




Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

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Chair Chat

Brent Arnold

(Belated) Happy New Year!

YASC rang in 2015 with another great pub night in Toronto.

Over 100 young lawyers filled the Irish Embassy on January 14 to meet old friends and make new connections. And it's a busy winter for us: I was back on the road January 22 to attend the Ottawa President's Winter Festive Reception, where I had the pleasure of reconnecting with young advocates from the East Region and hearing great ideas for future initiatives. Our first-ever Financial Planning 101 took place on January 29 and offered our junior members some excellent strategies for saving and spending wisely. Our next Pub Night will take place on February 12 in St. Catharines; thanks to YASC's Lionel Tupman for bringing us to Niagara Region for the first time. And, our February 25 mentoring dinner is just around the corner and I encourage you to take advantage of this unique opportunity to ask the tough questions in a safe and social environment (plus, good food *and* 2.5 hours of CPD).

For those who've been following our work and want to get involved, several positions on YASC will be opening up in the spring: we are now accepting applications for the 2015/2016 YASC. YASC gives a strong voice to young advocates and helps you make great connections. There's no better way to give back to the Society and the profession, and I encourage you to apply. There are also many other great ways to get involved: Join a Practice Group. Blog. Write for Keeping Tabs. Tweet. Become part of the community of advocates.

Brent

Young Advocates' Standing Committee Call for Applications

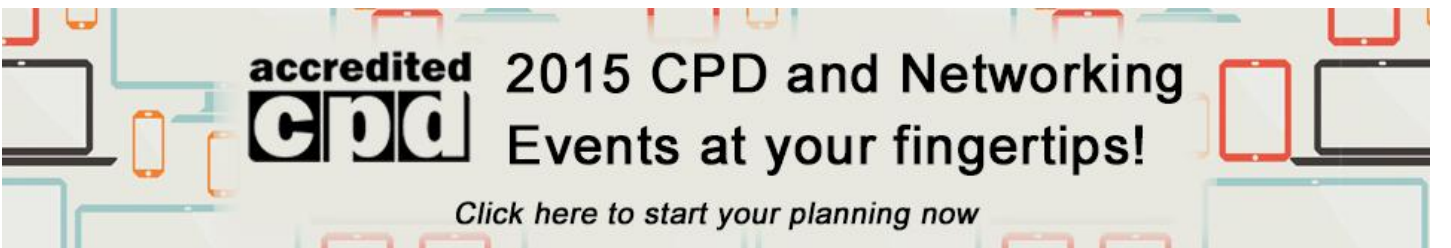
The Young Advocates' Standing Committee is seeking energetic junior Society members to become part of the 2015-2016 committee. This is an excellent opportunity to build your profile within The Advocates' Society and your local bar.

[Click here for the YASC application form.](#)

Not a Society member? [Click here](#) to join now.



YASC Flashback: Which one of these is not like the other?



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The YASC Interview: Nathaniel Erskine-Smith

By: Vanessa Voakes, *Stikeman Elliott LLP*



Subsequent to his call to the Ontario Bar in 2011, Nathaniel Erskine-Smith (also known as "Nate") obtained his master of laws from the University of Oxford. Upon his return to Toronto in 2012, he initially volunteered for the Canadian Civil Liberties Association and then later joined the Toronto-based civil litigation firm Kramer Simaan Dhillon where he primarily practises commercial litigation. Nate has appeared before the Ontario Superior Court of Justice, the Ontario Human Rights Tribunal, and the Divisional Court. Always an advocate, Nate won the federal Liberal Party nomination in Beaches-East York in December 2014, and looks forward to representing his home riding in the 2015 federal election.

Which word do you prefer: litigator or advocate?

In the day-to-day trenches, I'm a litigator, but overall I like to think of myself as an advocate.

Why did you become a litigator/an advocate?

I've always been interested in public speaking. I ended up in law school after a great moot experience in undergrad, and because I believed law would be useful no matter what I ended up doing. In the end, I was drawn to litigation because it's where I had the most fun; a healthy combination of competing to win, public speaking, applying legal principles, solving problems, and helping clients.

How would you describe your career so far?

Short but satisfying. I've been lucky to work on a range of different files and to gain a lot of first-hand experience. My firm is not only a group of good lawyers, they've also been very supportive in my pursuit of public interest cases and a political career.

What is your idea of perfect lawyerly happiness?

Winning is nice, but the best feeling is when that win helps to correct a real unfairness.

What are three things that you absolutely cannot live without?

My wife and family, my friends, and my independence.

Who would you most like to be stuck in an elevator with? Why?

Either John McClane or Elisha Otis. Either way, they're probably going to help me get out of the elevator.

