



Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

Expert Independence | Advocacy in 140 | Legal Lore | Interview | Upcoming Events



Happy Holidays
from
The Young Advocates' Standing Committee

CHAIR CHAT

BY: DANIEL NAYMARK,
NAYMARK LAW



Well, that's a wrap on 2016. It has been a challenging turn around the sun for many of us in Canada, and beyond. But the good news is that the holiday season is upon us, and this year, we take inspiration from the Yule tradition. A couple millennia ago, in ancient northern Europe, Yule was a time to persevere against the darkest days of the year. The Vikings believed that mistletoe had the power to resurrect the dead. The feast that took place during the Midwinter Solstice was dedicated to ensuring a fortuitous harvest in the coming year. People created giant sun-wheels, which they burned and rolled down

hills, to entice the sun to return to the sky. It was a time to fortify, to plan, and to push forward.

As advocates, we have learned how to collect facts, develop arguments and reason through analogy. So let us borrow some hope from the Viking mythos, and take this time of year to prepare for a 2017 which will demand, more than ever, fierce, ethical advocacy from members of our community. No pressure though. You have two weeks to get ready. And YASC is here to fortify you for the coming task with pub nights in Toronto (January 11) and Barrie (January 18).

In the meantime, from all of us at YASC, we wish you a restful and restorative end to 2016. ▀

Daniel

The Young Advocates' Standing Committee ("YASC") is a standing committee of The Advocates' Society with a mandate to be a voice for young advocates (advocates who are ten years of call or fewer) within the Society and within the profession. We do this through networking/mentoring events, by publishing articles by and for young advocates, and by raising issues of concern to young advocates as we work with the Society's Board of Directors.

The opinions expressed by individual authors are their own and do not necessarily reflect the policies of The Advocates' Society.



Getting it Wright: The Detour Gold Standard of Expert Independence



BY: CHANTELLE SPAGNOLA and CARLOS SAYAO, DAVIES WARD PHILLIPS & VINEBERG LLP¹

In rejecting a motion by the plaintiffs for production of drafts of an expert report, the Ontario Superior Court of Justice's recent decision in *Wright v. Detour Gold Corp.*² endorses the Court of Appeal's guidance regarding counsel's dealings with expert witnesses as articulated in *Moore v. Getahun*³. Of particular interest to litigation counsel, the decision in *Wright* builds upon the guidance in *Moore* by holding that it is entirely proper for an expert to retain independent legal counsel to assist in the preparation of his or her expert report.

The *Wright* case is a proposed securities class action commenced against Detour Gold Corporation ("Detour") and its former CEO. The plaintiffs allege that Detour's public disclosure during its first year of operations at its flagship gold mine contained misrepresentations regarding the company's production guidance and certain terms of a credit facility. In defending the plaintiffs' motion for leave to proceed with their secondary market claim under the Ontario *Securities Act*, the defendants retained an expert witness (a former

CEO, director and investment banker in the mining industry) to provide an opinion on Detour's public disclosure concerning terms of the credit facility.

The expert chose in turn to retain his own independent legal counsel to assist in the preparation and drafting of his report. This arrangement was used, in part, because it allowed the time-strapped expert to delegate certain tasks, such as locating and assembling publicly available sources that the expert relied upon in forming his opinion. This arrangement had the benefit of reducing involvement and potential influence of defendants' counsel, while ensuring that the content and conclusions of the report were those of the expert alone.

Unsurprisingly perhaps, the plaintiffs took a different view of the arrangement. They brought a motion for production of, among other things, drafts of the expert's report, arguing that the involvement of independent counsel in the preparation of the expert report resulted in an inappropriate interference with the expert's independence, impartiality, and duty to the Court.

In a forcefully written decision, the Court rejected these submissions and held that "what occurred in this case, if anything, is to be encouraged not discouraged"⁴ In particular, the Court found that the assistance of independent counsel served to enhance the expert's independence and impartiality, minimizing any risk of influence on the expert by counsel to the defendants, and allowing the expert to better satisfy his duty to the Court.

In arriving at its decision, the Court considered and reaffirmed the principles regarding counsel's dealings with expert witnesses articulated by the Court of Appeal in *Moore*, finding that it is proper and

normal for an expert to consult with counsel. The Court in *Wright* (quite rightly) reasoned that if it is proper for an expert to consult with counsel for a party to the litigation (whose loyalty is to the litigant), then consultation between the expert and his or her own independent counsel (whose loyalty is to the expert) should also be proper. As the Court of Appeal recognized in *Moore*, such assistance is helpful because it allows the expert to frame the opinion in a comprehensible manner and be responsive to the relevant legal issues. This was exactly what occurred in *Wright*.

