trials. Victims' rights and concerns over the willingness of witnesses to come forward are frequently raised as reasons against introducing cameras into courts. The pro-camera argument is often pitched at making the process more open to the public. My problem is this: As long as I've practiced, I've heard a great deal about the importance of an open court principle. When we file pleadings or motion records, we explain to our clients that these issues are now officially in the public. And while chambers appointments, mediations and pre-trials most often happen behind closed doors, the normative position is always that the process must be open and accessible to the public.



So why, then, is the debate about *whether* cameras should be introduced into the courtroom? Why is the question not *how* can we get cameras in the courtroom in a manner that will balance the need for an open court system with the concern that we must protect the rights of the most vulnerable in society (or, in the case of corporate disputes, the legitimate protection of commercially sensitive information)? With the proliferation of blow-by-blow live tweeting from the courtroom, to not institutionalize this open court principle (and thereby increase access to justice or visibility into the process), we leave the "opening" of the court process in the hands of journalists and laypeople. And while that is a truly democratic process, it leaves the field open to mob rule and trial by media. The vulnerable in that scenario cannot be protected, and we are left with hashtag justice.

If the conversation continues to be pitched at the whether, and not the how, then I don't believe the general public will ever truly buy into the idea that we have an "open court principle" or understand the values espoused by that principle as anything more than mere platitudes. ■

Peter

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THE UNBEARABLE LIGHTNESS OF INSTANT REPLAY AND STANDARD OF CONTRACTUAL REVIEW

(sub nom: How baseball taught me everything I need to know about the standard of review)

ANDREW C. LEWIS,
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 @AndrewLewisFC



You know what I'm talking about. It's that feeling you get when the Blue Jays seem to have made the third out by pegging the runner at second but the ump calls him safe.¹ Gibby tries to make himself look useful by challenging the play. The ump makes a show of putting on headphones while the American nationalists in MLB's New York City HQ review the tape. To you, from all angles, he looks out on the replay. But you've seen this movie before. You know exactly where this is going. They're going to uphold the call because the rule is that the video has to show the call on the field was conclusively incorrect in order to overturn it. Not "I would have called that sucker out so he's out" but, rather, "he looks out but I can't say for sure, so we'll pretend he was safe". Basically a reasonableness standard.

Except when it isn't. Oh yeah, you know exactly what I mean. You know they would have overturned that puppy had a Jay been the runner and an Oriole, Red Sock, Yankee, Cleveland [deleted] or even a freaking Ranger been the one applying the tag.



In those circumstances the powers that be apply a rigorous correctness standard. Because, c'mon, you know that guy was really out. And between my writing this and you reading it, you'll probably have seen this unwritten rule applied in the ALCS.²

Is it fair? No. No it's not. But it isn't called the "American League" for nothing. C'mon, get real. But at least we can all agree that they *pretend* to review everything on the same reasonableness standard.

The same can no longer be said for appellate review of contractual interpretation questions. Such things used to be questions of law and the interpretation had to be correct. Then in *Sattva*³ the Supreme Court of Canada said no, such things are questions of mixed fact and law to be given deferential review. Reasonable people can of course disagree about whether that leads to absurdities⁴, but

at least there was, like in baseball, one fictitious standard we could all agree to pretend applied.

But they couldn't leave well enough alone. Oh no. In September, the Supremes decided *Ledcor*.⁵ Now, if the court determines that the contract in issue is of a standard form, there is an exception to *Sattva* and the standard of review is correctness. Why? Well, from a policy perspective, to avoid contracts of broad and indiscriminate application being incorrectly interpreted so as to put the boots to large swaths of people in one fell and erroneous swoop. Which I suppose is fair enough, but still, here we go again.

So I ask you: What's the standard of review of a decision to apply the *Ledcor* standard form correctness standard exception to *Sattva* deferential standard?⁶ To ask the question is to answer it. Play ball! ■

1. If he had another eye he'd be a Cyclops.

2. I wrote this the day after the Jays eliminated the Rangers, in which game the Rangers asked for a review of EE's slide into second on the play scoring the winning 10th inning run. Had they flipped that one the Rogers Centre would have been a smouldering ruin this morning.

3. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53

4. *Oudin v. Centre Francophone de Toronto*, 2016 ONCA. 514 The Court of Appeal deferred to a decision that an *Employment Standards Act* minimum termination clause was enforceable despite it not referring to benefit continuation and severance pay even though that interpretation was contrary to the weight of judicial authority on that very point and thus, one would think, legally incorrect.....

5. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37

6. @andrewolewisFC, 2016 TWITTER. Okay, I'm quoting my own tweet here. Cut me some slack.

