S.C.C. File No.: 34317

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(APPELLANT)

and

CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

RESPONDENT
(RESPONDENT)

and

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF QUEBEC,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
ADVOCATES' SOCIETY and
MENTAL HEALTH LEGAL COMMITTEE

INTERVERNERS

FACTUM OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the British Columbia Civil Liberties Association

Micah B. Rankin
Elizabeth France
Sugden, McFee & Roos LLP
700 – 375 Water Street
Vancouver, B.C. Canada V6B 5N3
Tel: (604) 687-7700
Fax: (604) 687-5596
Email: mrankin@tru.ca
efrance@smrlaw.ca

Agent for the British Columbia Civil Liberties Association

Michael Sobkin
Barrister & Solicitor
2 - 90 Boulevard de Lucerne
Gatineau, Quebec J9H 7K8
Tel: (819) 778 - 7794
Fax: (819) 778 - 1740
Email: msobkin@sympatico.ca

Her Majesty the Queen

Malliha Wilson
Troy Harrison
Attorney General of Ontario
8th Floor- 720 Bay Street
Toronto, Ontario M5G 2K1
Telephone: (416) 326-4008
FAX: (416) 326-4181
E-mail: malliha.wilson@ontario.ca

Agent for Her Majesty the Queen

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, Ontario K2P 2H3
Telephone: (613) 566-2058
FAX: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Criminal Lawyers' Association of Ontario

P. Andras Schreck
Louis P. Strezos
Candice Suter
Schreck Presser LLP
6 Adelaide Street East, 5th Floor
Toronto, Ontario M5C 1H6
Telephone: (416) 977-6268 Ext: 1
FAX: (416) 977-8513
E-mail: schreck@schreckpresser.com

Agent for Criminal Lawyers' Association of Ontario

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Attorney General of Quebec

Brigitte Bussières
Gilles Laporte
Procureur général du Québec
1200, route de l'Église, 2e étage
Québec, Quebec G1V 4M1
Telephone: (418) 643-1477
FAX: (418) 644-7030
E-mail: bbussieres@justice.gouv.qc.ca

Agent for Attorney General of Quebec

Pierre Landry
Noël & Associés
111, rue Champlain
Gatineau, Quebec J8X 3R1
Telephone: (819) 771-7393
FAX: (819) 771-5397
E-mail: p.landry@noelassocies.com

Attorney General of Manitoba

Deborah L. Carlson
Attorney General of Manitoba
1205 - 405 Broadway Ave
Winnipeg, Manitoba R3C 3L6
Telephone: (204) 945-0679
FAX: (204) 945-0053
E-mail: dcarlson@gov.mb.ca

Agent for Attorney General of Manitoba

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Advocates' Society

John Norris
100 - 116 Simcoe St.
Toronto, Ontario M5H 4E2
Telephone: (416) 596-2960
FAX: (416) 596-2598
E-mail: john.norris@simcoechambers.com

Agent for Advocates' Society

Laura Stewart
Gowling Lafleur Henderson LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3
Telephone: (613) 786-0175
FAX: (613) 563-9869
E-mail: laura.stewart@gowlings.com

Attorney General of British Columbia

Bryant Alexander Mackey
Attorney General of British Columbia
1001 Douglas Street, 6th Floor
P.O. Box 9280, Station Provincial Government
Victoria, British Columbia V8W 9J7
Telephone: (250) 356-6712
FAX: (250) 356-5707
E-mail: bryant.mackey@gov.bc.ca

Agent for Attorney General of British Columbia

Henry S. Brown, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario K1P 1C3
Telephone: (613) 233-1781
FAX: (613) 788-3433
E-mail: henry.brown@gowlings.com

Mental Health Legal Committee

Anita Szigeti
Hiltz Szigeti
330 University Avenue
Suite 506
Toronto, Ontario M5G 1R7
Telephone: (416) 968-6575
FAX: (416) 968-3424
E-mail: aszigeti@hslaw.ca

Agent for Mental Health Legal Committee

Marie-France Major
Supreme Advocacy LLP
397 Gladstone Avenue
Suite1
Ottawa, Ontario K2P 0Y9
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Attorney General of Canada

