August 30, 2013

Roundtable on *Ontario v Criminal Lawyers' Association of Ontario*

Written by: Alice Woolley and Jonnette Watson Hamilton

Cases Considered: *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43

On August 13, 2013, Faculty of Law hosted its last Roundtable discussion of the summer. That discussion focused on the Supreme Court of Canada's August 1st decision in *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 concerning the compensation to be paid to a lawyer appointed to act as a "friend of the court", known as an *amicus curiae*. Participants included faculty members, researchers from the Alberta Civil Liberties Research Centre, JD and graduate students, and a post-doc fellow. What participants found most controversial about the decision was not the court's 5:4 split on the compensation issue, but rather the court's unanimity on the inappropriateness — and henceforth, presumably, inability — of courts to appoint *amicus curiae* to act as *de facto* defence counsel.

Facts

The decision involved the appeal of three decisions in Ontario where the rate of compensation set by the courts exceeded the Legal Aid rate in each case because the *amici* refused the lower Legal Aid rates. The Attorney General pays that compensation and objected to paying more than the Legal Aid rates. In each case the trial judge appointed an *amicus* to assist the accused, who had in each case discharged lawyers who had previously represented them. None of the cases were decided under the *Canadian Charter of Rights and Freedoms*, i.e., none required an order under section 24(1) of the *Charter* providing state-funded counsel in order to ensure a fair trial. The trial judges appointed lawyers to assist the accused in order to maintain the orderly conduct of the trials or to avoid delay in complex and lengthy proceedings.

In *R v Russell*, the *amicus* was appointed at the request of the Crown. The *amicus* took instructions from and acted on behalf of the accused, as if he were defense counsel except he could not be discharged or withdraw. In *R v Whalen*, a dangerous offender application, the accused had difficulty finding a legal aid lawyer due to a boycott of legal aid cases by many members of Ontario's criminal defence bar. An *amicus* was appointed to establish a solicitor-client relationship with the accused in order to stabilize the litigation process. In *R v Greenspon*, a former counsel was appointed *amicus* to avoid delay, but as the accused found counsel the *amicus* was not required.

A unanimous Ontario Court of Appeal affirmed all of the decisions. They linked the courts' ability to set rates of compensation for *amici* to their power to appoint them and held compensation should not be left up to the Attorney General.

Supreme Court of Canada Decision

No one questioned the jurisdiction of a Canadian court to appoint an *amicus curiae* to assist the court in exceptional circumstances. Ostensibly, the sole issue was whether courts' inherent or implied jurisdiction to appoint *amici* included setting their rate of compensation. The Supreme Court split 5:4 on this issue. The majority, in a decision written by Justice Karakatsanis, held that power was not included.

The dissenting judgment, written by Justice Fish, argued that the power to determine the compensation to be paid *amici* flowed from courts' inherent jurisdiction and need to control its own processes for three reasons:

> (1) the inability to set rates of compensation "would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing" (para 123);
> (2) "the integrity of the judicial process would be imperilled" and should not be dependent upon the Crown (para 124); and
> (3) "the Attorney General's unilateral control over the remuneration of *amici curiae* might create an appearance of bias and place *amici* themselves in an unavoidable conflict of interest" (para 125).

The dissent concluded there is no constitutional impediment to vesting a power in trial judges to set rates of compensation (para 126).

The majority disagreed and held that a court's inherent or implied jurisdiction to appoint an *amicus* is limited by the separation of powers that exists among the legislature, the executive (which includes the Attorney General) and the judiciary (para 15). Courts' inherent or implied jurisdiction does not allow courts "to enter the field of political matters such as the allocation of public funds, absent a Charter challenge or concern for judicial independence" (para 41).

Perhaps more importantly than this divided decision on *amici* compensation is the fact that the Supreme Court was unanimous on the "issue" of whether judges could appoint *amici* to act as defence counsel. (Ontario did not challenge the appointments in these cases, but the issue of whether it was appropriate to appoint *amici* to, in effect, act as defence counsel, was raised by two of the six interveners, the Attorneys General of British Columbia and Quebec). Justice Karakatsanis wrote (at para 49):

> Further, I agree with my colleague Fish J. that"[o]nce clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a 'friend of the court'" (para. 114). *Amicus* and court-appointed defence counsel play fundamentally different roles ….

Justice Karakatsanis held that when the terms of appointment of *amici* mirror the responsibilities of defence counsel, they are "fraught with complexity and bristle with danger" (para 50). She identified four specific concerns:

> 1. The appointment of an *amicus* "may conflict with the accused's constitutional right to represent himself" (para 51);
> 2. It can undermine a court's earlier decision to refuse to appoint state-funded counsel (para 52);

3. There is an inherent tension between the duties of the *amicus* to the accused and the duty of the *amicus* to the court, especially when the amicus' submissions are unfavourable to the accused (para 53);
4. Appointing *amici* to a defence counsel role could undermine provincial legal aid schemes (para 55).

As a result Justice Karakatsanis concluded that a lawyer appointed as *amicus* who takes on the role of defence counsel "is no longer a friend of the court" (para 56). Justice Fish did not go quite so far, concluding that an *amicus* "clothed with all the duties and responsibilities of defence counsel, …can no longer properly be called a 'friend of the court'" (para 114, emphasis added).

