

Her Majesty the Queen v. Imona Russel**Her Majesty the Queen v. Whalen****Her Majesty the Queen v. Greenspon**

[Indexed as: R. v. Imona Russel]

2011 ONCA 303

*Court of Appeal for Ontario, Rosenberg, Goudge and R.P. Armstrong JJ.A.
April 19, 2011*

Criminal law — Amicus curiae — Compensation — Both superior courts and statutory courts having jurisdiction to fix rate of compensation for amicus curiae as necessary incident of court's jurisdiction to appoint amicus — Orders setting compensation for amicus not infringing constitutional principle that only Parliament can authorize payment of money out of Consolidated Revenue Fund — Payment of amicus under court order authorized by Proceedings Against the Crown Act and Financial Administration Act — Court having jurisdiction to appoint third-party assessor to review amicus' accounts — Trial judges not erring in setting rates of compensation for amicus that exceeded legal aid rates — Financial Administration Act, R.S.O. 1990, c. F.12 — Proceedings Against the Crown Act, R.S.O. 1990, c. P.27.

Criminal law — Courts — Jurisdiction of court to appoint amicus curiae and fix rate of compensation — Crown arguing court having no power to fix rate of compensation for amicus curiae as courts not permitted to allocate public funds — Power to both appoint and fix rate of pay for amicus curiae incident to power of court to control process — Court rejecting Crown's position that when expanded amicus role similar to defence counsel's amicus should be limited to legal aid rate — Appropriate rate to be determined based on multi-factor test including what counsel would have been paid under legal aid system — Reasonable judgment calls by trial judges using special knowledge of complexity of case and scope of duties assigned to amicus upheld.

The Attorney General appealed orders setting rates of compensation for *amicus curiae* appointed in criminal proceedings and, in one case, appointing a third-party assessor to review *amicus*' accounts. In two of those cases, *amicus* had an extended role, taking on the functions of defence counsel, but was not permitted to withdraw if the relationship with the accused broke down. In the third case, former defence counsel was appointed as *amicus* after being discharged by the accused to ensure that the trial would proceed on schedule if the accused was unable to find new counsel. The *amicus* appointment ended when new counsel advised that he was ready to proceed on the scheduled trial date. The *amicus* orders were not made under s. 24(1) of the *Canadian Charter of Rights and Freedoms*; rather, they were made at the urging of Crown counsel or by trial judges on their own motion.

Held, the appeals should be dismissed.

While the orders in question were not made under s. 24(1) of the *Charter*, in cases where the appointment of *amicus* is made under the *Charter*, s. 24(1) provides the necessary foundation for orders respecting terms and conditions, including payment of *amicus*' fees.

Both superior court judges and judges of statutory courts such as the Ontario Court of Justice have the jurisdiction in criminal proceedings to fix the rate of compensation for *amicus curiae* as a necessary incident of the court's jurisdiction to appoint *amicus*. A court order for payment of *amicus* by the Crown does not infringe the constitutional principle that only a legislative body can allocate public funds. Payment of court order setting compensation for *amicus* was authorized by statute and to be paid out of consolidated revenue. It is not in public interest to appoint *amicus* without provision for payment and then order that trial be stayed until state funding provided for *amicus*. *Amicus* provided services to court in difficult circumstances in complex cases and, in one case, took on an expanded role at the behest of the trial judge to ensure that a murder trial could proceed in orderly and expeditious manner while protecting the accused's right to a fair trial, despite the accused's lack of co-operation with *amicus*.

The trial judge had jurisdiction to appoint an experienced criminal lawyer as a third-party assessor to review *amicus*' accounts.

The impugned orders were properly made in the circumstances of these cases. The judges did not err in setting rates of compensation that exceeded legal aid rates. First, the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26 does not apply to *amicus*. Second, *amicus* were appointed, in part, because the legal aid scheme could not adequately respond to these cases. Third, while the *amicus* in these cases were to perform many of the functions of defence counsel, it was also their job to assist the court and serve the administration of justice in the face of an uncooperative accused person. Since counsel was appointed to assist the court, it would not be appropriate for one of the parties, here the Crown who was adverse in interest to the accused, to unilaterally determine the fees to be paid to *amicus*. The trial judges consider several factors in setting the appropriate rate of compensation, including what legal aid would have paid defence counsel, the level of complexity of the role assigned to *amicus*, the complexity of the issues to be dealt with, the expertise of counsel, the rate at which counsel normally billed private clients and that the task involved public service, which is not remunerated at the same level as work done in the private sector. The judges in each of the orders reviewed considered the appropriate factors and relied on their knowledge of the circumstances of each trial when setting the rate of compensation. There was no reason to interfere with the rates of compensation set in these cases.

Auckland Harbour Board v. The King, [1924] A.C. 318, [1923] All E.R. Rep. Ext. 838, 93 L.J.P.C. 126, 130 L.T. 621 (P.C.); *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321, [2003] O.J. No. 1783, 171 O.A.C. 139, 176 C.C.C. (3d) 63, 57 W.C.B. (2d) 432 (C.A.); *R. v. Cai*, [2002] A.J. No. 1521, 2002 ABCA 299, [2003] 3 W.W.R. 423, 9 Alta. L.R. (4th) 28, 317 A.R. 240, 170 C.C.C. (3d) 1, 9 C.R. (6th) 184, 104 C.R.R. (2d) 341 [Leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 360]; *R. v. Martin*, [2010] B.C.J. No. 2296, 2010 BCCA 526, 296 B.C.A.C. 178; *R. v. Savard*, [1996] Y.J. No. 4, 74 B.C.A.C. 81, 106 C.C.C. (3d) 130, 47 C.R. (4th) 281, 30 W.C.B. (2d) 442 (C.A.); *R. v. W. (P.H.L.)*, [2004] B.C.J. No. 2096, 2004 BCCA 522, 204 B.C.A.C. 269, 190 C.C.C. (3d) 60, 64 W.C.B. (2d) 86 [Leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 550]; *R. v. White*, [2010] 3 S.C.R. 374, [2010] S.C.J. No. 59, 2010 SCC 59, 2011EXP-290, 329 D.L.R. (4th) 385, J.E. 2011-160, 265 C.C.C. (3d) 1, **consd**

Quebec (Attorney General) v. C. (R.), [2003] Q.J. No. 7541, [2003] R.J.Q. 2027, J.E. 2003-1578, 13 C.R. (6th) 1, 2003 IIJCan 33470 (C.A.); *R. v. Peterman* (2004), 70 O.R. (3d) 481, [2004] O.J. No. 1758, 186 O.A.C. 83, 185 C.C.C. (3d) 352, 19 C.R. (6th) 258, 119 C.R.R. (2d) 7, 61 W.C.B. (2d) 624 (C.A.), **distd**

Other cases referred to

Harkat (Re), [2004] F.C.J. No. 2101, 2004 FC 1717, [2005] 2 F.C.R. 416, 259 F.T.R. 98, 125 C.R.R. (2d) 319, 48 Imm. L.R. (3d) 211, 135 A.C.W.S. (3d) 900; *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 47, 2008 FC 46, 54 C.R. (6th) 76, 322 F.T.R. 256, 166 C.R.R. (2d) 134, 77 W.C.B. (2d) 248, [2008] 3 F.C.R. 306, 2010EXP-69; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 244 N.R. 276, J.E. 99-1756, 216 N.B.R. (2d) 25, 26 C.R. (5th) 203, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 90 A.C.W.S. (3d) 698; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, 2001 SCC 81, 206 D.L.R. (4th) 444, 279 N.R. 345, J.E. 2002-9, 154 O.A.C. 345, 159 C.C.C. (3d) 321, 47 C.R. (5th) 316, 88 C.R.R. (2d) 189, 51 W.C.B. (2d) 452; *R. v. Cairenius*, [2008] O.J. No. 2323, 77 W.C.B. (2d) 746, 232 C.C.C. (3d) 13 (S.C.J.); *R. v. Caron*, [2011] S.C.J. No. 5, 2011 SCC 5, 329 D.L.R. (4th) 50, 411 N.R. 89, 2011EXP-427, 14 Admin L.R. (5th) 30, 264 C.C.C. (3d) 320, J.E. 2011-232, EYB 2011-185762; *R. v. Cunningham*, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, 2010 SCC 10, 399 N.R. 326, 2010EXP-1163, J.E. 2010-626, EYB 2010-171414, 317 D.L.R. (4th) 1, 73 C.R. (6th) 1, 254 C.C.C. (3d) 1, 87 W.C.B. (2d) 70, 283 B.C.A.C. 280, 87 W.C.B. (2d) 70; *R. v. Imona-Russel*, [2008] O.J. No. 5405 (S.C.J.); *R. v. Imona-Russel*, unreported, July 2, 2009; *R. v. Imona-Russel*, unreported, September 16, 2009; *R. v. Rowbotham*, [1988] O.J. No. 271, 25 O.A.C. 321, 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 35 C.R.R. 207, 4 W.C.B. (2d) 30 (C.A.); *R. v. Samra* (1998), 41 O.R. (3d) 434, [1998] O.J. No. 3755, 112 O.A.C. 328, 129 C.C.C. (3d) 144, 39 W.C.B. (2d) 547 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 558]

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 24(1)
Constitution Act, 1867, s. 126
Criminal Code, R.S.C. 1985, c. C-46, ss. 486.3 [as am.], 672.24 [as am.], 694
Financial Administration Act, R.S.O. 1990, c. F.12 [as am.], ss. 11.1 (1), 13 [as am.]
Legal Aid Services Act, 1998, S.O. 1998, c. 26 [as am.]
Proceedings Against the Crown Act, R.S.O. 1990, c. P.27 [as am.], s. 22 [as am.]

