



Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

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It is March Madness for Young Advocates! YASC has a number of initiatives on the go focused on mentorship, building professional relationships and the exchange of ideas that impact young advocates. Here are some highlights:

TECH: YASC has launched its new seminar series focused on the impact of technology on the practice of litigation and on the administration of justice. This series features different stakeholders and perspectives, ranging from the impacts of social media to the effective use of technology in the courtroom. Our first event, which took place on March 3rd, focused on the use of demonstrative aids in the courtroom. It was enlightening and a tremendous success. Our next event, taking place on April 15th, focuses on technology in the courtroom and behind the scenes.

TRIVIA: YASC will present its 3rd Annual Charity Trivia Night (otherwise known as the "Battle of the Brains") in support of the TAS Gives Back campaign supporting PBLO's Education Law Project. The Master of Ceremonies will be former YASC Chair Danny Schwartz and the event will take place at Hot House Restaurant and Bar (at the corner of Church St. and Front St.). Only a few team spots remain.

TASTE: YASC is pleased to host its long standing "Vintage to Vintage: Wine & Cheese with the Bench". This is a unique opportunity to mix and mingle with the Bench at Historic Campbell House (along with delicious wine and artisan cheese pairings).

YASC will be seeking new members for the 2014/2015 year. As you know, YASC is a standing committee of The Advocates' Society comprised of young advocates (those being lawyers ten years post call or fewer). YASC is dedicated to promoting excellence in advocacy for Young Advocates and the highest standards of professionalism and mentorship within a fair and accessible system of justice for young advocates. The call for applications will be distributed by email on March 31, 2014. Please stay tuned!

As always, we welcome your feedback and look forward to seeing you soon.

Tony

Trivia Challenge

How many CPD hours do you earn if you attend Summer Trial Advocacy College?



Tweet your answer to @Advocates_Soc using hashtag #YASCTrivia for a chance to win a \$50 Best Buy Gift Card

Get ready for this year's YASC Trivia Challenge, happening on March 20, 2014. Answer the trivia challenge question in each newsletter for a chance to win great prizes and YASC bragging rights!

The YASC Interview

By: Brydie Bethell, *Simcoe Chambers*



Nathaniel Lipkus is a partner at Gilbert's LLP where he practices civil litigation with an emphasis on intellectual property law. He is also a Canadian patent and trade-mark agent, and government relations consultant, representing clients in court and before the Canadian and US governments. He was called to the Ontario Bar in 2007, and to the New York State Bar in 2008. Nathaniel graduated in 2006 receiving the Gold Medal in the JD/MBA program at the University of Toronto's Faculty of Law and Rotman School of Management. He curates Gilbert's LLP's biotechnology law blog, Just Biotech (www.justbiotech.ca).

Why did you become a litigator or advocate?

A: I am no good with my hands.

Which do you prefer: litigator or advocate?

A: Advocate.

How would you describe your career so far?

A: Rewarding, owing as much to the people I work with as to the work itself. And really fast.

What is your greatest fear in practice?

A: Becoming too cynical.

What is your idea of perfect lawyerly happiness?

A: No financial pressures, just the work of the advocate for appreciative clients.

Which lawyer do you most admire?

A: It is hard to answer definitively, but I thought it was wonderful and courageous when long-time opponents Ted Olson and David Boies teamed up to successfully challenge California's gay marriage ban. They (particularly Olson in the circumstances) deserve outspoken admiration.

What is your greatest extravagance in your every day life?

A: My next meal, which never fails to present a world of possibilities.

What is your favourite journey?

A: Running around the house with my 20-month-old Oscar, who never tires of it.

Which words or phrases do you most overuse?

A: It depends.

Which words or phrases do you think other lawyers most overuse?

A: I'll have to seek instructions. (when used for things not requiring instructions and when used to cut off a conversation)

What would you consider your greatest achievement?

A: Personally, I am so grateful for my wife Amanda, son Oscar and our loving and close families. Professionally, I don't think I have anything worthy of the question yet.

What is your favourite case?

A: The *Persons* case. (Yes, I am an intellectual property lawyer, but how could I pick an IP case over that one?)

