

ADVOCACY MATTERS

EDITORS NOTE | TAS HIGHLIGHTS AND REMINDERS | MODERN ADVOCACY INTERVIEW | ADVOCACY IN ACTION | BACK TO SCHOOL | THE NEXT FIVE



The Award of Justice

will be presented to

Joseph J. Arvey, Q.C.

on

October 27, 2015 in Toronto

[Click here to register](#)

EDITOR'S NOTE



EDITOR: PETER J. HENEIN,
CASSELS BROCK LLP

Welcome back, friends! Hope your summer was chock full of sun and fun and that you didn't complain about how muggy it was (because, come on... I mean, seriously. Stop it).

Time is money, so let's get right into it... Your first assignment is to write a 140 character essay on what you did this summer and tweet it to @Advocates_Soc using #LawBreak. We'll print the best ones in next month's issue.

Your second assignment is to read, and tell all your friends and family about Advocacy Matters.

There's something for everybody in this month's issue.

For those of you who wonder just what TAS does when it's not hosting black tie dinners, I commend Sarah Armstrong's round up of significant intervener briefs that TAS has been involved in this past year, including an update on *Groia v. LSUC*, *Moore v. Getahun* and *Trinity Western University v. LSUC*.

For those of you who want to hear more about what some of our members are into, check out my interview with Ken Dekker of Affleck Greene McMurtry LLP and our Back to School piece (that reveals someone who really wants a piano neck tie this year).

For those looking to kill an afternoon surfing the web, I commend Jasmine Akbarali's piece, *Finding a Good Blog*. You'll learn about the Clawbies. Yeah. That's a thing.

And for those who aren't interested in any of that, please click through anyway because we count on your hits to brag to other law groups about how popular we are.

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TAS HIGHLIGHTS AND REMINDERS

- The Fall Issue of The Advocates' Journal is out now!
- @Advocates_Soc has surpassed 4,000 followers on Twitter! Are you following The Advocates' Society on Twitter?
- Two new jobs are currently posted on the Advocates' Exchange Career Board. More information [here](#).
- Samuel S. Marr will be presented with The Catzman Award for Professionalism & Civility on September 24, 2015 at the Opening of the Courts in Toronto. For more information click [here](#).
- Joseph J. Arvay, Q.C. of Farris LLP will be presented with the Award of Justice on October 27, 2015 at a dinner in Toronto. For more information or to register, click [here](#).

Where do you like to sit back and read your copy of The Advocates' Journal?



Tweet your favourite reading spot to @Advocates_Soc with the hashtag #TASJournal for a chance to win a \$25 Starbucks giftcard

Career Board



FALL PROMOTION

Break through the clutter and reach 5000+ litigators

&

for the month of September, TAS members get one FREE job posting on the Advocates' Exchange Career Board

For more information contact Jared Ploughman, Marketing and Communications Coordinator, at jared@advocates.ca

An illustration of a superhero lawyer. The character is wearing a black suit and a red cape, flying through a blue sky with white clouds. The character is holding a briefcase and pointing upwards with the other hand.

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Finding a Good Blog

BY: JASMINE T. AKBARALI,
LERNERS LLP

I have never liked the word “blog”. It sounds too much like “blah-g”, which may explain why I was slower to warm to this method of social media communication. In truth, once I got over my knee-jerk, negative, linguistic reaction to the idea of a blog, I found that there was a lot of value to be gained – assuming you can find the blogs that interest you. But the world wide web is a big place and finding them might feel like hunting for a needle in a haystack. In this column, I will try to short-circuit some of that work by suggesting a few avenues to explore if you are new to blogs, and want to find the ones that will be worth your time.

To be clear, I am not talking about blogging; rather, I am focusing on following blogs. Blogging is a whole other way of reaching out online to communicate with an audience. It requires a certain amount of effort to do well. We’ll explore that later. For now, we begin with the baby step of reading blogs.

