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Ont CA rules on class action fees

CRISTIN SCHMITZ OTTAWA

In a judgment of note to civil litigators nationwide, the Ontario Court of Appeal has refused to boost to \$20 million from \$14.5 million the legal fees of four prominent class action law firms.

On March 28, Justices Russell Juriansz, Michael Moldaver and Robert Armstrong dismissed the appeal of Sutts, Strosberg of Windsor, Ont., and Toronto's Heenan Blaikie, Paliare Roland and Koskie Minsky from a ruling last year which fixed the firms' total compensation for a long and hard-fought class action against Money Mart at \$12.8 million for fees, \$1.1 million for disbursements and \$64,304 for GST. Counsel's basic docketed fees (described as "substantial" by the appeal court) without any premium for risk or success, totaled nearly \$9.8 million.

The 2003 action against defendants National Money Mart Co. and its parent Dollar Finan-

cial Group Inc., settled mid-trial in 2009. The plaintiffs alleged they were charged a criminal rate of interest for small loans with a due date for repayment linked to their payday.

The appellant law firms argued that the counsel fee approved by the motion judge below was "not fair or reasonable" (particularly when contrasted with the firms' initial request for \$27.5 million).

But the Court of Appeal disagreed, holding that the appellants failed to establish "any basis" for interfering with Superior Court Justice Paul Perell's discretionary determination that \$14.5 million was a fair and reasonable fee for the work class counsel "performed with competence and admirable skill."

Terrence O'Sullivan of Toronto's Lax O'Sullivan Scott Lisus LLP, who represented the appellants along with James Renihan, said his clients are considering whether to apply for leave to appeal to the

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ABORIGINALS ON JURIES



PAUL LAWRENCE FOR THE LAWYERS WEEKLY

Toronto lawyer Julian Falconer said the exclusion of aboriginals from juries could lead to challenges of jury verdicts in the wake of an Ontario Court of Appeal decision.

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Ottawa court interpreters looking to unionize

LUIS MILLAN

Freelance court interpreters in the Ottawa area, many of whom are currently boycotting new assignments to voice their displeasure over wages that have stagnated over the past decade, are in the midst of holding discussions with the oldest and one of the largest media unions in Canada in a bid to strengthen their hand in negotiations with the Ontario government.

With the backing of the Court Interpreters Association of Ontario (CIAO), a loosely organized group of Ottawa-area freelancers, including the vast majority of French, Arabic, Portuguese and Spanish interpreters, pledged more than a month ago to stop taking new

assignments after negotiations to increase the hourly rate from the current \$25 an hour to \$35 an hour stalled. "I received a flyer from a cleaning lady the other day, and she's asking \$29 an hour — and she isn't even accredited," pointed out Manuel Costa, one of three Ottawa freelance interpreters who launched the boycott.

Attempting to force the government's hand, in much the same way that freelance court interpreters successfully did in British Columbia nearly three years ago when they obtained a \$10 wage hike to \$45 per hour, has met with mitigated success. The tactics are beginning to take its toll on the administration of justice yet the Ontario government has not budged from its hard-line stance, said Stella Rahman, past president of the CIAO.

Rahman says that the Ministry of the Attorney General of Ontario is hiring unaccredited and unqualified interpreters or contracting out the work at great expense to Toronto-based interpreters. Interpreters travelling over 80 kilometres to a court date can bill \$25 per hour for travel time as well as claim meals and mileage.

"The courts are having a very difficult time in filling in all the requests for interpreters, and that's why many serious criminal charges are being thrown out," said Rahman, adding that there are rumours that the ministry is compiling a blacklist of freelancers who are refusing to work — a charge the ministry flatly denies. "Interpreters are crucial for the justice system to function nor-

mally but when it comes to paying interpreters they say they don't have any money. We have to push forward. Without a union, we're heading nowhere. As an association, we tried our best to communicate and negotiate with the ministry but they've said no every time."