Which talent would you most like to have?

A: Unshakeable resilience.

Who or what is the greatest love of your life?

A: My wife Amanda, who finds time for me notwithstanding an unrelenting daily regimen as Mom and rheumatologist extraordinaire.

What is your favourite drink?

A: My Saturday morning coffee from I Deal.

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

A: My dad, who was cross-examining me when I was still in diapers.

If you weren't a lawyer, what would you be?

A: A pretty sorry minor league pitcher.

What do you most value in your friends?

A: Authenticity.

If you could have one superpower what would it be?

A: Extraordinary healing ability. I am a real klutz, and I don't think any other superpower would be preventative enough.

What is something that you said today?

A: There's nobody on the roads. Why did we wake up so early again?

What is something someone said to you today?

A: Stop complaining.

What did you overhear today?

A: Roar! (overhearing Katy Perry and also my son Oscar the apparent tiger when his mittens are on)

Who is/are your Judge Crush(es) and why?

A: Justice Rosalie Abella, who gave a mesmerizing introductory speech on my first day of law school and roped me in. ♦

Arnup Cup Photos 2014



Technology and the Courtroom Series: New Directions in Court Technology



Tuesday, April 15, 2014 | 5:30 pm - 7:00 pm
The Advocates' Society
250 Yonge St., Suite 2700, Toronto

Join The Honourable Justice Lawrence W. Whalen, Superior Court of Justice and Monica Goyal, Aluvion Professional Corporation and My Legal Briefcase as they discuss new directions in court technology. Come and see how courtroom advocacy is changing with the advent of new developments in technology! This event is complimentary for members of The Advocates' Society. To RSVP please email Rachel Stewart at rachel@advocates.ca.

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Debate Club

Thursday, May 8, 2014 | 5:30 pm - 7:00 pm
The Advocates' Society
250 Yonge Street, Suite 2700, Toronto

Missed round one? Don't miss the second installment of Debate Club as we feature two new debaters! Join other Young Advocates' for this fun and informative evening. This event is complimentary for members of The Advocates' Society. To RSVP please email Rachel Stewart at rachel@advocates.ca.

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Golf Club

By: Emily Lawrence, *Paliare Roland Rosenberg Rothstein LLP*



I attend a lot of events about women in advocacy. As a young(ish) advocate with small children, I am the target audience for discussions about ‘making it’ as a woman lawyer. I enjoy hearing the war stories from senior women members of our bar about how they got to where they are. I think most of them will agree that their success is the result of a mixture of talent, ambition, supportive family and colleagues, and a large dose of luck.

These women I admire have made (and make) it work in one way or another, but it seems that there isn’t one clear path to a successful career as a woman advocate. And so, listening to these senior advocates fills me with a mixture of optimism and bewilderment. How can I plot my own path forward as a woman advocate? In chatting with younger women advocates, I sense I am not the only one who struggles with this. Thankfully, these great senior women advocates repeat one piece of advice that anyone can adopt: seek out mentoring opportunities.

This advice is echoed in the publications of the Law Society’s *Justicia Project* on retention of women in private practice. Having mentors will help you make partner and develop your book of business. While much could be written on how to find a good mentor, I offer my small suggestion on mentoring: find a good group of women advocates and hang out with them often.

And now to Golf Club.

Lawyers in our firm have an annual golf boondoggle – everyone is invited. Since none of the women in our firm enjoy golf enough to spend four days on the course, it is a de facto men’s event. Several years ago, the women of the firm decided to hold a women’s-only dinner during the golf trip. Our dinner was a hit, and we decided to meet monthly. We call it our ‘Golf Club.’

Golf Club is a chance for us to raise any issue in an

informal setting. We alternate between lunch and after work, and between in-firm and out-of-firm locations, so that more of us can attend. Golf Club has no stated objective and usually no fixed agenda. Our Golf Club conversations are wide-ranging: about our practices and our tough cases, our parenting and dog-training woes, our favourite new books. Often we discuss “women’s issues” from how to deal with sexist remarks from opposing counsel to where to buy high-waisted court skirts. I don’t think we have ever talked about golf.