The Court's unqualified approval of the retention of independent legal counsel by expert witnesses in *Wright* recognizes the practical reality that the use of independent counsel by an expert serves to reduce the involvement of a litigant's lawyers in the expert's work, and therefore can help prevent any real or perceived influence by a litigant's lawyers. Following the decision in *Wright* (which the plaintiffs have not sought leave to appeal), parties to litigation can, in appropriate circumstances and where costs permit, consider the option of having a testifying expert retain his or her own independent counsel to assist in the preparation of the expert's report. Notwithstanding the Court's decision in *Wright*, it continues to remain of utmost importance that counsel (both for a litigant and for an expert) in all instances observe the established guidance respecting dealings with expert witnesses as articulated by the Court of Appeal in *Moore*. In particular, the opinions of the expert must, without exception, remain the opinions of the expert alone. The retention of independent counsel by an expert should simply be viewed as one additional tool to help counsel achieve this imperative end. ▀

1. Chantelle and Carlos represent the defendants in this case together with their colleague Luis Sarabia (also of Davies).

2. *Wright v. Detour Gold Corp.*, 2016 ONSC 6807 [*Wright*].

3. *Moore v. Getahun*, 2015 ONCA 55 [*Moore*].

4. *Wright*, *supra* note 2 at para 23 [Emphasis added].



Erin Durant
@ErinDurant42

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Marie Henein is a role model for women. She is at the top of her profession and a strong advocate and mentor of young female lawyers.



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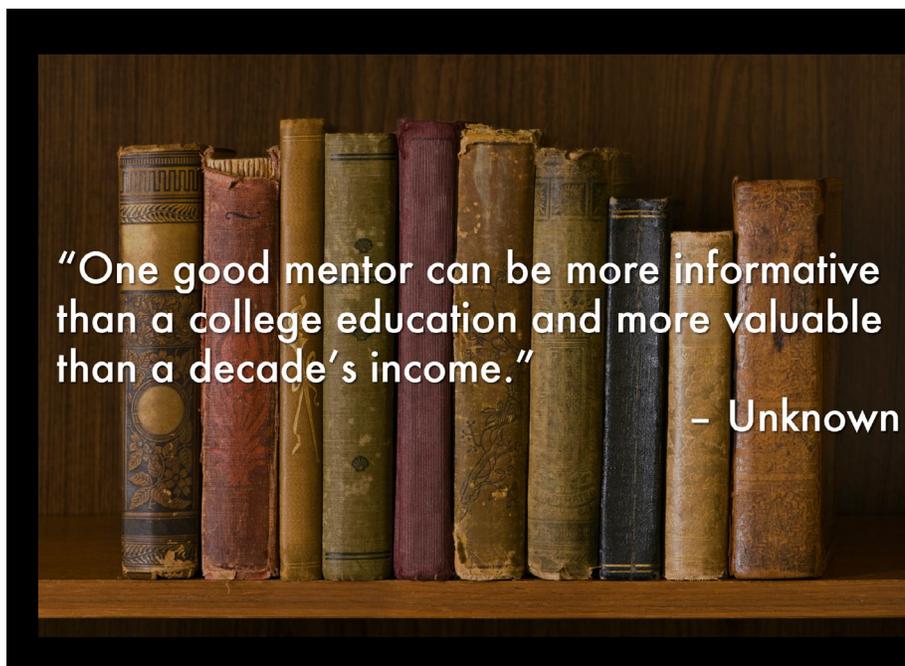
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“One good mentor can be more informative than a college education and more valuable than a decade’s income.”

– Unknown

Mentoring Dinner Series 2017: Build it They Will Come

Thursday, Feb 16, 2017
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Johnson on the Law



BY: DAVID CAMPBELL,
ROGERS PARTNERS LLP

The Life of Samuel Johnson LL.D. (1791) by James Boswell is one of the seminal works of modern biography. Dr. Johnson (1709–1784), aside from single-handedly writing the first major dictionary in English, was one of the language's great poets, writers, and wits. Boswell's biography details delightful insights and recorded conversations that occasionally touch on law and advocacy.

Establishing a Practice

James Boswell (1740–1795), a Scottish lawyer and Dr. Samuel Johnson's biographer, asked for Dr. Johnson's advice on whether he should establish a practice in England, since he visited London so frequently. The Doctor gave this advice—circa 1775:

You mustn't indulge too sanguine hopes should you be called to our bar. I was told by a very sensible lawyer that there are a great many chances against any man's success in the profession of the law: The candidates are so numerous and those who get large practice so few. It is by no means true that a man of good parts and application is sure of having business. A man might pass half a lifetime in the courts and never have an opportunity of showing his abilities.

Lasting Advice on Advocacy

Dr. Johnson's circle was made up 18th century London's great luminaries, among whom was the radical MP, John Wilkes. Being a lawyer himself,

Boswell asked Wilkes for advice on advocacy, specifically about pleading before the Commons' bar. Wilkes cited John 'Jack' Lee (1733–1793), Britain's Attorney General as a model:

"Be as impudent as you can, as merry as you can, and say whatever comes uppermost. Jack Lee is the best heard of any counsel; and he is the most impudent dog, and always abusing us."

Dr. Johnson on Advocacy

A conversation between James Boswell and Dr. Samuel Johnson, recorded between Boswell and Dr. Johnson on the subject of advocacy:

I asked him whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty.