Roundtable Discussion

From the point of view of participants in the Roundtable, the following six points were the most interesting aspects of the decision.

1. Trial judges should not appoint amici to act as defence counsel.

The majority and dissent agreed that a judge ought not to appoint counsel as *amicus* where the real point of that counsel is to assist an accused to conduct a defence. Even though the appointments were not directly at issue before the Court — and the point is therefore technically *obiter* — this appears to call into question the actual appointments being considered in the case. The implications of this unanimous view of the scope of an *amicus'* role and the circumstances under which an *amicus* may be appointed may be the most consequential going forward.

It certainly occupied most of the discussion at the Roundtable, with many voicing concerns about what would happen if trial judges did stop appointing *amici* to act as defence counsel. Trial judges would have to shoulder more of the responsibility themselves to ensure a fair trial for unrepresented accused. The dissent was concerned about this point, accusing trial judges of externalizing their duty by shifting the responsibility to *amici* who assume the role of defence counsel (para 115). The majority's concerns flowed the opposite way, as their concern was that the use of *amici* to assist the trial judge in fulfilling their duty to assist self-represented accused might result in "a trial judge doing something indirectly that she cannot do directly," and that is give them strategic advice (para 54).

What ought a trial judge to do when faced with an accused who cannot effectively represent himself, but who refuses to cooperate with counsel? Consider the case of the Unabomber, Ted Kaczynski. Kaczynski objected to his lawyers mounting an insanity defence, although the insanity defence was necessary to avoid the death penalty, absent a plea. He asked to represent himself. He was found competent to do so by a psychologist (although the evidence was also fairly strong that an insanity defence would work). The trial judge, however, decided that Kaczynski representing himself would undermine the fairness of the trial process, and insisted that the original defence team continue.

Should a trial judge have that power? What happens to the accused, especially the mentally unstable but legally competent accused (i.e., those relatively likely to fire their lawyer), if the judge does not?

The burden on *pro bono* initiatives as a result of government underfunding or lack of funding for legal representation in criminal and civil matters was noted. It seems that *pro bono* initiatives —

lawyers and law students giving of their time and expertise for little or no cost — are seen as the solution to most of these problems. But voluntary *pro bono* work cannot be a substitute for adequate government funding of legal aid. See, for example, "Tension at the Border: Pro Bono and Legal Aid", an October 2012 Consultation Document prepared by the Canadian Bar Association's Standing Committee on Access to Justice.

2. *The discomfort of the majority with the possibility that a court could make a decision that directly requires the expenditure of public funds in a particular way.*

Justice Karakatsanis draws distinctions between the functions of the legislative, executive and judicial branches (paras 27-31). She does so to support the position that it would be inappropriate for the judicial branch to impose financial burdens; doing so intrudes on the executive and legislative functions.

The roundtable discussion questioned whether this creates a defensible division between legal functions/institutional actors, or are the actual lines between them more amorphous -- e.g., between making policy choices (which she assigns to the legislative branch) and implementing and administering those choices (which she assigns to the administrative branch)? Or between adopting laws (legislative branch) and interpreting and applying those laws (judicial branch)?

The majority's strong position here seems difficult to reconcile with, for example, its attitude of deference to administrative decision makers (the executive) in interpreting legislation. If the judicial branch has the obligation to interpret and apply legislation, on what basis does it then defer to interpretations of the executive branch?

3. *The use of the power to stay proceedings when the Attorney-General and the appointed amicus cannot agree on the amicus' pay.*

Justice Karakatsanis indicates that in those "exceptional" cases when trial judges appoint *amici*, "the person appointed and the Attorney General should meet to set rules and mode of payment" (para 75). They may consult the trial judge, but the trial judge cannot make an order requiring payment. What happens if the Attorney General and the *amicus* cannot agree on what the former is to pay the latter? According to the majority, in that situation "the judge's only recourse may be to exercise her inherent jurisdiction to impose a stay" and "give reasons for the stay, so that the responsibility for the delay is clear" (para 76).

The dissent also has something to say about stays when the Attorney General and the *amicus* cannot agree on what the former is to pay the latter. And it is, of course, the opposite of what the majority said because the dissent thinks trial judges do have the power to set compensation rates for *amici* they appoint. The dissent does agree with majority that the Attorney General and the *amicus* should negotiate the rate of the latter's remuneration (para 132). But if the Attorney General and the *amicus* cannot agree on what the former is to pay the latter, then according to the dissent, the judge should set the rate of remuneration. Then it is up to the Attorney General to either pay the fee set by the judge or stay the proceedings (para 135).

These two different positions on who wields the stay power has different institutional actors acting as the proverbial "bad guy", staying trials and letting accused go free. The majority seems to acknowledge the optics when it says that although courts are not allowed "to enter the field of political matters such as the allocation of public funds" (para 41), they can make sure the public knows it is not their fault if trials are stayed (para 76).