Authorities referred to

Carter, Ian, "A Complicated Friendship: The Evolving Role of *Amicus Curiae*" (2008), 54 C.R. (6th) 89
Hogg, Peter W., *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997)
LeSage, Patrick J., and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen's Printer for Ontario, 2008)

APPEALS by the Crown from the orders of Forestell J. of the Superior Court of Justice dated September 25, 2009 and February 26, 2010; Keast J. of the Ontario Court of Justice dated September 18, 2009; and Ratushny J. of the Superior Court of Justice dated November 24, 2009 setting rates of compensation for *amicus curiae*.

Malliha Wilson, Troy Harrison and Baaba Forson, for appellant the Attorney General for Ontario.

P. Andras Schreck and Louis P. Strezos, for intervenor the Criminal Lawyers' Association.

[1] BY THE COURT: — These four appeals arise out of orders made by judges appointing *amicus curiae* in criminal proceedings. The Attorney General concedes that the judges had jurisdiction to appoint *amicus* but argues that the judges had no jurisdiction to set certain terms and conditions of the appointments relating to counsels' compensation. The nominal respondents in these appeals did not respond to the appeals. The court, however, has had the advantage of a factum and submissions from counsel representing the Criminal Lawyers' Association (the "CLA") as intervenor. The CLA supports the orders made by the trial judges. For the following reasons, the appeals are dismissed.

[2] The fundamental submission by the Attorney General is that while the judges had the power to make *amicus* appointments, they had no power to set the rates of compensation and, in the case of *Imona Russel*, had no power to put in place a process for monitoring the accounts submitted by *amicus* counsel. In short, the Attorney General claims that he alone has the power to set the rates of compensation and to deal with all issues concerning the monitoring of accounts. In support of this position, the Attorney General invokes the constitutional principle that Parliament alone can direct how public funds are to be expended out of the Consolidated Revenue Fund. Thus, absent a statutory foundation that would allow judges to set the rates of compensation, the courts have no power to direct that *amicus* be paid or how much they should be paid.

[3] We reject these submissions. Inherent in, and incidental to, the judges' conceded power to appoint *amicus* is the power to set the terms and conditions of that appointment, including the rates of compensation and the monitoring of the accounts. In a case where the appointment is made under the *Canadian Charter of Rights and Freedoms*, s. 24(1) of the *Charter* provides the necessary foundation for orders respecting terms and conditions including payment of *amicus*' fees. In other cases, there is statutory authority to support payment from the Consolidated Revenue Fund of these orders in the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 or the *Financial Administration Act*, R.S.O. 1990, c. F.12. The judges' orders do not infringe any constitutional principles.

The Facts

Imona Russel #1

[4] William Imona Russel was charged with first degree murder. He retained and then discharged several experienced

lawyers who had been retained pursuant to legal aid certificates. As a result, Legal Aid Ontario (“LAO”) refused to fund any new lawyers. On June 17, 2008, at the request of Crown counsel, Marrocco J., who was not the trial judge, made an order appointing Anthony Moustacalis as *amicus*, to ensure that the proceedings could continue, if the accused continued his serial discharge of defence counsel. That order contemplated a limited role for *amicus* since Mr. Imona Russel had re-retained one of the lawyers he had previously discharged. The order stated that Mr. Moustacalis would be paid at legal aid rates and that he had agreed to abide by LAO’s policies and procedures. The order set out *amicus*’ duties in these terms:

To familiarize himself with this brief. If the accused discharges his lawyer or if the Court so orders, to advise the accused about points of law and legal issues; to discuss legal issues with the Crown on behalf of the accused; to speak to the court on behalf of the accused in relation to legal issues.

[5] The Attorney General submits that Mr. Moustacalis always understood that his role could expand well beyond what is set out in this order. Implicit in this submission is that when Mr. Moustacalis subsequently sought additional compensation when his role did greatly expand, he was breaching an agreement with the court and the Attorney General. We reject this submission; it is simply not supported by the record. Mr. Moustacalis accepted the *amicus* appointment on the terms set out in the order.

[6] Throughout 2008 and 2009, Mr. Imona Russel continued his pattern of retaining and then discharging counsel. In December 2008, he applied to Nordheimer J. for state-funded counsel through a *Rowbotham* application. In reasons found at [2008] O.J. No. 5405 (S.C.J.), Nordheimer J. refused the application for two reasons. First, the applicant had brought his inability to obtain legal aid funding on himself by repeatedly discharging counsel. Second, *amicus* was available to assist in ensuring a fair trial. As Nordheimer J. said, at para. 21:

I accept that *amicus curiae* is not a substitute for one’s own personal counsel. The appointment of *amicus curiae* is not intended to act as a replacement for an accused person’s own counsel. What the appointment of *amicus curiae* does do, in a case where the accused person is unrepresented, is militate against any assertion of an infringement of the fair trial rights of the accused person by ensuring that there is counsel available to assist the court and the accused person as needed.

[7] Mr. Imona Russel’s trial began before Forestell J. in June 2009 with pre-trial motions. By this time, Mr. Imona Russel had retained counsel privately. In the course of the *voir dire* to determine the admissibility of statements made by Mr. Imona Russel, it became apparent that his privately retained counsel,

a first-year lawyer, could not provide competent representation in this complex first-degree murder prosecution. She was permitted to withdraw from the case. Mr. Imona Russel then brought a further *Rowbotham* application. Forestell J. dismissed this application.

[8] At this point, Mr. Imona Russel was no longer represented by counsel and the trial judge raised the question of whether the role of *amicus* should be expanded. Both Mr. Imona Russel and Mr. Moustacalis opposed expansion of the role. Mr. Imona Russel made it clear that he would not co-operate with *amicus*. In reasons delivered July 2, 2009, the trial judge ordered that the role of *amicus* be expanded. She described the new role in these terms:

I ordered that *amicus* cross-examine witnesses, make objections to inadmissible evidence and raise legal argument on behalf of Mr. Imona Russel. Effectively, I ordered *amicus* to defend the case as if he had a client who was choosing to remain mute.

[9] The trial judge also indicated at that time that she would revisit the role of *amicus* throughout the proceedings at the end of examination-in-chief of each witness. On September 16, 2009, the trial judge further expanded the role of *amicus* in these terms:

In addition to cross-examining witnesses and making legal arguments and objections on behalf of Mr. Imona Russel I ordered that *amicus* take instructions from Mr. Imona Russel in the same way that he would do if he were in a traditional solicitor-client relationship and that he act on behalf of Mr. Imona Russel in all respects as he would in a traditional solicitor-client relationship. There remained two significant differences in the role of *amicus* as compared to the role of defence counsel: Mr. Imona Russel could choose to stop instructing Mr. Moustacalis but he could not discharge him from participating in the trial and similarly, in the event of a breakdown in the relationship, Mr. Moustacalis could apply to the court for his role to be circumscribed but he could not, on that basis withdraw his services.

[10] Mr. Moustacalis then asked the Attorney General to agree to compensation at a rate higher than the legal aid rate. The Attorney General refused the request. Mr. Moustacalis then applied for permission to withdraw as *amicus curiae*. He did not ask the trial judge to order that he be compensated at a higher rate. Rather, the trial judge decided to deal with the issue in the course of *amicus*' application to withdraw. After hearing submissions, the trial judge made an order on September 25, 2009 that Mr. Moustacalis be compensated at a rate of \$192 per hour. Mr. Moustacalis had been practising law for 25 years and had conducted several murder trials. In comprehensive reasons, the trial judge considered her jurisdiction to order compensation of *amicus* and, in particular, her jurisdiction to determine the rate of compensation. She also considered whether junior counsel should also be appointed to assist Moustacalis.