There are tons of blogs out there, from all sorts of sources, covering all sorts of topics. There are parenting blogs, nutrition blogs, sports blogs, fashion blogs, and – no surprise – law blogs. If you want to find a law blog that speaks to your area of practice but you do not know where to begin, start with the Clawbies. The Clawbies are the Canadian Law Blog Awards, presented annually on New Year’s Eve. As the Clawbies describe themselves: “while they might not

be the most important legal awards of [the year], they are, without any question, the last ones to be handed out”.

If you visit www.clawbies.ca you will find a list of the blogs that won awards in 2014. They cover (and are organized by) all kinds of topics. This is a great place to start for an introduction to blogs on a topic that might interest you. Review the list and subscribe to a blog or two to see how you like it.

Another great place to start is Slaw, which bills itself as “Canada’s online legal magazine”, but is really a collection of blogs with lots of new content. Slaw blogs tend to be easily digestible and often very interesting. If you go to www.slaw.ca you can subscribe to Slaw and customize the kinds of posts about which you want to receive notice. Alternatively, you can visit its website as often as you wish and peruse what happens to be newest. Another option (if you have taken my advice about twitter and opened an account) is to follow @slaw_dot_ca where Slaw will tweet out its latest posts and you can click through to read the ones that interest you.

There are a couple particularly interesting blogs that I recommend you visit to decide whether you would like to make them part of your regular reading. Jordan Furlong blogs about the impact of the changing legal market at www.law21.ca. And at <http://canlii-connects.org>, lawyers post blogs, mostly case comments, on a series of issues. While frequented by lawyers, canlii-connects.org also services the non-legal market. In fact, it won the non-lawyer audience Clawbie in 2014.

The beauty of blogs is that a good one is informative, timely but also easy to read because the posts are short. As a result, following a few blogs on the topics that are right for you gives you a way to stay current without over-burdening your already-long reading list. In other words, a good blog gives you bang for your buck. Just stay away from the “blah-gs” and you will find exploring this area of social media rewarding.

Interview with Kenneth A. Dekker, Affleck Greene McMurtry LLP

BY: PETER J. HENEIN, CASSELS BROCK LLP



1 THE LAW: MAGIC OR DAILY GRIND? I'd say grind – with the occasional bit of fun, excitement and satisfaction thrown into the mix to keep me doing it. There is definitely no magic involved.

2 WHERE DO YOU FIND INSPIRATION ON A FILE? Solving clients' problems or, at a minimum, turning large messes into smaller and more manageable messes.

5 PETS OR NO? Do 8-year-old twins count? I hope someday to once again have the time and energy for another pet, but for now it's just my kids.

6 BEST ALBUM EVER? *Moving Pictures* by Rush. My ongoing love for that album is the single strongest indicator that down deep I really have not changed as a person since Grade 9.

7 FAVOURITE CULINARY INDULGENCE? Does wine count? If not, I'd say Atlantic lobster with copious amounts of melted butter – but only when consumed in the Maritimes, preferably close enough to the ocean to feel the salt spray from the lobsters' former home.

3 WORK? LIFE? BALANCE? Balance is absolutely key. It requires a huge amount of patience, time and effort – especially from my wife.

4 WHAT'S THE FUNNIEST THING ABOUT YOUR JOB? Whenever a litigant in a commercial dispute says "It's not about the money, it's about principle."

8 WHAT GIVES YOU SANITY? WHAT DRIVES YOU TO MADNESS? My Kids

9 FAVOURITE APP? I absolutely love Beef Carpaccio drizzled with olive oil and topped with pecorino cheese and shaved truffle (This question IS about food, isn't it?).

10 FAVOURITE JUDGE OR MASTER? Justice David Brown. I have appeared in front of him twice. The first time, he began his Reasons with the word "pickle." The second time, he began his Reasons with the word "sex." Both sets of Reasons ended with me winning. True story. You can look it up on Quicklaw if you want.

11 WHEN YOU WANT TO UNWIND, YOU...? Cook for my family and friends with lots of wine and/or beer (some of which occasionally makes it into the food).