According to Brendan Crawley, a spokesman with the ministry, there is "ongoing dialogue" between the ministry and "many" interpreter associations and ministry freelance interpreters. The ministry recently publicly stated that its current rate exceeds that which is offered by other provinces, and is comparable to that paid by other agencies such as the province's Citizenship and Immigration Ministry and the federal

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NEWS

No aboriginals on juries undermines trials

THOMAS CLARIDGE TORONTO

A recent little-noticed Ontario Court of Appeal ruling that prohibits systemic exclusion of First Nations from jury pools has led to the halting of jury trials in North-western Ontario and may pose a threat to similar trials and jury verdicts elsewhere in Canada.

Although the March 10 ruling was in the context of a coroner's inquest, the court based its decision on the importance of having "a representative jury."

"To function properly, a jury must have two key characteristics: representativeness and impartiality," wrote Justice John Laskin, with Justices Robert Sharpe and Karen Weiler concurring. "A representative jury is one that corresponds, as much as possible, to a cross-section of the larger community. And a representative jury enhances the impartiality of the jury."

The court went on to order a new inquest into the October 2007 death from a drug overdose of Jacy Pierre, a First Nations inmate in the Thunder Bay District jail and the decision's release led to a murder trial in Thunder Bay being delayed indefinitely when the trial judge, Superior Court Justice Helen Pierce observed a lack of Aboriginal representation in the

100-member jury pool.

Thunder Bay criminal lawyer Gil Labine has predicted that no jury trials will proceed in North-western Ontario until the Ontario government deals with the problem. "All the homicide trials are going to be held in abeyance until they can fix the problem of having the jury array...be representative of the people in North-western Ontario, which includes aboriginal people."

At the root of the problem is a decision by the federal Department of Indian and Northern Affairs (INAC) in 2000 to stop providing band electoral lists to the Provincial Jury Centre—a decision that was apparently not announced at the time and was discovered only in 2008 during a coroner's hearing into pre-inquest motions. An affidavit filed by Rolanda Peacock, acting supervisor of court operations for the District of Kenora, disclosed that no First Nations population lists had been relied upon since the federal department stopped sending band lists to provincial authorities.

The appeal court overturned a Divisional Court ruling that Ontario coroners had no jurisdiction to inquire into the representativeness of a jury roll, holding that while there was no express statutory or common law authority for

such an inquiry, a statutory tribunal had "not only those powers expressly granted by its enabling statute but as well, by implication, all the powers needed to accomplish its statutory mandate."

The court went on to conclude that the appellants had put forward enough evidence to warrant the coroner in the Pierre inquest to issue a summons to the Director of Court Operations to give evidence on how the Thunder Bay jury roll was established.

Justice Laskin said the evidence did not disclose why INAC stopped sending the band electoral lists to the Provincial Jury Centre, which is responsible for sending jury questionnaires to all Ontario residents, including First Nations persons. "Whatever the reason, the Centre did not have an accurate, up-to-date record of the names of on-reserve First Nations persons."

He added that the Peacock affidavit "shows that court officials did very little to obtain other records and, as a result, the District of Kenora jury roll was manifestly unrepresentative."

He went on to observe that there was "no reason to think that the unrepresentativeness of the jury roll in the District of Kenora was unique, his concern over the state of the roll in the District of Thunder Bay having been fuelled by the unwillingness of either the

district's coroners or Robert Gordon, its Director of Court Operations, "to be forthcoming about how the roll was established."

He said a request by two First Nations families for the information "was quite reasonable. But they did not get any answers. Instead they got the run-around. A lot of time and money might have been saved had the Ministry and the coroners simply provided the information."

On March 22, Toronto lawyer Julian Falconer, who represented the Nishnawbe Aski First Nation before the appeal court, wrote to federal Justice Minister Robert Nicholson and Indian Affairs Minister John Duncan reminding them of his letter alerting the government to the problem in September 2008 and complaining that his office had never received "even the courtesy of an acknowledgment."