[11] The trial judge rejected the submission of the Attorney General that Mr. Moustacalis had taken on the role well-knowing that his role would be expanded and that he had agreed to legal aid rates no matter the change in his role. She made the important point that an *amicus* appointment is not a contract with the Attorney General:

The order defining the terms of the appointment of *amicus* has been significantly varied. It is not reasonable to argue that the nature of the work can be substantively and significantly changed but that the terms of remuneration are immutable. The terms of the appointment are the subject of an order of this court. The order is not a contract between the Ministry of the Attorney General and Mr. Moustacalis. I have changed the terms of the order defining the work to be performed and it is reasonable to also revisit the terms with respect to remuneration to determine whether they are fair and appropriate.

[12] The trial judge also rejected the Attorney General's submission that *amicus* was performing a role akin to defence counsel and therefore should be compensated at the rate legal aid would pay defence counsel:

Mr. Moustacalis, in his expanded role, will in many ways act as a substitute for defence counsel. However, the role of *amicus* goes beyond that of defence counsel. *Amicus* is necessary in this case because Mr. Imona Russel has been unable to maintain a relationship with defence counsel. Legal aid is no longer available to Mr. Imona Russel because of his inability to maintain a relationship with counsel. The task facing *amicus* is formidable. He must attempt to obtain reasonable instructions and act on them. When unable to obtain instructions he must nevertheless endeavour to protect the interests of Mr. Imona Russel by testing the evidence of the Crown and raising legal arguments. His obligation is to the administration of justice. He fulfills that obligation in part by performing the tasks traditionally performed by defence counsel but the role of *amicus* entails more than the usual obligations between solicitor and client. *Most notably, amicus has no option to remove himself from the case when the relationship between he and the accused breaks down. He is expected to fulfill his overarching obligation to the administration of justice even in circumstances where the accused person provides no assistance, even where the accused impedes the task of amicus. The role of amicus requires a high level of skill, experience and judgment in a case, such as this one, where the amicus will straddle both the role of defence counsel and the role of friend to the court.*

(Emphasis added)

[13] The trial judge explained that she had chosen the rate of \$192 per hour because of the complex legal, factual and strategic issues, the challenges in obtaining instructions, the length of the proceedings and the importance of the *amicus* function. She considered this rate to be appropriate and reasonable since it was the rate the government would pay to represent the interests of a witness in a criminal case and "reflects the fact that acting as *amicus* has an element of public service and is acting at a rate

that is reduced from his rate for private clients”. The trial judge also appointed junior counsel to assist Mr. Moustacalis and fixed his rate at \$130 per hour.

[14] The trial judge left in place the oversight and management provisions of the original order. Paragraph 7 of the original order provided as follows:

Legal Aid Ontario shall manage funding of *amicus* in accordance with this order and Legal Aid Ontario’s policies and procedures, including authorization for disbursements, monitoring and review of accounts, billing practices, and payment rules

[15] The Attorney General appeals against the trial judge’s order fixing the rate of compensation for Mr. Moustacalis and for junior counsel.

Imona Russel #2

[16] On December 8, 2009, Mr. Moustacalis met with the Exceptions Committee of LAO, which is comprised of experienced criminal practitioners as well as LAO staff. The Exceptions Committee reviews the budget request submitted by counsel and then makes a recommendation to LAO. LAO did not respond for two months until just before the jury was to begin hearing evidence in February 2010. At that time, LAO approved a budget that allowed for 1,000 hours of preparation time to be shared between the two *amicus* counsel as well as time spent in court and three hours each of preparation per court day. However, by that time, *amicus* had already spent 1,275 hours in preparation. LAO took the position that they were constrained by the statutory test under the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26 to approve only those hours that would be approved “by a reasonable client of modest means”. *Amicus* took the position that this was not the appropriate test given that he did not have a client and he suggested a test of what a reasonable counsel would spend in discharging the obligations imposed by the order appointing him as *amicus*.

[17] On February 18, 2010, counsel appeared before the trial judge to deal with the issue of preparation time. Counsel for LAO suggested an “appeal” to the President of LAO. This was done and the President agreed to approve a budget of 1,275 hours for preparation but no more beyond that spent on days on which the court sat. *Amicus* suggested that an experienced criminal counsel be appointed to monitor and assess *amicus*’ accounts on an ongoing basis. This suggestion was in accordance with the Protocol for Management of Court-Ordered Publicly Funded Counsel that had been agreed to between the Ministry of the Attorney General and LAO:

Payment [of court-appointed counsel by the Ministry] would usually depend on Legal Aid Ontario's assessment of the account according to its rules. However, the Ministry may require that an independent third-party with expertise in criminal proceedings review, monitor and assess invoices on an ongoing basis and/or at the conclusion of the proceedings[.]

[18] LAO agreed with this suggestion; the Attorney General did not. LAO and *amicus* agreed on a lawyer to fulfill this role. LAO agreed to provide this lawyer with the relevant material. A few days later, LAO resiled from this agreement and so counsel returned to the court on February 23, 2010. During this court appearance, counsel for LAO disclosed that the Exceptions Committee had made a recommendation that had been rejected by the President of LAO. The actual recommendation from the committee was never disclosed. *Amicus* proposed two solutions: (1) that the trial judge appoint an independent third-party with expertise in criminal litigation to review the accounts or (2) that the Ministry pay the accounts as submitted and then have them assessed at the conclusion of the trial if it took issue with them. The Attorney General opposed both solutions and took the position that *amicus* was bound by the budget set by LAO or, in the alternative, that the trial judge determine how much preparation time was reasonable. The trial judge decided that she would appoint a third-party assessor. The parties then agreed on Mr. John Rosen, a very experienced criminal defence counsel. The trial judge set the rate of compensation for Mr. Rosen's time in performing the assessment at \$192 per hour, to be paid by the government. She also ordered that the government pay the accounts of *amicus* on an ongoing basis in accordance with the recommendation of the independent assessor, but could challenge the assessor's decision at the end of the case.

[19] The trial judge gave reasons for appointing a third-party assessor. She found "the rigid, adversarial and unhelpful stance taken by counsel for the Ministry of the Attorney General in this case risks jeopardizing approximately seven months of trial time and the associated costs". If *amicus* was permitted to withdraw at this point because of the impasse over preparation time, she would have to declare a mistrial. The accused's fair trial rights could not be protected without the assistance of *amicus*. It had been difficult to select a jury in the case because of the projected length of the trial. The trial judge was of the view that the Attorney General's suggestion that she monitor the accounts would not be appropriate. The Attorney General's counsel had not provided any principled reason for rejecting the independent monitor model. LAO took the position that none of the lawyers that had previously reviewed the file (presumably as part of the

Exceptions Committee system) should be appointed as the monitor. LAO took the position that those counsel owed a duty of loyalty to LAO and would be in a conflict of interest. Accordingly, she ordered that a senior, experienced criminal defence lawyer be appointed to set a budget for the case and “to review, monitor and assess the accounts of *amicus* on an ongoing basis”.

[20] The Attorney General appeals the order removing LAO as the monitor of *amicus*’ account, putting in place the independent counsel process and requiring the government to pay the assessor’s fees.

Paul Whalen

[21] Paul Whalen was convicted of a number of serious indictable offences and the Crown applied to have him declared a dangerous offender. The trial and dangerous offender application were before Keast J. of the Ontario Court of Justice. Mr. Whalen had dismissed two lawyers since the commencement of the proceedings and was unrepresented. While there was a legal aid certificate outstanding, Mr. Whalen had been unable to find a lawyer to accept it because of the ongoing boycott of legal aid work by criminal defence lawyers. The trial judge was of the view that Mr. Whalen was not capable of representing himself, given the complex expert evidence that would be led on the application. He concluded that it would not be possible for the proceedings to be fair unless he had the assistance of *amicus curiae*.

[22] Mr. Whalen’s family contacted a lawyer, Anik Morrow, and advised her that the trial judge was seeking somebody to act as *amicus*. Ms. Morrow spoke to Mr. Whalen by telephone on a number of occasions and explained what her role would be as *amicus*. She was satisfied that Mr. Whalen had confidence in her abilities. Ms. Morrow advised the trial judge that she was willing to act as *amicus* and asked to be paid at the rate of \$225 per hour. Counsel for the Attorney General advised the trial judge that LAO had located two lawyers who were willing to represent Mr. Whalen at legal aid rates. He suggested that one of these lawyers be appointed as counsel, although Mr. Whalen had not made a *Roubothom* application, and that the other one be appointed *amicus*. This double appointment would represent a cost at legal aid rates of approximately \$200 per hour. Mr. Whalen resisted this suggestion as he had never spoken to these lawyers and was comfortable with Ms. Morrow.

