

News

Moves

- **Ronald Dimock** has joined the Toronto office of global mediation and arbitration services provider JAMS, as an arbitrator and mediator in the intellectual property area. Dimock, who has nearly 40 years of patent, trademark and copyright law experience, remains in practice as a co-founding partner in Toronto law firm Dimock Stratton.
- Tax lawyer **Alex Pankratz** has joined the Toronto office of worldwide law firm Baker & McKenzie in Toronto as a partner in the global tax group. Pankratz, formerly at Osler, Hoskin & Harcourt, advises on public and private M&A, reorganizations and tax disputes.
- **Ralph E. Lean** has joined the Toronto office of *Gowlings* as counsel, while securities lawyer **Linda Hogg** has joined the firm's Vancouver office as a partner in the corporate finance and M&A groups. A corporate director certified by the Institute of Corporate Directors, Lean has served and continues to serve on the boards of a range of Canadian public and private companies, charities, foundations, and civic groups. Hogg, formerly at McMillan LLP, also is a lecturer at Simon Fraser University on finance, governance and compliance.
- **Siobhan Sams** has joined the commercial litigation group of Vancouver law firm *Harper Grey* as an associate. Sams, called to the bar in 1996 in B.C., formerly spent 13 years as a lawyer in the product liability group at Hogan Lovells in London.
- **Gordon Brandt** has joined the Vancouver office of Western Canada law firm *Lawson Lundell* as an associate in general civil and commercial litigation. Brandt clerked for judges of the British Columbia Supreme Court, and articulated and practised in the Vancouver office of Heenan Blaikie.

Credibility ruling reversed in child case

MICHAEL BENEDICT

Despite the “very high degree” of deference that must be paid to a trial judge’s assessment of a witness’s credibility, there remain circumstances when that evaluation can be reversed, according to a recent decision by the Court of Appeal for Ontario.

The case, *R. v. D.T.* [2014] ONCA 44, involves alleged sexual assault by a middle-aged man, a family friend of a nine-year-old who was 11 when he testified at trial. “This is a unique case because, although it affirms the principle of significant deference to a trial judge, it sets out circumstances for reversible error,” said Nikos Harris, a former appellate counsel who teaches criminal law at the University of British Columbia.

While acknowledging that “a flaw or contradiction in a child’s testimony should not be given the same effect as a flaw in an adult’s,” the appeal court nevertheless criticized the trial judge’s “failure to analyze *why* his concerns about reliability did not impact his assessment of [the child’s] credibility.” As a result, the court’s three-judge panel unanimously decided in its Jan. 21 ruling to overturn the conviction and order a new trial.

However, the complainant’s credibility may not be tested again. “I would be very surprised if the Crown proceeded with a retrial,” said Tina Yuen, a Toronto criminal appeal lawyer who handled the successful appeal. “There were so many problems with the witness at trial and now there’s this judgment.”

She added: “The trial judge never addressed credibility. This was the critical issue. Not about the details, but whether the events actually happened.”

For Yuen, the appeal ruling is about principle. “The case makes clear that although the stan-

dards for a child’s testimony are less than for adults, that does not mean that there should be no standards. Credibility findings are not immune. They must have a reasonable and logical basis supported by the evidentiary record.”

Writing for the court, Justice George Strathy said that while there was testimony that could have led to a conviction the trial judge’s “reasons for accepting D.B.’s evidence suffer from palpable errors of both fact and law, which vitiate his conclusion on D.B.’s credibility.”

Strathy added: “The trial judge seems to be saying that his concerns with D.B.’s reliability did not impact his credibility. Indeed, there were some serious issues about D.B. as an historian, including his vague and inconsistent descriptions of the alleged assaults, his uncertainties as to times and places and his repeated emotional breakdowns in the face of cross-examination, revealing problems with his versions of events.”

Simply put, according to UBC’s Harris, the trial judge made three fundamental errors. The first was a legal error, attaching credibility to the child’s prior statements that supported his testimony. D.B. had described his alleged assaults to his school counselor and to his mother, after denying to her on two previous occasions that anything untoward had happened. But the appeal court said that relying on these earlier assertions wrongly presupposes their truth.

“The fact of multiple disclosures cannot support D.B.’s credibility,” Strathy wrote. “This was an error of law.”

Secondly, the trial judge got a significant part of the record wrong. Based on the mother’s and counselor’s testimony, the trial judge, according to Strathy, “appears to have concluded



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Criminal appeal lawyer

that, having unburdened himself, the complainant’s behaviour improved, thus confirming his truthfulness.” But Strathy said there was no evidence upon which to base this conclusion of subsequent better conduct. “Accordingly, it was a palpable error of fact for the trial judge to rely on the complainant’s improved behaviour after the disclosure.”

Finally, the trial judge was illogical in his reasoning when he relied on the child’s disavowing an earlier lie to establish the truth of his other allegations. “The fact D.B. recanted one statement and not the other cannot mean the other becomes more believable,” Strathy wrote. “The trial judge’s reliance on D.B.’s knowledge of the difference between a lie and the truth in order to find him credible was not logically probative of the credibility of the allegations.”

Harris said that for these reasons the case is instructive “because it is a rare example in case law of where less deference is given a trial judge’s credibility findings.”

Toronto criminal lawyer Craig Penney agreed that while the case affirms the deference principle, it also affirms that trial judges can’t reach conclusions for the wrong reasons. “Judges are not endowed with divining rods that allow them to magically determine who is telling the truth and who is telling a lie,” said Penney. “As much as judges are trained, experienced and have ample guidance from other cases, mistakes are made in the search for what happened.”

The case is also a reminder that defence counsel “must be wary of that slow but steady steamroller that gives voice to alleged victims and punishes the accused with the operator atop losing view of the accused and his rights,” Penney added.

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Tel: (905) 479-2665 Fax: (905) 479-3758

Toll-free: 1-800-668-6481

Email: comments@lawyersweekly.ca

Main Office

123 Commerce Valley Drive East

Suite 700, Markham, ON L3T 7W8

Ottawa Bureau

c/o Parliamentary Press Gallery

Rm 350-N, Centre Block

Parliament Hill, Ottawa, ON K1A 0A6

Tel: (613) 820-2794 Fax: (613) 995-5795

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Scott Welsh (905) 479-2665, ext. 324

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