Christopher M. Rupar
Attorney General of Canada
Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario K1A 0H8
Telephone: (613) 941-2351
FAX: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

TABLE OF CONTENTS

PART I – OVERVIEW OF ARGUMENT

1. Over three and a half centuries ago the Court of Exchequer responded to a prosecutor's objection to an *amicus curiae's* motion to quash an inquisition saying this:

> It is for the honour of the court of justice to avoid error in their judgments… Errors are like felons and traitors; any person may discover them… Barbarism will be introduced, if it [the *amicus curiae*] not be admitted to inform the court of such gross and apparent errors in offices.[1]

2. At the time this case was decided the *amicus curiae* was already an ancient and venerable figure in the English courts.[2] Early on, English courts avoided precisely defining the parameters of the *amicus*' function. This allowed the device to develop into "a highly adaptable instrument for dealing with many of the problems that arise in adversary proceedings."[3] Despite the *amicus*' long history in English law, its flexible and evolving nature cannot help but to periodically raise the kinds of controversy that confront the Court in this appeal.

3. At issue in the present case is the question of whether a court's jurisdiction to appoint *amicus curiae* entails an incidental power to require that the Crown remunerate an *amicus* on terms defined by the court. This Intervener, the British Columbia Civil Liberties Association ("BCCLA"), has a longstanding interest in the relationship between the criminal justice system and civil liberties. The BCCLA recognizes that the protection of civil and human rights depends upon the existence of a system of law in which courts are able to impartially and independently settle disputes. For the courts to function in our adversarial system, the BCCLA says that judges must be in a position to call upon the assistance of *amicus curiae* on such terms as are necessary for the court "to administer justice fully and effectively."[4]

4. It is beyond controversy that courts in Canada have an inherent power to appoint *amicus curiae*. Accordingly, this appeal reduces to the question of whether the power to set the rate of remuneration of *amicus curiae* is among the "apparently inexhaustible variety of circumstances"[5]

---

[1] *The Protector v. Geering*, Hardres 85, 86, 145 Eng. Rep. 394 (1656) [*Protector v. Geering*].
[2] Samuel Krislov, "The *Amicus Curiae* Brief: From Friendship to Advocacy" (1963) 72 Yale L. J. 694 [*Krislov*].
[3] *Ibid.* at p. 696.
[4] *R. v. Caron*, 2011 SCC 5, [2011] 1.S.C.R. 78 at para. 51 [*Caron*]; see also *Ibid.*, at paras. 26, 39; and see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Curr. Legal Probs.* 23 at 48 [Jacob].
[5] Jacob, *supra* at p. 23; *Caron, supra* at para. 29.

where the court's inherent jurisdiction may be invoked. To answer this question, the Court is asked to examine a set of constitutional principles related to Parliamentary appropriations which, the Appellant maintains, should impel this Court to allow its appeal.

5. The BCCLA submits that the Court of Appeal was correct that "[i]nherent in, and incidental to, the judges' conceded power to appoint *amicus* is the power to set the terms and conditions of that appointment."[6] The evolving and flexible nature of the power, the court's duty to preserve access to impartial and effective adjudication, and the applicable constitutional principles all support this conclusion.

PART II – POINTS IN ISSUE

6. The BCCLA focuses its submission on the Appellant's first ground of appeal; that the Court of Appeal erred in finding that courts have the inherent jurisdiction to order that *amicus curiae* be remunerated according to terms defined by the judge making the appointment. The BCCLA will advance three points in respect of this issue:

A. The Court should recognize that the *amicus curiae* is shorthand for a flexible and evolving legal device that permits courts to command the assistance of an independent third party where it is necessary for the administration of justice.

B. The *amicus curiae* appointment power is not subject to strict parameters and it at least includes the power to order payment of *amicus* counsel who are capable of assisting the court in fulfilling its duties.

C. The constitutional principles at issue in *Auckland Harbour Board* do not control the analysis because the orders under appeal are not "appropriations" but instead judgments against the Crown.

---

[6] *R. v. Russel*, 2011 ONCA 303 at para. 3.

