



SUPREME COURT OF CANADA

CITATION: Ontario v. Criminal Lawyers' Association of Ontario,
2013 SCC 43

DATE: 20130801
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BETWEEN:

Her Majesty The Queen

Appellant

and

Criminal Lawyers' Association of Ontario and Lawrence Greenspon

Respondents

- 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

Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 85)

Karakatsanis J. (McLachlin C.J. and Rothstein, Moldaver
and Wagner JJ. concurring)

DISSENTING REASONS:
(paras. 86 to 143)

Fish J. (LeBel, Abella and Cromwell JJ. concurring)

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ONTARIO v. CRIMINAL LAWYERS' ASSOCIATION

Her Majesty The Queen

Appellant

v.

**Criminal Lawyers' Association of Ontario and
Lawrence Greenspon**

Respondents

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**

Interveners

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2013 SCC 43

File No.: 34317.

2012: December 12; 2013: August 1.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Appointment of amici curiae — Provincial Attorney General and amici curiae appointed by trial judges in criminal proceedings disagreeing on amici's rate of remuneration — Whether superior and statutory courts have inherent or implied jurisdiction to determine rate of remuneration of amici curiae.

In three cases arising in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae* to assist the accused, who had discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. The cases were not decided under the *Canadian Charter of Rights and Freedoms* and did not proceed on the basis that the accused could not have fair trials without the assistance of counsel. The Attorney General took the position that here, the *amici* played a role similar to that of defence counsel and should accept legal aid rates. However, the *amici* refused to accept those rates, and the judges fixed rates that exceeded the tariff and ordered the Attorney General to pay. In one case, a judge also appointed a senior lawyer to set a budget for the *amicus* and to review, monitor and assess his accounts on an ongoing basis. The Crown appealed the decisions, on the basis that courts lacked jurisdiction to fix the rates of compensation for *amici curiae*. The Court of Appeal dismissed the appeal, holding that incidental to a superior or statutory court's power

to appoint an *amicus* is the power to set the terms and conditions of that appointment, including the rate of compensation and the monitoring of accounts.

Held (LeBel, Fish, Abella and Cromwell JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Rothstein, Moldaver, **Karakatsanis** and Wagner JJ.: Courts of inherent jurisdiction have the power to appoint *amici curiae* exceptionally, where this is necessary to permit a particular proceeding to be successfully and justly adjudicated. This power is also implied by the ability of statutory courts to function as courts of law. *Amici curiae* have long played a part in our system of justice. However, to the extent that the terms of an *amicus*' appointment mirror the responsibilities of defence counsel, they blur the lines between those two roles. The appointment of an *amicus* for such a purpose can conflict with the accused's constitutional right to represent himself, can defeat previous judicial decisions to refuse to grant state-funded counsel following an application invoking the accused's fair trial rights under the *Charter*, can require the *amicus* to make legal submissions that are not favourable to the accused or are contrary to the accused's wishes, can result in the court's lawyer taking on a role that the court is precluded from taking and can undermine the provincial legal aid scheme. Hence, a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

Absent authority flowing from a constitutional challenge or a statutory provision, the jurisdiction to fix the compensation of *amici curiae* must be found within the inherent or implied jurisdiction of the courts. The inherent jurisdiction of superior courts permits them to make orders necessary to protect the judicial process and the rule of law and fulfill the judicial function of administering justice in a regular, orderly and effective manner. Similarly, to function as courts of law, statutory courts have implicit powers. However, the doctrine of inherent jurisdiction does not operate without limits. Such inherent and implicit powers are subject to any statutory provisions and must be responsive to the separation of powers that exists among the various players in our constitutional order and the particular institutional capacities that have evolved from that separation. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. A court's inherent or implied powers must not trench on the provinces' role in the administration of justice

While the courts have the jurisdiction to set terms to give effect to their authority to appoint *amici curiae*, the ability to fix rates of compensation for *amici* is not essential to the power to appoint them and its absence does not imperil the judiciary's ability to administer justice according to law in a regular, orderly and effective manner. Furthermore, an order that the Attorney General must provide compensation to an *amicus* at a particular rate is an order directing the Attorney General to pay specific monies out of public funds. While court decisions can have

ancillary financial consequences, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the public for it. Making such an order absent authority flowing from a constitutional challenge or a statutory provision does not respect the institutional roles and capacities of the legislature, the executive (including the Attorney General), and the judiciary, or the principle that the legislature and the executive are accountable to the public for the spending of public funds. 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. Accordingly, superior and statutory courts' inherent or implied jurisdiction to appoint *amici* does not extend to setting rates of compensation for *amici* and ordering the provinces to pay.

In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and the Attorney General should meet to set rates and modes of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey. If the assistance of an *amicus* is truly essential and the matter cannot be amicably resolved between the *amicus* and the Attorney General, the judge's only recourse may be to exercise his jurisdiction to impose a stay until an *amicus* can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear.

Per LeBel, **Fish**, Abella and Cromwell JJ. (dissenting): Trial judges may appoint an *amicus curiae* to ensure the orderly conduct of proceedings and the availability of relevant submissions. They should not be required to decide contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions. The power to appoint an *amicus* should be exercised exceptionally and with caution. An *amicus* should not be appointed to impose counsel on an unwilling accused or permit an accused to circumvent the established procedure for obtaining government-funded counsel. Furthering the best interests of the accused may be *an incidental result*, but is not *the purpose*, of an *amicus* appointment.

The jurisdiction to fix the fees of *amici curiae* is necessarily incidental to the power of trial judges to appoint them. Granting the provincial Attorney General the exclusive power to fix an *amicus*' rate of remuneration would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing. It would also imperil the integrity of the judicial process, as the ability of courts to ensure fair and orderly process should not depend on a reliance on the continuous and exemplary conduct of the Crown, which is impossible to monitor or control. Finally, 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. As *amici* often play a role that can be said to be adversarial to the Crown, if the Crown were permitted to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the expectation of give and

take might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General.

There is no constitutional impediment to vesting in trial judges the authority to fix the fees of *amici curiae* when necessary in the circumstances. The principle that only Parliament can authorize payment out of money from the consolidated revenue fund acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Here, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* whether or not their rate of remuneration is fixed by the courts, because, with the *Financial Administration Act*, R.S.O. 1990, c. F.12, the Legislative Assembly has pre-approved the disbursement of funds for the purpose of satisfying court orders.

Once a trial judge names and defines the role of an *amicus curiae*, a consensual approach ought to be favoured. The Attorney General and the *amicus* should be invited to agree on both the rate of remuneration and the manner in which the *amicus*'s budget is to be administered. If an agreement cannot be reached, the trial judge should fix the rate. In fixing the rate of remuneration, the judge should consider the importance of the assignment undertaken, the legal complexity of the work, the skill and experience of counsel and his normal rate, and should consider that the *amicus* is performing a public service paid for with public funds. While the legal aid tariff should be taken into account as a guide, it is not determinative. The ultimate choice of whether to proceed with the prosecution in light of the associated

costs remains that of the Attorney General, which thus preserves the proper balance between prosecutorial discretion and the jurisdiction of courts.

Cases Cited

By Karakatsanis J.

Distinguished: *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374; *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321; **discussed:** *Auckland Harbour Board v. The King*, [1924] A.C. 318; **referred to:** *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Morales*, [1992] 3 S.C.R. 711; *R. v. Hinse*, [1995] 4 S.C.R. 597; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531; *Batistatos v. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *R. v. Power*, [1994] 1

S.C.R. 601; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Di Iorio v. Warden of the Common Jail of the City of Montreal*, [1978] 1 S.C.R. 152; *In re Criminal Code* (1910), 43 S.C.R. 434; *R. v. Peterman* (2004), 70 O.R. (3d) 481; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *Boucher v. The Queen*, [1955] S.C.R. 16; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Chan*, 2002 ABCA 299, 317 A.R. 240 (*sub nom. R. v. Cai*); *R. v. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *R. v. Rockwood* (1989), 91 N.S.R. (2d) 305; *Child and Family Services of Winnipeg v. J. A.*, 2003 MBCA 154, 180 Man. R. (2d) 161; *R. v. Ryan*, 2005 NLCA 44, 199 C.C.C. (3d) 161; *R. v. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200; *Grollo v. Palmer* (1995), 184 C.L.R. 348.

