NEWS

Judge is rapped for in-chambers talk

Court of Appeal orders new trial in Oshawa sexual assault trial

CHRISTOPHER GULY

The Ontario Court of Appeal has rebuked a lower court judge for holding a mid-trial discussion in-chambers in the absence of the accused.

The three-judge panel ordered a new trial in *R v. Schofield*, 2012 ONCA 120, and issued a reminder to judges about the appropriate procedure for in-chambers meetings with counsel.

Not every in-chambers discussion is prohibited, "especially if the discussion is of a preliminary nature, does not involve any final determination and is recounted in open court in the presence of the accused," Justice James MacPherson wrote. "The test in each case is whether the context and contents of the in-chambers discussions involved the accused's vital interests."

The appellant, William Thomas Schofield, was facing four charges of indecent assault related to alleged acts in the early 1970s.

Greenspan

Justice Alexander Sosna, who presided over the case without a jury, convicted Schofield on two counts following a 12-day trial in 2009 and imposed a three-and-a-half year prison sentence.

Justice Sosna met in-chambers with Crown and defence counsel, after the accused had testified. The judge urged counsel to reach a resolution and indicated that the accused "didn't do too well in cross-examination," the appeal court heard.

On appeal, the Crown conceded that this breached s. 650(1) of the *Criminal Code*, which requires the accused to be present during his or her trial. However, the Crown asked that the convictions be upheld under the curative proviso section of the *Criminal Code*.

The Court of Appeal declined to apply the proviso, in part because it was a "deliberate" decision to exclude the accused from the in-chambers meeting. "The discussions involved very important substantive matters, including the trial judge's stated impressions of the accused's testimony. In my view, the in-chambers discussion had a profound effect on the apparent fairness of the trial proceedings," wrote Justice MacPherson, with Justices Dennis O'Connor and Paul Rouleau concurring.

The Court of Appeal added that it was also inappropriate for Justice Sosna to provide his view about the quality of the accused's testimony. "Those comments, even if they had been made in the presence of the appellant, seriously compromised the trial judge's impartiality," observed Justice MacPherson.

Brian Greenspan, who represented Schofield in his appeal, said that when lawyers are called into a judge's chambers during a trial, they usually expect to discuss "something innocuous like scheduling."

In this case, however, Justice Sosna "essentially initiated a resolution discussion," which

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>
> Justice James MacPherson, Ontario Court of Appeal

took the Crown and defence counsel (not Greenspan) by surprise, Greenspan said.

The Court of Appeal decision is based "on the principle of justice being seen to be done," he said.

In its decision, the Court of Appeal cited one of its own decisions, *R v. Roy* (1976), a case where Greenspan also acted for the appellant.

While the legal issues may not be new, the ruling in *Schofield* reminds judges not to hold such meetings, especially in a judge-alone trial, said James Stribopoulos, a law professor at Osgoode Hall in Toronto.

"Here, the judge was the trier of law and in fact going behind closed doors mid-trial and sharing his views on the evidence and the credibility of the accused," said Stribopoulos, co-author of *Criminal Procedure in Canada*. "There are really no circumstances under which a judge should be meeting with the lawyers in the absence of the accused, period."

He explained that if a judge has forgotten or is unaware of case law in this area, it is incumbent on lawyers to put the brakes on the judge's invitation to meet in chambers during a trial.

"Lawyers go into chambers all the time in the pre-trial stages when the judge wants to talk about something very logistical and not substantive. But that routine can make lawyers forget about the precedents and can cause someone to make a big mistake as happened in this case," Stribopoulos said. "Lawyers have to remember not to allow mid-trial discussions to happen and judges have to remember not to request them."

Elise Nakelsky, who acted for the Crown in the *Schofield* appeal, was unavailable for comment since a new trial was ordered, said Ontario Ministry of the Attorney General spokesman Brendan Crawley. ■

Non-profit act gives charity members more say

Legislative changes may bring more clarity for non-profit groups

DONALEE MOULTON

The clock is ticking for non-profit organizations in Canada. Last fall, the federal government proclaimed the *Canada Not for Profit Corporations Act*, which gives these organizations three years to incorporate under the new act — and adjust to a new legal landscape.