12 IF SUSIE HAS 3 APPLES AND JOHNNY HAS 5 APPLES, AND SUSIE OFFERS TO LEND JOHNNY 2 APPLES AT A DAILY COMPOUNDING INTEREST RATE OF 0.25 APPLES, HOW MANY APPLES WILL JOHNNY OWE SUSIE AFTER 5 YEARS IN A DEPRESSED MARKET? I didn't go to law school to do math. However, I have consulted with a prominent plaintiff's side valuation expert and have been told that it can reasonably assumed that, had Susie not loaned those 2 apples to Johnny, she would have exchanged those apples for peaches at the height of the apple market and thereby avoided the declining market for apples. When the returns from the more bullish peach market are applied and compounded over the past 5 years and interest at the agreed-upon rate is added to the compound returns and then these returns are then applied back to the interest, and a 20% across the board reduction for contingencies is applied, it is clear that Johnny will owe Susie between 500,000 and 1 million apples, plus ongoing interest and costs (which are not payable in apples, of course).

THE VOICE OF THE PROFESSION

BY: SARAH J. ARMSTRONG,
FASKEN MARTINEAU
DUMOULIN LLP



The Advocates' Society routinely intervenes in matters before the courts that deal with issues of significance to the profession, including matters affecting access to justice, the practice of law by advocates, the enhancement of civility and professionalism among advocates and the administration of justice. The Society has established a reputation as an intervener whose submissions are insightful and helpful to the courts. This month, we highlight three examples of the Society's interventions.

GROIA V. THE LAW SOCIETY OF UPPER CANADA

By: Deborah Templer, *Gowling Lafleur Henderson LLP*, & Matthew Law, *Lax O'Sullivan Scott Lisus LLP*

In the spring of 2013, The Advocates' Society made the decision to intervene before the Law Society Appeal Panel in the case of *The Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2013 ONL-SAP 0041. The Law Society's prosecution of Mr. Groia relates to his conduct as defence counsel to John Felderhof, who was charged with (and ultimately acquitted of) various offences relating to the Bre-X scandal. Mr. Groia's courtroom conduct was the subject of discussion in both the Superior Court and Court of Appeal after the OSC brought an (unsuccessful) application to have the trial judge disqualified. The Law Society Hearing Panel found Mr. Groia guilty of professional misconduct, relying in part on those prior comments in the Superior Court and Court of Appeal.

The *Groia* case continues and since the fall of 2013, the Society has intervened before the Law Society Appeal Panel and the Divisional Court, and has, just days ago, been granted leave to inter-

vene before the Court of Appeal for Ontario. There are two principal issues that lie at the heart of the Society's intervention in this case – issues that affect every one of the Society's over 5,000 members:

The 'test' for sanctionable incivility

In addressing the 'test' for incivility that rises to the level of professional misconduct, the Society took the position before the Appeal Panel that uncivil conduct in the courtroom should only be subject to disciplinary action where it is *egregious or continuous and serves to threaten or undermine the integrity of the administration of justice*. While not accepted by the Law Society Appeal Panel, this definition was largely adopted by the Divisional Court on appeal. Justice Nordheimer, writing for the Court, concluded that in order to amount to professional misconduct, uncivil conduct must have "undermined, or ... had the reasonable prospect of undermining, the proper administration of justice." The Court cited the Society's [Principles of Civility for Advocates](#) in its reasons.

The use of prior judicial reasons in a

subsequent disciplinary hearing

A second, perhaps less-headline grabbing but critically important, issue that has in fact dominated the Society's interest in this case (and was the focus of the Society's leave application to the Court of Appeal) relates to the use that can be made by our regulator of prior judicial reasons or comments when subsequently seeking to prosecute a lawyer for misconduct. In reasoning largely adopted by the Appeal Panel and Divisional Court, the Society has asserted that prior judicial reasons are inadmissible as evidence of professional misconduct where the subject lawyer was not a party to those prior proceedings, had no opportunity to give evidence in support of (or to explain) his or her conduct, and enjoyed no right of appeal.

