



# Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

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## CHAIR CHAT

BY: DANIEL NAYMARK,  
NAYMARK LAW



Ah, Blue Mountain in October. What could be better? The biennial Fall Forum is behind us. It was a great opportunity for young advocates from Ontario and beyond to network with colleagues, benefit from the wisdom of respected senior colleagues and dance till all hours in the Blue Mountain Village while looking out of place in their suits. Highlights of the weekend included Justice Cromwell's inspiring keynote address and two mentoring roundtables where young and not-so-young advocates met for candid talk about practice management and ethical issues.

We have more good things in store. We are taking advantage of Campbell House's location on the Toronto Santa Claus

Parade route. On November 20th, young advocates are invited to Campbell House from 12:30 to 3:00 with their kids for family-friendly crafts, games, Santa, and the chance to see YASC members in elf hats. Spots are limited.

Don't worry, not all our events are kid-friendly. Come *without* your kids to our next Toronto Pub Night, November 16th at Pravda Vodka Bar. We guarantee there will be no crafts or games or family-friendly anything. Though there's no telling whether or not there will be elf hats.

On November 3rd, we are hosting our first Fireside Chat event in Ottawa. The Fireside Chat series is my personal favourite. They feature preeminent members of the bench and bar regaling young advocates with anecdotes and reflections from their careers in an informal, intimate setting. Our guest at our first Ottawa Chat is none other than David Scott, Q.C. Sign up now—registration is free for members and space is limited! ■

*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.*



### Anti-SLAPP legislation and the importance of process



BY: CARLO DI CARLO,  
STOCKWOODS LLP

#### Introduction

As advocates we generally are taught axioms advising us to get to the nub of an issue and to not let process get in our way. We favour “substance over form” and discourage “dancing on ceremony”. But, obviously, there are instances where process does matter. In fact, sometimes, the process used will impact whether a substantive issue will be dealt with. This last point is relevant as courts begin to interpret the fairly recently enacted *Protection of Public Participation Act* (“PPPA”). This act amended the *Courts of Justice Act* to create a *sui generis* regime that allows a defendant to bring a motion to dismiss a strategic lawsuit against public participation (“SLAPP”).

The first courts dealing with the PPPA are adjourning these motions and scheduling them for 2 days. This is a troubling trend that is contrary to the wording of the PPPA as well as the intention behind the act. It creates the risk of transforming a regime that was meant to balance the scales between the (typically) wealthy strategic plaintiff and its defendant, into one that is inaccessible to the very individuals the regime was meant to assist.

#### Background on the PPPA

The express purpose of the PPPA is to

encourage expression on matters of public importance and to discourage SLAPPs. During debate at the Legislative Assembly, the Assistant to the Attorney General elaborated on the purpose of the PPPA stating:

We all know that strategic lawsuits against public participation have long been used as a tactic by companies or individuals to tie the hands of weaker opponents—typically those who cannot afford the cost of a lengthy legal battle. What we have is an unfair way to win an argument, and this needs to come to an end.<sup>1</sup>

The PPPA accomplishes this purpose in two ways. The first is through the creation of an expedited process. The PPPA provides that a motion brought under the PPPA “shall” be heard no later than 60 days after the notice of motion is filed with the court. Further, the court is not provided with the forensic powers granted under Rule 20.

The second point is complementary to the first. After the defendant shows that his/her expression relates to a matter of public importance, the regime places a significant onus on the plaintiff to show the court: (a) that its claim has “substantial merit”; (b) that the defendant has “no valid defence”; and (c) that the harm the plaintiff has suffered is likely to suffer outweighs the importance of expression on matters of public importance.<sup>2</sup>

#### Why lengthy hearings undermine the PPPA

Although the wording of the act suggests that it will provide robust protections to defendants of SLAPPs, recent decisions may cause these protections to be largely illusory. Specifically, there is a risk that the first courts hearing these motions will establish a procedural precedent that will undermine the purpose and effectiveness of the PPPA. This is demonstrated in the *Papa v. Zeppieri* matter, where the court adjourned a