4. *The majority's strong distinction between matters of judicial independence that might justify the court requiring such expenditures, and matters of independence of the bar (which arguably includes access to lawyers), which would not.*

The majority holds that "concern for judicial independence" is a reason for "judges to use their inherent jurisdiction to enter the field of political matters" (para 41). Participants questioned whether judicial independence is something that requires judicial entry into the allocation of public funds, while the independence of the bar does not. In this case and in *Christie* (*British Columbia (Attorney General) v Christie*, 2007 SCC 21, [2007] 1 SCR 873), the SCC has shown a real reluctance to monitor the government's decisions with regards to the provision of access to lawyers. Is that reluctance consistent with the inherent jurisdiction of the court, judicial independence and the independence of the bar as formal (or informal) constitutional ideals?

Justice Karakatsanis suggests that inadequate funding may be reviewed when judicial independence is at issue. She mentions (at para 42) that the closure of the Manitoba courts by the withdrawal of court staff on a series of Fridays, as a part of a wider deficit-reduction effort, was found unconstitutional in the *Provincial Judges Reference (Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3). Again, why is judicial independence sufficient to warrant judicial activism while general concerns with respect to ensuring access to justice is not?

5. *The idea that legal services are essentially fungible, that as long as you have a lawyer, it does not matter what sort of lawyer you have — or does it?*

The majority's judgment appears to rest on the assumption that lawyers are largely fungible. For example, the majority states that "if the increasing demands on trial judges are best met by the appointment of *amici* to assist, but not act for, the unrepresented accused, the province may create a roster of available and qualified counsel who are prepared to act at the rate offered by the Attorney General" (para 73). In other words, if you have a lawyer then you have a lawyer, and there is no relevant difference in terms of access to justice or the satisfaction of the accused's rights that could arise from the quality of that lawyer or her legal representation.

At the Roundtable the question was raised as to whether, if that assumption does underlie the decision, it is justifiable? Does it say something about how we should approach entry to the profession? Is it an argument in favour of the public defender model of delivering legal aid services?

The dissent might appear to take the opposite approach, dividing lawyers into those who represent people of modest means and need not be paid very much, and lawyers who represent the courts and who therefore ought to be paid more. The dissent states that "it would be inappropriate to consign the administration of *amici*'s budgets to Legal Aid … [because] Legal Aid's expertise is in setting budgets for a person of modest means, which is not the applicable standard in the case of *amici* appointments" (para 140). Does this assume the lawyer appointed as a friend of the court ought to be paid more because of the nature of their client? Or because they are better lawyers?

The roundtable considered why would we accept in the criminal justice system that the legal payment for a lawyer representing "a person of modest means" would not be "the applicable standard" for paying an *amici*? What does that say about how we view the entitlements of persons of modest means in the criminal justice system relative to the entitlements of judges who want assistance in the conduct of cases?

6. Would undermining the legal aid system be a bad thing, from a public policy perspective?

Recall that the reason these cases came to the Supreme Court was that the Attorney General of Ontario took the position that the *amici* played a role similar to that of defence counsel and should accept legal aid rates, but the *amici* refused to accept those rates, and the judges fixed rates that exceeded the legal aid tariff and ordered the Attorney General to pay those higher rates. And recall that at the time of at least one of the cases on appeal — after June 1, 2009 — criminal defence lawyers had launched their eight month boycott to protest the provincial government's refusal to raise the legal aid tariff, which paid $77 to $98 an hour depending on their experience level, with caps on the number of hours paid. The majority never discusses legal aid rates or the remuneration ordered by the trial judges in the cases under appeal — a curious omission in a decision that arose because of rates of pay. The dissent does note the rates of compensation set by the trial judges in each of the three cases: $200 per hour (para 103), $250 per hour for very senior counsel (para 104), and $192 per hour, which the trial judge noted was the rate that would be paid by the Attorney General to a lawyer of the *amicus*'s year of call to prosecute or to represent the interests of a witness in a criminal case" (para 99).

The majority makes much of the idea that allowing judges to set the rate of remuneration for *amici*, whether acting as defence counsel or not, would undermine the current legal aid system paras 55, 72-73, 77). For example, she asserts (para 79):

> Given the cost of lengthy trials, compensation orders for lawyers in a long complex criminal trial can represent the expenditure of hundreds of thousands of dollars of public funds, reviewable only by an appellate court. There is a real risk that such a disregard of the separation of powers and the constitutional role and institutional capacity of the different branches of government could undermine the legal aid system and cause a lack of public confidence in judges and the courts.

Legal aid reform in Canada is one of the issue that the Canadian Bar Association has been advocating for a number of years; see their website on "Legal Aid in Canada" and, in particular, their resolutions and Litigation Strategy. While the Supreme Court's reluctance to interfere in these matters may be understandable, it is not obviously desirable as a matter of public policy.

At the recent Canadian Bar Association in Saskatoon Chief Justice McLachlin reiterated her oft-noted position that access to justice is a major problem in Canada (as reported here, e.g.) The Supreme Court has in these sorts of public statements been a leader in these issues. The roundtable raised the question of whether that leadership has extended to its judgments, or whether to some extent the Court is acquiescing in the government's willingness to let participants function without the benefit of counsel, even where judges view counsel as essential.