Rumour has it you're an avid baseball fan and player – describe your most memorable game.

I played ball through high school and university, but my most memorable game was in elementary school when I traveled to the Caribbean to play. After ending the game in extra innings with the winning hit, some of the kids watching the game asked for my autograph. Admittedly, it's unlikely to be as memorable for those kids who now know how little my signature is worth.

What is your perfect pizza?

My wife and I are usually pretty strict about eating vegan (I was born and raised a vegetarian), so my perfect pizza is probably disgusting to 99.9% of the population.

If you could have any superpower what would it be? Why?

Telekinesis. Because sometimes I don't want to get up from my chair.

What would you consider to be your greatest achievement?

I'm not sure about greatest, but I'm proud to have been called to the bar, to have graduated from Queen's and Oxford, to have been on the right side of a Divisional Court case, and to have recently won the federal Liberal nomination in my home riding of Beaches-East York.

What current Canadian legal issue or issues do you think is/are the most pressing? Why?

Access to justice is rightfully top of mind for our courts. Outside of small claims, litigation is too expensive for lower and middle class Canadians.

The current approach to criminal justice is also a problem. Our prison population is at an all-time high while the crime rate continues to decrease.

If it were up to you, what steps would you take to solve the problem(s)?

To answer the cost of litigation, improve funding for legal aid and raise the limit for small claims. More rough justice, less arcane procedure.

With respect to criminal justice, whether it's mandatory minimum sentences, drug offences and safe injection clinics, assisted suicide for those terminally ill, or our new prostitution laws, evidence should guide our decision-making.

What's the best advice anyone ever gave you?

There's a Vonnegut quotation that always stuck with me: "We are what we pretend to be, so we must be careful about what we pretend to be."

Do you have any advice for young advocates?

Don't forget what you wanted to accomplish before you went to law school.

Did you make any new year's resolutions?

Don't answer questionnaires.

How's that going for you?

Until just now, I was on the right track.

To the Re-*Diemer* of Legal Fees: Take Heed

Ontario Court of Appeal's Decision on Receivership Legal Fees Offers a Strong Critique of the "Billable Hour"

Chris Horkins, *Cassels, Brock and Blackwell LLP*, and Peter Reinitzer, *Student-At-Law*

The Ontario Court of Appeal recently addressed the approval of legal fees in insolvency proceedings in its decision in *Bank of Nova Scotia v. Diemer*. The decision contains a strong critique of the billing system used by the vast majority of the legal industry – the billable hour.

Diemer concerned a receivership in respect of a cattle farming operation near London, Ontario. On a motion for approval of fees, the presiding judge assessed the receiver's counsel fees at roughly half the total amount claimed. The motion judge concluded that the fees charged by the receiver's counsel were excessive and disproportionate in relation to the size of the receivership and opted to reduce the amount by applying the significantly lower average rate charged by local London practitioners. This was done despite the fact that the order appointing the receiver provided for the receiver and its counsel to be paid at their "standard rates" and the evidence from the receiver that the rates charged by its counsel were comparable to the rates charged by other Toronto law firms for similar services and that the fees were fair and reasonable in the circumstances.

While the Court of Appeal disagreed with some of the motions judge's criticism of the receiver's counsel, ultimately the Court agreed with the lower court's overall assessment that the fees charged were disproportionate and dismissed the receiver's appeal.

In arriving at its conclusion, the Court of Appeal was particularly critical of the "billable hour" fee structure used widely throughout the legal industry, whereby fees are calculated by multiplying the time spent on the file, as measured in six-minute increments, by the hourly rate of the legal practitioner. The Court noted that billable hours were implemented in the mid-twentieth century as a way to increase lawyers' profits. It also noted that, while a lawyer's record of billable hours is usually accompanied by an explanation of how the time was spent, these descriptions often fail to provide the client with a meaningful basis upon which to evaluate the lawyer's work. The Court also found that the practice of docketing in six-



minute increments obscures the value of legal fees; for example, a lawyer reading a one-line email could give rise to a "0.1" six-minute docket entry and the associated fee. This, the Court held, demonstrates a failure of the "billable hour" model to accurately capture the value of the time spent on providing legal services.

While these concerns are relevant in all areas of litigation, the Court found that concerns over the fairness and reasonableness of legal fees are particularly relevant in insolvency proceedings. The Court noted that, in traditional solicitor/client litigation, clients and their counsel can negotiate fee agreements prior to formalising their relationship, whereas in a court-supervised insolvency proceeding, where administrative costs such as legal fees take a priority charge over creditor claims, stakeholders with little or no influence on the legal fees may end up "bear[ing] the burden of the largesse of legal expenditures." Although this did not occur in *Diemer*, as the recoveries were sufficient to discharge the secured debt, the Court found this should be a prevailing concern in assessing counsel fees in insolvency proceedings.