PPPA motion initially scheduled for October 9, 2016 until June 2017. The rationale provided, in part, was the court’s view that this motion required 2 days to argue.<sup>3</sup>

This creates a potentially worrisome trend, one that could threaten the viability of this act. Requiring a 2-day motion to determine the application of the PPPA all but guarantees that the right to have a hearing within 60 days will not be adhered to. It provides the strategic plaintiff with an obvious invitation to delay the dismissal of his or her claim. This is completely contrary to what the Legislature intended when it drafted the PPPA. During the debate introducing the PPPA, the Assistant to the Attorney General noted that the PPPA would identify strategic lawsuits “quickly” in order to stop individuals from using such suits to “silence critics”.<sup>4</sup> The almost 9-month delay in the *Papa* decision is precisely the harm that the Legislature intended to avoid: the continuation of the SLAPP allows its deterrent effect to continue. As MPP Jagmeet Singh, for the NDP, stated:

Now, in the case of a strategic lawsuit designed to deter public participation, the initiator of that lawsuit has a vested interest in ensuring that the lawsuit takes as long as possible to get a resolution. In fact, they don’t want the lawsuit to get a resolution. It’s the sword of Damocles, it’s the threat of that lawsuit, which is actually the deterrent.<sup>5</sup>

More than just the delay, the length of the hearing is also contrary to the Legislature’s intention in terms of the type of hearing that it intended to create. As the PPPA Advisory Panel noted in its report recommending the adoption of this legislation, the “existing remedies are not effective” to deal with SLAPPs. Courts are often reluctant to dismiss cases on preliminary motions based on affidavit evidence and oral argument whereas a trial can be “very expensive and time-consuming”.<sup>6</sup> Imposing the

## ANTI-SLAPP LEGISLATION cont...

expense and time of a lawsuit on a defendant, quite apart from whether the claim is successful, has been identified as a central purpose of a SLAPP. It is for these reasons, that the Advisory Panel concluded that the new legislation should be “distinct from the existing rules” and create a regime that is *sui generis*.<sup>7</sup>

And, on the face of the PPPA, that is precisely what the Legislature did. The rigorous onus placed on the plaintiff demonstrates that the Legislature did not intend for courts to engage in a piercing analysis of the facts. Because of this threshold, a detailed forensic assessment of the facts to make credibility assessments is not necessary. As long as a court can find any validity to the defence, that is sufficient for the purposes of s.

137.1 of the *Courts of Justice Act*. This point is further demonstrated by the fact that the Legislature chose not to provide the court with the forensic powers that it has under Rule 20. To the contrary, the Legislature placed a limit on cross-examinations.<sup>8</sup>

Simply put, a lengthy hearing is not necessary for a PPPA motion. It is not an alternative form of summary judgment. It is a *sui generis* regime, intended to quickly weed out strategic suits so as to encourage expression on matters of public interest and discourage retaliatory lawsuits. However, by treating it as though it were summary judgment, and thus requiring a lengthy hearing, courts will be inadvertently assuring that the PPPA will not accomplish this goal. It will become a remedial statute that is effectively out of reach for those who need its remedies the most. ■

1. Ontario, Legislative Assembly, House of Commons Debates, No 112 (27 October 2015) at 1620 (Hon Lorenzo Berardinetti).
2. See *e.g.*, *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(1)(a)–(d).
3. Kim Zarzour, “Ruling on Richmond Hill anti-SLAPP legislation case delayed” online: (2016) Metroland Media < <http://www.yorkregion.com/news-story/6900998-ruling-on-richmond-hill-anti-slapp-legislation-case-delayed/>>.
4. Ontario, Legislative Assembly, House of Commons Debates, No 112 (27 October 2015) at 1620 (Hon Lorenzo Berardinetti).
5. Ontario, Legislative Assembly, House of Commons Debates, No 112 (27 October 2015) at 1710 (Hon Jagmeet Singh).
6. Ontario, Anti-SLAPP Advisory Panel Report to the Attorney General, Report to the Attorney General, ¶11.
7. *Ibid.*
8. See *e.g.*, *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.2(4).