PART III – ARGUMENT

7. The Appellant's argument hinges on the proposition that recognizing a power to order the remuneration of *amicus curiae* disregards the "exclusive authority of the Legislature to control the spending of public monies" contrary to *Auckland Harbour Board v. The King*.[7] Implicit in this line of argument is the unstated premise that the orders under appeal are tantamount to a mandatory appropriation order requiring payments out of the Consolidated Revenue Fund.

8. In spite of arguing that the orders under appeal are unlawful, the Appellant concedes that the *Auckland Harbour Board* "rule" is subject to at least three existing exceptions: payments authorized by statute; payments ordered by the court under s. 24(1) of the *Charter*; and orders of advanced costs in civil proceedings involving the Crown made pursuant to the court's inherent jurisdiction.[8] Since the orders under appeal do not fit into any recognized exception, the Appellant insists that the Crown has no legal obligation to pay for *amicus curiae*.

9. The BCCLA says that to understand why the Appellant's argument must fail, it is essential to begin by considering the nature and evolution of the court's historic power to appoint *amicus curiae*. From there, the BCCLA elaborates on why the power to order that *amicus curiae* be remunerated on particular terms is a necessary component of the court's flexible and evolving inherent jurisdiction. The BCCLA concludes by scrutinizing Viscount Haldane's remarks in *Auckland Harbour Board* and explaining why they have no bearing on the orders under appeal.

A. The *Amicus Curiae* Serves the Evolving Needs of the Court

10. The essence of the BCCLA's submission is that the recognition of the court's inherent jurisdiction to order the Crown to remunerate third parties is a principled component of the legal device commonly referred to as an "*amicus curiae*". Although literally translated as neutral "friend of the court", the *amicus curiae* is better understood as a "catchall device" that permits judges or courts to compensate for the deficiencies that arise from adversarial litigation.[9]

---

[7] Appellant's Amended Factum, paras. 4, 21, 22; and see *Auckland Harbour Board v. The King* [1924] AC 318 (PC) [*Auckland Harbour Board*].
[8] Appellant's Amended Factum at para. 42.
[9] Krislov, *supra* at 720.

11. The power to receive representations from disinterested third parties (*viz.*, *amicus curiae*) has existed in English law at least as far back as the 14th Century.[10] Although similar devices were known to Roman law,[11] the English *amicus curiae* bore only a fleeting resemblance to its Roman counterpart.[12] The original function of *amicus curiae* was one of "oral Shepardizing" of cases, that is to say, "the bringing up of cases not known to the judge."[13] *Amicus* would inform judges of areas of law beyond their expertise or knowledge, either in the form of impromptu oral or non-binding written submissions.

12. Although the *amicus curiae's* role in providing neutral advice has always remained central to its function, the *amicus* has long since ceased being limited to the role of neutral advisor. Relatively early on in its history, courts of law and equity began to rely upon *amicus curiae* to prevent frauds from being effected through collusive suits.[14] As early as the 1700s, courts allowed *amicus curiae* to take on adversarial roles in legal proceedings by representing otherwise unrepresented third party interests.[15]

13. *Amicus curiae* have always played a particularly prominent role in protecting the interests of accused persons in criminal proceedings. To understand their importance, one must bear in mind that for much of England's early modern history the accused was incompetent to testify under oath while simultaneously being prohibited from being represented by legal counsel.[16] *Amicus curiae* were essential in tempering the harshest features of English criminal procedure by drawing the court's attention to faulty inquisitions or defective indictments.[17]

14. The court's inherent jurisdiction to appoint *amicus curiae* has, thus, never been narrowly circumscribed. Instead, the term *amicus curiae* has been a shorthand for the power to appoint a third party to act as an "officer of the court" to assist the court as the court deems necessary.[18] In

---

[10] Edmund Ruffin Beck and Rudolph Sobernheim, "Amicus Curiae - Minister of Justice" (1948) 17 Ford. L. Rev. 38 at 40 [Beck & Sobernheim] at 48.
[11] Krislov, *supra* at 694.
[12] Max Radin, "Sources of Law—New and Old" (1928) 1 S Cal. L. Rev. 411 at 418.
[13] Krislov, *supra* at 695.
[14] *Ibid.* at 696.
[15] *Coxe v. Phillips* 95 Eng. Rep. 152 (K.B. 1736).
[16] John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) at pp. 11 – 65.
[17] *Protector v. Geering*, *supra*; see also *Rex v. Vaux*, 90 Eng. Rep. 314 (1687).
[18] Beck & Sobernheim, *supra*. This is not unlike the duties this Court has imposed on defence counsel in *R. v. Cunningham*, [2010] 1 S.C.R. 331 at para. 59 [*Cunnigham*].