BREAKFAST NEAR TIFFANY'S VI

Advocates Inspire at Breakfast Near Tiffany's VI



HERMIE ABRAHAM,
ADVOCATION PC

On Friday September 30th, over 130 women advocates gathered at the stunning Four Seasons Hotel in Toronto for TAS' sixth-annual "Breakfast near Tiffany's" event. This sold-out, members-only breakfast meeting always features wonderful networking, fellowship with members of TAS, a delicious meal, and a chance to be inspired by a panel of lawyers,

who discuss a pertinent topic about the practice of law. This year's event was no exception.

Moderated by M. J. Lucille Shaw, *Miller Maki LLP*, an outstanding panel of women advocates shared their stories and insights about social justice litigation and advocacy. Jill Presser, *Presser Barristers*, discussed the challenges and inspiration she obtains from working with criminal defendants, many of whom suffer from mental health issues. Renatta Austin, *Barrister & Solicitor* gave insight into the sacrifices and rewards of public interest litigation, while talking about her work for children in education, youth criminal and child welfare disputes. Dianne Corbiere, *Nahwegahbow, Corbiere*, shared what motivated her to advocate for Indigenous rights and the gratification she obtains from serving her community, while the Hon. Justice

Patricia C. Hennessy of the Superior Court of Justice provided advice and encouragement to lawyers pursuing a career in social justice advocacy.

Together, the panelist delivered a masterclass presentation, not only about doing what you love and practising in a way that is meaningful, but also about serving the public and making a difference in the lives of those who are often marginalized by the legal system.

And while just one lucky winner walked away with the door prize, a Tiffany's pendant, generously donated by Commonwealth Legal, all attendees left inspired, encouraged and renewed by the impact these women advocates are making (and have made) on our justice system. Thank you TAS for giving us the opportunity to connect and hear from these inspiring advocates. ▀



(L to R) The Honourable Justice Patricia C. Hennessy, Dianne G. Corbiere, Jill R. Presser, Renatta Austin



(L to R) Lucille Shaw, Deborah Palter, The Honourable Justice Patricia C. Hennessy, Selena Visser, Jill Presser, Renatta Austin, Dianne G. Corbiere, Ceyda Tocsoy, Emily Graham

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Interview with Norman Emblem, Dentons LLP



Norm Emblem is a member of the Litigation and Dispute Resolution group of Dentons' Toronto office. Norm has a very broad-ranging commercial litigation and advocacy practice, including class action defense, securities, and insurance defence. A former member of the TAS Board of Directors, Norm and his jazz trio have become a staple at End of Term Dinner and the Society's holiday receptions. When he is not chillin' at home with the family, or dusting his guitars, Norm can be found playing gigs with his band Oui B. Jammon.

1

Q: What keeps you coming back day in, day out?

A: My love of commuter traffic from Unionville ... my lovely wife ... our five great children ... our golden retriever ... the challenge of a busy litigation practice!

2

Q: The greatest legal mind, other than yourself?

A: Lord Denning.

3

Q: When you're looking for inspiration on a file, you...?

A: I reread transcripts of brilliant cross-examinations I have conducted over the last 28 years and I rewatch Joe Pesci in "My Cousin Vinny".

4

Q: Work? Life? Balance?

A: I work hard, play hard, work out, volunteer, do pro bono work, mentor and I spend as much time with my family as possible.

9

Q: When you want to unwind, you...?

A: I put my play clothes on, put my feet up and chill with my family!

5

Q: What gives you sanity?

A: Home movies, laughter, playing jazzy blues guitar, walking our dog Lindy, cooking, surfcasting for striped bass.

10

Q: What's the most ridiculous thing about being a litigator?

A: Trying to fit in my all wool, no stretch 1988 issue waistcoat just after Christmas, Easter and Thanksgiving and having to haul litigation carts over uneven streetcar tracks!

11

Q: Favourite culinary indulgence?

A: A toasted Montreal sesame seed bagel with crushed avocado, topped with a thick sliced field tomato crowned by a lightly peppered poached egg along with an espresso!

Q: What drives you to madness?

A: Traffic, know it alls and litterbugs!



12

Q: Favourite courtroom in the country? Why?

A: Courtroom 1 in Kingston, Ontario because it is old school and majestic.

6

Q: Pets or no?

A: Golden retrievers!

13

Q: What's the most important rule for you regarding email etiquette?

A: Being polite.



7

Q: Best album ever?

A: The Rolling Stones' "Exile On Main Street".

14

Q: Describe your favourite three guitars:

A: (a) my 1993 Fender Stevie Ray Vaughan Stratocaster; (b) my 1985 Gibson Custom Shop ES 335 (blonde) and (c) my 2010 Gibson Custom Shop Les Paul R9 VOS Reissue (faded tobacco).

8

Q: Favourite app?

A: Guitar Tuna - the best guitar tuner ever!

