News

Moves

- Corporate commercial litigation lawyer **Usman Sheikh** has joined the Toronto office of *Gowlings LLP* as a partner and member of its firm-wide commercial litigation and class actions groups. Sheikh was formerly a prosecutor in the enforcement branch of the Ontario Securities Commission, and also has private practice experience, most recently at Bennett Jones.
- **Ahmed Bulbulia** and **Mohamed El Rashidy** have joined Toronto law firm *KSM Law*. Bulbulia, a registered trademark agent who previously practised at Ottawa's Macera & Jarzyna, focuses mainly on civil litigation and copyright law, while El Rashidy's practice areas include criminal law, real estate and community advocacy.
- **Martin Masse** has joined the Ottawa office of *Norton Rose Fulbright* as a partner practising regulatory law, including competition, international trade law and procurement matters. Masse was formerly at McMillan LLP.

Awards

- **Roger Lepage**, a partner in the Regina office of *Miller Thomson*, has been named the recipient of L'Ordre des francophones d'Amérique, an annual honour that recognizes people and organizations who play an important part in promoting French language in North America.
- **Tara Erskine**, a labour lawyer and partner at *McInnes Cooper* in Halifax, has been named the 2015 recipient of the Canadian Association of Counsel to Employers' Roy Heenan/Dave Ross Volunteer of the Year award.

Sexual touching conviction set aside

KIM ARNOTT

Alberta's highest court has ruled it was inconsistent of a jury to convict a man of sexual touching of a person under 16 years old after acquitting him of sexual assault.

In a split decision in *R. v. Seufert* [2015] A.J. No. 971, the Court of Appeal for Alberta set aside the conviction and entered an acquittal on the charge of sexual touching. In allowing the appeal, the majority decision by Justices Peter Martin and Barbara Veldhuis noted that the Crown conceded the verdict on the sexual touching charge was "inconsistent with and not logically severable" from the sexual assault charge.

"In the context of this case, if you're going to find him guilty of the sexual interference, you're going to find him guilty of the sexual assault and vice versa. You can't say he's guilty of one and not the other," summarized Dino Bottos, an Edmonton lawyer who teaches criminal law at the University of Alberta.

Errors in the trial judge's instructions to the jury, which may have caused the confusion in the verdicts, also tainted the appellant's conviction on a charge of invitation to sexual touching by a person under 16 years, the court found. It ordered a new trial on that charge.

However, in dissent, Justice Brian O'Ferrall said he would have dismissed the appeal because the sexual touching verdict was neither inconsistent nor unreasonable.

Given that the charges related to a series of incidents that took place over a six-month period, he argued that the jury should not be precluded from finding that there was no doubt sexual touching occurred, even if they couldn't conclude that the intentional "application of force" was present

to result in a sexual assault.

"I recognize that courts have held that non-consensual touchings involve the intentional application of force. However, there is no escaping the fact that the ordinary meaning of the word connotes the use of violence, power or constraint," he noted.

"Those of us trained in the law may understand that both offences involve an assault, but Parliament, which is responsible for the codification of the criminal law, has not only created two separate offences, but also has expressly distinguished between

Silver

the two by making the intentional application of force an element of sexual assault but not sexual touching," Justice O'Ferrall added. "Parliament has not in any way indicated that it is

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>
> **Dino Bottos**
> Criminal lawyer

impossible to be not guilty of one and yet guilty of the other."

Finally, he added that the conviction for sexual touching was not unreasonable, as it was supported by the evidence in the case.

"It is only the perceived logical inconsistency with the verdict of not guilty of sexual assault which makes the verdict at all suspect," added Justice O'Ferrall.

Bottos said O'Ferrall's attempt to distinguish sexual touching as different from an application of force is wrong-headed, has no foundation in law and ignores jurisprudence defining the meaning of the terms.

"He's equating the term 'application of force' with forcefulness. That is, a mere touch wouldn't do as an application of force. But at law, it's long been established that any application of force is sufficient to make out a sexual assault," he said. "You can't let the jury go off and interpret the law based on its own interpretation of the words in the offence section.

"He thinks he's doing the Crown a favour by coming up with this interpretation. But if you think his logic through, you would actually absolve a lot of people in minor sexual assault cases where there was a mere touching of a person violating their sexual integrity."

O'Ferrall's apparent suggestion that force requires violence contradicts the Supreme Court of Canada's finding that any intentional touching amounts to an application of force, said Lisa Silver, a Calgary lawyer and sessional instructor with the University of Calgary's faculty of law.

While it's unsurprising that the court set aside the conviction in this case, given the Crown's concession that inadequate jury instructions led to the inconsistent verdicts, Silver noted two cases along similar lines were decided differently by the Court of Appeal for Ontario.

In *R. v. S.L.* [2013] O.J. No. 1311, Ontario's high court declined to find a conviction for sexual interference to be inconsistent with an acquittal for sexual assault.

In that case, Silver noted, Justice John Laskin found that the acquittal appeared to arise from jury confusion about the concept of force. But given that the conviction was supportable on the evidence and determined by a properly instructed jury, he concluded it should stand.

Leave to appeal that decision to the Supreme Court of Canada was denied, and the Court of Appeal for Ontario issued a very similar decision more recently in *R. v. Tyler* [2015] O.J. No. 4653, she added.

"(Justice O'Ferrall) seems to be following the same train of thought as Justice Laskin did in Ontario, but this may not have been the right case for it, and he did make a few comments that seem legally incorrect."

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