News

Moves

- Mining lawyer **France Tenaille** has joined the Toronto office of *Gowling Lafleur Henderson* as a partner in the firm's global mining group, with particular expertise in private M&A and project finance in Latin America. Tenaille, a member of the bar in Venezuela as well as Ontario, was previously at Cassels Brock.
- Real estate lawyer **Olga Bochkaryova** has joined Vancouver law firm *Richards Buell Sutton* as an associate in the firm's real estate lending group. Bochkaryova, who also provides her services in Russian, was formerly in-house counsel at a trade finance lender. Also joining the firm: employment lawyer **Michelle Quinn**, formerly at Bobert & Burton and a member of the personal injury, employment, litigation and dispute resolution groups; litigation lawyer **Jonathan Woolley**, formerly at Henshall Scouten; and beer industry lawyer **Carlos Mendes**, formerly at Davis LLP, and part of the commercial real estate and craft breweries and distilleries groups.
- **Brian Awad** has joined Atlantic Canada law firm *McInnes Cooper* as a partner and part of the firm's litigation group. Awad was formerly at Burchells LLP.
- Business law firm *Bennett Jones* has added 10 new partners in three of its Canadian offices: In Calgary, **Alixe Cameron** (commercial and farm property real estate), **Karen Keck** (securities, M&A), **Justin Lambert** (energy, fraud, corporate litigation), **James McClary** (private equity, M&A), **Duncan McPherson** (energy, project development), **Geoff Stenger** (project development) and **Alexis Teasdale** (corporate commercial litigation; in Toronto, **Kristopher Hanc** (M&A) and **Aaron Sonshine** (corporate finance, M&A); and in Edmonton, **Robert Bothwell** (corporate commercial, real estate).

Court struggles with 'victimology' issues

New trial ordered for B.C. man charged with exploiting nanny

KIM ARNOTT

A British Columbia court should not have allowed a "victimologist" to testify as an expert witness without scrutinizing his qualifications as an authority in that field, the province's highest court has ruled.

A new trial has been ordered for a man convicted of three charges under the *Immigration and Refugee Protection Act*, after the B.C. Court of Appeal found in *R. v. Orr* [2015] B.C.J. No. 366 that criminologist Yvon Dandurand should not have been allowed to offer an opinion on a question "critical to the complainant's credibility."

"This is another example of the court wrestling with the challenge of expert opinion evidence, particularly in the area of the behavioural sciences," said Tom Curry, a partner with Toronto-based litigation firm Lenczner Slaght.

During a 2013 jury trial, Franco Yiu Kwan Orr was accused of improperly bringing a non-Canadian nanny into Canada. The nanny, who can't be identified due to a publication ban, called police in 2010 and complained that she was being exploited by the Orr family.

She alleged she was being forced to work 16 hours a day, and was not allowed to leave the house on her own or communicate with people outside the Orr family. She said her passport had been withheld from her, and her contact with her family in the Philippines was limited since her arrival in Canada in 2008.

With her credibility central to the case, the Crown elicited expert opinion testimony from Dandurand to explain why someone in that circumstance might not contact the authorities or share her plight with others for nearly two years.

> "This is another example of the court wrestling with the challenge of expert opinion evidence, particularly in the area of the behavioural sciences.
>
> **Tom Curry**
> Lenczner Slaght

Dandurand was qualified by the trial judge as an expert in victimology, described as a branch of criminology looking at how victims react to their circumstances.

On appeal, counsel for Orr argued that the trial judge erred in making that qualification, and that the lengthy and detailed hypothetical scenario put to the expert so closely mirrored the complainant's evidence that it amounted to oath-helping.

In writing for the unanimous panel, B.C. Court of Appeal Justice Peter Willcock found a lack of testing or examination of the criminologist's qualifications resulted in "insufficient evidence to substantiate his qualification."