The Court reiterated that the factors set out by the New Brunswick Court of Appeal in *Federal Business Development Bank v. Belyea* and endorsed by the Ontario Court of Appeal in *Re Bakemates International Inc.* continue to guide the analysis. Those factors include the value of the debtor's assets, the presence of any complications, the time spent, and the cost of comparable services. However, the Court also stated that the predominant concern should be the value of legal services provided to the receiver. Namely, the Court should focus more on "what was accomplished" rather than the amount of time spent. Notwithstanding that the standard form of receivership order used at the Toronto Commercial List permits the payment of legal fees at counsel's "standard rates", the Court is still required to consider whether the fees claimed are "fair and reasonable" in the circumstances.

In *Diemer*, the Court of Appeal agreed with the motions judge that the receiver's counsel's fees were too high because: (i) the debtor was largely cooperative in the bankruptcy proceed-

ings, (ii) the receivership was not complex, (iii) it was inappropriate for senior counsel to attend motions in London, Ontario for unopposed motions, and (iv) counsel's rates were disproportionate to the size and scope of the receivership.

Diemer arrives at a time when law firms are facing increasing pressures both inside and outside the legal industry to change their fee structures. As profit margins shrink, corporate clients are looking for more creative ways to save money and are less likely to accept traditional "hours times rate" billing methods. The criticisms leveled by the Court at the billable hour model echo those made by commentators and thought leaders on the future of the legal profession. Many are unhappy with the billable hour fee structure's inability to provide certainty with respect to the cost of legal services. As a result, many firms are beginning to implement alternative fee arrangements.

Could *Diemer* be a canary in the coal mine for billable hours? If *Diemer* is signaling a shift in the way that courts view the billable hour fee structure and its ability to capture the fair value of legal services, lawyers will have to increase their efforts to find an acceptable alternative.

Chris Horkins is an associate in the Advocacy Group at Cassels Brock and Blackwell LLP with a focus on insolvency litigation. Chris is grateful to Cassels Brock articling student Peter Reinitzer for doing most of the work on this article.

2015 Court House Series: Challenging Credibility



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Toronto

February 11, 2015 | 12:00pm – 4:30pm
TAS Members: \$67.80
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CPD: 2.25 Professionalism Hours and up to 2.5 Substantive Hours

London

February 12, 2015 | 12:00pm – 4:00pm
TAS Members: \$67.80
Non-Members: \$84.75
CPD: 2.25 Professionalism Hours and up to 1.75 Substantive Hours

Sudbury

February 12 and 25, 2015 |
3:00pm – 5:00pm
One Session:
TAS Members: \$45.20
Non-Members: \$56.50
CPD for February 12: 0.75 Professionalism Hours and up to 1.25 Substantive Hours
Two-Session Package:
TAS Members: \$79.10
Non-Members: \$90.40
CPD for February 25: 1.5 Professionalism Hours and up to 0.5 Substantive Hours

Ottawa

February 12, 2015 | 12:00pm – 4:00pm
TAS Members: \$67.80
Non-Members: \$84.75
CPD: 2.25 Professionalism Hours and up to 2.25 Substantive Hours

Windsor

February 19, 2015 | 2:00pm – 5:30pm
TAS Members: \$62.15
Non-Members: \$79.10
CPD: 2.25 Professionalism Hours and up to 1.25 Substantive Hours

Thunder Bay

February 19, 2015 | 1:00pm – 4:30pm
TAS Members: \$67.80
Non-Members: \$84.75
CPD: 2.25 Professionalism Hours and up to 1.25 Substantive Hours



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Kingston

February 19, 2015 | 1:00pm – 4:00pm
TAS Members: \$62.15
Non-Members: \$79.10
CPD: 2.25 Professionalism Hours and up to 0.75 Substantive Hours

Hamilton

April 15, 2015 | 1:00pm – 5:00pm
TAS Members: \$67.80
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Kitchener

May 14 and May 21, 2015 | 5:00pm – 7:00pm
One Session:
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Two-Sessions:
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CPD per session: 0.75 Professionalism Hours and up to 1.25 Substantive Hours

YASC Events

Connecting Outside the Courtroom

Toronto Pub Night



President's Festive Reception @ Ottawa



Upcoming Programs and Events for Young Advocates

Niagara Region Pub Night

Thurs, Feb 12
6:00pm - 8:00pm
St. Catharines

Mentoring Dinner: They Didn't Teach THAT in Law School

Wed, Feb 25
6:00pm - 8:30pm
Toronto



4th Annual Trivia Challenge for Charity

Thurs, Mar 26
6:00 - 8:30 pm
Toronto

Do A Trial! (Civil)