this way, it is "a prime example of a legal institution evolving and developing while maintaining superficial identity with the past."[19] The recognition of the power to order remuneration should be seen as a reflection of the contemporary pressures on judges who, on the one hand, must resolve disputes involving unrepresented litigants and interests; and yet on the other, must do so impartially with a view to ensuring that trials are fair.[20]

B. Courts Necessarily Have the Power to Appoint Paid *Amicus Curiae*

15. Since both parties acknowledge that courts have the power to appoint *amicus* and to determine what role they will play in the proceedings, the real question is whether contemporary Canadian courts have the incidental authority to order that *amicus* be paid and to set the terms of their remuneration. The thrust of the Appellant's submission is that the decision about whether to remunerate *amicus curiae* and any applicable rates of compensation should be left to the discretion of the Crown.

16. The BCCLA's submission is that it is courts and judges who are best positioned to determine the kinds of assistance they need to carry out their mandate to "administer justice fully and effectively". The power to appoint *amicus* originates in superior courts' inherent jurisdiction "to ensure that they can function as courts of law and fulfill their mandate to administer justice".[21] In the case of statutory courts, "the powers conferred by an enabling statute are construed to include [...] all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime".[22] This must entail, where the court deems it necessary to administer justice fully and effectively, the power to order that a court-appointed *amicus* be remunerated, and at what rate.

17. Contemporary courts have typically appointed *amicus* in three situations: (1) where there is a matter of public interest in which the court invites the Attorney-General or some other capable individual to intervene; (2) to prevent an injustice, for example, to make submissions on points of law that may have been overlooked; and (3) to represent the unrepresented.[23] However, these situations represent the present culmination of an evolving power to call on third parties

---

[19] Krislov, *supra* at 720.
[20] *Wewaykum Indian Band et al v. Canada*, 2003 SCC 45, [2003] 2 S.C.R 259 at para. 76.
[21] *Cunningham,supra* at para. 18.
[22] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at para. 51; *Cunningham, supra* at para. 19.
[23] *R. v. Lee* (1988), 125 C.C.C. (3d) 363 (S.C.) at para. 11.

(*amicus curiae*) where a third party's skill, experience or, indeed, "adversity" is required for the court to fulfill its institutional mandate and constitutional duties.

18. This Court is no stranger to this phenomenon and has appointed experienced *amicus* to assist it on many occasions.[24] In *Miron v. Trudel,*[25] for instance, the Court appointed W. Ian Binnie, Q.C. (as he then was) to make submissions on the application of s. 1 of the *Charter.* In *Reference re Secession of Quebec*, the Court appointed a number of *amicus* counsel to make submissions with respect to Quebec's interests. This need for assistance is not unique to this Court. All courts in Canada are called upon, from time to time, to adjudicate over complex subject matter where they require the assistance of persons other than the litigant parties. This is a natural by-product of living in a complex society governed by the rule of law.

19. The upshot is that it is the judge faced with the difficult and sometimes unenviable task of adjudicating such disputes who is best situated to decide, firstly, whether *amicus* is necessary; and secondly, whether it is necessary to set any relevant terms of remuneration. To appoint *amicus* with the skill and experience the court needs, the court must have the authority to order payment and, if necessary, to determine rates of compensation. Without these powers, the appointing court may be unable to retain the counsel it needs in order to maintain the proper administration of justice and ensure trial fairness.[26]

20. As a practical matter, rates of compensation are a relevant factor in a lawyer's decision to accept a retainer and therefore, the court's ability to appoint an *amicus* capable of rendering assistance. In British Columbia, at least, less than 10% of the Province's practicing lawyers take on legal aid referrals, a number that has been steadily declining. Lawyers cite the legal aid tariff rates as being the principal reason they do not take retainers.[27] While it is not the role of the

---

[24] See *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253 at para. 155 (per LeBel J. dissenting) citing *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724 and *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[25] *Miron v. Trudel,* [1995] 2 S.C.R. 418. McLachlin J. (as she then was) noted that when there are no submissions on section 1 of the *Charter*, courts "may also appoint an *amicus curiae* to assist the court by providing an impartial assessment, as was done in this appeal" (at para. 129).