By Fish J. (dissenting)

R. v. Rowbotham (1988), 41 C.C.C. (3d) 1; *Québec (Procureur général) v. C. (R.)* (2003), 13 C.R. (6th) 1; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3

S.C.R. 575; *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13; *R. v. Samra* (1998), 41 O.R. (3d) 434; *R. v. Lee* (1998), 125 C.C.C. (3d) 363; *R. v. Bain*, [1992] 1 S.C.R. 91; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Auckland Harbour Board v. The King*, [1924] A.C. 318; *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321; *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374; *R. v. Chemama*, 2008 ONCJ 140 (CanLII).

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Armstrong JJ.A.), 2011 ONCA 303, 104 O.R. (3d) 721, 277 O.A.C. 264, 270 C.C.C. (3d) 256, 86 C.R. (6th) 407, 234 C.R.R. (2d) 157, [2011] O.J. No. 1792 (QL), 2011 CarswellOnt 2608, affirming orders for the setting of rates of

compensation for and the monitoring of accounts of *amici curiae*. Appeal allowed, LeBel, Fish, Abella and Cromwell JJ. dissenting.

Malliha Wilson, Troy Harrison, Kristin Smith and Baaba Forson, for the appellant.

P. Andras Schreck and Louis P. Strezos, for the respondent the Criminal Lawyers' Association of Ontario.

No one appeared for the respondent *Lawrence Greenspon*.

Alain Préfontaine, for the intervener the Attorney General of Canada.

Jean-Yves Bernard and Brigitte Bussières, for the intervener the Attorney General of Quebec.

Written submissions only by *Deborah Carlson and Allison Kindle Pejovic*, for the intervener the Attorney General of Manitoba.

Bryant Alexander Mackey, for the intervener the Attorney General of British Columbia.

Micah B. Rankin, Michael Sobkin and Elizabeth France, for the intervener the British Columbia Civil Liberties Association.

John Norris, for the intervener the Advocates' Society.

Anita Szigeti, Mercedes Perez and Marie-France Major, for the
intervener the Mental Health Legal Committee.

The judgment of McLachlin C.J. and Rothstein, Moldaver, Karakatsanis and Wagner JJ. was delivered by

KARAKATSANIS J.—

I. Introduction

[1] This case raises troubling implications that strike to the heart of the constitutional relationship between the judicial and other branches of government in our constitutional democracy.

[2] It is not disputed that a court may appoint a lawyer as “*amicus curiae*”, a “friend of the court”, to assist the court in exceptional circumstances; or that the Attorney General is obligated to pay *amici curiae* when appointed. What is at issue is whether a court’s inherent or implied jurisdiction extends to fixing the rates of compensation for *amici curiae*.

[3] In the four matters under appeal, which all arose in the context of criminal proceedings in Ontario, trial judges appointed *amici curiae*, set higher rates of compensation than those offered by the Attorney General of Ontario and ordered the Attorney General to pay. The Attorney General took the position that, in these cases, the *amici* played a role similar to that of defence counsel and should accept legal aid rates. The Court of Appeal concluded that provincial and superior courts have the jurisdiction to fix the rates of compensation. The Attorney General appeals that decision, although it does not seek the return of any monies paid.

[4] My colleague Fish J. concludes that the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to a court's power to appoint them. He finds no constitutional impediment to this power.

[5] Respectfully, I disagree. Absent statutory authority or a challenge on constitutional grounds, courts do not have the institutional jurisdiction to interfere with the allocation of public funds. While the jurisdiction to control court processes and function as a court of law gives courts the power to appoint *amici curiae*, it does not, in itself, provide the power to determine what the Attorney General must pay them. The scope of a superior court's inherent power, or of powers possessed by statutory courts by necessary implication, must respect the constitutional roles and institutional capacities of the legislature, the executive and the judiciary. As the Chief Law Officers of the Crown, responsible for the administration of justice on

behalf of the provinces, the Attorneys General of the provinces, and not the courts, determine the appropriate rate of compensation for *amici curiae*.

[6] For the reasons that follow, I would allow the appeal.

II. Background

[7] These cases were not decided under the *Canadian Charter of Rights and Freedoms*. They did not proceed on the basis that the accused could not have fair trials without the assistance of counsel. Instead, the trial judges appointed counsel to assist the accused, who had in each case discharged counsel of their choice. The judges did so in order to maintain the orderly conduct of the trials or to avoid delay in these complex, lengthy proceedings. However, in each of these cases, the role of the *amici* closely mirrored the role of defence counsel, except that they could not be dismissed by the accused.

[8] In *R. v. Imona Russel*, 2009 CarswellOnt 9725 (S.C.J.) (“*Imona Russel #1*”), an *amicus* was appointed, at the request of the Crown, “to ensure the orderly conduct of the trial” (para. 6). The accused had discharged several experienced legal aid counsel and the court had twice refused the accused’s request for an order under s. 24(1) of the *Charter* providing state-funded counsel in order to ensure a fair trial. The role of *amicus* was initially expanded so that he would “defend the case as if he had a client who was choosing to remain mute” (para. 13). Subsequently, at the request of the accused, the trial judge told the *amicus* to take instructions from and act

on behalf of the accused as he would in a traditional solicitor-client relationship — except he could not be discharged or withdraw due to a breakdown in the relationship with the accused. Later, after the *amicus* applied for permission to withdraw from the case, the trial judge appointed a senior criminal lawyer to set a budget for the *amicus* and to review, monitor and assess his accounts on an ongoing basis (*R. v. Imona Russel*, 2010 CarswellOnt 10747 (S.C.J.) (“*Imona Russel #2*”).

[9] In *R. v. Whalen*, Sept. 18, 2009, No. 2178/1542 (Ont. Ct. J.), a dangerous offender application, the respondent was unrepresented and had a history of discharging lawyers. He had difficulty finding legal aid counsel, due to a boycott of legal aid cases by many members of Ontario’s criminal defence bar. The judge appointed an *amicus* to “stabilize the litigation process” (A.R., at p. 26). Although the Attorney General had found other counsel who were available to act at legal aid rates, the respondent had developed a relationship of confidence with a particular lawyer who would not accept the legal aid rate. An *amicus* was appointed to establish a solicitor-client relationship with the respondent, with the ability to override the respondent’s instructions in his best interest.

[10] In *R. v. Greenspon*, 2009 CarswellOnt 7359 (S.C.J.), a former counsel, who had been discharged by one of six co-accused, was appointed as *amicus*. This was done to avoid delay, in the event that the accused could not find counsel ready to act in time. Ultimately, the accused found counsel who was able to proceed without delay and the *amicus* was not required.

[11] In each of these cases, the *amicus* refused to accept the legal aid rate offered by the Attorney General. The trial judge fixed a rate that exceeded the tariff, ordering the Attorney General to pay. The Attorney General appealed all four decisions.

III. Decision of the Court of Appeal, 2011 ONCA 303, 104 O.R. (3d) 721

[12] The Court of Appeal considered the four appeals together and affirmed the decisions, as it was of the view that superior and statutory courts have the jurisdiction to appoint *amici* even where s. 24(1) of the *Charter* does not apply and there is no statutory provision for such an appointment. The capacity of a superior court to appoint an *amicus* stems from the court's inherent jurisdiction to act where necessary to ensure that justice can be done. For a statutory court, the capacity stems from the court's power to manage its own process and operate as a court of law, and arises in situations where the court must be able to appoint an *amicus* in order to exercise its statutory jurisdiction.

[13] The Court of Appeal concluded that in order to ensure that serious criminal cases can proceed where difficulty is caused by an unrepresented accused, judges must have the ability to secure the assistance of an *amicus*. To the extent that the ability to fix rates of compensation for *amici* is linked to the capacity to appoint them, it should not be left in the hands of the Attorney General. The court concluded that this authority did not raise any institutional issues or social, economic or political policy concerns.