Responding to an INAC spokeswoman's assertion that the First Nations themselves should have been providing their electoral lists, Falconer sought the ministers' response to five questions:

"(1) At any time, were First Nations apprised by INAC or the A.G. that the INAC decision not to provide band lists to the Ontario Government would have consequences for their communities?"
See **Nishnawbe** Page 30

LEGAL BRIEFS

New disclosure policy

Nova Scotia announced March 30 that it is implementing a more "open and transparent" public disclosure policy on major incidents involving people in its custody.

"We've looked at what other jurisdictions are doing and I can assure you that Nova Scotia will have one of the most open and transparent policies for disclosure of information," Justice Minister Ross Landry said in a statement.

The new policy, which will be reviewed in six months, includes online information updates for "major incidents" involving people in custody.

Major incidents include: death in custody; a lockdown of a correctional facility; an assault committed by a person in custody against another person resulting in serious injury that requires in-patient hospitalization; escape from custody; wrongful release of a person from custody before a sentence expired; a hostage taking; and a bomb threat.

Child access most litigious

Cases focused on child access feature more fights in court than those focused on child custody or child support, Statistics Canada discloses.

Citing 2009-2010 data obtained from Nova Scotia, Ontario, Alberta, B.C., Yukon, Northwest Territories and Nunavut (66 per cent of Canada's population), the agency recently said child access cases involve, on average, more pre-trial hearings, adjournments and judgments over the life of the case than child custody or support. In 2009-2010, one-third of access cases were contested, the highest proportion among single issue cases. In comparison, about 23 per cent of single-issue cases involving custody and 17 per cent of child support cases, were contested.

In 2009-2010, family law cases accounted for 35 per cent of all civil court cases.

Free mediation a success

New Brunswick says its new free mediation service for families undergoing separation and divorce has been busy.

In the first six months of operation after it began last September, the New Brunswick Family Mediation Service fielded 893 calls on its toll-free telephone intake line, and 657 people were referred on to a community-based mediator.

Up to nine-and-a-half free hours of mediation per case on such issues as parenting arrangements and child support are available. There are nearly 40 trained professional mediators doing the work. Many of the mediators are professional social workers, but some are lawyers.

The service aims to improve access to family justice services for the seven judicial districts outside of Saint John, N.B.

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Google Books stalled after settlement rejected

ARNOLD CEBALLOS

In a major setback to resolution of a high-profile copyright infringement lawsuit dealing with Google Inc.'s digitization of millions of books, a United States District Court judge has rejected a proposed settlement of the lawsuit as being unfair.

The lawsuit stemmed from Google's plans to digitize copies of books in a number of libraries' collections, many of which were still subject to copyright protection. The class action lawsuit was launched in New York in 2005 by

the Association of American Publishers and The Author's Guild over what they alleged amounted to "massive copyright infringement" by Google as a result of the company's plan.

After two years of negotiations, the parties agreed to settle the case in 2008. Under the terms of the agreement, Google would be granted a number of rights, including the right to continue to digitize materials, sell subscriptions to an electronic books database and sell online access to individual books. In exchange, Google would pay rights holders a share of the rev-

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2 BLOOR ST. EAST, SUITE 1800
TORONTO, ONTARIO M4W 3J5
ESTABLISHED 1887

TELEPHONE: (416) 961-5000
FAX: (416) 961-5081
E-MAIL: riches@patents-toronto.com

NEWS

Judges poaching interpreters from one another

Interpreters

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Immigration and Refugee Board.

"There could be a number of reasons a freelance interpreter is not available," said Crawley in an email exchange with *The Lawyers Weekly*. "The priority of the ministry is to ensure that the courts continue to run smoothly across the province. If an interpreter is unavailable for any reason, the ministry continues to contact other interpreters in order to meet the needs of the court."