[23] The trial judge appointed Ms. Morrow as *amicus* and set her rate of payment at \$200 per hour. Although the appointment would incorporate features of the traditional solicitor-client relationship, the trial judge made it clear that Ms. Morrow would

continue to act as *amicus* even if Mr. Whalen lost confidence in her. The trial judge was of the view that appointing the two lawyers as suggested by the Attorney General created a risk of destabilizing the proceedings.

[24] The Attorney General originally appealed against the order appointing Ms. Morrow as *amicus* and against the order setting the rate of compensation. At the hearing of the appeal, counsel for the Attorney General conceded that the trial judge had jurisdiction to appoint *amicus* and sought only to appeal the order setting the rate of compensation.

Lawrence Greenspon

[25] Wahab Dadshani was charged with first degree murder along with five other co-accused. Mr. Dadshani had retained Lawrence Greenspon to represent him. After a number of adjournments, some caused by accused changing counsel, the trial was set to begin on February 2, 2009 before Ratushny J. By that time, the case would have been before the courts for more than five years. On November 12, 2008, Mr. Dadshani discharged Mr. Greenspon, thus threatening to derail the trial. To ensure that the trial proceeded as scheduled, in the event that Mr. Dadshani was unable to find counsel able to begin the trial on the scheduled date, the trial judge appointed Mr. Greenspon as *amicus*. On December 4, 2008, Mr. Dadshani advised the trial judge that he had found a new counsel. The trial judge told Mr. Greenspon to cease any further work, but to keep his calendar clear for the two months that the trial was expected to occupy. The trial judge did not end the *amicus* appointment until January 5, 2009, when new counsel advised that he was ready to proceed on the scheduled trial date.

[26] Mr. Greenspon applied to the trial judge for an order for compensation at the hourly rate of \$250 for himself, \$120 for his junior and \$50 for a clerk. He submitted an account of over \$40,000 for services rendered, including reserving the months in which the trial was scheduled to take place. The trial judge ordered that Mr. Greenspon only be compensated for work actually done, 3.25 hours, at the hourly rate of \$250, for a total of \$812.50.

[27] The Attorney General appeals against the trial judge's order setting the rate of compensation for *amicus*.

The Issues

[28] These four appeals raise the following issues:

- (1) Does a superior court judge have jurisdiction to fix the rate of compensation for *amicus*?

- (2) Does a judge of a statutory court, the Ontario Court of Justice, have jurisdiction to fix the rate of compensation for *amicus*?
- (3) Did the trial judge in the *Imona Russel* case have jurisdiction to put in place a process for monitoring *amicus*' accounts?
- (4) If there is jurisdiction, should it have been exercised in these cases?

[29] The Attorney General makes the following arguments in support of the appeals:

- (1) A court has no jurisdiction to make an order that has the effect of allocating expenditure of public funds.
- (2) The order for payment of counsel, and in *Imona Russel* #2, the monitoring order, were not the least intrusive measures.
- (3) The orders made in all three cases were akin to orders appointing defence counsel since *amicus* effectively carried out the functions of defence counsel. Therefore, they should be paid in accordance with what LAO would pay for defence counsel in comparable cases.
- (4) There was no evidence before the court to support the rates set by the trial judges.

Analysis

Jurisdiction to appoint amicus

(i) *The jurisdiction under s. 24(1) of the Charter*

[30] Although the Attorney General concedes that judges of a superior court and a statutory court, such as the Ontario Court of Justice, have jurisdiction to appoint *amicus curiae*, it is important to identify the source of that jurisdiction to understand the limits of the power. Although not in issue in these cases, one obvious source of jurisdiction is s. 24(1) of the *Charter*, which provides as follows:

24(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[31] In our view, the superior court and statutory courts are courts of competent jurisdiction for the purpose of granting a s. 24(1) remedy, such as the appointment of *amicus*: see *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, [2001] S.C.J. No. 79, at

paras. 90-93. While s. 24(1) is generally viewed as a provision to remedy prior infringements of rights, it can also operate to prevent apprehended infringement rights. The Supreme Court of Canada made this clear in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, at para. 51, where Lamer C.J.C. said as follows:

This Court has held on a number of occasions that remedies can be ordered in anticipation of future Charter violations, notwithstanding the retrospective language of s. 24(1): Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; R. v. Vermette, [1988] 1 S.C.R. 985; R. v. Harrer, [1995] 3 S.C.R. 562. In Harrer, McLachlin J., concurring in the result, held at para. 42 that “[s]ection 24(1) applies to prospective breaches, although its wording refers to ‘infringe’ and ‘deny’ in the past tense”. In Operation Dismantle, Dickson J. (as he then was) held at p. 450 that an applicant requesting a remedy for a prospective breach “must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter”. He also found at p. 458 that courts require proof of “probable future harm” before ordering such a remedy.

(Emphasis added)

[32] Indeed, s. 24(1) is the source of jurisdiction for the so-called *Rowbotham* order (*R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (C.A.)), which gives a judge the power to stay proceedings until the state provides funding for counsel in circumstances where counsel is necessary to secure a fair trial. As the court said, at p. 70 C.C.C.:

Where the trial judge is satisfied that an accused lacks the means to employ counsel, and that counsel is necessary to ensure a fair trial for the accused, a stay of the proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the *Charter* where the prosecution insists on proceeding with the trial in breach of the accused’s *Charter* right to a fair trial. It is unnecessary in this case to decide whether the trial judge in those circumstances would also be empowered to direct that Legal Aid or the appropriate Attorney General pay the fees of counsel.

[33] It will be observed that in this passage the court left open the question of whether s. 24(1) also gives a court jurisdiction to order the state or legal aid authorities to pay for counsel. There can now no longer be any doubt that s. 24(1) does give the court the power to order the Crown to compensate counsel, in an appropriate case, as where the less intrusive remedy of a stay of proceedings would not be appropriate. Thus, see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, a child protection proceeding, at para. 101:

There are only two possible remedies a judge can order under s. 24(1) to avoid a prospective s. 7 breach in circumstances where the absence of counsel for one of the parties would result in an unfair hearing: *an order that the government provide the unrepresented party with state-funded counsel, or a stay of proceedings is clearly inappropriate in this case*, as it would result in the return of the children to the appellant’s custody.

Children should not be returned to their parent's care when there is reason to suspect that they are in need of protection. Indeed, this would run contrary to the purposes of Part IV of the *Family Services Act*. The government must, therefore, provide the appellant with state-funded counsel.

(Emphasis added)

[34] Counsel for the Attorney General concedes that s. 24(1) gives a judge the power to order the state to compensate counsel. That issue was not explored at any length at the hearing of these appeals, inasmuch as the orders in these cases were not made under s. 24(1), which depends upon an application by the person whose rights will be infringed. In these cases, the *amicus* orders were made at the urging of Crown counsel or by the trial judges on their own motions.

[35] It must be noted that several of the cases to which we were referred where trial judges made payment orders in *amicus* cases suggest that they would have had no jurisdiction to make the order if the *amicus* order was necessary to prevent a violation of the accused's s. 7 rights. See, for example, *R. v. Cairenius*, [2008] O.J. No. 2323, 232 C.C.C. (3d) 13 (S.C.J.), at para. 50:

I agree with the Crown that if there was a *Charter* component to the appointment of *amicus*, on the basis of the authorities noted earlier, there would be no jurisdiction in courts to set fees for *amicus*. The proceedings would simply be stayed until the government fulfilled its constitutional obligations.

[36] We do not agree. Whether or not there is a *Charter* component to the appointment of *amicus* does not determine the court's jurisdiction to make an order for payment of fees. Rather, for reasons that we will develop further, if an accused applied under s. 24(1) for appointment of *amicus* and the trial judge was satisfied that such an appointment was necessary to ensure a fair trial as guaranteed by s. 7, the judge would have jurisdiction to make the order appointing *amicus*. As a necessary incident of that jurisdiction, the judge would have the power to order that remuneration for *amicus* be paid by the state and the power to determine the rate of payment. We will return to this issue when considering the so-called *Auckland Harbour* principle.

