

CRIMINAL LAW

SCC decision rejects “proof of benefit” requirement for breach of trust offences

The “income trust scandal” brought breach of trust issues into the headlines, but the Supreme Court has also recently considered the elements of this offence.

By Michael Tochor

Revelations of a possible leak of confidential information from the Department of Finance in November 2005 were a big story in last January’s election. Opposition parties were quick to call this the “income trust scandal” and these revelations took on an increased significance when the RCMP – in the midst of the election campaign – publicly disclosed that a criminal investigation was underway. The RCMP were seeking to determine whether any government official leaked information to investors who profited from learning the government’s taxation policy before the policy was made public. The investigation focused on whether the offence of breach of trust contrary to s. 122 of the *Criminal Code* had occurred.

Nothing more has been heard about this RCMP investigation; however, the Supreme Court has since redefined the essential elements of this offence in an unrelated case.

While *R. v. Boulanger*, [2006] S.C.J. No. 32 may be seen as clarifying the elements of this offence (see the July 21 issue of *The Lawyers Weekly*, p. 2), it also quietly displaced a large body of case law that required, as an essential element, proof of a “benefit” to the

accused. In this sense, *Boulanger* now effectively widens the net for prosecutions under s. 122. This article will briefly address the evolution of this particular element.

Prior to the release of *Boulanger* on July 13, most jurisdictions in Canada required proof of some “benefit” to the accused before a conviction could be registered for this offence. The leading case was *R. v. Perreault* (1992), 75 C.C.C. (3d) 425 (Que.C.A.); leave to appeal to S.C.C. refused 77 C.C.C. (3d) vi. There the essential elements were set out at pp. 442-443:

“(1) The accused is an official (civil servant);

“(2) The impugned act was committed in the general context of the execution of his duties;

“(3) The act constitutes a fraud or breach of trust;

“(i) The accused did an act or failed to do an act contrary to the duty imposed upon him by statute, regulation, his contract of employment or directive in connection with his office;

“(ii) The act must give the accused a *personal benefit directly or indirectly*.” (emphasis added)

Notably, a required element was proof that the accused received some *benefit* from the impugned conduct.

Other decisions from Quebec,

such as *R. v. Flamand* (1990), 141 C.C.C. (3d) 169 and *R. v. Gagne* (2000), 148 C.C.C. (3d) 182, followed *Perreault* and reiterated the same elements.

Many other jurisdictions repeated that proof of a benefit to the accused was a required element: *R. v. Pilarinos*, [2002] B.C.J. No. 1958 (B.C.S.C.) at paras. 280-281; *R. v. Yellow Old Woman*, [2003] A.J. No. 1479 (Alta. C.A.) at para. 9; *R. v. Berntson*, [1999] S.J. No. 89 (Sask. Q.B.) at para. 32; and *Re Aasland Information*, [2000] M.J. No. 619 (Man. Prov. Ct.) at para. 113.

Ontario, however, served as an exception to this requirement. While trial judges in *R. v. Green*, [1994] O.J. No. 1296, *R. v. Gentile*, [1994] O.J. No. 4445, and *R. v. Pomeroy*, [1995] O.J. No. 590 reaffirmed the *Perreault* elements, the Ontario Court of Appeal considered a different path.

Earlier, in *R. v. Rahn* [1994] O.J. No. 3745, the Ontario Court of Appeal expressly followed *Perreault* and allowed an appeal against a conviction where some benefit to the accused was not proven. However, more recently, in *R. v. Fisher* [2001] O.J. No. 116 the court expressed some doubt as to whether proof of a benefit to the accused was essential. In *Fisher*, the Crown submitted that *Per-*

reault and cases which followed it were wrongly decided. It also pointed out that this issue had not been argued in *Rahn*.

Rather than following *Rahn*, and the cases from other jurisdictions, *Fisher* declined to deal with the issue, concluding at para. 9:

“We do not find it necessary to resolve the very interesting legal issue of whether a personal benefit is an essential element of the offence of breach of trust.”

Thus, on the basis of *Fisher*, there was an open question in Ontario as to whether a benefit to the accused was essential.