The labour conflict is exacerbating an already precarious situation. With only three staff interpreters, Ottawa courts rely heavily on the region's approximately 100 freelancers. Ontario courts provide over 150,000 courtroom hours of interpretation annually but has only 142 fully accredited interpreters, including staff and freelancers, and 229 conditionally accredited, who can take on only less complex court proceedings such as bail hearings.

The dearth of qualified interpreters has become so severe that Ontario Superior Court Judge

Casey Hill recently stated that judges are going so far as to poach them from one another. "Day in and day out, the courts are unable to get competent interpreters," said Judge Hill late last year to the Criminal Lawyers' Association (CLA). "The competition between courts has become almost cut-throat. There just aren't enough to go around."

It's a situation that was aggravated when the ministry launched an effort to improve standards with a new accreditation test in 2009. The test, developed by the Vancouver Community College, a pioneer with a national and international reputation for its multilingual programs in interpreter training, still rankles. Rahman, who points out that "even interpreters with 20 years of experience in the courts" failed the test, asserts the test standards are not a true reflection of what actually takes place in court, particularly the test that examines an interpreter's capacity to conduct simultaneous translation. She says that the simultaneous test is delivered at a clip rate of 190 words per minute when in fact during court proceed-

ings interpreters, depending on the language, speak at a rate of between 130 and 140 words per minute. "When the test preparations were sent out, CIAO pointed out the problems about the speed of the test, and the ministry promised to do something about it—they never did," said Rahman.

Ted Hough, the managing partner of The Language Bureau, a Vancouver-based professional interpreter and translation agency who had a hand in developing the Ontario interpreter's test, categorically states that the test was not conducted at 190 words per minute. "That is wrong, absolutely unconditionally wrong," said Hough.

In fact, Hough says that he is frankly bewildered that so many Ontario freelance court interpreters passed the test, particularly since research on the subject indicates that the pass rate is a dismal five per cent.

"Every jurisdiction that has brought in testing has been dismayed at how poorly people do," said Hough, who is also the business manager of the Canadian Translators and Interpreters Guild,


which is affiliated with the Communication Workers of America/Canada (CWA Canada), the union that has begun discussions with CIAO. "So here's the question that needs to be asked: If the normal pass rate is five per cent, how did Ontario court interpreters manage a 30 per cent pass rate. Are they six times better than every other body of interpreters in the world?" asked Hough rhetorically.

David Bosveld, an organizing director with CWA Canada who approached CIAO, believes that both freelance court interpreters and the Ontario government would benefit if the freelancers would join their union. "We feel that our organization and our ability to create a strong voice speaking in one direction will be able to possibly generate some changes in their working conditions," said Bosveld. While a traditional union model is out of the question, Bosveld feels that Ontario freelance court interpreters could benefit from alternative models for independent contractors that CWA Canada has implemented with freelance writers at the CBC. The government, on the other

hand, would stand to gain from the creation of a union because CWA Canada could offer training to raise the standards of interpretation, said Bosveld.

Even the CLA has weighed in on the situation. The CLA supports a "robust wage" for court interpreters so that they "can deliver consistent and high quality services" to clients facing criminal proceedings in Ontario in a manner that is in keeping with the rights of those clients, as enshrined in s. 14 of the *Charter of Rights and Freedoms* and the common law, said Patrice Band, a CLA director, in an email exchange.

In the meantime, Odette Borris, an Ottawa-based interpreter, is calling on judges and lawyers to "officially ask, on the record, if the interpreter is accredited, and if they are fully accredited or conditionally accredited because we know there are cases where the ministry is sending interpreters not officially deemed capable of handling the task according to their policy." ■

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Agreement reflected commercial, not academic, interests

Google

Continued From Page 2

enues. In addition, a registry would be created to maintain a database of rights holders and to distribute revenues to them.

The proposed settlement would have applied to books registered in the United States Copyright Office or published in the United Kingdom, Australia and Canada as of a certain date.