IV. Analysis

[14] My colleague Fish J. provides three reasons for finding the power to set the rate of compensation to be incidental to a superior court's inherent jurisdiction and a statutory court's power to control its own processes: (1) the inability to set rates of compensation would unduly weaken the court's appointment power and ability to name the *amicus* of its choice (para. 123); (2) the integrity of the judicial process would be imperilled and should not be dependent upon the Crown (para. 124); and (3) unilateral control by the Attorney General over remuneration might create an apprehension of bias and place an *amicus* in a conflict of interest (para. 125). He concludes that there is no constitutional impediment to vesting such a power in trial judges.

[15] I take a different view. The jurisdiction to appoint an *amicus* does not necessarily imply or require the authority to set a specific rate of compensation. The ability to order the government to make payments out of public funds must be grounded in law and a court's inherent or implied jurisdiction is limited by the separate roles established by our constitutional structure. Absent authority flowing from a constitutional challenge or a statutory provision, exercising such power would not respect the institutional roles and capacities of the legislature, the executive (including the Attorney General), and the judiciary, or the principle that the legislature and the executive are accountable to the public for the spending of public funds.

[16] I propose to explain my conclusion by first addressing the constitutional framework that surrounds the exercise of a superior court's inherent jurisdiction. This framework also applies to the exercise of the jurisdiction implied by the ability of statutory courts to function as courts of law. Second, I will apply that constitutional framework to the particular context of *amicus* appointments.

A. *The Constitutional Framework*

(1) The Inherent Jurisdiction of Superior Courts

[17] Canada's provincial superior courts are the descendants of the Royal Courts of Justice and inherited the powers and jurisdiction exercised by superior, district or county courts at the time of Confederation (*Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 326-27, *per* Estey J.). As such, superior courts play a central role in maintaining the rule of law, uniformity in our judicial system and the constitutional balance in our country.

[18] The essential nature and powers of the superior courts are constitutionally protected by s. 96 of the *Constitution Act, 1867*. Accordingly, the "core or inherent jurisdiction which is integral to their operations . . . cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at para. 15). The rationale for s. 96 has evolved to ensure "the maintenance of the rule of law through the protection of the judicial role" (*Reference re Remuneration of Judges of the*

Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (“*Provincial Judges Reference*”), at para. 88).

[19] In *MacMillan Bloedel*, a majority of this Court described the powers at the core of a superior court’s jurisdiction as comprising “those powers which are essential to the administration of justice and the maintenance of the rule of law” (para. 38), which define the court’s “essential character” or “immanent attribute” (para. 30). The core is “a very narrow one which includes only critically important jurisdictions which are essential to the existence of a superior court of inherent jurisdiction and to the preservation of its foundational role within our legal system” (*Reference re Amendments to the Residential Tenancies Act (N.S.)*, [1996] 1 S.C.R. 186, at para. 56, *per* Lamer C.J.).

[20] In his 1970 article, “The Inherent Jurisdiction of the Court”, 23 *Curr. Legal Probs.* 23, which has been cited by this Court on eight separate occasions,¹

I. H. Jacob provided the following definition of inherent jurisdiction:

. . . the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court

¹ *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at pp. 591-92, *per* Wilson J. (granting leave to appeal to a non-party); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 240 (issuing injunction on the court’s own motion to guarantee access to court facilities); *R. v. Morales*, [1992] 3 S.C.R. 711, at pp. 754-55, *per* Gonthier J. (discretion regarding bail); *R. v. Hinse*, [1995] 4 S.C.R. 597, at para. 21, *per* Lamer C.J. (stay of criminal proceedings for abuse of process); *MacMillan Bloedel*, at paras. 29-31, *per* Lamer C.J. (punishing for contempt out of court); *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 64, *per* L’Heureux-Dubé J., and at para. 131, *per* Cory, Iacobucci and Bastarache JJ. (discretion to grant a right of reply in a criminal trial); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18 (authority to refuse defence counsel’s request to withdraw); *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at paras. 24-34, *per* Binnie J. (granting interim costs).

may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [p. 51]

[21] As noted by this Court in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:

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).

[22] In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review, the doctrine of inherent jurisdiction does not operate without limits.²

[23] It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislatures (see *MacMillan Bloedel*, at para. 78, *per* McLachlin J., dissenting on other grounds). As Jacob notes (at p. 24): “. . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision” (emphasis added) (see also *Caron*, at para. 32).

² These limits are a topic that has also been considered by the highest courts in the United Kingdom and Australia, see *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, at paras. 18-22, *per* Dyson J.; *Batistatos v. Roads and Traffic Authority of New South Wales*, [2006] HCA 27, 227 A.L.R. 425, at paras. 121-36, *per* Kirby J.

[24] Further, even where there are no legislative limits, the inherent jurisdiction of the court is limited by the institutional roles and capacities that emerge out of our constitutional framework and values (see *Provincial Judges Reference*, at para. 108).

[25] These limits were recognized in a thoughtful thesis on inherent jurisdiction written by Jonathan Desjardins Mallette:

[TRANSLATION] As for the unwritten [constitutional] structural principles, they are particularly relevant to determining the limits of the exercise of the inherent jurisdiction of the courts. They require the courts to take into account the structure of our Constitution, which includes other fundamental principles, such as the rule of law and parliamentary supremacy.

(La constitutionnalisation de la juridiction inhérente au Canada: origines et fondements, LL.M. thesis, Université de Montréal (2007), unpublished, reproduced in the Attorney General of Quebec's book of authorities, vol. II, at p. 375.)

[26] With the advent of the *Charter*, the superior courts' inherent jurisdiction must also support their independence in safeguarding the values and principles the *Charter* has entrenched in our constitutional order. Thus, the inherent jurisdiction of superior courts provides powers that are essential to the administration of justice and the maintenance of the rule of law and the Constitution. It includes those residual powers required to permit the courts to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner — subject to any statutory provisions. I would add, however, that the powers recognized as part of the

courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.

(2) Separation of Powers

[27] This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 49-52).

[28] Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial

adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[29] All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).³

[30] Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.

[31] Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give

³ The normative force of the separation of powers has been recognized by this Court on multiple occasions since *New Brunswick Broadcasting*. See *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 620-21; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 33-34 and 106-11; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at paras. 104-5; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, at para. 21; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 39-41.

sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be “better placed to make such decisions within a range of constitutional options” (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 37).

(3) The Administration of Justice in the Provinces

[32] The framers of our Constitution established a delicate balance between the federal and provincial governments, anchored by s. 96 courts, whose independence and core jurisdiction and powers provide a unified, national judicial presence (see *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, at p. 728). While the federal government is responsible for the appointment of s. 96 judges, the Constitution has charged the provinces with the responsibility for the administration of justice in the provinces (*Constitution Act, 1867*, s. 92(14)).

[33] Pursuant to this power, the provincial legislatures enact laws and adopt regulations pertaining to courts, rules of court and civil procedure, or delegate this function to another body. They also pass laws to provide the infrastructure and staff necessary to operate the courts and establish schemes to provide legal representation to persons involved in court proceedings. The provincial legislature votes the funds necessary to operate the justice system within the province, and the executive, mainly through the office of the Attorney General, is charged with the responsibility of administering these funds and more broadly, the administration of justice itself. As Dickson J. stated in *Di Iorio v. Warden of the Common Jail of the City of Montreal*,

[1978] 1 S.C.R. 152, at p. 200: “since Confederation, the provincial departments of the Attorney General have in practice ‘administered justice’ in the broadest sense, at great expense to the taxpayers . . .”.

(4) Role of the Attorney General in the Administration of Justice on Behalf of the Province

[34] The first reference to the “*attornatus regis*” — the King’s Attorney — dates back to the 13th century (J. L. J. Edwards, *The Law Officers of the Crown* (1964), at p. 16). The role of Attorney General was carried into Canada in the 18th century, with the first Attorney General of Upper Canada being appointed in 1791 (P. Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature 1791-1899* (1986), at pp. 6-7). The role was continued by the *Constitution Act, 1867*, as s. 63 explicitly mentions the Attorney General as one of the officers of the Executive Council of Ontario.

[35] The Attorney General of Ontario, on behalf of the executive, acts pursuant to the province’s responsibility under s. 92(14) of the *Constitution Act, 1867* for the administration of justice. As Chief Law Officer of the Crown, the Attorney General has special responsibilities to uphold the administration of justice (see, for example, *Ministry of the Attorney General Act*, R.S.O. 1990, c. M.17, s. 5). Idington J. noted in *In re Criminal Code* (1910), 43 S.C.R. 434, at p. 443, that “custom, tradition and constitutional usage, hav[e] charged [the Attorney General] with the administration of justice within the province as his primary duty . . .”.