(ii) *The non-Charter jurisdiction to appoint amicus*

[37] In limited circumstances, there will be a statutory basis for a court to order appointment of *amicus curiae*.¹ Where

¹ Section 486.3 of the *Criminal Code*, R.S.C. 1985, c. C-46 provides that in certain proceedings the accused shall not personally cross-examine certain witnesses. In such cases, the trial judge is to appoint counsel to conduct the cross-examination. The *Criminal Code* does not spell out counsel's duties and whether the counsel acts as retained counsel or more akin to

s. 24(1) of the *Charter* does not apply, and where there is no statutory basis, we are satisfied that a superior court and a statutory court conducting a criminal trial have the jurisdiction to appoint *amicus curiae*, which flows from the authority to control their processes in order to function as courts of law.

[38] This court has confirmed the jurisdiction of a superior court to appoint *amicus* in *R. v. Samra* (1998), 41 O.R. (3d) 434, [1989] O.J. No. 3755 (C.A.), at p. 443 O.R., leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 558. It is anchored in the superior court's inherent jurisdiction, that broad and flexible power to act where it is necessary to do so to ensure that justice can be done. In the cases before us, the Attorney General does not contest this proposition.

[39] In *R. v. Caron*, [2011] S.C.J. No. 5, 2011 SCC 5, Binnie J., speaking for the court, described that jurisdiction this way, at para. 24:

The inherent jurisdiction of the provincial superior courts, is broadly defined as “a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived “not from any statute or rule of law, but from the very nature of the court as a superior court of law” (Jacob, at p. 27) to enable “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner” (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30), referred to “those powers which are essential to the administration of justice and the maintenance of the rule of law”, at para. 38.

[40] In the case of a statutory court, such as the Ontario Court of Justice, the jurisdiction to appoint *amicus* is found in that court's power to manage its own process. Here, too, the Attorney General does not contest the jurisdiction to appoint *amicus*.

[41] The *Report of the Review of Large and Complex Criminal Case Procedures* described the power in these terms: “A judge

amicus. Interestingly, the *Criminal Code* does not provide for payment of counsel performing this role. Section 672.24 of the *Criminal Code* requires the court to appoint counsel to represent an accused where the accused is unfit to stand trial and the accused is not represented by counsel. In *R. v. Savard*, [1996] Y.J. No. 4, 106 C.C.C. (3d) 130 (C.A.), legal aid refused to pay counsel who had acted for the accused and the Attorney General also refused to pay. The majority of the Yukon Territory Court of Appeal held that the court had no power to compel the Attorney General to pay counsel's fees, relying upon, *inter alia*, the *Auckland Harbour* principle. Wood J.A. dissented. The following year, the Code was amended to provide that the Attorney General pay fees and disbursements of counsel if the accused has been refused legal aid funding. We will discuss the *Savard* decision below.

has the power to appoint *amicus curiae* at the trial of an unrepresented or self-represented accused on the basis of its inherent jurisdiction to protect the fairness of the trial and the proper administration of justice” (P. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen’s Printer for Ontario, 2008), at pp. 156-57). We agree with that description.

[42] Recently, in *R. v. Cunningham*, [2010] 1 S.C.R. 331, [2010] S.C.J. No. 10, Rothstein J., speaking for the court, spoke of the broad authority of both the superior court and the statutory court to control its process in very similar terms. In speaking of the inherent jurisdiction of the superior court, he said the following, at para. 18:

Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). *Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner.* As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process.

(Emphasis added)

[43] Justice Rothstein spoke about a statutory court’s authority, at para. 19:

Likewise in the case of statutory courts, the authority to control the court’s process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a “doctrine of jurisdiction by necessary implication” when determining the powers of a statutory tribunal:

. . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime . . .

(*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 14, [2006] 1 S.C.R. 140, at para. 51)

It is unnecessary to fully explore the circumstances in which a statutory court may exercise the authority to appoint *amicus*. The authority at least arises where the exercise of the power to appoint *amicus* is necessary for the court to properly exercise the jurisdiction conferred by statute, in this case the jurisdiction conferred by the *Criminal Code* to try an accused: see *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 47, [2008] 3 F.C.R. 306 (F.C.); *Harkat (Re)*, [2004] F.C.J. No. 2101, [2005] 2 F.C.R. 416 (F.C.); and the very helpful article by I. Carter, “A Complicated Friendship: The Evolving Role of *Amicus Curiae*” (2008), 54 C.R. (6th) 89. In each

of the cases before us, the judge appointed *amicus* because the assistance of *amicus* counsel was necessary to prevent a failure of justice.

The elements of the amicus order

[44] The variety of roles that the court may require *amicus* to play in order that justice is done are aptly described in *Cairenius*, at paras. 51-58:

The authorities stress there is no fixed definition of the role of *amicus*. Indeed, the authorities cited, and other cases, reveal a continuum for the role of *amicus*. At the one end would be the *LePage*-type order, under which *amicus* basically acts as defence counsel for accused who refuse to participate, or refuse to participate and disrupt the proceedings to the extent that they are removed from the courtroom: *R. v. Atherley* [2001] O.J. No. 4363 (S.C.J.). In these cases counsel could be permitted to cross-examine and make submissions on behalf of the accused, applicant/patient, including consulting with the accused/patient, if they will communicate with *amicus*, to ascertain relevant lines of inquiry, as occurred in *R. v. Lee*, [1998] N.W.T.J. No. 194 (N.W.T.S.C.). In these situations, the role of *amicus* would be very much akin to that of defence counsel, albeit in some cases without input from the accused/patient.

In cases like *Samra*, defence counsel has been involved in the proceedings before the trial, and would be the most logical candidate to be appointed *amicus*. That *amicus* might fulfill a role very much akin to that of defence counsel.

Amicus fulfilled a different role in *Khadr*, *supra*, where counsel was appointed to assist the court in proceedings under s. 38 of the *Canada Evidence Act*, where the underlying proceeding arose in the context of a request for Khadr's extradition to face charges in the United States. Some of the disclosure provided to Khadr contained extensive redactions or deletions. The trial judge determined he had no jurisdiction to determine whether the circumstances of the extradition required production of un-redacted copies of the disclosure, because that jurisdiction was assigned to a designated judge of the Federal Court under s. 38 of the *Canada Evidence Act*.

In appointing *amicus*, Mosely J. held that *amicus* would have access to the unredacted versions of the documents, and could make submissions on the facts and law. *Amicus* could also present issues favouring the person seeking disclosure during the *ex parte* hearings, so that to a limited extent *amicus* was acting for Khadr. However, *amicus* had no solicitor-client relationship with the Khadr. *Amicus* was to assist the Court in arriving at a just determination of the issues, but in doing so was required to keep the information at issue confidential until such time as it was ordered disclosed.

A different variation occurred in *R. v. Brown* [1999] O.J. No. 4866 (Gen. Div.), where *amicus* did not cross-examine witnesses, did not give legal advice to the accused, was not privy to any confidential information from the accused, and functioned only on the basis of the evidence adduced at trial and his dialogue with counsel of record.

At the other extreme would be cases in which *amicus* was appointed to represent and make submissions on behalf of unrepresented interests before

the court. The Supreme Court of Canada recently appointed *amicus* pursuant to Rule 92 of the *Supreme Court Rules* SOR/2002-156, permitting *amicus* to file a factum, book of authorities, and to make oral submissions in *Attorney General of Ontario, 3rd Party Record Holder v. Lawrence McNeil et al.*, [2007] S.C.C.A. No. 57, in which the judgment is reserved. In the Supreme Court of Canada, McNeil was not involved because his appeal to the Court of Appeal had been allowed on the basis of fresh evidence. Accordingly, it was necessary for the Court to appoint *amicus* to provide “his” perspective on the issues to be determined.

Similarly, where *amicus* was appointed to assist the court in determining whether a witness, accused or offender, were subject to informer privilege, *amicus* would not be acting for the party claiming the privilege: *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43.

In between, will be some cases where *amicus* will be permitted to cross-examine witnesses: *R. v. Phung* [2006] O.J. No. 5663; *Tehrankari, supra*. In others, there would be no cross-examinations. In some, the trial judge might permit submissions by *amicus* on the merits of the case to the jury or to the judge. In others, no submissions would be permitted.

[45] Where the court concludes that it is necessary to appoint *amicus*, it is for the court, not the Attorney General or Crown counsel, to set the terms of the appointment. As this court said in *Samra*, at p. 444 O.R., “*amicus curiae* is not a party to the action but a friend of the court”. The terms will be determined in each case by the court’s assessment of what is necessary for the proper administration of justice. It is then for the court to set out the terms under which *amicus* will function. As with any counsel providing services to a private client, one of the terms under which counsel functions may concern compensation. The jurisdiction to appoint *amicus* must necessarily include the power to set the terms under which *amicus* will function, including the rate of compensation.