The Supreme Court in *Boulanger*, after a careful historical review of this provision, set out these elements of the offence at para. 58:

“(1) The accused is an official;

“(2) The accused was acting in connection with the duties of his or her office;

“(3) The accused breached the standard of responsibility in conduct demanded of him or her by the nature of his office;

“(4) The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused’s position of public trust; and

“(5) The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corruptive or oppressive purpose.” (emphasis added)

The court implicitly rejected the line of authorities which required proof of benefit to the accused and, instead, adopted a less restrictive interpretation of



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this element. Conduct which does not result in some benefit to the accused, but is done for a purpose “other than the public good”, will now attract sanction. A lack of benefit to the accused no longer prevents a conviction, as was the case in *Rahn*.

Boulanger, in effect, broadens the application of the offence by eliminating the Crown’s obligation to prove that some benefit accrued to the accused. Prosecutors will now only be required to undertake a more limited inquiry to establish that the accused’s purpose was something other than the public good. This will be a different, and less onerous, undertaking than proving to the court that the accused derived a particular benefit.

This, in turn, may result in prosecutions for breach of trust occurring with greater frequency.

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Burden of proof on Crown high

JURIANSZ

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titles) as “communication” because that argument was being raised for the first time. He wrote, “It would offend the rule against double jeopardy to dismiss the appeal based on a new theory that the charges relate to the contents of the covers and not the CDs and lyric sheets.” He relied on *R. v. Varga*, [1994] O.J. No. 1111, as authority for the principle that “A Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial.”

Justices Kathryn Feldman and Jean MacFarland agreed.

Peter Lindsay acted for Elms. He told *The Lawyers Weekly* he has been involved in several hate-speech cases and that the number of prosecutions has been increasing in the past 10 years. He pointed out that the seminal case of *R. v. Keegstra* [1990] S.C.J. No. 131, ruled that this section of the

Code violates the right to freedom of expression, but it is a reasonable limit.

Acknowledging that the burden of proof on the Crown is very high, Lindsay commented that we “should be reluctant to criminalize words without a very high *mens rea* requirement. If it were up to me I wouldn’t prosecute these offences at all. The sort of people who are prosecuted are marginalized. They don’t have any real influence. By prosecuting them, you spend a lot of public money on people who are nuisances, and you make them martyrs to like-minded people of whom there aren’t very many. I don’t know why we spend so much money prosecuting people who are involved in allegedly promoting hate speech. I’d far prefer they’d spend more money on gun crimes in Toronto in 2006 than in prosecuting people who are supposedly selling CDs at a private party.”

Christine Bartlett-Hughes acted for the Crown. She told *The*

Lawyers Weekly she does not think there has been an increase in prosecutions over the past 10 years. Instead the rate, at least in Ontario, has been “relatively constant” at one or two a year. She admitted there has been an increase in investigations and that more money has been put into investigating this offence. She said she could not comment further because leave to appeal to the Supreme Court of Canada “is under review at this point.”

Alan Borovoy, general counsel of the Canadian Civil Liberties Association since 1968, told *The Lawyers Weekly*, “My colleagues and I have registered over the years what we think is the lack of wisdom in having this anti-hate law. Basically, the law itself creates unwarranted risks to freedom of speech. The difficulty is the murky, vague language of the section: ‘the willful promotion of hatred.’”

“We know that freedom of speech is often most important when it registers strong disapproval,” said the 74-year-old Borovoy. “The question arises,

when does disapproval end and hatred begin? This law has ended up harassing people who don’t bear the remotest resemblance to those it was intended to target. For example, it has been used against anti-American protesters, anti-apartheid activists, a pro-Zionist book and Jewish community leaders. This is miles from what the legislation had originally envisaged and intended.

“In our view there are other ways to limit hate mongers in society that don’t incur this type of risk. For example, when people of standing in the community express racist views or invective of one

kind of another, very often what happens is what should happen: people lower the boom on them. People show disdain for what the speaker says. That’s what should happen.

“I make a distinction between those who have standing and those who don’t. Among other things I think there’s a growing ability to enforce our human rights legislation more effectively. The better we’re able to enforce those kind of laws, the more we help to create a climate in our community that is inhospitable to racist invective.”

Reasons: *R. v. Elms*, [2006] O.J. No. 3635.

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