[36] The Attorney General remunerates various participants in the criminal justice system — including provincial Crown counsel, court reporters, interpreters, registrars and law clerks. The Attorney discharges his obligation to provide counsel for indigent accused through the establishment of legal aid programs (see *R. v. Peterman* (2004), 70 O.R. (3d) 481 (C.A.)). Defence counsel appointed under s. 24(1) of the *Charter* (see, for instance, *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)), are funded directly by the Attorney General. This does not create an apprehension of bias or a conflict of interest. Instead, this role is consistent with the Attorney's responsibilities and public accountability. Indeed, even provincial court judges are paid by the provincial Attorneys General and are still seen as independent (see *Provincial Judges Reference*).

[37] The Attorney General is not an ordinary party. This special character manifests itself in the role of Crown attorneys, who, as agents of the Attorney General, have broader responsibilities to the court and to the accused, as local ministers of justice (see *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24, *per* Rand J.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 191-92, *per* Lamer J.).

(5) Limitations on the Courts' Inherent Jurisdiction In the Context of the Administration of Justice

[38] It is vital that each branch of government respect its proper institutional role and capacity in the administration of justice, in accordance with the Constitution and public accountability.

[39] Section 96 judges possess inherent power to make orders necessary to protect the judicial process and the rule of law. The courts must of course safeguard their own constitutional independence to assure the fairness of the judicial process and to protect the rights and freedoms of Canadians that are entrusted to them under the *Charter*. As the Canadian Judicial Council noted in its 2006 report, “[i]t is crucial to bear in mind that inherent powers, by definition, inhere in courts and their jurisdiction and so cannot be analysed independently of the role the judiciary is expected to play in the constitutional structure” (*Alternative Models of Court Administration* (2006), at p. 46). As such, these powers are exercised within the framework for the administration of justice that the province has established.

[40] As the Court made clear in the *Provincial Judges Reference*, judicial independence includes a core administrative component, which extends to administrative decisions that bear “directly and immediately on the exercise of the judicial function” (*Provincial Judges Reference*, at para. 117). These were listed in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 709, as including:

. . . assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions

As this Court went on to hold in *Valente*, at pp. 711-12, while greater administrative autonomy or independence may be desirable, it is not essential to judicial independence (see also *Provincial Judges Reference*, at para. 253).

[41] The proper constitutional role of s. 96 courts does not permit judges to use their inherent jurisdiction to enter the field of political matters such as the allocation of public funds, absent a *Charter* challenge or concern for judicial independence. For this reason, it is generally accepted that courts of inherent jurisdiction do not have the power to appoint court personnel. Staffing the courts is the responsibility of the provincial government.

[42] Of course, a complaint that inadequate funding risks undermining the justice system may be subject to court oversight, whether by way of a *Charter* application or a challenge based on the constitutional principle of judicial independence, as was the case in the *Provincial Judges Reference*, where the closure of the Manitoba courts by withdrawing court staff on a series of Fridays, as a part of a wider deficit-reduction effort, was found unconstitutional (paras. 269-76).

[43] However, the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it.

B. *Amicus Curiae and the Inherent Jurisdiction of the Court*

(1) Appointing Amici

[44] While courts of inherent jurisdiction have no power to appoint the women and men who staff the courts and assist judges in discharging their work, there is

ample authority for judges appointing *amici curiae* where this is necessary to permit a particular proceeding to be successfully and justly adjudicated.

[45] *Amici curiae* have long played a role in our system of justice. As early as the mid-14th century, the common law courts from which our superior courts are descended received the assistance of *amici* (see S. C. Mohan, “The *Amicus Curiae*: Friends No More?”, [2010] *S.J.L.S.* 352, at pp. 356-60). Indeed, as one scholar has noted, “[t]here can be no doubt as to the age and wide acceptance of the *amicus curiae*. As to its origin, on the other hand, there is a great deal of doubt. Like so many things of great age, its roots are lost even though the practice still continues” (F. M. Covey, Jr., “*Amicus Curiae*: Friend of the Court” (1959), 9 *DePaul L. Rev.* 30, at p. 33). A number of cases have recognized the practice; in addition, there are statutory provisions that provide for the appointment of *amicus* in certain circumstances.⁴

[46] A court’s inherent jurisdiction to appoint *amicus* in criminal trials is grounded in its authority to control its own process and function as a court of law. Much like the jurisdiction to exercise control over counsel when necessary to protect the court’s process that was recognized in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, the ability to appoint *amici* is linked to the court’s authority to

⁴ In civil matters in Ontario, Rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits a court to appoint a friend of the court for the purpose of rendering assistance by way of argument. In this Court, Rule 92 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, permits the Court or a judge to appoint an *amicus* in an appeal, while s. 53(7) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, provides for the appointment of *amicus* to argue in favour of an unrepresented interest where the Governor in Council has referred a matter to the Court for its consideration, and authorizes the Minister of Finance to pay the reasonable expenses of counsel out of funds authorized by Parliament for expenses of litigation.

“request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberations” (B. M. Dickens, “A Canadian Development: Non-Party Intervention” (1977), 40 *Mod. L. Rev.* 666, at p. 671).

[47] Thus, orders for the appointment of *amici* do not cross the prohibited line into the province’s responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second, as my colleague Fish J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing the line between meeting the judge’s need for assistance and the province’s role in the administration of justice.⁵

[48] So long as these conditions are respected, the appointment of *amicus* avoids the concern that it improperly trenches on the province’s role in the administration of justice.

(2) Amicus as Defence Counsel

⁵ Making use of *amicus* in this manner is not universally endorsed. In the United Kingdom, the Attorney General and Lord Chief Justice jointly issued guidance to the judiciary regarding the use of advocates to the court, as *amicus* are known there (see “Memorandum— Requests for the appointment of an advocate to the court”, reproduced in Lord Goldsmith, “Advocate to the Court”, *Law Society Gazette*, February 1, 2002 (online). This guidance specified that advocates to the court are traditionally appointed on points of law and do not normally lead evidence, examine witnesses, and, in particular, are not to be appointed solely because an accused is unrepresented (para. 4).

[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 (see D. Berg, “The Limits of Friendship: the *Amicus Curiae* in Criminal Trial Courts” (2012), 59 *Crim. L.Q.* 67, at pp. 72-74).

[50] The issue of whether it was appropriate to appoint *amicus* to effectively act as defence counsel was raised by the Attorney General of Quebec and the Attorney General of British Columbia, who were interveners in this Court. It was not challenged by the Attorney General of Ontario. However, to the extent that the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger.

[51] First, the appointment of *amici* for such a purpose may conflict with the accused’s constitutional right to represent himself (see *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 972).

[52] Second, it can also defeat the judicial decision to refuse to grant state-funded counsel following an application invoking the accused’s fair trial rights under the *Charter*. For instance, by expanding the role of the *amicus*, first to act as though he was defending a client who remained mute, and later to take instructions from the accused, the trial judge in *Imona Russel* undermined the court’s earlier decisions to deny state-funded defence counsel.

[53] Third, there is an inherent tension between the duties of an *amicus* who is asked to represent the interests of the accused, especially where counsel is taking instructions, as in *Imona Russel* and *Whalen*, and the separate obligations of the *amicus* to the court. This creates a potential conflict if the *amicus*' obligations to the court require legal submissions that are not favourable to the accused or are contrary to the accused's wishes. Further, the privilege that would be afforded to communications between the accused and the *amicus* is muddied when the *amicus*' client is in fact the trial judge.

[54] Thus, it seems to me that this current practice of appointing *amici* as defence counsel blurs the traditional roles of the trial judge, the Crown Attorney as a local minister of justice and counsel for the defence. Further, the use of *amici* to assist a trial judge in fulfilling her duty to assist an unrepresented accused might result in a trial judge doing something indirectly that she cannot do directly. While trial judges are obliged to assist unrepresented litigants, they are not permitted to give them strategic advice. Where an *amicus* is assigned and is instructed to take on a solicitor-client role, as in *Imona Russel* and *Whalen*, the court's lawyer takes on a role that the court is precluded from taking.