Golf Club has given me an opportunity to learn more about the lives, not just the practices, of my women colleagues. I get valuable advice not only from my more senior colleagues, but from my peers as well. I think Golf Club has given my more senior colleagues insight into how the legal profession has changed in the years since they were junior associates, and how it has not.

Finding a good group of women advocates doesn’t need to be limited to one’s firm, of course. Some firms put on networking events especially for women advocates (if you can snag an invite.) Or start your own. I know young women advocates who have regular dinners with other “lady barristers” from firms of similar size and practice area.

Whatever form it takes, having the space and opportunity to talk openly with other women lawyers has many benefits. It is grounding and comforting to vent, trade stories of outrage and success, and discuss practice issues relevant to women in litigation. Establishing a support network of other women advocates has made me a better lawyer, and a more satisfied one. I don’t know what my practice will look like in 5, 10, or 20 years, but Golf Club makes me a little more optimistic that I can plot my own path forward as a woman in litigation, or at least have a good time trying. ♦



Vintage to Vintage Wine and Cheese with The Bench

Thursday, April 24, 2014
Campbell House
160 Queen Street West, Toronto
5:30 pm to 7:30 pm

Members and Non-members welcome

Advocates less than 10 years called don't want to miss this annual opportunity to mix and mingle with the Bench. Historic Campbell House sets the perfect tone for this intimate evening, where you will have the chance to connect with Judges and Masters in a casual and relaxed setting outside the courtroom.

Tantalize and test your palate with tastings and artisan cheese pairings created especially for this event.

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Conduct in Family Law

By: Heather Hansen, *Martha McCarthy & Company LLP*

In the late 1960s and 1970s, Western common law jurisdictions moved away from purely fault-based divorce regimes. In Canada, the 1968 *Divorce Act*¹ introduced "breakdown of the marriage" as a no-fault ground of divorce and in so doing, shifted the emphasis away from the consideration of a spouse's conduct following marriage breakdown. In our modern family law system, we hear and say daily that conduct is irrelevant. However, a closer look reveals that the parties' behaviour, actions and attitudes continue to have powerful implications that can significantly impact and shape the outcome of a case.

By way of example, the equalization of net family property under Part I of the *Family Law Act (FLA)* is based on the premise that spouses make an equal contribution to the marriage, financially or otherwise.² Equal sharing is not just a starting presumption but a common standard that is only changed if it would otherwise be unconscionable.³ A finding of unconscionability may lead to an unequal division of the parties' Net Family Properties. However, the unconscionable standard is a very high one, beyond even 'grossly inequitable', and has been described as something that would 'shock the conscience'.⁴

Is the purpose of unequal division also to punish spou-

sal misconduct and open the door to an examination of conduct? The drafters of the *FLA* were guided by a 1969 Law Reform Commission report that stated: “The power to vary should be exercised only to avoid the possibility of gross injustice, and not as a disciplinary or punitive measure with respect to the fulfilling of matrimonial obligations.”⁵ In *Levan v Levan*, Justice Backhouse held that equal division should only be “departed from to the extent necessary to avoid unconscionability,” instead of modified to reach the most fair division possible.⁶

The Court of Appeal has decided that courts should have broader discretion in order to “rectify the otherwise unconscionable result and, at the same time, [send] a warning to spouses tempted to hide or divert assets that it is not worthwhile to do so.”⁷ Two years following that statement, the Court of Appeal in *Serra v Serra* clarified that “the true target of the limited exception to the general rule is a situation that leads to an unconscionable result, whether that result flows from fault-based conduct or not.”⁸ So while conduct is a major factor that leads to unconscionability, it is not the *raison d’être* of the exception to equal division.