YOU AND A GUEST ARE INVITED TO A NIGHT OF LUXURY

## RAISE THE MACALLAN

Join us for cocktails and a private tasting  
of The Macallan range

**Wednesday, November 30, 2016**

Select a session:

Session 1: 6:00 P.M. – 7:00 P.M. OR Session 2: 8:00 P.M. – 9:00 P.M.

**The Omni King Edward Hotel**

The Vanity Fair Ballroom, Second Floor  
37 King St. East, Toronto

**Please arrive promptly for your session.**

RSVP via Eventbrite [www.raisethemacallan-toronto-2016.eventbrite.ca](http://www.raisethemacallan-toronto-2016.eventbrite.ca)  
by November 19, 2016 with your choice of session.

Must be of legal drinking age. Please savour responsibly. Transportation arrangements recommended.



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## FALL FORUM REPORT



BY: DAVID CAMPBELL, ROGERS PARTNERS LLP  
& EMILY PINCKARD, ROSS BARRISTERS

One-hundred and eighty-five young lawyers, thirty mentors, and a retired Supreme Court of Canada Justice converged on one of Ontario's premier resorts for the Society's showcase conference for young lawyers. On October 21–22, The Westin Trillium House at Blue Mountain was the venue for the seventh biennial Fall Forum. This year's theme was *Today's Litigator: How to Survive and Thrive in a Changing Profession*.

Conference Chairs Meaghan Boisvert, Erin Durant, Shaun Hohman, and Malik Martin organized the event, and emceed several of the presentations. Meaghan Boisvert even drove TAS President Bradley Berg to Collingwood from Sudbury, where he had attended a gala dinner with the local bar.

Interest in this year's conference was national. Lawyers from as far away as Halifax, Calgary, and Vancouver made the trip to Blue Mountain.

The first day featured some of Canada's top lawyers and judges providing insight on being a specialist or generalist, mediation advocacy, opening your own firm, getting back up after a knockdown, and the view from the judge's perspective.

After the cocktail reception, sponsored by Collins Barrow, recently retired Supreme Court Justice Thomas Cromwell opened the dinner portion of the program with a keynote address. The wit, warmth, and humour of his speech would be lost in any attempt to describe it.

Wrapping up the dinner, TAS Vice-President Sonia Bjorkquist and YASC Chair Daniel Naymark presented four exceptional award winners with their prizes. See the photos on page 6 for further details about the accomplishments of Denisa Mertiri, Gerard Kennedy, Maureen Edwards, Sara Mahoney, and Lauren Tomasich.

Thanks to the generosity of Bentham IMF, attendees continued the evening of collegiality at the After-Party, complete with pizza bar. Conviviality spilled over into Blue Mountain Village for those who wanted to dance the night away.



After breakfast, Saturday's program kicked off with demonstrations featuring Emily Lawrence, Shaun Hohman, and Meaghan Boisvert who worked with senior counsel from the TAS board of directors to perform re-enactments of common displays of incivility that many young advocates face today.

The last agenda item at Fall Forum was the crowd-favourite mentoring roundtables, which are often the most highly regarded part of the program. Members of the TAS board of directors, Justice Cromwell and Justice Horkins met with small groups of young advocates to answer questions, and provide helpful insight into various legal practice topics. Check out the Twitter feed from the event to read the live feedback using [#FallForum2016](#).

