Farris litigator, Sean Hern, appears in The Lawyers Weekly newspaper.

New extradition hearing ordered due to hearsay evidence

THE LAWYERS WEEKLY

April 18, 2008 by Gary Oakes, Victoria

A divided B.C. Court of Appeal has ordered a new extradition hearing for a man wanted in the United States on fraud and related charges because the record of the case includes evidence gathered in Canada that amounts to inadmissible hearsay.

That "does not 'satisfy the rules of evidence under Canadian law' within the meaning of s. 32(2) of the [Extradition] Act;" Justice Jo-Anne Prowse held.

Justice Kenneth Smith agreed but pointed out in concurring reasons that under the new Act, that "general rule no longer applies to evidence gathered outside of Canada."

In dissenting reasons, Justice Edward Chiasson would have dismissed the appeal. He said he believes that the record of the case "must be accepted by extradition judges for what it is: a summary of the evidence available to the prosecuting state. As such, it is admissible..."

Sean Hern, counsel for the wanted man, Henry Anekwu, told *The Lawyers Weekly* that, "it's a significant case because it's drawing a divide between the interpretation by the courts in Ontario and B.C. of the evidentiary provisions in the *Extradition Act."*

"The B.C. decision may be problematic for the Crown in many other extradition cases," he said, adding that "I'm sure very serious consideration is being given to" seeking leave to appeal the judgment to the Supreme Court of Canada. Hern is with Vancouver's Farris, Vaughan, Wills & Murphy LLP.

Justice Prowse said the American government contends that between May of 1999 and June of 2003, Anekwu "participated in fraudulent telemarketing" activities whereby primarily elderly U.S. residents were told that they were winners of a lottery, but that in order to collect their winnings they had to remit funds to cover purported taxes and transaction fees to companies in Canada, including Capital Award Inc. ('Capital') and Platinum Award Inc. ('Platinum').

Victims sent payments ranging from hundred's to thousands of dollars to addresses in Canada for Capital and Platinum but never received any lottery winnings.

"In brief, the record of the case summarizes evidence which seeks to establish that Mr. Anekwu was one of two officers of Capital and the sole officer of Platinum and that he is linked to rental mailboxes in British Columbia to which victims of 'the telemarketing scheme sent payments. Some of these funds are stated to have been deposited into a bank account in Mr. Anekwu's name. Details of the evidence of the victims are provided in summary form, but none of their evidence directly implicates Mr. Anekwu. Surveillance evidence shows Mr. Anekwu entering a building in which the fraudulent telemarketing activities were alleged to be occurring. The record of the case also summarizes other documentary and identification evidence."

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She said she did not agree "that the fact that s. 33 is silent with respect to Canadian-gathered evidence gives rise to the inference that Parliament intended to permit such evidence to be admitted at an extradition hearing if it would otherwise be inadmissible under Canadian law. That question is specifically addressed in s. 32(2) of the Act which makes it clear that Canadian-gathered evidence must comply with the Canadian rules of evidence to be admitted at an extradition hearing. It does not say that all Canadian-gathered evidence, except that forming part of a record of the case, must comply with Canadian rules of evidence; nor, in my view, can that be reasonably inferred from these provisions when read together."

Justice Prowse concluded that she was "satisfied that the proper application of s. 32(2) requires that if Canadian-gathered evidence is summarized in a record of the case, it must comply with Canadian rules of evidence, including the rules of evidence relating to hearsay as traditionally applied, to be admitted."

She noted that the federal government conceded "that if the Canadian-gathering evidence is excluded, the remaining evidence is not sufficient to justify a committal. It follows that the Minister of Justice's surrender order must also be set aside."

Jeffrey Johnston of Justice Canada represented the government.

Reasons: United States of America v. Anekwu, [2008] B.C.J. No. 536

About Sean Hern

Sean Hern practises as general litigation counsel and has appeared before all levels of court and numerous administrative tribunals. He has experience in a wide range of commercial matters including contractual disputes, debt collection matters, real estate litigation, corporate oppression cases, negligence issues and fraud. Of particular interest for Sean is the defence of class actions, complex commercial litigation and the conduct of Canadian aspects of multi-jurisdictional disputes. Sean runs Farris' Victoria office and practices out of both Victoria and Vancouver.

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