[26] *Cunningham supra* at para. 35. It would seem incongruous for this Court to find that there is an inherent jurisdiction to require counsel to work for free to protect the administration of justice and yet to conclude that it cannot require the Crown to remunerate *amicus curiae.*

[27] "Making Justice Work: Improving Access and Outcomes for British Columbians", *Legal Services Society (LSS) Report to the Minister of Justice and Attorney General Shirley Bond,* July 1, 2012 at p. 21.

courts to decide the Province's wisdom in setting the legal aid tariff, it is clear that courts will not be in a position to appoint *amicus* capable of assisting them if they are bound, as a matter of law, by the legal aid tariff.

21. In addition to ensuring that courts can effectively administer justice, recognizing the courts' inherent and statutory jurisdiction to order that *amicus* be remunerated promotes access to justice. At its most basic level, access to justice means access to a fair and impartial system of adjudication.[28] Access to justice is, in this sense, enhanced when the court is able to call upon qualified *amicus curiae* to assist it, including by promoting or safeguarding the interests of an unrepresented party or interest.

22. The power to order terms of remuneration should be viewed as a corollary of the court's evolving power to appoint *amicus*. Acknowledging such a power is essential to maintaining the rule of law and the independence of the judiciary. The only remaining question is whether, as argued by the Appellant, there is a controlling principle of constitutional law that prohibits courts from ordering the Crown to pay the fees of an *amicus curiae*.

C. The Auckland Harbour Rule Does Not Control the Outcome of this Appeal

23. The Appellant argues that "the Court of Appeal has disregarded the exclusive authority of the Legislature to control the spending of public monies..."[29] The BCCLA submits that the Appellant misconceives and overstates the relevance of the *Auckland Harbour Board* decision to matters at issue in this proceeding.

24. The *Auckland Harbour Board* case concerns principles governing the separation of power between the executive and legislative branches of government, and not the courts and the executive. It stands only for the proposition that money expended by the government without legislative appropriation is recoverable by the government.[30] It does not stand for the generic proposition that courts cannot order the Crown to pay monies in satisfaction of a court order made pursuant to the court's inherent jurisdiction.

---

[28] Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About" (2008) 46 Osgoode Hall L. J. 773 at pp. 777-778.
[29] Appellant's Amended Factum at para. 4.
[30] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., loose-leaf (Scarborough, Ont.:Thomson/Carswell, 2007) at 1.9, footnote 94 citing Enid Campbell, "Parliamentary Appropriations" (1971) 4 Adel. L. Rev. 145 at 161.

25. At issue in *Auckland Harbour Board* was the government's ability to recover monies paid in contravention of the terms of a conditional appropriation authorized by an Act of the New Zealand Parliament. The Plaintiff Harbour Board brought an action to recover monies that had been taken by the Crown as a set-off against an unlawful payment the Crown had earlier made to the Harbour Board. The Privy Council (per Viscount Haldane) rejected the Harbour Board's action to recover the monies since allowing the action would have been tantamount to ordering the Crown to make a payment in contravention of the very appropriation statute that authorized the payment.[31]

26. It was in these narrow circumstances – an action against the Crown to make a payment that was *prohibited* by the authorizing legislation – that Viscount Haldane tendered the following observation:

> 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.[32]

27. Put simply, the Privy Council's 1924 decision in *Auckland Harbour Board* involved a very different set of circumstances and legal principles than are at issue in this appeal. There are at least three reasons why the constitutional principles discussed in the *Auckland Harbour Board* decision are not determinative of the outcome of this case.