The Society was granted leave to intervene before the Court of Appeal on September 4 and will be filing its intervention factum in October 2015. The appeal is scheduled to be heard from December 14-16, 2015.

The Advocates' Society is represented by Terrence O'Sullivan, Deborah Templer, and Matthew Law.

MOORE V. GETAHUN

By: Jean-Claude Killey,
Paliare Roland Rosenberg Rothstein LLP

In January 2014, a trial-level decision was released in an otherwise unremarkable medical malpractice action that sent shockwaves through the profession well beyond the personal injury bar. In the course of the trial in *Moore v. Getahun*, 2014 ONSC 237, the cross-examination of the defendant's expert unearthed a 1.5 hour telephone call between the expert and the defendant's counsel, during the course of which, the expert testified, he had made some relatively minor changes to his draft report, at the suggestion of counsel.

The trial judge concluded that not only were this conversation and the changes suggested by counsel improper but also, as a result of the 2010 amendments to the *Rules of Civil Procedure* relating to experts, it was improper for counsel to review a draft expert report at all.

The implications of this decision were quickly recognized as profoundly problematic for large swaths of the litigation bar. The Advocates' Society

intervened on the appeal, as did an impressive array of interested organizations that included the Ontario Trial Lawyers' Association, the Canadian Defence Lawyers' Association, the Holland Group, the Canadian Institute of Chartered Business Valuators, and the Criminal Lawyers' Association.

The Society was uniquely positioned to represent the interests of litigators from across a broad range of practice areas including corporate/commercial, family, intellectual property, criminal, and administrative law. It made very valuable use of this role by striking a task force, conducting broad and rigorous consultation across the profession, and developing a set of principles for communicating with experts: [the Principles Governing Communications with Testifying Experts](#). These principles would eventually find themselves appended to the decision of the Court of Appeal for Ontario in *Moore v. Getahun* (2015 ONCA 55) with favourable commentary by the court.

The Society made submissions in the Court of Appeal that it was not only proper for counsel to communicate

with an expert about the expert's draft report, but that doing so was part of the advocates' duty to advance the administration of justice. Integral to that duty, an advocate must marshal relevant evidence, avoid inadmissible evidence, counsel experts on their duties of impartiality and independence, and ensure that an expert's opinion is clearly communicated. All point to the need for, and propriety of, counsel involvement before an expert's final report is put before the Court.

This essential submission was joined in by all of the intervenors (as well as both parties to the appeal) and taken up by the Court of Appeal, which held that "[c]ounsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court."

An application for leave to appeal to the Supreme Court of Canada has been filed, although the focus of the appeal is on other issues.

The Advocates' Society is represented by Linda Rothstein and Jean-Claude Killey.

TRINITY WESTERN UNIVERSITY V. THE LAW SOCIETY OF UPPER CANADA

By: Joanna Radbord,
Martha McCarthy & Co. LLP

In June, The Advocates' Society intervened in the judicial review in *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250.

The Advocates' Society supported the Law Society of Upper Canada's decision to deny accreditation to Trinity Western University's proposed law school. TWU requires that all students, faculty and staff sign a "Community Covenant" contracting to refrain from sexual intimacy outside of different-sex marriage. The Law Society determined it could not condone the Covenant as a condition of law school admission, as it would have the effect of denying equal access to the profession contrary to the public interest.

TWU argued that the Law Society did not have jurisdiction to make this decision, and that the Law Society violated the *Charter*-protected rights and

freedoms of TWU and its potential students. TWU claimed that LGBTQ people were welcome to attend the school, so long as they refrained from prohibited conduct. In any case, TWU could not discriminate against LGBTQ people or others because it is not subject to the *Charter* or the *Human Rights Code*.

Associate Chief Justice Marrocco and Justices Then and Nordheimer upheld the Law Society's decision not to accredit the proposed law school.