[55] Finally, there is a risk that appointing *amici* with an expanded role will undermine the provincial legal aid scheme. In this case, the Ontario legislature had passed the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, which provides for the representation of indigent accused. The inherent or implied jurisdiction of a court

cannot be exercised in a way that would circumvent or undermine those laws. Absent a constitutional challenge, the judicial exercise of inherent or implied jurisdiction must operate within the framework of duly enacted legislation and regulations.

[56] For all these reasons, I conclude that a lawyer appointed as *amicus* who takes on the role of defence counsel is no longer a friend of the court.

(3) Compensating Amici

(a) *The Auckland Harbour Principle*

[57] I agree with my colleague Fish J. that the principle stated by the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318, 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” (p. 326), does not resolve the issue before us.

[58] However, the *Auckland Harbour* principle highlights the limits of the court’s role in the administration of justice, a role that is based on history, convention, competence and capacity. As already noted, the government of the day bears the responsibility for weighing public priorities and then allocating the resources and designing the programs required to act on its policy choices.

[59] Obviously, court decisions can have ancillary financial consequences. Moving to larger venues for jury selections involving a number of panels, or continuing a sitting of the court late into the day, incurring overtime expenses for court staff, implicate greater costs for the public purse. Yet, they are legitimate exercises of a court's inherent jurisdiction to control its own process. In much the same way, an order appointing an *amicus* does not take on the character of an appropriation, but rather is one of the countless decisions that may be taken by a court that will have incidental consequences for the public purse.

[60] However, an order that the Attorney General must provide compensation at a particular rate goes beyond an order with ancillary financial consequences, and becomes an order directing the Attorney General to pay specific monies out of public funds. Such orders must be grounded in law.

[61] If not derived from a *Charter* challenge or authorized by specific statutory authority, the jurisdiction to fix the compensation of *amici* must be found within a court's inherent or implied jurisdiction.

(b) *Does the Courts' Inherent or Implied Jurisdiction Extend to Setting Rates of Compensation for Amici and Ordering the Province to Pay?*

[62] The question is whether a judge, acting properly in the exercise of her inherent or implied jurisdiction, can fix the rate of payment of an *amicus curiae* and order the province to pay the *amicus* out of public funds.

[63] The Court of Appeal's approach rests on the premise that the inherent or implied power to appoint an *amicus* would be meaningless unless the court has the authority to ensure that rates of compensation will be adequate to retain the *amicus of its choice*. The submission is that it will sometimes be necessary for the court to name a specific person as *amicus* in order to manage or salvage a high-risk trial. Without the power to fix a rate of compensation, it is argued that the court's ability to ensure the effective conduct of a trial is weakened and the judicial process imperilled.

[64] I agree that the courts have the jurisdiction to set terms to give effect to their authority to appoint *amici*. However, I do not accept the premise that the court's ability to fix rates of compensation for an *amicus* is essential to the power to appoint *amici*, or that its absence imperils the judiciary's ability to administer justice according to law in a regular, orderly and effective manner. To the contrary, the spectre of trial judges fixing and managing the fees of *amici* imperils the integrity of the judicial process.

(i) Necessity

[65] Historically, courts have effectively appointed *amici* without the need to fix the rate of compensation. There is no dispute that a court has the ability to specify the general qualifications required for the task at hand. The Attorney General has the obligation to pay what is constitutionally adequate to serve the needs of the courts.

[66] As well, the experience with *Rowbotham* orders over the last two and a half decades has confirmed an attitude of restraint, as, even in those *Charter* cases, courts have not considered it necessary to direct the rates to be paid to state-funded lawyers appointed to represent the accused. A number of appellate courts have considered the issue and found it unnecessary to direct the rate of compensation (see *R. v. Chan*, 2002 ABCA 299, 317 A.R. 240 (*sub nom. R. v. Cai*), at para. 9; *R. v. Ho*, 2003 BCCA 663, 190 B.C.A.C. 187, at para. 73, *Peterman*, at para. 30). This is in line with the approach outlined by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 104, where a rate of remuneration for state-funded counsel was not specified.

[67] However, this is not to say that an order fixing rates of remuneration under the *Charter* is precluded, as s. 24(1) “should be allowed to evolve to meet the challenges and circumstances of [the case]” (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 59). It remains open to a court of competent jurisdiction to award such a remedy where a *Charter* right is at stake and it is appropriate and just to do so.

[68] Furthermore, this is not a case like *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374, where s. 694.1(3) of the *Criminal Code* provided statutory authority for the Registrar of this Court to fix the fair and reasonable fees and disbursements of counsel appointed by the Court pursuant to s. 694.1(1), where counsel and the Attorney General could not agree, or *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321

(C.A.), where the Attorney General in effect delegated to the court the task of finding an independent prosecutor for contempt proceedings that had been brought against Crown officials in order to avoid the appearance of a conflict of interest (para. 18); counsel for the Attorney General conceded that the court had jurisdiction to fix compensation (para. 13). Apart from these two cases and the cases at bar, I have not been directed to, nor have I been able to find, any appellate decision which has concluded that it was necessary to fix the rates of remuneration for state-funded counsel.

(ii) Limitations Imposed by Our Constitutional Order

[69] As I have explained, permitting judges to set rates and to order payment without authority based on a statute or derived from a constitutional challenge takes the judge out of the proper judicial role. A court's inherent or implied jurisdiction cannot surpass what the Constitution permits. As we have seen, the inherent jurisdiction of the court must respect the constitutional framework and the allocation of responsibility this framework makes. It is for the duly elected members of the legislature to determine what funds are expended on the administration of justice, not the judges.

[70] In cases where the lawyer contemplated by the court opts not to accept the compensation offered by the Attorney General, the court does not, in my view, have the ability to specify a rate of remuneration in order to secure the *amicus* of its choice. The inability to have the *amicus* of its choice does not deprive the court of its

nature as a court of law. Even the accused, whose right to a fair trial is at stake, is not entitled to be provided with state-funded counsel of choice, provided he or she receives legal representation that gives a fair opportunity to make full answer and defence (see *R. v. Rockwood* (1989), 91 N.S.R. (2d) 305 (S.C. (App. Div.)), at paras. 15-20; *Chan*, at para. 18; *Child and Family Services of Winnipeg v. J. A.*, 2003 MBCA 154, 180 Man. R. (2d) 161, at para. 45; *Peterman*, at paras 26-28; *R. v. Ryan*, 2005 NLCA 44, 199 C.C.C. (3d) 161, at paras. 7-8; *R. v. Gagnon*, 2006 YKCA 12, 230 B.C.A.C. 200, at paras. 9-11).

[71] In Ontario, the Attorney General typically finds a number of appropriate lawyers willing to act as *amicus* for the consideration of the trial judge. Such a process respects the institutional and complementary constitutional roles of the courts, the Attorney General on behalf of the executive, and the legislature.

[72] The appointment of *amici* cannot be permitted to devolve into a routine way of getting complex trials completed. Fundamentally, providing judges with the assistance required to complete criminal trials in a fair and timely way is a matter concerning the administration of justice. As such, it is the responsibility of the province. Ultimately, it is the province's duty to find solutions to recurring problems such as those that arose in the cases before us. To routinely ask judges to resolve these problems by extraordinary orders taxes the inherent jurisdiction of the court with more than it can properly be made to bear.

[73] For example, 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. The province may create a mechanism for the monitoring and oversight of those funds, or look to a staffed office to fulfill the role. It may be that the province chooses to enhance the legal aid plan or to establish a separate regime to address the different roles of *amici*.⁶ It can choose to respond to public policy problems in a way that does not undermine other programs and priorities, including the legal aid program. What is more, the government is accountable to the public for such choices.

[74] Of course, it remains the case that a failure to provide the appropriate support may compromise the judicial process in a specific case. For instance, in a criminal case, the absence of a qualified court reporter or interpreter may mean that the court cannot proceed with the trial. However, a trial judge cannot use her inherent jurisdiction to insist that the Attorney General pay the higher rates required to attract a particular court reporter or interpreter. Sometimes a trial cannot proceed, and must be rescheduled, despite the trial judge's or the Crown's best efforts.

