

EXPERT WITNESSES

OCA quashes convictions based on footwear evidence

By John Jaffey
Toronto

The Ontario Court of Appeal quashed second-degree murder convictions and ordered new trials for two appellants whose convictions may have been based on questionable "footwear" evidence. The court found the evidence should not have been admitted because it had no logical connection to the offences, apart from the "seductive" circular reasoning offered by the Crown.

The footwear evidence was only part of an accumulation of circumstantial evidence that tied Wilfredo Portillo and Noe Portillo to the 1998 murder of Ted Purchla, a man in his early 50s who had been partially disabled by a stroke. From some of the other evidence, it could be inferred, wrote Justice David Doherty, that Wilfredo and Noe were drinking beer with Purchla in his apartment after 1:30 a.m. on the morning of the murder.

"In the course of the investigation at the homicide scene," wrote Justice Doherty, the police found an envelope under the deceased's head with blood on it and a partial shoe print beside

the blood. They found a second partial shoe print in the mud outside of the patio door of the deceased's apartment.

Two days later, a police officer found two Adidas running shoes in the vicinity of Wilfredo Portillo's apartment. One was found in an alley about 15 feet to the right of a set of stairs leading to Mr. Portillo's apartment. Those stairs provide access to other apartments as well. This running shoe was closer to the door leading to the apartment next to Wilfredo Portillo's apartment. The second Adidas running shoe was found in the entrance to the same alley about 20 feet away from the first running shoe. It was on a boulevard in front of an auto body shop. The two running shoes were the same brand, colour and size. Both appeared to have been worn. One shoe had a lace, the other did not."

However, Justice Doherty noted, though the treads of the shoes matched the footprints at the crime scene, there was no evidence that Wilfredo Portillo had ever worn those running shoes or even that they were his size.

At trial, the Crown tendered the footwear along with finger-

print and DNA evidence as part of a package of circumstantial evidence tying the Portillos to the crime scene. He admitted the shoes could have belonged to other tenants in the Portillos' building. But then he attempted to connect the shoes to Portillo by saying, "but there was no evidence that those [other] people left their finger and hand impressions on beer bottles ... in Ted Purchla's apartment, left their DNA on a cigarette, left their hair on the victim's body. Putting that all together, I submit you can find that those shoes are connected to Wilfredo Portillo."

Justice Doherty found that the footwear could be relevant only if two facts were proven: first that the shoes found by the police made the prints at the crime scene and, second, that the shoes belonged to Portillo.

He pointed out the jury had been invited to engage in circular reasoning, which "goes beyond inference to assumption and speculation. The jury may well have engaged in the very reasoning that Crown counsel invited them to undertake."

He concluded that the jury might have taken the specious footwear evidence into account when they found Wilfredo Por-

tillo guilty. They might have used the same evidence to find Noe Portillo guilty as well, because the Crown's theory was that the Portillos had acted together. He concluded that both appellants were entitled to a new trial based on the erroneous admission of the "footwear" evidence.

Justices James Carthy and Marc Rosenberg agreed.

Diane Oleskiw acted for Wilfredo Portillo; Gregory Lafontaine and Jill Presser acted for Noe Portillo. Philip Downes represented the Crown.

Reasons in *R. v. Portillo*, [2003] O.J. No. 3030, are available from FULL TEXT: 2319-031, 18 pp.

RCAs benefit key employees

RCA

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per year until retirement at age 65. This person can expect to accrue pensionable income of \$484,963, (70 per cent of the last three years' average). The estimated immediate contributions that can be made for this individual's RCA as a tax-deductible expense for the company and a non-taxable benefit for this individual is \$2,653,000. The tax-

deductible contribution for 2004 would be \$186,000. (Contribution amounts in the RCA increase by approximately 3.5 per cent annually, to match inflation.

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1. Use funds that have accumulated in your company's retained earnings.
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RCAs benefit top executives and key employees by ending RRSP and pension-maximum discrimination. RCAs provide a disciplined and orderly way for employers to help key people fund their retirement in a tax-effective way. RCAs do not affect RRSP or individual pension plan contribution limits and there are

no caps on how much can be contributed into them. Nor do they have any caps on the payouts to planholders. Assets are held in trust and are protected from creditors of both the company and the individual.

RCAs are best for owners, executives, and key personnel of a company with corporate profits of more than \$200,000. Ideal RCA candidates are between the ages of 45 and 65 and have gross annual incomes over \$100,000.

If your company is planning to make or has made contractual promises to offer supplemental pensions or savings plans to attract or keep key people, an RCA that utilizes maximum tax benefits for your company and tax deferral for your key people is an option worth investigating.

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*Due diligence is essential***ASSUMPTIONS**

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the opinion is no more than a provisional one.

The second duty cited is particularly significant in that it suggests that an expert opinion be qualified if material facts cannot be ascertained due to scope limitations. In practice, while expert reports frequently include a qualification, it is less common to see it explicitly stated how knowledge of the missing information may have affected the conclusions reached.

To summarize, the CICBV requires disclosure of key assumptions, that sufficient evidence be obtained to be able to support conclusions, disclosure of material scope limitations and a related qualification of opinion if necessary. The courts have

consistently supported expert reports that use well-substantiated assumptions and appeal to business and commercial sense. They have taken exception to expert reports that represent little more than a mathematical exercise without much in the way of due diligence into the veracity and reasonability of assumptions.

Valuation experts need to undertake sufficient due diligence to ensure that the foundations of their opinions are firmly laid and that their reports will be found useful by the courts. Only then will they serve the needs of their clients.

Robert Boulton, CA, CBV, is a partner and Prem Lobo, CA, is an associate of Low Rosen Taylor Soriano, one of the largest independent business valuation firms in Canada.

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