Reaction to the proposed settlement was significant, with approximately 500 submissions filed, with the vast majority objecting to the settlement agreement, according to United States Circuit Court Judge Denny Chin, who was called upon to approve the settlement. Approximately 6,800 class members also opted out of the settlement. Objections ranged from the

adequacy of the class representation to antitrust concerns to international law concerns.

The Canadian Association of University Teachers, for example, argued in its brief opposing the settlement that the agreement was a commercial document that reflected the commercial, not academic, interests of American parties.

While the association is generally supportive of the fair use defence that Google is relying on in the lawsuit, the proposed settlement represented a "private commercial arrangement" that "did not reflect broad enough views", according to Paul Jones, Professional Officer for the association.

Judge Chin agreed, writing in his March 22 decision that the agreement would "simply go too far." According to Judge Chin, the

agreement would permit the class action, which originally dealt with Google's scanning and display of "snippets" for online searching, to "implement a forward-looking business arrangement that would grant Google significant rights to exploit the entire books, without permission of the copyright owners."

Particularly troubling to Judge Chin was the provision in the agreement that the settlement allowed class members to "opt-out" of it, rather than "opt-in" to it. His decision urges the parties to consider revising the agreement accordingly. He has scheduled a status conference on the matter on April 25.

The rejection of the proposed settlement will leave many Canadian publishers disappointed, according to intellectual property




Sookman

lawyer Barry Sookman of M c C a r t h y Tétrault LLP in Toronto. "They were looking forward to finding a way to work with Google to find a way to develop new markets," said Sookman, who acknowledged that some Canadians did not support the agreement, viewing it as "essentially usurping rights" through the requirement to opt-out of the settlement, rather than opt-in.

"In general, our association supported, with substantial reservations, the settlement," according to Carolyn Wood, the Executive Director of the Association of Canadian Publishers. The organization's written brief said that it

considered the proposed settlement "to be in the best interest of the majority of our members," particularly because of what it called a "logical and transparent" opt-out provision. With the agreement now rejected, "we are back to great uncertainty and a bit of a wild west environment," said Wood.

The parties are now back to the pre-settlement days, according to Sookman, and they will have to decide if they want to "continue dancing, but with different music." According to Sookman, their options are to heed Judge Chin's suggestions to make any proposed settlement an "opt-in" settlement, to come up with a different settlement that the judge did not consider or to continue the lawsuit. ■

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Decision could lead to challenges of past jury verdicts

Nishnawbe

Continued From Page 2

inclusion on jury rolls? If so, please advise as to the form of this notice. If not, why not?

"(2) Did INAC or the A.G. seek the consent of First Nations leadership for the distribution of band lists to the Ontario Government solely for the purpose of their inclusion on jury rolls (i.e. a con-

sent to limited disclosure)? If so, please advise as to the form of this request for consent to limited disclosure. If not, why not?

"(3) What communications did INAC or the A.G. have with representatives of the Ontario Government on the decision to cease providing band lists? Did your Ministries seek consents through the Ontario Government for the release of information for the pur-

poses of the compilation of jury rolls? Please advise us as to the nature of the communications and whether the compilation of jury rolls was discussed.

"(4) Did the Ontario Government apprise you at any time that your failure to provide band lists would result in the exclusion of First Nations from jury rolls?

"(5) What other provinces' jury rolls have been affected by the


decision to cease providing First Nations band lists?"

Falconer told *The Lawyers Weekly* that while he had no idea how widespread the problem may be, it could well lead to challenges of past jury verdicts. "The decision could have both past and future consequences."

At the appeal hearing last September, Kimberly R. Murray of Aboriginal Legal Services of

Toronto represented the successful appellant families, while Kim Twohig of Ontario's Civil Law Office and Michael Burke of Stikeman Elliott LLP acted for the respondent coroners. ■

Reasons: *Nishnawbe Aski Nation v. Eden*, [2011] O.J. No. 988.

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