[75] In those exceptional cases where *Charter* rights are not at stake but the judge must have help to do justice and appoints an *amicus*, the person appointed and

⁶ For instance, in Manitoba the appointment of *amici* is addressed in *The Legal Aid Manitoba Act*, C.C.S.M. c. L105, s. 3(2): "Subject to the approval of the council, Legal Aid Manitoba may provide legal aid requested by the minister, a judge, or an officer of a court or tribunal, including providing representation as a friend of the court, and legal information or advice to an organization or agency, or to persons within a geographic area."

the Attorney General should meet to set rates and mode of payment. The judge may be consulted, but should not make orders regarding payment that the Attorney General would have no choice but to obey.

[76] In the final analysis, if the assistance of an *amicus* is truly essential and the matter cannot be amicably resolved between the *amicus* and the Attorney General, the judge's only recourse may be to exercise her inherent jurisdiction to impose a stay until the *amicus* can be found. If the trial cannot proceed, the court can give reasons for the stay, so that the responsibility for the delay is clear.

(c) *The Integrity of the Judicial Process Would Be Imperilled*

[77] Finally, recognizing that courts have the inherent or implied power to set rates of compensation creates a very real risk of compromising the judicial role. The respondent Criminal Lawyers' Association of Ontario says that courts use their inherent jurisdiction to set rates of remuneration for *amici* infrequently and for small amounts, such that the sums involved are modest and do not engage social, economic or political policy. However, the practical result is that, in Ontario, 242 superior court judges would have the ability to instruct the Attorney General in the expenditure of funds on the administration of justice, in a piecemeal and inconsistent fashion. As noted above, such orders would potentially undermine the province's legal aid system.

[78] Decisions regarding rates of compensation for *amici* would put judges into the fray, requiring them to determine fair rates of compensation; to monitor the compensation claimed; or, as happened in *Imona Russel #2*, to appoint further counsel to monitor the fees and the time claimed, at a further fixed fee.

[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. Indeed, as the High Court of Australia found in *Grollo v. Palmer* (1995), 184 C.L.R. 348, at p. 365, courts may not exercise non-judicial functions that would diminish public confidence in the integrity of the judiciary as an institution.

V. Conclusion

[80] In summary, the ability to fix rates of compensation is not necessary for the court to make its power to appoint *amici curiae* effective, and the judicial process will not be weakened or imperilled if compensation cannot be ordered. Indeed, even following a *Rowbotham* application, when the courts have the jurisdiction to direct compensation for counsel appointed under s. 24(1) of the *Charter*, the courts have rarely found it necessary to direct the rates payable to defence counsel.

[81] Allowing superior and statutory court judges to direct an Attorney General as to how to expend funds on the administration of justice, in the absence of a constitutional challenge or statutory authority, is incompatible with the different roles, responsibilities and institutional capacities assigned to trial judges, legislators and the executive in our parliamentary democracy.

[82] In the end, what concerned the Court of Appeal was the proper course to follow if the Attorney General is unreasonable and a particular lawyer is not prepared to accept the rates for service as *amicus*. While trial judges have a number of options regarding how to proceed in the face of such an impasse, they do not have the power to determine what a reasonable fee is or to order the government to pay it. Such orders cross an impermissible line. The other pillars of government are accountable for establishing spending priorities and, so long as their initiatives pass constitutional muster, have the institutional capacity to define public policy and find program solutions. The Court must allow provinces the flexibility they require to meet their constitutional obligation to fund *amici*, when essential.

[83] While the rule of law requires an effective justice system with independent and impartial decision makers, it does not exist independently of financial constraints and the financial choices of the executive and legislature. Furthermore, in our system of parliamentary democracy, an inherent and inalienable right to fix a trial participant's compensation oversteps the responsibilities of the judiciary and blurs the roles and public accountability of the three separate branches

of government. In my view, such a state of affairs would imperil the judicial process; judicial orders fixing the expenditures of public funds put public confidence in the judiciary at risk.

[84] For the reasons stated above, the ability to set rates of compensation for *amici* does not form part of the inherent jurisdiction of a superior court. Given this conclusion, it follows that the ability to set rates of compensation for *amici* does not form part of the implicit powers of a statutory court to function as a court of law.

[85] Accordingly, I would allow the appeal. In light of the public importance of the issues engaged by this appeal, the parties will bear their own costs.

The reasons of LeBel, Fish, Abella and Cromwell JJ. were delivered by

FISH J. —

I

[86] An *amicus curiae* is a friend of a court *in need* — and the friend of *that court* indeed.

[87] Accordingly, courts may appoint an *amicus* only when they require his or her assistance to ensure the orderly conduct of proceedings and the availability of

relevant submissions. And once appointed, the *amicus* is bound by a duty of loyalty and integrity *to the court* and not to any of the parties to the proceedings.

[88] It is uncontested in this case that trial judges have jurisdiction to appoint an *amicus curiae* and to determine the role of the *amicus* in the proceedings before them. It is uncontested as well that the Attorney General who has conduct of the prosecution — in this case the Attorney General of Ontario — is then obliged to remunerate the *amicus* appropriately: A.F., at para. 3.

[89] The only question on this appeal is whether trial judges can themselves fix the fees to be paid to the *amicus*. The appellant would answer that question in the negative; the respondents in the affirmative.

[90] I agree with the respondents. In my view the jurisdiction to fix the fees of *amici curiae* is necessarily incidental to the power of trial judges to appoint them. There is no constitutional impediment to vesting in trial judges the authority to do so when necessary in the circumstances.

[91] As I explain below, once a trial judge names and defines the role of an *amicus curiae*, a consensual approach ought to be favoured. The Attorney General and the *amicus* should be invited to agree on both the rate of remuneration and the manner in which the *amicus*'s budget is to be administered. If an agreement cannot be reached, the trial judge should fix the rate. The Attorney General then has the option

of either paying the fee or staying the proceedings as a matter of prosecutorial discretion.

II

[92] This appeal concerns four distinct judgments, rendered in three cases and joined both in the Court of Appeal and in this Court for hearing and decision.

[93] In each instance, the trial judge appointed an *amicus curiae* and set the terms and conditions of the *amicus*'s compensation. The judge then ordered the Crown to remunerate the *amicus* at the rate and upon the conditions fixed by the court.

[94] Two of the judgments before us relate to the trial of William Imona Russel. After Mr. Imona Russel had discharged several experienced lawyers whom he had retained under legal aid certificates, the Crown — not the accused — requested that the trial judge appoint an *amicus*. The appointment of an *amicus*, the Crown contended, would serve the interests of justice by ensuring the orderly conduct of the trial in the event that Mr. Imona Russel persisted in his serial discharge of defence counsel.

[95] An *amicus curiae* was appointed on June 17, 2008. The order set out the duties of the *amicus* as follows:

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.

(*R. v. Imona Russel*, 2009 CarswellOnt 9725 (S.C.J.) (“*Imona Russel #1*”), at para. 7.)

The order also stated that the *amicus* would be paid at the legal aid rate and that Legal Aid Ontario would manage the funding.

[96] After Mr. Imona Russel again dismissed his lawyer, Legal Aid refused to fund any new defence counsel. Mr. Imona Russel then brought an application for an order requiring the Attorney General to fund counsel as a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms* for an infringement of his right to a fair trial (more commonly known as a “*Rowbotham* order”: see *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)). This application was denied and appeals against that decision were dismissed.

[97] The trial judge felt bound in these circumstances to expand the role of the *amicus* previously appointed, despite Mr. Imona Russel’s protests and his refusal to cooperate with the *amicus*. The *amicus* was instructed to cross-examine witnesses, make objections to inadmissible evidence and raise legal arguments on behalf of Mr. Imona Russel. Effectively, as the trial judge noted, he was told “to defend the case as if he had a client who was choosing to remain mute”: *Imona Russel #1*, at para. 13.

[98] Two months later, Mr. Imona Russel reversed his position and requested a further expansion of the role of the *amicus*. Subject to a minor disagreement as to privilege of the communications between the *amicus* and the accused, this expansion was supported by the Crown. In the result, the trial judge ordered the *amicus* to take instructions from and act on behalf of Mr. Imona Russel as he would in a traditional solicitor-client relationship, subject to two notable exceptions: Mr. Imona Russel could not discharge the *amicus* and the *amicus* could not withdraw his services due solely to a breakdown in the relationship with the accused.