The Court found that TWU's proposed law school would discriminate against LGBTQ people, those unwilling to sign the Community Covenant for religious or conscientious reasons, unmarried cohabitants and women. The Court rejected as false any distinction between LGBTQ practices and personhood, holding it unacceptable that TWU students "must sign a document in which they agree to essentially bury a crucial component of their very identity."

The Court stated that declining accreditation "does not, in fact, preclude TWU from opening a law school," de-

spite TWU's argument that it would not open the school without accreditation from the Law Society. "[W]hile . . . there is a degree of interference with religious beliefs, should that result occur . . . the motivating force not to open the law school appears to be more economic than it is religious."

It is expected that the Court of Appeal for Ontario will grant TWU leave to appeal.

There are parallel proceedings in Nova Scotia and British Columbia. In Nova Scotia, TWU was successful at first instance. See *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25. The Advocates' Society will be intervening in the Nova Scotia appeal, with a hearing expected in April 2016. The British Columbia judicial review hearing concluded August 26, 2015, and is under reserve.

The Advocates' Society is represented by Chris Paliare, Joanna Radbord and Emily Lawrence in the Ontario proceedings, and Bruce MacIntosh, Q.C. in the Nova Scotia proceedings.

BACK TO SCHOOL

The kids aren't the only ones going back to school. This September, The Advocates' Society will hold its biennial Train the Trainer, where a new group of intermediate and senior TAS members will be trained to teach our signature Learning By Doing advocacy skills workshops. Advocacy Matters reached out to some of this year's Train the Trainer candidates to see what is on their Back to School wish list. Here is what we learned...



NADIA EFFENDI

BORDEN LADNER GERVAIS LLP

LAPTOP

On the top of my wish list? To never have to carry a piece of paper ever again! My goal is to become completely paperless and have a laptop (the lightest I can find) as my only tool. Looks like the MacBook might meet my criteria at 2.03 pounds.

VARIDESK

BRENT OLTHUIS

HUNTER LITIGATION CHAMBERS



"Time on my feet" in court isn't getting me to the recommended daily time standing.



STUART ZACHARIAS

LEARNERS LLP

IRON MAIDEN T-SHIRT

Iron Maiden "Book of Souls" t-shirt. The new album dropped on September 4th. I haven't stopped listening to it since.

PIANO KEY NECKTIE

CRAIG LOCKWOOD

OSLER, HOSKIN & HARCOURT LLP



I'm holding out for a piano key necktie, because it is only a matter of time until they come back into fashion... Also, I have a profound respect for their inventor, Mugatu.

EDUCATION PROGRAMS

ADVANCED DO A TRIAL
September 26, 2015 - Toronto

CONDUCT OF THE FAMILY LAW MOTION
October 2, 2015 - Toronto

ARBITRATION ADVOCACY
October 7, 2015 - Toronto

KITCHENER CRIMINAL COURTHOUSE
October 14, 2015 - Kitchener

WRITTEN ADVOCACY
October 16-17, 2015 - Toronto

For A Full Listing of Education Programs [Click Here](#)

ADVOCACY EVENTS

OPENING OF THE COURTS / CATZMAN AWARD
September 24, 2015 - Toronto

MENTORING DINNER: THE NEXT EPISODE
October 15, 2015 - Toronto

AWARD OF JUSTICE PRESENTATION AND DINNER
October 27, 2015 - Toronto

FALL CONVENTION
November 11-15, 2015 - Grand Velas, Mexico

DUBIN LECTURE
The Hon. Albert (Albie) Sachs
November 26, 2015 - Toronto

For A Full Listing of Advocacy Events [Click Here](#)

PRACTICE GROUPS

LET'S TALK ABOUT LAWYER SAFETY AND SECURITY
September 28, 2015 - Toronto

CRIMINAL LAW RECEPTION
October 1, 2015 - Toronto

HOT TOPICS IN CLASS ACTIONS
October 15, 2015 - Toronto

CONSTRUCTION LAW TELESEMINAR
October 22, 2015 - Toronto

THE INTERSECTION OF FAMILY AND ESTATES LAW
November 2, 2015 - Toronto

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