[46] Put another way, where the court determines that the appointment of *amicus* is necessary to avoid an injustice, a necessary corollary must be the authority to order state funding of *amicus*, at a rate prescribed by the court, where that is required to ensure that the role is filled and that the court’s need is met. The court could not fulfill its function to administer justice according to law if it could create the role of *amicus* where that was necessary, but had no power to ensure that the role was filled because it could say nothing about the rate of compensation. We therefore conclude that the jurisdiction to appoint *amicus* necessarily extends to fixing the rate of compensation.

The Auckland Harbour argument

[47] While conceding the power of the court to appoint *amicus* and to set some of the terms of the appointment, the Attorney General submits that the court has no jurisdiction to order the

state to pay *amicus*' fees, let alone set the rate at which *amicus* should be paid. The Attorney General's submission rests on the broad proposition that under our Constitution, it is for Parliament or the legislature, as the case may be, to allocate the expenditure of public funds, not the courts. This submission rests upon what we have termed the *Auckland Harbour* principle expressed by the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318, [1923] All E.R. Rep. Ext. 838 (P.C.) on an appeal from the Supreme Court of New Zealand. That principle simply stated is that only Parliament can authorize the payment out of money from the Consolidated Revenue Fund. The principle is associated with Parliament's assertion of authority over the Crown (see P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough, Ont.: Carswell, 1997), at p. 1-19). *Auckland Harbour* itself concerned the legality of a payment by a Minister of the Crown contrary to the terms of a statute. The following passage from the opinion of Viscount Haldane, at pp. 326-27 A.C., captures the principle:

[F]or it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government if it can, as here, be traced.

[48] We do not doubt that the *Auckland Harbour* principle also forms part of the Constitution of Canada. As applied to the provinces, the principle is captured, in part, in s. 126 of the *Constitution Act, 1867*:

126. Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

[49] And, the principle is codified in Ontario by s. 11.1(1) of the *Financial Administration Act*:

11.1(1) Money shall not be paid out of the Consolidated Revenue Fund and neither a non-cash expense nor a non-cash investment shall be recognized by the Crown unless the payment or the recognition is authorized by this or another Act of the Legislature.

[50] As we have said, the power to set the rate of compensation of *amicus* and require the state to pay is a necessary incident of the court's jurisdiction to appoint *amicus*. The proper exercise of that appointment jurisdiction is not contested in these cases. In our view, payment of *amicus* by the Crown under a court order made pursuant to this jurisdiction is authorized by an Act of the legislature within the meaning of s. 11.1, namely, s. 22 of the *Proceedings Against the Crown Act*. It provides, in part, as follows:

22. The Minister of Finance shall pay out of the Consolidated Revenue Fund the amount payable by the Crown,

(a) under an order of a court that is final and not subject to appeal[.]

[51] Moreover, s. 13 of the *Financial Administration Act* itself would appear to provide authority for the payment out of the Consolidated Revenue Fund of orders by the court made against the Crown:

13. If any public money is appropriated by an Act for any purpose or is directed by the judgment of a court or the award of arbitrators or other lawful authority to be paid by the Crown or the Lieutenant Governor and no other provision is made respecting it, such money is payable under warrant of the Lieutenant Governor, directed to the Minister of Finance, out of the Consolidated Revenue Fund, and all persons entrusted with the expenditure of any such money or a part thereof shall account for it in such manner and form, with such vouchers, at such periods and to such officer as the Minister of Finance may direct.

(Emphasis added)

[52] In summary, we conclude that the *Auckland Harbour* principle does not excise the power to set the rate of compensation and order the state to pay from the jurisdiction to appoint *amicus*. The legislature has authorized the payment by the Crown of amounts ordered under properly made court orders.

Should these orders for payment of amicus have been made

[53] The Attorney General submits that even if the jurisdiction exists, these orders should not have been made because the trial judges in these cases failed to adopt the “least restrictive approach”. The least restrictive approach was expressed by the Quebec Court of Appeal in *Quebec (Attorney General) v. C. (R.)*, [2003] Q.J. No. 7541, [2003] R.J.Q. 2027 (C.A.) (unofficial translation), which concerned orders by trial judges requiring the Attorney General to pay the fees of defence counsel in cases where the accused had been refused legal aid or where defence counsel seeks a rate above what legal aid was prepared to pay. The Quebec Court of Appeal dealt with the cases on the basis that the orders had been made under s. 24(1) of the *Charter* and

held that the trial judges should not have made the orders requiring the Attorney General to pay defence counsels' fees. Rather, the trial judges should have stayed the proceedings as suggested by this court in *R. v. Rowbotham*. In the course of their reasons, the Court of Appeal provided a number of policy reasons for their decision, at paras. 162-65:

Inévitablement, l'ordonnance prononcée se heurte au droit de l'État de répartir ses ressources selon les priorités et choix qu'il a arrêtés. Celui-ci devra, en effet, puiser dans les fonds publics, s'il entend se soumettre à l'ordonnance. En conséquence, lorsque le tribunal statue sur la réparation en vertu du paragraphe 24(1) de la *Charte*, il doit se garder de discuter de la politique du gouvernement à l'égard de l'aide juridique, ou encore de la justesse d'une décision de la Commission des services juridiques ou de l'un de ses officiers, parce qu'il n'est pas saisi de ces questions. Lorsque le tribunal conclut, à l'égard d'une personne admissible à l'aide juridique, que le tarif ne répond pas à la norme constitutionnelle, il prend une décision "ponctuelle", c'est-à-dire qu'il constate que le régime n'a pas été conçu pour le type de dossier dont il est saisi, ce qui n'empêche pas pour autant le régime de continuer à s'appliquer dans les autres cas. Telle est la limite de l'intervention du tribunal.

La suspension de l'instance, jusqu'à ce que l'ordonnance soit respectée, n'autorise pas le tribunal à fixer le montant des honoraires, ou à dicter au gouvernement les moyens de s'acquitter de son obligation constitutionnelle. À cet égard, les enseignements de la Cour suprême commandent de laisser au gouvernement toute la latitude de décider si, ultimement, il va satisfaire à l'ordonnance ou encore — comme cela est sa prérogative — s'y refuser et laisser l'instance suspendue, ce qui signifie la fin des procédures.

La question de déterminer ce que l'État doit déboursier pour garantir ce droit constitutionnel n'est donc pas justiciable puisqu'il n'appartient pas aux tribunaux, comme nous l'avons fait ressortir précédemment, de s'ingérer dans la répartition des ressources limitées de l'État.

Plusieurs motifs servent à expliquer la conclusion selon laquelle le tribunal ne doit pas dicter au gouvernement les moyens de s'acquitter de son obligation constitutionnelle et préciser les sommes qu'il doit déboursier pour garantir ce droit : (1) les tribunaux ne sont pas institutionnellement compétents pour s'ingérer dans la répartition des fonds publics, d'où la latitude qui doit être laissée au gouvernement (2) dans la plupart des cas, la fixation du montant des honoraires constituerait une façon détournée de contourner la LAJ, (3) à titre de réparation constitutionnelle, l'ordonnance ne doit pas empiéter sur le domaine législatif plus qu'il est nécessaire et, en conséquence, elle ne doit pas constituer la mesure la plus contraignante, et (4) finalement, comme l'État conserve le choix de poursuivre ou non les procédures, il est raisonnable de lui laisser une marge de manoeuvre pour s'acquitter de son obligation constitutionnelle de fournir au prévenu les services d'un avocat rémunéré à même les fonds publics.

Inevitably, the order made will conflict with the right of the government to allocate its resources in accordance with its own priorities and choices. The state will have to dip into public funds if it intends to comply with the order. Consequently, when the court rules on relief under subsection 24(1) of the Charter, it must refrain from discussing the government's policy on legal aid or the reasonableness of a decision of the Commission

des services juridiques or one of its officials, because these issues are not before it. When the court finds with respect to a person who is eligible for legal aid that the tariff does not meet the constitutional standard, it is making a “case-specific” decision; that is to say that it finds that the system was not designed for the type of case that is before the court although this does not mean that the system cannot continue to apply to other cases. This is the limit on the court’s intervention.

Staying the proceedings until the order is complied with does not authorize the court to set the amount of the fees or to dictate to the government how it will fulfil its constitutional duty. In this respect, the statements of the Supreme Court require that we leave government all possible latitude to determine whether it will ultimately comply with the order or — as is its prerogative — refuse to do so and leave the proceedings stayed, which means that the proceedings are at an end.