Q: Now give me the best one **A:** Sure thing but on long term loan! 🍀

CATZMAN AWARD

Congratulations to The 2016 Catzman Award recipient, Donald Bayne, *Bayne, Sellar, Boxall*. The award was presented at the Opening of the Courts in Toronto (September 13, 2016) and Ottawa (September 28, 2016).

The award presentation in Toronto is pictured here.



(L to R) Julie Catzman, Donald Bayne, Attorney General Yasir Naqvi



(L to R) Julie Catzman, Brad Berg, Donald Bayne



(L to R) Chief Justice George R. Strathy, Donald Bayne

Celebration of Advocacy

Featuring The Honourable W. Ian C. Binnie, C.C., Q.C.

November 1, 2016 @ The Vancouver Club
Vancouver, B.C.

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November 2, 2016 @ The Petroleum Club
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HILARY BOOK,
LAX O'SULLIVAN LISUS GOTTLIEB LLP

Instructions: Each letter of the alphabet in the quotes below has been replaced by a different letter. For example, in the first quote, the letter "C" has been replaced by the letter "F". The first contestant to send the correctly decoded quotes to jared@advocates.ca wins a \$25 Starbucks gift card. Answers will be published in the next issue of Advocacy Matters.

Quote #1

ZEPG TML ECDP UEP NCFUB MG TMLY BHIP, CYOLP UEP NCFUB. ZEPG TML ECDP UEP ACZ
MG TMLY BHIP, CYOLP UEP ACZ. ZEPG TML ECDP GPHUEPY, EMAAPY. - CA OMYP



Quote #2

ZD ZX UGDDGQ DP HGGB WPNQ JPNDM AYPXGV KEV YGD BGPBYG DMZEH
WPN KQG K RPPY DMKE DP PBGE ZD KEV QGJPIG KYY VPNUD. - JKQH DSKZE



The Advocates' Society is honoured to present
the 2017 Advocates' Society Medal to
Stephen Grant, *Grant & Sadvari*



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ADVOCACY EVENTS

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SCAP CHAT

The Advocates' Society's Standing Committee on Advocacy and Practice ("SCAP") contributes to the improvement of access to justice and the legal profession. Tell us what you think about SCAP's work on twitter using #SCAPCHAT.



Intervention: *Alberta v. Suncor Energy Inc.*

The Advocates' Society will be applying for leave to intervene before the Court of Appeal of Alberta in *Alberta v. Suncor Energy Inc.* This case raises the issue of the protection of litigation privilege in the context of the preparation of a statutorily-mandated workplace incident report. The Society has retained Carsten Jensen, Q.C., of Jensen Shawa Solomon Duguid Hawkes LLP as counsel. Read the decision of the Alberta Court of Queen's Bench [here](#).



Federal Judicial Appointments

In July 2016, The Advocates' Society [wrote to the Federal Minister of Justice](#) to provide its views on the Federal judicial appointments process, including the Supreme Court of Canada appointments process. The Society advocates for an appointments process that possesses the hallmarks of transparency, diversity and inclusiveness; enhances judicial independence and eliminates partisanship; and ensures the appointment of the highest caliber of candidates to our courts. Following the announcement by the Prime Minister of the [new Supreme Court of Canada appointments process](#), the Society sent letters to the [Prime Minister](#) and [Minister of Justice](#) to congratulate them on the development of a process that integrates these important elements.



Consultations by the Law Society of Upper Canada on the Law Practice Program, the Lawyer Licensing Process, and Racialized Licensees

The Advocates' Society has struck task forces to respond to the consultations by the Law Society of Upper Canada on the future of the Law Practice Program and the lawyer licensing process generally, and racialized licensees. Read these reports here:

[Law Society of Upper Canada: Professional Development & Competence Committee – Pathways Pilot Project Evaluation and Enhancements to Licensing Report](#)

[Law Society of Upper Canada: Equity and Aboriginal Issues Committee – Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions](#)

SCAP CHAT is a regular member update published by The Advocates' Society's Standing Committee on Advocacy and Practice ("SCAP"). SCAP's mandate is to:

- advance the quality and efficiency of the system of justice at all levels of the courts and administrative tribunals;
- initiate, promote or respond to changes in legislation and regulation;
- promote the fairest and most accessible determination of litigants' rights;
- work to enhance the ability of advocates to act effectively on behalf of their clients, through liaison with the judiciary, government and other stakeholders;
- promote the independence of the bar and judiciary; and
- consider and recommend interventions, in accordance with the Interventions Policy, to the Board of Directors.

SCAP welcomes comments from Society members on current SCAP issues, and suggestions for new issues that fall within SCAP's mandate. Please send your comments or suggestions to scapchat@advocates.ca.