This exceptional learning and networking experience was made possible by the generous contribution of time by judges and senior counsel, and by the financial support of our sponsors—Bentham IMF, Collins Barrow and Neesons. We are already looking forward to 2018! ■

Thanks to Fall Forum  
2016 Sponsors:

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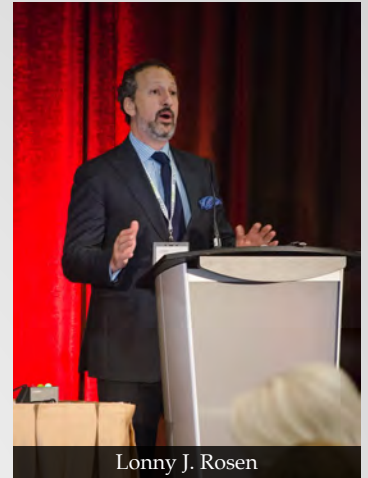
FALL FORUM PHOTOS



J. Thomas Curry, Joseph J. Markson,  
Michelle C. Awad, Q.C.



Derek G. Friend, Aaron Franks, Sarah J. Armstrong,  
Andrew Bernstein



Lonny J. Rosen



The Hon. Justice William B. Horkins, The Hon. Justice Darla  
A. Wilson, The Hon. Justice David M. Brown, Erin H. Durant



D. Brian Foster, Q.C., Daniel Naymark,  
Janice L. Wright, Sarah J. Armstrong



Brian J. Gover, Ann L. Morgan,  
J. Scott Maidment



The Hon. Justice Darla A. Wilson



Bradley E. Berg, TAS President



The Honourable Thomas A. Cromwell

Congratulations to the recipients of the first biennial Young Advocates' Standing Committee Awards.

Outstanding Participation Award - Denisa Mertiri, *Thornton Grout Finnigan LLP*

Commitment to Pro Bono Award - Gerard J. Kennedy, *Ph.D. Candidate, Osgoode Hall Law School*

Commitment to Pro Bono Award - Maureen Edwards, *Martha McCarthy & Company LLP*

Writer's Award - Lauren Tomasich, *Osler, Hoskin & Harcourt LLP*

Civility Award - Sara Mahoney, *Cavanagh Williams LLP*



Denisa Mertiri



Gerard J. Kennedy



Maureen Edwards



Lauren Tomasich



Sara Mahoney

My *pro bono* practice to date, largely supported by my former firm, Osler, Hoskin & Harcourt LLP, has been enormously enriching and fulfilling. It is also largely the basis of my research interest in access to justice. The Advocates' Society in general, and the Young Advocates' Standing Committee in particular, has been a wonderfully supportive network through which I have made friends and colleagues from whom I have learned and will continue to learn. I am honoured and humbled to receive this award.

—Gerard J. Kennedy

Thanks so much to YASC for the Writer's Award, and for encouraging young advocates to contribute to The Advocates' Society publications. For those of us who have a day job that involves a significant amount of legal writing (in short, all of us), contributing to The Advocates' Society publications allows us to be creative and to approach issues relevant to the bar from a different perspective. I found that attending The Advocates' Society events and reporting on learnings and highlights is an effective way to engage with The Advocates' Society, build on what I learned and build profile at the same time, and I encourage other young advocates to do the same.

—Lauren Tomasich

As the saying goes: you are only as good as the company you keep. I am extremely lucky to be surrounded and mentored by the best company! Thank you to my fantastic colleagues (past and present) in the Ottawa bar, especially those who have gone the extra mile of nominating and selecting me as this year's recipient, and for encouraging and supporting me as a young advocate. A special thanks also to the YASC and TAS for recognizing the importance of the principles of civility and professionalism in our profession.

—Sara Mahoney

YASC Awards Presented at Fall Forum 2016



Denisa Mertiri, Sonia Bjorkquist,  
Daniel Naymark



Daniel Naymark, Gerard J. Kennedy,  
Sonia Bjorkquist



Sonia Bjorkquist, Lauren Tomasich,  
Daniel Naymark

## Remarks on behalf of new lawyers



BY: JACOB DAMSTRA,  
LERNERS LLP

*Jacob Damstra offered to share his remarks from the 190th Annual Fall Opening of the Courts in London, Ontario on Sep 28, 2016.*

Your Honours, Your Worships, Dean Scott, servicemen and women, new colleagues of the Bar, friends, families and members of the community and the church, good evening. And to the Salvation Army, thank you for hosting our 190th Annual Fall Opening of the Courts in London and for providing this magnificent space and marvelous band.