[99] Following this significant expansion of his duties and obligations, the *amicus* sought a variation of his order of appointment. The trial judge agreed to increase the *amicus*'s rate of remuneration to \$192 per hour. This, she 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": *Imona Russel #1*, at para. 49.

[100] Several months later, being of the opinion that the budget of hours authorized by Legal Aid Ontario was not sufficient to permit him to adequately represent Mr. Imona Russel, the *amicus curiae* requested the appointment of an independent assessor to review Legal Aid's decision and to recommend a budget. Legal Aid initially agreed but later revised its position. The *amicus* then applied to the court for permission to withdraw.

[101] The trial judge held that the *amicus*'s request for an independent third party assessor was entirely reasonable. He ordered that a senior criminal lawyer be appointed to set a budget and to review, monitor and assess the accounts of the *amicus* on an ongoing basis: *R. v. Imona Russel*, 2010 CarswellOnt 10747 (S.C.J.) ("*Imona Russel #2*").

[102] The second case on appeal concerns the trial of Paul Whalen. Mr. Whalen was convicted of a number of serious indictable offences and the Crown applied to have him declared a dangerous offender. Mr. Whalen had dismissed two lawyers since the commencement of proceedings and was unrepresented. He had been unable to retain counsel under his legal aid certificate because of an ongoing boycott of legal aid work by criminal defence lawyers in Ontario. The trial judge was of the view that, given the complex expert evidence that would be led on the application, the fairness of the proceedings would be compromised unless an *amicus curiae* was appointed by the court.

[103] The trial judge appointed Anik Morrow as *amicus* because she had already started to develop a relationship of confidence with Mr. Whalen, a difficult client. The judge believed that appointing two other lawyers, as suggested by the Attorney General, created a risk of destabilizing the proceedings. The trial judge set Ms. Morrow's rate of compensation at \$200 per hour and ordered Legal Aid Ontario to manage the account: *R. v. Whalen*, Sept. 18, 2009, No. 2178/1542 (Ont. Ct. J.).

[104] The final case on appeal was initiated by Lawrence Greenspon, a senior counsel. Wahab Dadshani was charged with first degree murder. His case had been before the courts for more than five years when, three months before his trial was to commence, he decided to discharge Mr. Greenspon. As a result, the court appointed Mr. Greenspon as *amicus curiae* in order to ensure that the trial proceeded as scheduled, whether Mr. Dadshani had counsel or not. Mr. Greenspon performed only 3.25 hours of work as *amicus* and his appointment lasted only until Mr. Dadshani's new counsel confirmed his presence at trial. The trial judge set Mr. Greenspon's rate of remuneration for his work as *amicus curiae* at \$250 per hour. In fixing this rate, the trial judge noted that Mr. Greenspon had more than 28 years of experience at the bar and was certified by the Law Society of Upper Canada as a specialist in criminal litigation: *R. v. Greenspon*, 2009 CarswellOnt 7359 (S.C.J.), at para. 49.

[105] The Crown appealed against all four decisions. In its view, trial judges have no jurisdiction to set the *amici*'s rates of remuneration, to determine how their budgets will be administered or order the Attorney General to pay the *amici* at the rates fixed by the court. In the alternative, the Crown contended that the trial judges should have adopted the "least restrictive approach" and stayed the proceedings rather than order payment.

[106] The Ontario Court of Appeal unanimously dismissed the appeals. The Court found that incidental to a judge's power to appoint an *amicus* is the power to set the terms and conditions of that appointment, including the rate of compensation

and the monitoring of accounts. It also held that since the cases under appeal do not engage the *Charter*, a temporary stay of proceedings — the least restrictive approach according to the Quebec Court of Appeal in *Québec (Procureur general) v. C. (R.)* (2003), 13 C.R. (6th) 1, at paras. 162-65 — was not the appropriate remedy in the circumstances: *R. v. Imona Russel*, 2011 ONCA 303, 104 O.R. (3d) 721.

[107] The Crown now appeals to this Court against the judgment of the Ontario Court of Appeal.

III

[108] Exceptionally, trial judges may appoint an *amicus curiae* to ensure the orderly conduct of proceedings and the availability of relevant submissions. They should not be required to decide contested, uncertain, complex and important points of law or of fact without the benefit of thorough submissions.

[109] Courts are empowered in some instances by specific statutory provisions, such as s. 486.3 of the *Criminal Code*, R.S.C. 1985 c. C-46, to appoint counsel for particular purposes. They may also order the appointment of defence counsel pursuant to a *Rowbotham* application as a remedy under s. 24(1) of the *Charter*.

[110] The appointment of *amici curiae* derives, however, from different sources and should be kept conceptually distinct.

[111] Superior courts are empowered by their inherent jurisdiction to appoint *amici curiae*. Most recently, in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at paras. 24 and 29, this Court described the inherent jurisdiction of superior courts as follows:

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 summary, Jacob states, “The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways”. . . .

See also *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32; *Halsbury’s Laws of England* (4th ed. (reissue) 2001), vol. 37, at para. 12.

[112] In the case of statutory courts, the power to appoint an *amicus* derives from the court’s authority to control its own process in order to administer justice fully and effectively. Their authority to appoint *amici* is necessarily implied in the power to function as a court of law: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 70-71; *Cunningham*, at para. 19.

[113] The Crown did not, either before this Court or the courts below, contest the propriety of the *amicus* appointments in any of the cases before us. Nor did it challenge the established distinctions between defence counsel, whether appointed pursuant to a legal aid certificate or under a *Rowbotham* order, and *amicus curiae*. The Crown's appeal is restricted to a single question: whether trial judges have jurisdiction to fix an *amicus*'s rate of remuneration.

[114] I think it useful nonetheless to provide some guidance regarding the circumstances in which an *amicus* appointment is appropriate. An *amicus curiae* may play many roles but it is important to recognize at the outset that an *amicus* is *not* a defence counsel. Once clothed with all the duties and responsibilities of defence counsel, the *amicus* can no longer properly be called a "friend of the court".

[115] The discretion of trial judges to appoint an *amicus* is not unrestricted. The power to appoint should be exercised sparingly and with caution (see *Caron*, at para. 30), and appointments should be in response to specific and exceptional circumstances. Trial judges must not externalize *their* duty to ensure a fair trial for unrepresented accused by shifting the responsibility to *amici curiae* who, albeit under a different name, assume a role nearly identical to that of defence counsel.

[116] An accused is entitled to forego the benefit of counsel and elect instead to proceed unrepresented. An *amicus* should not be appointed to impose counsel on an unwilling accused or permit an accused to circumvent the established procedure for obtaining government-funded counsel: *Cunningham*, at para. 9. In the vast majority

of cases, as long as a trial judge provides guidance to an unrepresented accused, a fair and orderly trial can be ensured without the assistance of an *amicus*. Such is the case even if the accused's defence is not then quite as effective as it would have been had the accused retained competent defence counsel.

[117] If appointed, an *amicus* may be asked to play a wide variety of roles: *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13 (Ont. S.C.J.), at paras. 52-59, *per* Durno J. There is, as Rosenberg J.A. pointed out in *R. v. Samra* (1998), 41 O.R. (3d) 434 (C.A.), at p. 444, “no precise definition of the role of *amicus curiae* capable of covering all possible situations in which the court may find it advantageous to have the advice of counsel who is not acting for the parties”.

[118] Regardless of what responsibilities the *amicus* is given, however, his defining characteristic remains his duty to the court and to ensuring the proper administration of justice. An *amicus*'s sole “client” is the court, and an *amicus*'s purpose is to provide the court with a perspective it feels it is lacking — all that an *amicus* does is in the public interest for the benefit of the court in the correct disposal of the case: *R. v. Lee* (1998), 125 C.C.C. (3d) 363, at para. 12 (N.W.T.S.C.).

[119] While the *amicus* may, in some circumstances, be called upon to “act” for an accused by adopting and defending the accused's position, his role is fundamentally distinct from that of a defence counsel who represents an accused person either pursuant to a legal aid certificate or under a *Rowbotham* order.