28. The first reason is that Viscount Haldane's reference to payments "out of the consolidated fund" harkens to a set of constitutional principles that are not engaged by this appeal. Viscount Haldane's allusion to days "long gone" refers to the situation that prevailed in England prior to the *English Bill of Rights* of 1688.[33] By the terms of the *Bill of Rights*,[34] taxes could not be levied without the consent of Parliament. Parliament also insisted that it exercise substantial control over the Crown's spending of public monies. On the other hand, the Crown

---

[31] *Auckland Harbour Board, supra* at 326.
[32] *Ibid.* at 326 – 327.
[33] Hans W. Baade, "Mandatory Appropriations of Public Funds: A Comparative Study, Part I" (1974) Virginia Law Review 393 at 406 - 409 [Baade].
[34] *Bill of Rights,* 1 W. & M., Sess. 2, c. 2, 4 (1689), art. 4.

alone could initiate the spending of monies that were duly appropriated by Parliament. These rules of taxation and appropriation form "a cluster of rules that safeguard parliamentary democracy"[35] and are reflected in sections 53, 54, 102 and 126 of the *Constitution Act, 1867*.[36] They are not, however, principles that preclude the court from ordering the government to pay the fees of *amicus curiae*. The constitutional rules governing taxation and appropriation are simply not engaged by this appeal.

29. The second and related reason the "Auckland Harbour rule" is not determinative is that the orders under appeal are judgments, not "appropriations". An appropriation is an Act of Parliament or the Legislature that authorizes the expenditure of monies by the Crown.[37] The orders under appeal are judgments and should be treated as such. No additional appropriation act is required for the government to make a payment pursuant to a valid judgment. The Ontario provincial legislature has already authorized payments to be made by the Crown out of the Consolidated Revenue Fund for the purposes of satisfying "an order of a court that is final and not subject to appeal."[38]

30. Thirdly, the Appellant's interpretation of the *Auckland Harbour Board* decision cannot be reconciled with the Court's decisions in *Okanagan* and *Caron*. In both cases, this Court recognized that courts have an inherent and statutory jurisdiction to make interim cost orders against the Crown in civil and criminal proceedings.[39] There is, in substance, no meaningful legal distinction between an interim cost order and an order for the payment of *amicus* to assist the court, and the Appellant points to nothing supporting such a distinction. Since interim costs orders do not require special appropriation legislation, there is simply no basis for the proposition that appointing and remunerating *amicus curiae* would run afoul of any constitutional principle.

---

[35] Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 3 ed. (Scarborough, Ont.: Carswell, 2000) at 316 [Hogg, Monahan & Wright].
[36] Baade, *supra* at 409.
[37] Hogg, Monahan & Wright, *supra* at 316; "Section 54 requires that bills relating to the appropriation of taxes (supply bills) be accompanied by a royal recommendation. The only bills that are guaranteed to the executive under s. 54 of the *Constitution Act, 1867* are true appropriation bills": *Eurig Estate (Re)*, [1998] 2 S.C.R. 565 at para. 56.
[38] *Proceedings Against the Crown Act*, R.S.O. 1990, c P. 27, s. 22; also see s. 30 of the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50 that provides that the "Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown."
[39] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Caron, supra.*

31. As a final observation, the BCCLA notes that the Appellant's submission appears predicated upon a theory of Crown immunity that no longer exists in Canadian law. To borrow from Viscount Haldane's phraseology, long gone are the days when the Crown could rely on obsolete doctrines of immunity. This Court need look no further than its recent judgment in *King Street Investments Ltd. v. New Brunswick (Finance)* where it rejected the kind of presumptive immunity rule that the Appellant wishes to resuscitate in this case.[40]

32. In sum, it is the BCCLA's respectful submission that there is no constitutional principle that prevents courts from appointing *amicus curiae* at a particular rate of remuneration. It is, furthermore, essential for courts to be in a position to appoint sufficiently experienced *amicus curiae* to assist them in complex and serious cases. In short, courts must have the tools they need to preserve their own integrity and to protect the public's confidence in them, both of which are essential to maintaining the rule of law.[41]

PART IV – SUBMISSIONS REGARDING COSTS

33. The BCCLA does not seek costs, and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

34. The BCCLA respectfully submits that the appeal should be determined in accordance with the submissions made in this factum.

35. The BCCLA seeks leave to make oral argument for up to 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19th day of November, 2012.

for **Micah B. Rankin**

Elizabeth France

[40] *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3.
[41] See *R. v. Lewis*, 2012 ONCJ 85 and *R. v. Meloche*, 2012 ONCJ 376 where the court appointed paid *amicus* as a result of trial management concerns.