My name is Jacob Damstra and I have been asked to give remarks on behalf of the newest members of this great profession of law in London and Middlesex. While I am honoured and humbled to speak for myself and my peers of the 2016 Call to the Bar, at this stage in my two week old career as a lawyer, I am not sure I have much to say—don't worry, my experience with lawyers assures me this loss for words won't last long. In any case, I thought I might make brief comments on what the practice of law—and indeed, the entire justice system—mean to me as a new lawyer. And I say the entire justice system, because I see my role as a lawyer practising law as but a very small piece of what is necessary to preserve, promote, and protect the rule of law.

I first want to acknowledge and thank the men and women on

the front lines of justice. The officers patrolling our streets, the constables securing our courts and transporting offenders, at the local, provincial and national levels, all deserve the deepest respect and gratitude for putting themselves in harm's way to make our society a safer, more peaceful, more just one in which to live. I am blessed to be marrying into an Ontario Provincial Police family, and I myself serve as an officer in the Canadian Armed Forces; thus I am palpably aware of the threats we face and the importance of peace and order on both domestic and international levels. So to those of you in uniform here today and to all of the others with whom you serve: thank you, I—we lawyers—salute you.

From the front lines, to behind the bench, I want to address another institution with which I feel close—the judiciary. We all know, at some level, how fortunate we are to live in a society where the independence and impartiality of the judiciary is guarded so vigilantly. As a result, we can trust that disputes will be resolved fairly and justly, and peace and order in our communities will be preserved. As a Law Clerk to the Justices of the Court of Appeal, I had a first-hand, behind the scenes, view of this. I must apologize to my new colleagues at the Bar, I don't have any secret formulas about how to win an appeal, perhaps to the dismay of my new employer. But what I can tell you is how much the judges with whom I worked care about reaching not only the right result, but the result that is fair and just too (even though, as lawyers, we know *our* clients is always right). And I did learn, having asked many judges who have lived their entire lives in law: “what is the greatest lesson you have ever learned?”—certain themes are repeated. I don't think I'm breaching any Judge-Clerk confidentiality to share two of these lessons today. The first is *be honest*—with yourself and with others, because in the end the truth will prevail, it always does; life, and the practice of law, are far more

fulfilling when lived virtuously. The second is *be humble*—never overestimate your own ability, knowledge, or importance and always keep learning.

Finally, I want to emphasize the importance of events such as this one. Some, especially of my vintage, might view such ceremonial events as outdated and unnecessary. But I would encourage my generation of lawyers to continue to attend and support this tradition and others. The Opening of the Courts provides an opportunity for the Bench, the Bar, the Police, faith groups, and the community to come together; to remember we are each only one part of the justice system; to acknowledge we have much to share with and learn from each other.

I will close with a passage I have written and refined over the past few years, as I contemplated my impending entry into the profession of law. I think this captures my philosophy about life as much as it describes how I see my role in this justice system of which we are all a part:

*Without peace, the seeds of justice will not take root;*

*Without justice, the flowers of peace will never blossom;*

*Without love, which gives people the integrity and the courage to do the right things and fight for them both, the world will enjoy neither.*

So, officers, justices, and colleagues of the legal profession, as I set out on my legal career, I intend to do so with integrity, courage, and love, to fight for peace and justice. I will attempt to practise with honesty and humility; I will strive to attend and support this tradition and others, to learn from each of you, and to share what I learn along the way. I hope that you will join me. ■

## Interview with Naomi Lutes, Greenspan Humphrey Lavine

BY: SHANNON BEDDOE,  
MARTHA MCCARTHY & COMPANY LLP



1

**Q: Why did you become a litigator or advocate?**

**A:** Growing up, I was fascinated by criminal law. Why? No, not because I had any lawyers in my family, but because I loved *Perry Mason* and *Matlock*, two of the only “adult” shows that I was allowed to watch as a child. I was not allowed to watch *Full House*, but *Perry Mason* was just fine with my parents. So, when I arrived at law school, I decided to see if my interest in criminal law would hold up in real life: I volunteered (and later worked at) the University of Toronto’s legal clinic, Downtown Legal Services, which is where I truly fell in love with criminal law.