Furthering the best interests of the accused may be *an incidental result*, but is not *the purpose*, of an *amicus* appointment.

[120] As Durno J. explained in *Cairenius*, at para. 62:

. . . [an] *amicus* is generally not counsel for the accused/applicant, there is no solicitor-client relationship, and *amicus* does not take instructions from a client. The general role of *amicus* is to assist the court. *Amicus*, as a friend of the court, has an obligation to bring facts or points of law to the court's attention that might be contrary to the interests of the applicant. This is contrary to the traditional role of defence counsel described in *Rondel v. Worsley*, [1969] 1 A.C. 191 (H.L.) at 227-8, and cited with approval by Rosenberg J.A. in *Samra*

[121] Where a trial judge appoints an *amicus*, these distinctions between an *amicus* and court-appointed defence counsel should be made clear both to the *amicus* and to the accused. The blurring of the line between the two roles in the present cases causes me some concern; however, as pointed out, that is not the issue before us.

[122] I turn now to the main issue raised on this appeal. In my view, a necessary corollary to a trial judge's power to appoint an *amicus* is the power to fix the *amicus*'s remuneration. I am unable, for three reasons, to adopt the contrary position urged by the appellant — one that would grant the provincial Attorney General the exclusive power to fix an *amicus*'s rate of remuneration.

[123] First, such a position would unduly weaken the courts' appointment power and ability to name an *amicus* of their choosing. Counsel available to serve as

an *amicus* would be limited to those willing to accept appointment at the rate fixed by the Attorney General.

[124] Second, the integrity of the judicial process would be imperilled. It has not been suggested that the Attorney General would set the rate of remuneration unreasonably or impracticably low. Nonetheless, the reasoning of this Court in another context is equally relevant here: the ability of the court to ensure a fair and orderly process “should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control”: *R. v. Bain*, [1992] 1 S.C.R. 91, at p. 104.

[125] Finally, 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. As *amici* often play a role that can be said to be adversarial to the Crown, if the Crown were permitted to determine unilaterally and exclusively how much an *amicus* is paid, the reasonable person might conclude that the “expectation . . . of give and take” might lead the *amicus* to discharge his duties so as to curry favour with the Attorney General: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 187.

[126] There is, moreover, no constitutional impediment to a trial judge ordering the Ministry of the Attorney General to pay an *amicus* at a specific rate of remuneration fixed by the court.

[127] The fundamental constitutional principle derived from the decision of the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318, provides that only Parliament can authorize payment out of money from the consolidated revenue fund: see also *Constitution Act, 1867*, s. 126; *Financial Administration Act*, R.S.O. 1990, c. F.12 (“*FAA*”), s. 11.1(1).

[128] The *Auckland Harbour* principle, however, finds no application in the case at bar. The principle acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature. Since, however, the Attorney General has the authority to disburse public funds to pay *amici curiae* when their rate of remuneration is not fixed by the court, then the same authority necessarily exists even if their rate is fixed by the court.

[129] As a constitutional matter, the fees of *amici curiae* in this case can be paid by the Attorney General directly from the Consolidated Revenue Fund under a standing appropriation provided for in the *FAA*.

[130] Section 13 of the *FAA* provides that “[i]f any public money is . . . directed by the judgment of a court . . . 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”. See also *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, s. 22. As the Legislative Assembly has pre-approved the disbursement

of funds for the purpose of satisfying court orders, there can be no violation of the *Auckland Harbour* principle.

[131] I note that s. 13 of the *FAA* does *not* itself grant courts the jurisdiction to order the Crown to expend money or remunerate *amici curiae*. Rather, this provision authorizes the executive branch to make payment once a valid court order is made and thus precludes the application of the *Auckland Harbour* principle.

IV

[132] Once a trial judge names and defines the role of an *amicus curiae* — with or without the assistance of the parties — a consensual approach ought to be favoured. This approach would invite the Attorney General and the *amicus* to meet and agree on the rate of remuneration and on the administration of the budget.

[133] Both parties should negotiate in good faith and with due regard for their respective obligations to the judicial process: Attorneys General should consider their duty to promote the sound administration of justice and *amici curiae* should keep in mind both the element of public service inherent in their role and the “privilege of belonging to a profession that is not simply a business”: *Ontario v. Figueroa* (2003), 64 O.R. (3d) 321(C.A.), at para. 28.

[134] The provincial Attorney General and the *amicus* should be given a limited time to negotiate based upon the state of proceedings and the urgency of the

appointment. In general, negotiations should be given as little time as is practicable. Any dispute regarding remuneration should be resolved expeditiously, in a manner that does not delay, much less derail, the proceedings. Moreover, the *amicus* should not be permitted to hold proceedings hostage by extending negotiations in order to secure more generous compensation.

[135] If the Attorney General and the *amicus* cannot reach agreement, the trial judge should fix the rate of remuneration. The Attorney General then retains the option of either paying the fee or staying the proceedings.

[136] The ultimate choice of whether to proceed with the prosecution in light of the associated costs appropriately remains that of the Attorney General. The proper balance between prosecutorial discretion and the jurisdiction of the court is thus preserved. A *Rowbotham* order achieves that same result by a different and well-established route, which is not in issue here. As Iacobucci and Major JJ. explained in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at para. 47:

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution . . . do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum. [Emphasis in original.]

[137] In fixing the rate of remuneration, the trial judge should take into account a number of considerations. I believe that the factors identified by the Ontario Court of Appeal in *Figueroa* in determining the rate of remuneration of an independent prosecutor are equally applicable in the case of an *amicus* appointment. Goudge J.A. set out these factors in *Figueroa*, at paras. 27-30:

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.

Thus I would add these two considerations to the list. It is relevant to fixing a reasonable rate for the independent prosecutor that he or she is performing a public service paid for with public funds.

See also *R. v. White*, 2010 SCC 59, [2010] 3 S.C.R. 374.

[138] The Attorney General of Ontario urges us to accept that the legal aid tariff constitutes a presumptively reasonable remuneration for an *amicus*. While the legal

aid tariff should be taken into account as a guide, it is certainly not determinative:
White.

[139] It must be recalled that *amici* are not bound by the legal aid regime. Their client is the court, not an indigent accused, and they are “not parties to that implicit agreement between the defence bar and the state through which, it appears, defence counsel have agreed to effectively contribute a portion of their services to ensure that the broadest number of indigent defendants are afforded the legal representation they could not otherwise retain”: *R. v. Chemama*, 2008 ONCJ 140 (CanLII), at para. 11.

[140] As mentioned earlier, I also favour a consensual approach to determining the manner in which an *amicus*'s budget and payment is to be managed. A reasonable budget is necessary to enable the *amicus* to do that which is expected of him. In my respectful view, subject to the agreement of an *amicus*, it would be inappropriate to consign the administration of *amici*'s budgets to Legal Aid. 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.

V

[141] It has not been suggested — nor can it be — that an immoderate or unreasonable fee was set by the trial judges in any of the cases before us. In each instance, the fees fixed are substantially lower than the *amicus*'s private practice rates and are virtually identical to the fees paid *by the Crown* to similarly qualified counsel

retained as *ad hoc* prosecutors, or to represent witnesses in criminal cases, or pursuant to s. 684 of the *Criminal Code: Imona Russel #1*, at para. 49; *Figueroa*; *Chemama*, at para. 14.

[142] The trial judges exercised their jurisdiction appropriately in setting the rates of remuneration and in providing for the management of the *amici*'s budgets. They committed no reviewable error of law in the exercise of their discretion.

VI

[143] For all of the foregoing reasons, I would dismiss the appeal.

Appeal allowed, LEBEL, FISH, ABELLA and CROMWELL JJ. dissenting.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent the Criminal Lawyers' Association of Ontario: Schreck Presser, Toronto; Louis P. Strezos & Associate, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the British Columbia Civil Liberties Association: Sugden, McFee & Roos, Vancouver.

Solicitors for the intervener the Advocates' Society: Simcoe Chambers, Toronto.

Solicitors for the intervener the Mental Health Legal Committee: Hiltz Szigeti, Toronto; Swandron Associates, Toronto; Supreme Advocacy, Ottawa.