"An expert must not only be qualified generally but must also be qualified to express the specific opinion proffered. The courts should be wary of accepting evidence of experts in the behavioural sciences, and ought to look for evidence of subject matter expertise."

He added: "Mr. Dandurand testified in this case about the vulnerability of nannies and the methods employed by the 'people who exploit them.' There was no evidence of how he came to know what is 'very common' in situations such as the hypothetical put to him. There was no examination of the manner in which he became acquainted with the subject matter of his opinion within the area of his expertise."

Along with failing on the qualification element required in the first part of the test outlined in *R. v. Abbey* [2009] O.J. No. 3534, Justice Willcock added "there was a risk (Dandurand's testimony) would run afoul of the exclusionary rule against oath-helping."

The case highlights the importance of a thorough examination of expert credentials, even in the absence of defence objections, said Curry.

"Everybody is struggling with ways to present evidence of this kind...we get to the area of friction between these behavioural sciences and the court's need for some ability to measure the quality of the expert evidence that's being proffered," he said.

Glenn Anderson, author of *Expert Evidence* and a part-time faculty member at Dalhousie's law school, agreed. "These issues really show the challenges we all have with this type of evidence, in terms of evaluating the expertise and objectivity...and the validity or reliability of opinions."

Having decided the expert evidence should not have been admitted, the court didn't need to deal with the appropriateness of asking a hypothetical question closely mirroring the complainant's evidence.

However, Justice Willcock did find the long and detailed question to be "problematic," noting: "There was a risk the jury would consider Mr. Dandurand's evidence as an invitation to believe the evidence of the complainant, not only with respect to her silence but with respect to how she had been treated."

That comment, along with the court's decision to append the hypothetical question posed to Dandurand to its decision, signals "a broad caution" in this area, said Curry.

"They signal that there's a real risk that all you're really doing is overlaying expert evidence on top of the complainant's evidence." he said. "I think guidance will be taken from this case on that issue, although the court didn't find it necessary to decide it."

Anderson said the court's decision offers "a flag for lawyers" as they prepare queries for expert witnesses in cases like this. "It highlights that there can be issues with the use of hypothetical questions."

THE LAWYERS WEEKLY

Publisher
Ann McDonagh

Editor In Chief
Rob Kelly

Senior Editor
Matthew Grace, LL.B.

Focus Editor
Richard Skinulis

Ottawa Bureau Chief
Cristin Schmitz

Production Co-ordinator
Pauline Poulin

Art / Production Designer
Sara Hollander

Correspondents
Kim Arnott, Toronto
Luigi Benetton, Toronto
Thomas Claridge, Toronto
Christopher Guly, Ottawa
Geoff Kirbyson, Winnipeg
Luis Millan, Montreal
Donalee Moulton, Halifax

LexisNexis
CCAB BPA WORLDWIDE BUSINESS

HOW TO REACH US
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

Website
www.lawyersweekly.ca

Member, Ontario Press Council
2 Carlton Street, Suite 1706, Toronto, ON
(416) 340-1981; Fax: (416) 340-8724

GST/HST/QST No.: R121051767

ADVERTISING

Advertising Sales
Jim Grice (905) 415-5807
Ritu Harjai (905) 415-5804
Valery Salo (905) 415-5881

Advertising Traffic Co-ordinator
Jackie D'Souza (905) 415-5801

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

Print Subscription Rates
1 year (48 issues): $305, plus tax
2 years (96 issues): $520, plus tax
1 year U.S./international: $420
1 year student: $70, plus tax
Individual copies: $12, plus tax

Digital Subscription rates
1 year (48 issues): $275, plus tax
2 years (96 issues): $470, plus tax
1 year U.S./international: $375
1 year student: $60, plus tax

Postal Information: Please forward all postal returns to: Circulation Controller, The Lawyers Weekly, 123 Commerce Valley Drive East, Suite 700, Markham, ON L3T 7W8. Return postage guaranteed. ISSN 0830-0151. Publications Mail Sales Agreement Number: 40065517.