The question as to how much the state must spend in order to guarantee this constitutional right cannot be litigated because it is not up to the courts, as we noted earlier, to interfere in the allocation by the state of its limited resources.

There are several reasons that justify a finding that the court must not dictate to the government how it should fulfil its constitutional duty and must not indicate the sums that it must spend in order to guarantee this right: (1) the courts do not have institutional jurisdiction to interfere in the allocation of public funds, which explains the flexibility that the government must retain, (2) in most cases, the determination of the amount of the fees would be a distorted means of circumventing the LAA, (3) in terms of constitutional relief, the order must not encroach upon the legislative area more than is necessary and it must not accordingly be the least intrusive measure, and (4) finally, since the state retains authority to decide whether or not to continue the proceedings, it is reasonable for the state to be left with room for manoeuvre in order to fulfil its constitutional duty to provide the services of counsel paid from public moneys.

(Footnotes omitted)

[54] We agree that the policy reasons set out by the Quebec Court of Appeal signal the need for caution in making orders that have the effect of expending public money. However, a temporary stay of proceedings was not the appropriate remedy in these cases. Nor does the Attorney General argue that this should have been the result, not having himself initiated a stay. *Amicus* were appointed so that the cases could proceed. It hardly seems logical for the court to appoint *amicus* and then stay the proceedings. All parties shared an interest in these cases going forward. Moreover, unlike *R.C.*, these cases do not engage the *Charter*. They do not raise the spectre of the courts telling the state to spend public funds to fulfill constitutional rights. They are about the courts exercising their inherent jurisdiction to see that justice is done.

[55] The Attorney General also argues that these orders should not have been made because they undermine the legal aid certificate program and, even if compensation were ordered to [be] paid by the state, it should have been left to the Crown to fix the rate.

[56] The Attorney General submits that because *amicus* in these three cases came to undertake a role similar to that of defence counsel who have undertaken to defend a case under a legal aid certificate, the effect of the judges' orders was to circumvent the provisions of the *Legal Aid Services Act*. This submission fails for three reasons. First, the *Legal Aid Services Act* does not apply to *amicus*. Second, *amicus* were appointed because, in part, the legal aid scheme could not adequately respond to these cases, in large measure because of the conduct of the accused. Third, *amicus* does not perform the role of defence counsel. For example, we agree with the reasons of Forestell J. that the task asked of *amicus* in *Imona Russel #1* cannot simply be equated with defence counsel. It was not. It was to assist the court in very difficult circumstances, in part by performing some of the services of defence counsel for a completely uncooperative client but also serving the much broader interests of the administration of justice as described below. The role can properly be described as a formidable challenge.

[57] Further, since *amicus* was appointed in each case to assist the court, it would not be appropriate for one of the parties, here the Crown who is adverse in interest to the accused, to unilaterally determine the fees to be paid to *amicus*. The argument based on expertise and institutional capacity has little traction when the issue is setting fees of counsel who have been appointed to assist the court. This is not a question involving broad issues of social, economic and political policy, but the capacity to set fees of counsel in a particular case, a matter well within the institutional capacity of the judge presiding at the trial. The jurisdiction to set fees of *amicus* is the same as the jurisdiction to set the fees of the independent prosecutor considered by this court in *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321, [2003] O.J. No. 1783 (C.A.), at para. 13, where the Attorney General conceded the court's power to set counsel's fees:

Before this court, the Crown acknowledged the inherent jurisdiction of the trial judge, as a Superior Court, to initiate and conduct contempt proceedings. Mr. Brown [counsel for the Attorney General] further acknowledged that this jurisdiction extends to the appointment of an independent prosecutor at the Crown's expense where, as here, the Crown would be subject to a conflict of interest if it were to take carriage of those proceedings. He also conceded that a necessary corollary of this was that the trial judge could fix the rate of remuneration which the Crown would be obliged to pay, but only if he considered the relevant factors and determined a rate that was reasonable in all the circumstances.

[58] It is unclear whether the Attorney General has now resiled from the concession made in *Figueroa*. In any event, we

are satisfied that the concession was properly made and applies equally to setting fees of counsel appointed as *amicus*.

[59] The Attorney General also relied upon this court's decision in *R. v. Peterman* (2004), 70 O.R. (3d) 481, [2004] O.J. No. 1758 (C.A.), but *Peterman* was not an *amicus* case. Like *C. (R.)*, it concerned a court order that had the effect of circumventing the provisions of the *Legal Aid Services Act*. As we have said, none of these cases do that. To a similar effect is the decision of the Alberta Court of Appeal in *R. v. Cai*, [2002] A.J. No. 1521, 170 C.C.C. (3d) 1 (C.A.), leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 360, and the Yukon Territory Court of Appeal in *R. v. Savard*, referred to earlier, in footnote 1. Both cases relied upon the *Aukland Harbour* principle. For the reasons set out above, it is our view that this principle does not bar an order requiring the Attorney General to pay the fees of *amicus*.

[60] Finally, on this issue we note that the British Columbia Court of Appeal has recently dealt with the question of *amicus* appointments. In *R. v. W. (P.H.L.)*, [2004] B.C.J. No. 2096, 190 C.C.C. (3d) 60 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 550, the accused, who had been unrepresented at trial, appealed his conviction for several sexual offences. He had been refused legal aid and his *Rowbotham* application was dismissed because he had the financial capacity to hire counsel. The court allowed his appeal from conviction because the appellant could not have a fair trial without counsel. The court recognized that the trial judge was faced with an awkward problem because the accused had the means to retain counsel but decided to proceed on his own. The court held, at para. 21, that when it became evident that the appellant could not have a fair trial, the trial judge could entertain a fresh *Rowbotham* application and appoint counsel or "request the Attorney General to appoint an *amicus curiae*".

[61] The British Columbia Court of Appeal returned to this issue in *R. v. Martin*, [2010] B.C.J. No. 2296, 2010 BCCA 526, another case where an accused proceeded to trial without counsel. Speaking for the court, at para. 49, Bennett J.A. clarified that it is for the court to appoint *amicus*. She held, however, that if *amicus* is to receive payment, the Attorney General must agree to the appointment:

A trial judge has the discretion to appoint an *amicus curiae*. However, if the *amicus* is to receive reimbursement, the Attorney General must agree to the appointment: see *R. v. P.H.L.W. supra*, and *R. v. Miner*, [1997] B.C.J. No. 625 (C.A.). There are a number of instances in this province where this step has been taken: see, for example, *R. v. Grabowski*, 2006 BCSC 1124 and *R. v. Benji*, 2006 BCSC 1370. The role of the *amicus* is that of "friend of the court"; and is generally appointed to assist the court

on a point of law. However, it is not uncommon for an *amicus* to provide legal assistance to an unrepresented accused. The person who is best able to ascertain whether an unrepresented litigant has the ability to represent himself during a trial is the trial judge, who deals with the person on a day to day basis. There may be occasions where the trial judge does not recognize the difficulty an accused is having, or is unaware of assistance which may be provided. See, for example, *R. v. P.H.L.W.*, *supra*. But by and large, an experienced trial judge will quickly recognize whether an accused is incapable of conducting his or her defence. Normally, this can be addressed by a *Rowbotham* application. However, where, as in this situation, an accused is in a position to hire counsel but opts to represent himself, the appointment of an *amicus* will only be an option if he is unable to adequately put his defence before the jury.

[62] It does not appear that the issue of funding was directly before the Court of Appeal in either case, and in *Martin*, the court held that on the particular facts there was no need for the assistance of an *amicus curiae*. The court cited no authority for the proposition that only if the Attorney General agrees to the appointment can counsel receive payment for their services. The court also did not elaborate on the form of agreement. For example, would it have been sufficient that, as in the Imona Russel case, it was the Attorney General's counsel who asked that *amicus* be appointed?

Setting the rate of compensation

[63] The only challenge raised by the Attorney General to the rates of compensation set in these cases is the want of evidence to sustain them. We will address that below in the context of each order.

[64] However, it is appropriate to address some of the relevant factors that can be looked to in any particular case when the court must determine the rate of compensation for *amicus*.