The kind of conduct that can lead to an unconscionable result includes hiding or sheltering assets,⁹ depleting away assets on risky ventures or gambling,¹⁰ and spending family property on luxuries or extra-marital affairs.¹¹

In the recent, 2013, Ontario Superior Court case, *Panchalingam v Pathmalingam*,¹² the court turned this issue upside down and engaged in an examination of good conduct. Here, the husband lived in the matrimonial home since separation and fully supported the parties’ three children. The wife incurred significant post-separation debt that was secured against the parties’ only material asset: the matrimonial home. The husband submitted that he should not have to pay an equalization payment and relied on the court’s analysis in *Serra*. Justice Croll, quoting from *Serra*, noted:

There is no principled reason that I can see, given the language of the act and its purpose or objects, to confine the word “unconscionable” in s. 5(6) only to circumstances arising from fault-based conduct on the part of one of the spouses. Although unconscionable conduct is obviously an appropriate consideration in determining whether equalizing the net family properties would be unconscionable, in my opinion the true target of the limited exception to the general rule is a situation that lead to an unconscionable result, whether that result flows from fault-based conduct or not.¹³

Justice Croll found that the wife engaged in a deliberate course of action which constituted a reckless depletion of her net family property. She also failed to pay child support and had accumulated arrears. This stood in contrast to the husband’s exemplary conduct: he paid the bills, supported and cared for the children and maintained the home. Justice Croll found that it was as much the husband’s *good* conduct as the wife’s *poor* conduct that supported her conclusion that it would be unconscionable for the husband to be required to pay an equalization payment to the wife.¹⁴

While we have moved away from the old “fault-based” system where the conduct of the party – in of itself – was a basis for making various substantive orders, conduct continues to be relevant in the determination of corollary relief in a modern family law case. Conduct can be focused and discreet: an isolated event such as foregoing an employment opportunity, to broad and philosophical: the impact of a spouse’s conduct over the course of a marriage on their partner’s mental health and stability. Despite the amorphous nature of conduct in the modern family law case, it is clear that its role is far less linear than in the historic fault-based regime. The law reveals that the issue of conduct and the remedies that flow therefrom are often used as a fail-safe for an imperfect system. Family law has moved towards increased uniformity and predictability at the expense of flexibility and individualized justice. Conduct is a factor built into the system to mitigate potentially unfair formalism.¹⁵ ♦

(Endnotes)

1. *Divorce Act*, SC 1968-1969, c 24.
2. *Family Law Act*, RSO 1990, c F3 at s 5(7) [*FLA*].
3. *Ibid* at s 5(6).
4. See the decision of Justice Backhouse in *LeVan v LeVan*, 2006 CanLII 31020 (ON SC) at para 258 [*LeVan*].
5. Ontario Law Reform Commission, *Report on Family Law*, Part IV (Department of Justice, 1969).
6. *LeVan*, *supra* note 4 at para 274.
7. *Czieslik v Ayuso*, 2007 ONCA 305 (CanLII) at para 35.
8. *Serra v Serra*, 2009 ONCA 105 (CanLII) at para 58 (emphasis added) [*Serra*].
9. *Stone v Stone*, 1999 CanLII 15094 (ON SC).
10. *Weddel v Weddel*, 2006 CanLII 21589 (ON SC); and *Naidoo v Naidoo* 2004 CanLII 34415 (ON SC).
11. *Hutchings v Hutchings*, 2001 CanLII 28130 (ON SC).
12. *Panchalingam v Pathmalingam*, 2013 CarswellOnt 8578 (Ont SCJ).
13. *Ibid* at para 22, citing *Serra*, *supra* note 8 at para 58.
14. *Ibid* at paras 25-32.
15. Reproduced in part from: “Why Conduct Still Matters” Heather Hansen (2011 Six Minute Family Lawyer Presentation).

Around TAS Photos



Summer Trial Advocacy College

Thursday, June 5 & Friday, June 6, 2014
9:00 am to 4:30 pm
The Advocates' Society
250 Yonge Street, Suite 2700, Toronto

Reserve your spot today for this intensive two day workshop and master the art of trial advocacy. This hands-on program will test and refine your skills in case analysis, opening statements, examination-in-chief, cross-examination, and closing argument in a safe and supportive learning environment.

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Practice Management: Managing Your Way to Trial Success

Friday, May 23, 2014
1:00 pm to 4:30 pm
The Advocates' Society
250 Yonge Street, Suite 2700
Toronto

Learn not just what you should be doing differently in managing your practice, but what you have to be doing in order to meet professional obligations and attain trial success!

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We invite your comments and feedback. E-mail us at: jessical@advocates.ca.