JOHNSON. 'Why no, Sir, if you act properly. You are not to deceive your clients with false representations of your opinion: you are not to tell lies to a judge.'

BOSWELL. 'But what do you think of supporting a cause which you know to be bad?'

JOHNSON. 'Sir, you do not know it to be good or bad till the Judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it: and if it does convince him, why, then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all

you can for your client, and then hear the Judge's opinion.'

BOSWELL. 'But, Sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion, does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?'

JOHNSON. 'Why no, Sir. Everybody knows you are paid for affecting warmth for your client; and it is, therefore, properly no dissimulation: the moment you come from the bar you resume your usual behaviour. Sir, a man will no more carry the artifice of the bar into the common intercourse of society, than a man who is paid for tumbling upon his hands will continue to tumble upon his hands when he should walk on his feet.'

One of the most famous quotes that Boswell captured from Johnson was that, "No man but a blockhead ever wrote except for money." So there's a clue as to how the great lexicographer would judge the author of this piece. ▀



Interview with Jason Beitchman, Rayman Beitchman LLP

BY: SAM HALL,
HALL LEGAL COUNSEL



1

Q: You were called in '08 in Ontario (and '12 in B.C.), worked for many years at a large Bay Street firm and then launched your own firm. How has that transition gone?

A: It has been really exciting over the last year to know that I could build my own practice. I like the diversity of my files and developing direct relationships with my clients. Having a smaller firm allows me to represent smaller businesses and individuals. There is a completely different feel to it.

2

Q: Anything you know now that you wish you'd known before you took the leap?

A: Renting photocopiers is really expensive.

3

Q: Which living lawyer do you admire most?

A: Is Denny Crane still alive? Seriously though, that's a hard question to answer. I have a soft spot for lawyers that fight for the underdog.

4

Q: Like Saul Goodman?

A: I admire his entrepreneurial spirit.

5

Q: What is your greatest fear as a lawyer?

A: Limitation periods. And award-dinner speeches (unless it's Justice Winkler).

6

Q: What is your idea of perfect lawyerly happiness?

A: Talking to judges. The only time when I am truly in the moment is when getting peppered with questions from the court on an appeal or a motion.

7

Q: What is your greatest extravagance in your everyday life?

A: Ha! With a young family and a new business, I will let you know when I have a chance to splurge on something for myself.

8

Q: What is your favorite journey?

A: I have had the chance to be counsel in a few different provinces over the years. My lawyer's bucket list includes appearing in as many different courts across the country as I can. I argued part of a class action appeal in Manitoba a while ago. We were fortunate enough to get leave to appeal to the S.C.C. Knowing that I could convince the Supreme Court that our case had an issue of national importance was something I feel pretty good about. Unfortunately, the appellant went bankrupt—the case was permanently stayed and we never got to argue it before the Supremes.

9

Q: Before law, you were in the publishing business, any favorite reads?

A: My favorite law geek book is the biography of J.J. Robinette, written by George Finlayson. For Can-Con, I am a big Mordecai Richler fan. I recently caught up on George R.R. Martin's *Song of Fire and Ice* series and am waiting for the next book to come out.

10

Q: So, who's your favorite character from *Game of Thrones*?

A: From the books, it's Jon Snow. From the T.V. series, Tyrion. (As a purist, there are differences between the books and the series.)

11

Q: From whom have you learned the most about the practice of law?

A: Clerking was such an important experience for me in developing litigation judgment. The Federal Court is unique in that you are matched up with one judge for the whole year. I spent that year seeing what persuaded, what didn't and how cases got decided.

12

Q: Any tips for the aspiring solo?

A: Whatever stage you are at, try to meet as many people as you can. Go to the TAS CLE's, the cocktail parties and get-togethers. Go to conferences, lunches and coffee meetings. That will help you. Plus, developing relationships with all the smart, interesting people in law is the best part of the job! ♣

UPCOMING EVENTS

Fireside Chat on Advocacy

Special edition for government lawyers
With The Honourable Justice Andromache Karakatsanis
of the *Supreme Court of Canada*.

Tuesday, Jan 24, 2017
Campbell House
Toronto, ON

[Click here to register](#)



Wine & Cheese with The Bench

Thursday, Feb 2, 2017
The University Club at Queen's
Kingston, ON

Complimentary for TAS Members
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Hear candid advice from experienced counsel
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oral and written submissions.

Tuesday, February 7, 2017
9:00 a.m. – 4:30 p.m.
The Advocates' Society Education Centre
Toronto, ON.

[Click here for more information](#) ▶

Upcoming Events



YASC Pub Night
(Toronto)

Jan 11, 2017



YASC Pub Night
(Barrie)

Jan 18, 2017



New Date!

President's Reception
(Ottawa)

Feb 2, 2017



Wine & Cheese with
The Bench
(Kingston)

Feb 2, 2017



Pitch Perfect: How to
Win & Keep Work
from In-House Counsel
(Toronto)

Feb 9, 2017