

Lack of legal aid leads court to overturn conviction

Boycott receives unexpected boost by ineffectual defence mounted by Windsor man accused of arson

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Monday, Jun. 08, 2009 03:55AM EDT

A rapidly expanding boycott of Ontario's legal aid plan got a boost from an unexpected source Friday, when the Ontario Court of Appeal overturned an arson conviction because a defendant who had been denied legal aid was forced to mount his own, ineffectual defence.

A 3-0 majority concluded that William Rushlow – a Windsor, Ont., man who was sentenced to a year in jail for burning down his own home – had been no Perry Mason when it came to legal argument and cross-examination.

“The lack of assistance of counsel impaired the appearance of fairness and, possibly, the ability to make full answer and defence – and in that sense, resulted in a miscarriage of justice,” Mr. Justice Marc Rosenberg said.

Against that backdrop, the number of Ontario lawyers who have pledged to boycott serious legal aid cases to protest against chronic underfunding has risen from 150 to 270.

The expansion was largely due to a decision by the Criminal Lawyers Association to allow lawyers with five years of experience to join the movement. The boycott had been previously limited to criminal lawyers with 10 years of experience.

“The board initially thought that the senior members of our bar would carry the issue, but we have been swamped by requests to participate,” CLA president Frank Addario said in an interview.

Mr. Addario said that nearly 90 per cent of lawyers who are qualified by Legal Aid Ontario to handle “extremely serious cases” have now joined the boycott. They include such legal luminaries as Edward Greenspan, Clayton Ruby, Marlys Edwardh, Brian Greenspan, Austin Cooper, John Rosen, Alan Gold, William Trudell and Mark Sandler.

Another veteran defence lawyer, Peter Zaduk, also joined the boycott last week, just hours after winning a major acquittal in a high-profile murder case. Mr.

Zaduk's client, Ashleigh Pechaluk, had been charged in a lesbian axe-murder case.

"I've done these cases for 31 years, but I can't do them any more," Mr. Zaduk said in an interview. "The system is out of balance and relies on free services from defence counsel. I'm fed up."

Mr. Addario said the Rushlow ruling underlined the fact that "the need for an adequately funded, publicly supported defence bar is the same as for any other public service.

"Many of our judges were lawyers when the legal aid plan was vibrant and well-funded, so they might be finding the present situation frustrating," he said.

The ruling revolved around whether the trial judge ought to have granted Mr. Rushlow a "Rowbotham order" – an order instructing the Ministry of the Attorney-General to fund the defence of an accused person who has already been denied legal aid.

Judge Rosenberg said the trial judge erroneously felt that she could grant a Rowbotham order only if a case presents "unique challenges above and beyond those that would ordinarily be expected in a criminal trial."

The trial judge also noted: "Were it otherwise, an enormous number of self-represented individuals might well be entitled to state-funded counsel, thereby causing a serious interference with the administration of the state sponsored Legal Aid plan."

However, Judge Rosenberg said a judge can grant a Rowbotham order if the impending trial will involve some complexity and it seems clear that defence counsel "is essential to ensure that the accused receives a fair trial."

Judge Rosenberg also said that the health of the legal aid plan is not their business. "It was not the trial judge's concern how the decision to appoint counsel in this case would impact on Legal Aid Ontario's operations," he said.