Sat, Mar 28
9:00am - 4:00pm
Toronto



Wine and Cheese with the Bench

Thurs, Apr 16
5:30pm - 7:30pm
Toronto



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An Easy Way to Stop Power of Attorney Fraud

Stephen Aylward, *Stockwoods LLP*



some cases, “duelling” powers of attorney with inconsistent terms create chaos. There are also cases of plain vanilla forgery. These practices hurt the grantor and their loved ones. They also undermine public confidence in powers of attorney and pose practical problems for banks or hospitals who are presented with one. The misdeeds of an attorney may remain undetected for years, sometimes coming to light only on the death of the grantor. In one recent case, the grantor was an elderly woman suffering from Alzheimer’s and a host of other diseases. The attorney, her daughter, used her mother’s assets to buy an Escalade, a Harley-Davidson, two diamond rings, luxury vacations, and home renovations.

There is increasing recognition of the need for reform. The federal government announced in its 2014 budget that it would take measures to

A person who signs a power of attorney demonstrates incredible trust in the person charged with overseeing their affairs. Too often that trust is abused. Power of attorney fraud is a serious issue and becomes more so as our population ages. Action is needed to prevent the exploitation of the vulnerable. Establishing a public registry of powers of attorney is a simple and effective solution.

A power of attorney is an instrument that gives one person, the “attorney,” the power to oversee the affairs of another, the grantor. The attorney is usually a friend or relative. An attorney can write cheques, take out a mortgage, or cash out an RRSP. In fact, a power of attorney can give an attorney the right to carry out any act that the grantor is legally capable of doing, other than making a will. Powers of attorney are an important tool that allow people to plan for who will make financial or health-related decisions once they lose their legal capacity to old age or illness. When everything goes as planned, they can reduce family conflict and bring comfort to the grantor that their wishes will be carried out.

But the list of potential abuses is long. The grantor may have lacked capacity when making the grant. The attorney might continue to exercise the power after it has been revoked. In

ensure to protect the vulnerable from financial abuse by ensuring banks have adequate measures in place. A number of banks have since announced that they have implemented enhanced fraud prevention measures.

The Law Commission of Ontario is currently considering the idea of instituting a public registry of powers of attorney. This is a laudable proposal that would significantly mitigate abuses.

Public registries have had significant benefits in other jurisdictions. In the United Kingdom, the Office of the Public Guardian has long maintained a registry of all powers of attorney. It is difficult to determine the validity of a power of attorney on the face of the document. A registry helps solve this problem by allowing the validity of an instrument to be readily verified. Registration is encouraged by making registered powers of attorney valid against unregistered powers. Forgery is much harder, because at least three members of the grantor’s family must be notified of the registration. In the case of duelling powers of attorney, it is easier to tell which document reflects the true wishes of the grantor. There is an objection procedure that allows the validity of a power of attorney to be challenged. As an added benefit, a registry keeps these documents in one place so friends or family know where to look for them.

Some jurisdictions, including Manitoba, the Northwest Territories, and Nunavut, allow for a voluntary registry, and most Canadian provinces currently allow a power of attorney to be entered on a land registry, which can provide protection in the case of real estate transactions. There is also a nongovernmental registry, Nidus.ca, that keeps track of powers of attorney in BC on a voluntary basis. But a more comprehensive solution is needed.

The idea of a public registry of powers of attorney is not new in Ontario. A public registry was recommended by the Law Commission of Ontario in 1972, although its recommendation was not implemented. In February, 2013, a private members' bill proposing such a registry was voted down over concerns about privacy.

Oddly, Ontario maintains a Register of Guardians, which keeps track of persons who become entitled to manage the affairs of another by statute or court order but not of attorneys. Guardianship is a related concept to a power of attorney. A guardian arises where a person is incapable of making decisions for herself and does not have a power of attorney. The Register of Guardians keeps track of the identity of a guardian, any limits on the scope of the guardian's authority, and when the guardianship starts and ends.

A public registry creates some privacy concerns. But these concerns can be mitigated by clever design. The Register of Guardians, for example, only maintains limited information and will only disclose the information to a person who makes a request tied to the name of the grantor.

A public registry is a sensible reform idea that would thwart the abuse of some of our society's most vulnerable members.



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What? They Didn't Teach THAT in Law School
Wednesday, February 25, 2015

Well, That was Awkward
Thursday, May 21, 2015

The Next Episode
Thursday, October 22, 2015

All dinners take place 6:00pm - 8:30pm at Campbell House,
160 Queen St. W., Toronto

To RSVP, click here.