The legislation, is a major — and much needed — overhaul of its predecessor, the *Canada Corporations Act*, said Richard Bridge, a charity lawyer based in Middleton, N.S. "The old act is a shambles. It is incomplete, full of holes and of little practical guidance when it comes to governance issues. Its replacement is long overdue.

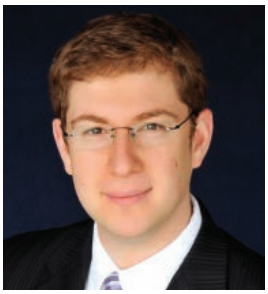
"The new act is exceptionally comprehensive," he added. "It fills the holes in the old act in detail. It builds in modern governance practices and standards and provides guidance on the procedural matters that entities will need to deal with."

That comprehensiveness means more work for lawyers, at least initially. "This legislation is very extensive. It requires careful study," said Terrance Carter, managing partner with law firm Carters Professional Corp. in Orangeville, Ont.

The legal foundation on which non-profit incorporation is built has shifted with the new legislation. "The biggest change conceptually is how incorporation is intended to operate now," said Adam Aptowitzer, a partner with Drache Aptowitzer LLP in Ottawa. "In the past, the government acted in a paternalistic way. In the new act, there are more checks and balances within the corporation."

Directors will have greater scope, he added. "In a fractious environment, they could use these new rights to bring issues to the table that could otherwise be swept under the table."

In addition, the *Canada Not for Profit Corporations Act* serves as a better blueprint for individuals at the helm of non-profits. "For directors, the new act provides clarity on fundamental matters including legal duties and powers, potential liability, standard of care and due diligence, conflicts of interest,



Aptowitzer

indemnification, and procedural matters," Bridge said. According to a background paper prepared by Industry Canada, one of the deficiencies of the previous legislation was its lack of provisions addressing the liability of directors and the balance between the rights and responsibilities of directors and members.

Bill C-4, the new legislation, addresses these shortcomings by creating standard provisions regarding the qualifications of directors, the election and removal of directors by members and the holding of meetings.

Another major shift concerns members. "One of the most significant changes in the new act is the clarification and expansion of the roles, rights, and potential remedies of members. The governance balance between members and directors is tipped toward members," Bridge said.

Lawyers and their clients will want to tread carefully on this new ground.

"A member is, in effect, anyone called a member, [and] calling someone a member gives them the rights of a member," Aptowitzer said. "You may want to use another word or title to distinguish those who are really members and can vote."

Under the new act, he added, "it is a lot easier for members to call a meeting to discuss an issue. It's a lot easier to kick off a director. These are critical issues which often divide boards."

That division may ultimately land organizations and their members in court. "The new legislation allows members to bring lawsuits in the name of the corporation. You might see more litigation using this legislation to push agendas," Aptowitzer said.

Another area of significant change concerns bylaws. The previous act "made it necessary in many cases to create comprehensive bylaws to cover the holes in the legislation," Bridge said. "The new act will provide answers to many of the questions lawyers and their clients encounter, and there will be less need to rely upon bylaws."

The legislation also lays out the rules by which a non-profit will operate unless the organization says differently in its bylaws, said Aptowitzer, who also pointed out that amending the bylaws in certain circumstances can be a little more difficult. "The prudent organization will do a bylaw review."

Clearly, there is more to mull over.

"There are new complexities involving soliciting and non-soliciting corporations and religious corporations. Lawyers will have to be very well versed," said Carter.

The comprehensive nature of the new act means that it is likely less flexible, noted Bridge.

"It is voluminous and in parts challenging to decipher. It will require effort for directors and staff of non-profit organizations and charities to get up to speed on it. Education will be important," said Bridge ■

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