CRIMINAL LAW

New protocol targets Fisher order cost overruns at Legal Aid Ontario

By Thomas Claridge
Toronto

A spokesman for Ontario's Ministry of the Attorney General was silent when asked what means, if any, are available to reclaim some of the more than $1 million the Crown has apparently been billed based on a "Fisher order" for the defence of a Toronto police officer who has been convicted of murdering his mistress.

Uncharacteristically, the spokesman, Brendan Crawley, took several days before returning the call from *The Lawyers Weekly* and then apologized, saying all he could offer at the moment was a "no comment" and reference to a recent announcement by Attorney General Chris Bentley.

In a release headed "Legal Aid Review And New Protocol Will Strengthen Access To Justice And Effective Use Of Public Funds," the new minister was quoted as saying a key priority for the government was "strengthening and improving Ontario's legal aid system."

Bentley announced that he was accelerating the development of a new protocol between his ministry and Legal Aid Ontario, saying this work had started immediately after comments made by Superior Court Justice Bryan Shaughnessy on June 14 in relation to the then-pending jury trial of the police officer, Richard Wills.

"The protocol will ensure that public funds for legal aid are spent effectively in those rare criminal cases where the ministry is ordered to pay for defence counsel," the release said, adding that Bentley will work with John McCamus, the Chair of Legal Aid Ontario, and seek input from the criminal defence bar "on the formalized protocol."

The announcement said the AG also planned to meet with Michael Trebilcock, a University of Toronto law professor who is currently leading a review of Ontario's legal aid system.

Chris Bentley

"I look forward to Professor Trebilcock's recommendations as we work to strengthen legal aid in Ontario," said Bentley. "Access to justice for those who need it most must rest upon a strong foundation ensuring the effective use of public resources, with appropriate checks and balances in place."

The legal aid review was announced in September 2006, and is expected to be completed at the end of next February.

Richard Wills did not fit the label as one of "those who need it most," having become self-impoverished by transferring real estate holdings, his police pension and other assets to his wife and children a short time after the homicide.

Justice Shaughnessy issued the Fisher order (based on *R. v. Fisher*, [1997] S.J. No. 530) on April 28, 2005, after being advised that Legal Aid Ontario had refused to issue a certificate on learning that Wills had effectively made himself judgment-proof.

The order required that defence counsel be paid at the $200-an-hour rate sought by the Cindy Wasser, the Toronto lawyer then representing the accused.

Justice Shaughnessy expressed concern that without defence counsel, the case would be untriable.

Mediators should encourage full disclosure from outset

MULTIPLE

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They can find out whether experts are available by phone, to help the parties deal with complex matters that are part of the information sharing of mediation, for example, economic or engineering evidence.

• Discuss whether there is an agreement on liability — in some matters, liability is not an issue. Parties can work on an agreed-upon range of liability.

Sometimes damages and liability are a bit of a moving target. The parties may see a monetary exposure, and express it as a combination of damages and liability. Both issues may go into the mix in determining offers and need to be addressed on each round of offers.

Occasionally, parties will not want to be nailed down to percentages or amounts from one round to another. Contributions will express a unique formula, to be changed in each round. The mediator should make sure there is always a merit-based approach to the numbers.

In some cases, the parties will say in caucus that they want to see what other parties have offered before they proceed. The problem with this tactic is that it becomes hard to stop and eventually ends with no one putting money on the table. Inevitably, the mediation is derailed through positional bargaining.

Rather, a better strategy is for the mediator to encourage, in private caucus, generous and reasonable behaviour from the parties in the initial bargaining round, with the agreement from all that there will be full disclosure of the offers from the various parties. This transparent process helps build trust, and parties know where they stand in respect of the others and in the assessment of risk.

"Matters will settle when the plaintiff feels that the numbers from the defence group accurately reflect what may happen at trial."

The mediator may want to canvas each party in private caucus as to who they see as most responsible, least responsible, and where these parties sit on the continuum of responsibility.

This process will help the mediator assess risk. Where the evidence and all the parties see a party as not responsible, it doesn't do any good for the mediator to lean on that party. If most of the evidence points to one of the parties, who is being reasonable and generous in the risk assessment, it hurts the process for the mediator to push that party.

Either before or during the mediation, the mediator will want to find out whether any of the parties have formed power blocks or negotiation groups — parties may see their position as similar to others and bargain in blocks or groups. This may not be effective early on with respect to the assessment of the risk the parties have. Parties bargaining in blocks early in mediation can change the perceived risk in the sense that the cost of proving a point for the group may be less than for individual parties.

One or more parties may try to convince the mediator that since they have been reasonable and put up money that represents their exposure, they should be allowed to leave. However, it's preferable for mediators not to release parties from mediation — it should be up to the parties, on the basis of group decision.

If one party leaves the mediation, parties with perceived similar position will also want to leave.

Generally, matters will settle when the plaintiff feels that the numbers from the defence group accurately reflect what may happen in trial. Sometimes, the plaintiff group will want the mediator to know this number on a confidential basis, and whether it is achievable. The defence may want to do the same thing.

In the course of the mediation the parties will send messages of where the lines are and with some time on process and negotiation, complex multi-party cases will settle.

David Stark is a member of the Law Society of Alberta, and has a mediation-based practice. He frequently lectures on the benefits of mediation and negotiation.