

ROBERTSON TWO: REPORT TO THE CLASS
by Heather Robertson
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I am pleased to report that, thanks to the efforts of Kirk Baert and his legal team at Koskie Minsky LLP, we have reached a tentative settlement in the class action launched in 2003 on behalf of freelance writers. We alleged that the defendants distributed the articles and literary works of freelance authors in online Internet databases without sufficient permission, contrary to Canadian copyright laws. In other words, even though authors may have authorized a single print publication of their articles, we argued that they did not also, by implication, authorize publication by electronic means.

The complete definition of those persons who are included in this class action (often called “class members”) can be seen on the Koskie Minsky website: www.kmlaw.ca/freelanceclassaction. Essentially, class members are freelancers whose articles or other literary works were published in Canada in print by Toronto Star Newspapers Ltd., Rogers Publishing Limited or Canwest Publishing Inc. and whose works were distributed in online databases without their written permission.

In June 2010 there was a court-approved settlement with one of the defendants, Canwest Publishing Inc. That settlement was made in the context of an insolvency proceeding. In October 2009, as a result of its deteriorating financial condition, Canwest was forced to seek protection from its creditors under federal insolvency laws. This meant that recovery in this action from Canwest would have been very difficult, if not impossible. However, despite this challenge, we were able to settle with Canwest. The settlement provided for more than 160,000 shares in Canwest’s successor company – Postmedia Network Canada Corp. We are currently considering alternatives to maximize the value of these shares, including the possible sale of the shares in exchange for cash funds.

The remaining defendants in this class action are Toronto Star Newspapers Ltd., Rogers Publishing Limited, CEDROM-SNi Inc. and ProQuest Information and Learning LLC and they have now agreed to settle the action, subject to court approval. The tentative settlement would include a payment of \$5.475 million for the benefit of class members. There will be a hearing on April 11, 2011 at 10:00 a.m. at Osgoode Hall, 130 Queen Street West in Toronto where the

Ontario Superior Court of Justice will consider whether to approve the settlement. Class members or their representatives may attend this hearing.

This settlement with Toronto Star, Rogers, CEDROM and ProQuest, if approved, would provide two advantages for class members.

First, the settlement would provide the certainty of millions of dollars for the benefit of class members. In contrast, there is no guarantee of success if this action proceeded to trial. As with any lawsuit, there are risks of going to trial and it is possible a judge would find that the defendants did not breach copyright laws or that class members are not entitled to as much compensation as this settlement provides. The defendants have raised a number of complex defences as justification for their conduct. Overcoming these defences may be difficult and costly. This action also presents unique challenges to success. It is based on a provision of the federal *Copyright Act* that provides “statutory damages” to compensate for a copyright infringement. No court has applied a claim for statutory damages under the *Copyright Act* on this scale in similar circumstances. It is thus extremely difficult to anticipate the outcome of a trial.

Second, the settlement provides payment sooner than if we waited for the outcome of a trial. A trial in this action could still be years away and, even if we won, it is a near certainty that the defendants would pursue any and all appeals.

This settlement should also be considered in the context of the earlier settlement with Canwest. Any funds from a possible sale of the Postmedia shares will be added to the settlement funds from Toronto Star, Rogers, CEDROM and PROQuest. The end result would be more settlement funds, in addition to the \$5.475 million, for class members.

Over the next several months we will be working hard with the lawyers in this case to prepare for the settlement approval hearing in April 2011 and to design the claims process for the distribution of settlement funds to freelance authors and other persons that qualify as class members. Our objective is to create an efficient system for the distribution of settlement funds.

We encourage anyone who may be interested in this settlement or the class action to review the Koskie Minsky website for more information: <http://www.kmlaw.ca/freelanceclassaction>.