PART VI – TABLE OF AUTHORITIES

Case Law	
	PARAS. CITED
ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140	16
Auckland Harbour Board v. The King, [1924] AC 318 (PC)	7-9, 25-26
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71, [2003] 3 S.C.R. 371	30
Coxe v. Phillips, 95 Eng. Rep. 152 (K.B. 1736)	12
Eurig Estate (Re), [1998] 2 S.C.R. 565	29
Kingstreet Investments Ltd. v. New Brunswick (Finance), 2007 SCC 1, [2007] 1 S.C.R. 3	31
Miron v. Trudel, [1995] 2 S.C.R. 418	18
Named Person v. Vancouver Sun, 2007 SCC 43, [2007] 3 S.C.R. 253	1, 18
Protector v. Geering, Hardres 85, 86, 145 Eng. Rep. 394 (1656)	13
R. v. Caron, 2011 SCC 5, [2011] 1.S.C.R. 78	3, 30
R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331	14, 16, 19
R. v. Lee, (1988), 125 C.C.C. (3d) 363 (S.C.)	17
R. v. Lewis, 2012 ONCJ 85	32
R. v. Meloche, 2012 ONCJ 376	32
Reference re Secession of Quebec, [1998] 2 S.C.R. 217	18
Rex v. Vaux, Comb. 13, 90 Eng. Rep. 314 (1687)	13
Wewaykum Indian Band et al v. Canada, 2003 SCC 45, [2003] 2 S.C.R 259	14

PART VII – STATUTORY PROVISIONS

***Bill of Rights* 1 W. & M., 2d sess., c. 2**

4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.

***Constitution Act, 1867. 30 & 31 Victoria*, c. 3. (U.K.).**

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

102. All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Loi constitutionnelle de 1867, 30 & 31 Victoria, ch. 3 (R.U.)

53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

54. Il ne sera pas loisible à la Chambre des Communes d'adopter aucune résolution, adresse ou bill pour l'appropriation d'une partie quelconque du revenu public, ou d'aucune taxe ou impôt, à un objet qui n'aura pas, au préalable, été recommandé à la chambre par un message du gouverneur-général durant la session pendant laquelle telle résolution, adresse ou bill est proposé.

102. Tous les droits et revenus que les législatures respectives du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, avant et à l'époque de l'union, avaient le pouvoir d'approprier, — sauf ceux réservés par la présente loi aux législatures respectives des provinces, ou qui seront perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par la présente loi, — formeront un fonds consolidé de revenu pour être approprié au service public du Canada de la manière et soumis aux charges prévues par la présente loi.

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.

126. Les droits et revenus que les législatures respectives du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick avaient, avant l'union, le pouvoir d'approprier, et qui sont, par la présente loi, réservés aux gouvernements ou législatures des provinces respectives, et tous les droits et revenus perçus par elles conformément aux pouvoirs spéciaux qui leur sont conférés par la présente loi, formeront dans chaque province un fonds consolidé de revenu qui sera approprié au service public de la province.

***Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50**

Loi sur la responsabilité civile de l'État* et le *contentieux administratif*, *L.R.C. 1985*, *ch. C-50

30. (1) On receipt of a certificate of judgment against the Crown issued under the regulations or the *Federal Courts Rules*, the Minister of Finance shall authorize the payment out of the Consolidated Revenue Fund of any money awarded by the judgment to any person against the Crown.

30. (1) Sur réception d'un certificat de jugement rendu contre l'État et délivré en vertu des règlements ou des *Règles des Cours fédérales*, le ministre des Finances autorise le paiement, sur le Trésor, de toute somme d'argent accordée à une personne, par jugement contre l'État.

***Proceedings Against the Crown Act*, RSO 1990, c P.27**

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;

(b) under a settlement of a proceeding in a court;

(c) under a settlement of a claim that is the subject of a notice of claim under section 7; or

(d) under a final order to pay made by a competent authority under a trade agreement that the Crown has entered into with the government of another province or territory of Canada, the government of Canada or any combination of those governments. 1994, c. 27, s. 51; 2009, c. 24, s. 32.