News

Moves

- *Borden Ladner Gervais* hired 23 lawyers to join the firm in Vancouver, Ottawa, and Toronto. They are: **Kevin Barr** in the Vancouver office in construction, bankruptcy, insolvency and restructuring and **Stephen Holmes**, estates and trusts, business purchase and sale, corporate tax and family wealth; in Ottawa, **Jeffrey Coghlan** specializing in intellectual property, patents and information technology; in Toronto, **Bevan Brooksbank**, **Graeme Hamilton**, **Corry Lomer**, **Ivana Nenadic**, **Suzanne Kittell**, **Graham Splawski** commercial litigation; **Eric Koh**, tax, **Maddie Axelrod**, labour and employment; **Andrew Baker**, environmental, municipal, expropriation and regulatory; **Rachael Belanger**, **Arthur Nahas** financial services; **Laura Costen**, **Roma Lotay** securities and capital markets; **Matthew Gray**, **Natalie Salafia** insurance and tort liability; **Andrew Guerrisi**, commercial real estate; **Naveen Hassan**, health law; **David Major**, construction; **Pierre Permingeat** and **Stephen Nguyen** corporate commercial.
- *Minden Gross* announced **Alexandra (Sasha) L. Toten** joined the firm as part of its business law group. Her work focuses on corporate and commercial law.
- Toronto firm *Robins Appleby* added one partner and three associates to its firm in Toronto. **Rick Angelson** has joined as a partner in the real estate group, which also added and **Zale Skolnik** as an associate. **Charlie Kim** joined as an associate in the business law group. **Daniel Goldgut** joined as an associate in the tax and estate planning group.

One sentence undoes sex assault trial

KIM ARNOTT

A single unclear sentence in an otherwise correct jury instruction has led the Ontario Court of Appeal to order a new trial for a man convicted of sexual assault and sexual interference.

In a split 2-1 decision in *R. v. C.K.-D.*, [2016] ONCA 66, the court decided Ontario Superior Court Justice Catherine Aitken had erred in instructing a jury on assessing the credibility of a 17-year-old witness who testified she had been assaulted by her stepbrother when she was 12.

In her charge to the jury, the trial judge said, "So, in terms of her memory of the actual events, it is the memory of a 12-year old that you are considering."

The sentence was embedded in what the court found to be "otherwise a correct instruction" explaining the need to assess the complainant's evidence as an adult, except with regard to inconsistencies related to peripheral matters, which should be considered in the context of the age she was at the time of the event.

Despite that, Justices William Hourigan and Robert Sharpe found the sentence, at very least, to be "a source of confusion for the jury on the critical issue in the trial, being the assessment of A.Y.'s credibility."

But in dissent, Justice Mary Lou Benotto said she would not have allowed the appeal based on her reading of the entirety of the charge.

"The impugned sentence cannot be viewed in isolation," she wrote. "The instructions before and after the impugned sentence, and the charge as a whole, made the jury's task clear. I do not agree that the jury could have been misled. Moreover, even if the impugned sentence — viewed in isolation — did not accurately reflect the law, I do not agree that it could have led to a miscarriage of justice."

> I read it as a bit unfortunate that the appeal was allowed on the basis of a rather minor slip in the language of the trial judge, who seemed to be trying to illustrate or expand on the standard charge in a way that went wrong.
>
> **Lisa Dufraimont**
> Osgoode Hall

> If you are a child, you may not remember if you were in Grade 5 or Grade 6 when the assault occurred. But you may remember it in relation to your 10th birthday. The events that have meaning to a child may be narrower in range than for an adult.
>
> **Susan Vella**
> Rochon Genova LLP

Queen's University law professor Nicholas Bala said the decision will provide additional impetus to trial judges to stick to standardized jury instructions that use wording previously approved by the courts of appeal. "It sends a message to trial judges to be extremely careful in these cases in the exact words they use."

However, he added, research into jury decision making belies the notion that a few select words are likely to be ultimately influential. In fact, evidence suggests that juries often take in a limited amount from a lengthy jury charge.

"With regard to the fact that one phrase could've been more precise in the context of the overall charge, I personally find the comments of the dissent persuasive, and indeed, consistent with the growing body of research about how juries actually deliberate," said Bala. "I would certainly agree that the phrase was not ideal but in the broad sense, I think the charge was very clear."

The impugned sentence, which could be read to be either consistent or inconsistent with the law, was interpreted in the most "uncharitable" way by the majority, said Osgoode Hall law professor Lisa Dufraimont.

"I read it as a bit unfortunate that the appeal was allowed on the basis of a rather minor slip in the language of the trial judge, who seemed to be trying to illustrate or expand on the standard charge in a way that went wrong," she said.

Susan Vella, a lawyer with Rochon Genova LLP and an expert in civil sexual assault litigation, says the decision provides guidance consistent with prior jurisprudence around assessing credibility of childhood memories.

In both the majority decision and dissent, she noted, the court reiterated that while the credibility of a witness's evidence is assessed based on their adult testimony, the importance of inconsistencies in peripheral details such as dates, times or the specific order of events should be assessed based on the age of the child at the time of the alleged event.

"If you are a child, you may not remember if you were in Grade 5 or Grade 6 when the assault occurred. But you may remember it in relation to your 10th birthday," she noted. "The events that have meaning to a child may be narrower in range than for an adult."

The successful appeal was argued by Lou Strezos, who assisted the unrepresented appellant as part of the Ontario Court of Appeal Inmate Duty Counsel program.

Interestingly enough, notes Strezos, two appeals were successfully argued on the same day by duty counsel from the program. In *R. v. Ghadban*, [2015] ONCA 760, the same panel of judges allowed a sentence appeal argued by Toronto lawyer Jill Presser. Strezos said he expected he would stay on the case if the Crown opts to appeal.

Such an appeal might offer useful guidance around jury charges, said Bala. "I hope to see this or some other case appealed to the Supreme Court of Canada for clarification or direction on the issue of jury charges and the extent to which appellate courts should be looking at the overall sense rather than specific words or phrases."

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