2

**Q: Which word do you prefer: litigator or advocate?**

**A:** Advocate. Because whether or not I see the inside of a courtroom, I always advocate for my client.

**Q: What is your year of call?**

**A:** 2011

3

4

**Q: What do you like most about the practice of law?**

**A:** That it’s never boring. Criminal law is varied in both subject matter and people; it’s dynamic, challenging, intellectually stimulating, and incredibly rewarding. Additionally, my practice includes both trial and appellate work, which adds yet another layer of variety.

7

**Q: What would you consider your greatest achievement?**

**A:** I hope that my greatest achievement is still ahead of me! In terms of what I’m most proud of so far in my career, it would probably be my work on *R. v. Fercan*, 2016 ONCA 269, where, on behalf of our client, we successfully argued for costs against the Federal Crown. The costs award was upheld on appeal in a decision in which the Court recognized, for the first time, the jurisdiction of the Ontario Court of Justice to award non-*Charter* costs.

8

**Q: What is your greatest fear in practice?**

**A:** That my mistakes will cause a client to go to jail.

**Q: How would your colleagues describe you?**

**A:** A team player, dedicated, slightly nerdy, quick to laugh.

9

**Q: What is the latest non-legal book you’ve read?**

**A:** It’s a tie between two books, as I finished them at about the same time: *The Black Widow* by Daniel Silva and *The Cursed Child* screenplay by J.K. Rowling.

6

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

**A:** Driving to work every day (we have a handy parking lot attached to our building).

10

**Q: What is your favourite case?**

**A:** *Regina v. Morrissey* (1995), 97 CCC (3d) 193 (Ont. C.A.) would win if it were a contest of cases I most frequently cite in appeals, but I’ll have to give it to *Regina v. Stinchcombe*, [1991] 3 S.C.R. 326 for its importance and lasting implications in criminal law.



11

**Q: Which talent would you most like to have?**

**A:** The ability to speak multiple languages.

12

**Q: Who or what is the greatest love of your life?**

**A:** My husband.

15

**Q: What is your favourite drink?**

**A:** Alcoholic: red wine.  
Non-alcoholic: diet coke.

16

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

**A:** Brian Greenspan.

13

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

**A:** Probably a classics professor. Had I not decided to apply to law school, I planned to pursue a masters, then a PhD, in classical studies, which was my undergraduate major.

14

**Q: What is your most distinctive characteristic?**

**A:** This is a tough question! Does worrying count? I'm very stubborn: I work hard, I detest change, and am very loyal.

17

**Q: What unique knowledge have you gleaned in your practice that you can share with other young advocates?**

**A:** These are hardly unique but bear repeating: practice makes perfect, preparation is everything, and be yourself - your persona as a litigator should be true to your persona out of court.

Also, as a corollary to the old adage that it takes a lifetime to build a good reputation and only one incident to ruin it, I think it's important for young advocates to know that, when starting out, we frequently do get the benefit of the doubt. If you prepare and have something of substance to say, judges will listen – they don't write you off because you are a young advocate. If you are professional, respectful and prepared, you will have an audience. ▀

## Upcoming Events



**YASC Pub Night  
(Thunder Bay)**

Nov 2, 2016



**Fireside Chat on  
Advocacy (Ottawa)**

Nov 3, 2016



**YASC Pub Night  
(Toronto)**

Nov 16, 2016



**Santa Claus Parade  
Party (Toronto)**

Nov 20, 2016



**Bench & Bar Pub  
Night (Kingston)**

Nov 24, 2016