[65] In the recent case of *R. v. White*, [2010] 3 S.C.R. 374, [2010] S.C.J. No. 59, 2010 SCC 59, a panel of the Supreme Court of Canada set the rate of compensation for counsel appointed under s. 694 of the *Criminal Code* to act on behalf of an accused who was a party to an appeal to that court. That guidance is of equal relevance to the setting of the rate of compensation for *amicus*. The panel dealing with the motion (Binnie, Fish and Charon JJ.) said this, at para. 4:

The determination under s. 694.1(3) should be based on a broader assessment of what is fair and reasonable in the circumstances, including the recognition of the limits of state funding but having regard to such factors as counsel's experience, the importance of the issues raised and the complexity of the case; see *Alberta (Chief Commissioner of the Human Rights and Citizenship Commission) v. Brewer* (a taxation decision of the Registrar of the Supreme Court of Canada, dated September 11, 2009) and *R. v. Pietrangelo*, 2008 ONCA 547, [2008] O.J. No. 5137 (QL).

[66] In *Figueroa*, this court addressed the task of fixing a reasonable rate of compensation for an independent prosecutor appointed by the court. As with *White*, the circumstances are directly analogous to the circumstances in the cases before us. The court said the following, at paras. 27-29:

In my view, a number of considerations should go into this task. While not exhaustive, that list includes the importance of the assignment undertaken, the legal complexity of the work to be done, the skill and experience of counsel to be appointed and his or her normal rate charged to private sector clients. These considerations reflect the fact that, to some extent, this is a retainer like any other.

However, in several respects this is not a retainer like any other. First, the independent prosecutor is being asked by the court to serve the needs of the administration of justice. In my view, acting in the public interest in this way constitutes one manifestation of the professional responsibility that has characterized the legal profession at its best. To the extent that an independent prosecutor is performing such a public service, he or she ought not to expect to be remunerated at private sector rates. It is part of the privilege of belonging to a profession that is not simply a business.

Second, it must be remembered that the rate fixed for the independent prosecutor will be paid from public funds. In an age when there are so many pressing needs taxing that resource, I do not think that it should be used to pay at private sector rates.

[67] In our view, the factors referred to in these two judgments, while not exhaustive, provide very relevant considerations for a court tasked with fixing the rate of compensation for *amicus*. We would only add that the rate that legal aid would pay to defence counsel is also an important factor and may serve as the applicable template in many cases.

[68] In advancing this approach, we recognize that calling on counsel to provide the invaluable service of *amicus* at the financial sacrifice it will very likely entail engages the highest tradition of professionalism that has always characterized the defence bar and is essential if the criminal justice system is to properly serve the public interest.

The orders made

[69] In all of the three cases before us, the Attorney General raised the same challenges to the court ordering the state to pay for *amicus* and setting the rate of compensation. We have dealt with these arguments generically, and concluded that none impair the orders under appeal.

[70] In addition, the Attorney General argued that each of the orders was flawed for reasons specific to the particular order. We will address each order in turn.

Imona Russel #1

[71] The Attorney General argues that the trial judge erred in disregarding the original agreement of *amicus* to be paid at legal aid rates; in finding that changes in the scope of *amicus*' appointment was relevant to the rate of compensation; and in setting that rate in the absence of evidence.

[72] These arguments fail. The trial judge found that the significant change in the scope of the work required of *amicus* by the court so changed the reasonable expectations of all parties that the prior agreement of *amicus* did not apply, and revisiting the rate of compensation was entirely reasonable. She found that the increased value added by *amicus* under the new scope of appointment warranted greater compensation. The trial was at a critical juncture, with *Charter* issues, search issues, confidential informer privilege issues and the evidence yet to come in the following four months. The charge was first degree murder. It was important to the administration of justice and the public interest that this proceed without delay. The expanded role of *amicus* would clearly allow the trial to proceed more efficiently, resulting in significant savings for the administration of justice. It avoided the risk of a mistrial having to be declared at that point, if *amicus* could not be obtained. Mr. Moustacalis had already served a considerable period as *amicus* at legal aid rates and could reasonably have refused the greater commitment now being asked. However, he was uniquely placed to perform the expanded role now required.

[73] In summary, the trial judge selected the rate based on the very kinds of considerations referred to in the preceding section of our reasons and her detailed knowledge of the proceedings. It is not apt to treat the setting of the rate of compensation as a fact-finding exercise requiring evidence. Rather, it is a judgment call based on relevant considerations. We agree entirely with the basis on which the trial judge proceeded, and we see no reason to interfere with the rate of compensation ordered in these circumstances, even though it exceeded the legal aid rate for defence counsel.

Imona Russel #2

[74] The trial judge ordered that independent counsel be appointed in place of LAO to set a budget for and review the accounts of *amicus*. The Attorney General argues that there was no evidence that LAO had not set a workable budget and could not supervise *amicus*' accounts. Nor was there any basis for disregarding the statutory test applied by LAO in setting

the budget for defence counsel acting pursuant to a legal aid certificate.

[75] These arguments also fail. The trial judge concluded that the risk of a mistrial and the jeopardy to the imminent seven-week trial of the accused on serious charges required the oversight she ordered. This was necessary to ensure that *amicus* could give the court the necessary assistance. She was fully familiar with the circumstances and the urgent need to resolve the issue of oversight. We see no basis to disagree with her judgment. Nor was there any need to impose the LAO statutory test for defence counsel on the budget of *amicus*. As we have explained, the two roles are different. One acts for the accused. The other assists the court to properly administer justice.

Whalen

[76] The Attorney General challenges the rate of compensation set by the trial judge, arguing there was no basis to set a rate above the legal aid rate and no evidence to support the rate actually selected.

[77] We cannot agree. In his reasons, the trial judge explained why the appointment of *amicus* was necessary, and why it was very important that it be Ms. Morrow, because of the relationship she had developed with the accused. Appointing a new lawyer as *amicus* ran the risk of destabilizing the entire proceeding. In selecting the precise rate, the trial judge made clear that he was not dealing with the legal aid standard for defence counsel but was setting the rate of compensation for a particular *amicus*. In selecting the rate, the trial judge applied *Figueroa*, paying special attention to the obvious complexity of a dangerous offender application, the experience and expertise of Ms. Morrow and the unique relationship she had been able to develop with Mr. Whalen. As we have said, these are all relevant considerations, and we see no error in the trial judge proceeding on that basis.

Greenspon

[78] Here, too, the Attorney General challenges the rate of compensation fixed by the trial judge on the basis that there was no evidence to support that decision.

[79] Again, we disagree. The trial judge was guided by the criteria in *Figueroa* and the specialized experience of *amicus*. We see no error in her proceeding to fix the rate on that basis. We would note, however, that this is in the context of the rate applying only to 3.25 hours. Had it been applied to a full trial, some

considerable justification beyond the experience of counsel would have been required to justify the substantial rate fixed.

[80] For all these reasons, the appeals are dismissed.

Appeals dismissed.

Patriarcki v. Attorney General of Canada*

[Indexed as: Patriarcki v. Canada (Attorney General)]

2011 ONSC 407

Superior Court of Justice, R. Smith J. January 18, 2011

Employment — Jurisdiction — Plaintiff public servant invited by her department director to submit application for “secret” level security clearance and instructed to give application to director’s assistant for forwarding to relevant authorities — Plaintiff discovering after her contract had ended that assistant had lost or failed to forward application — Plaintiff unable to accept offer of another government job which was conditional on her having security clearance — Plaintiff suing government on basis that assistance was negligent and government was vicariously liable for that negligence — Essential character of dispute not falling within scope of grievance procedure under s. 91 of Public Service Staff Relations Act — Superior court having jurisdiction to hear action — Public Service Staff Relations Act, R.S.C. 1985, c. P-35, s. 91.

While employed by the Government of Canada on a three-year contract, the plaintiff was invited by the director of her department to submit an application for a “secret” level security clearance. As instructed, she gave her application to the director’s assistant M to forward to the relevant authorities. After her contract ended, the plaintiff discovered that M had lost or failed to forward the application. As a result, she was unable to accept an offer of another government job that was conditional on her having a “secret” level security clearance. The plaintiff brought an action against the government, alleging that M was negligent and that the government was vicariously liable for that negligence. The Attorney General brought a motion for summary judgment dismissing the action, arguing that the plaintiff was required to pursue a remedy under the *Public Service Staff Relations Act* (“PSSRA”) and that the court should not exercise its residual jurisdiction to hear the action.

Held, the motion should be dismissed.

In its essential character, the plaintiff’s claim did not fall within the scope of the grievance procedure under s. 91 of the PSSRA. It was not a dispute with her employer over a matter which affected the terms and conditions of her employment contract, which ended before her discovery of M’s alleged negligence. Rather, it was a claim in negligence and negligent misrepresentation against a

* Vous trouverez la version française à la p. 765, *post*.