



**AMICUS CURIAE
INMATE MENTAL DISORDER APPEALS PROGRAM**

October 8, 2009

Chief Justice Warren Winkler
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2M5

- and -

Associate Chief Justice Dennis O'Connor
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2M5

- and -

Mr. Justice Marc Rosenberg
Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2M5

Dear Chief Justice and Justices:

We are writing today to advise the Court of the position of the Amicus counsel panel who assist mentally disordered accused in this Court regarding the current boycott of some legally aided matters by members of the Criminal Lawyers' Association and the withdrawal of services to this Court by inmate duty counsel. We are writing to advise you that effective December 15th, 2009 we will no longer accept appointments as Amicus Curiae.

We have been provided a copy of the July 20, 2009 letter from inmate duty counsel advising of their immediate withdrawal of services. We now realize that at this time, our Amicus roster lawyers comprise the only group of counsel who continue to accept Orders of this Court who have not raised any issue with respect to our compensation at legal aid's current rates either for the work we do in this Court or generally. Our silence to date should not be interpreted as

any disagreement with the position taken province-wide now by members of the CLA in relation to specified services or by the inmate duty counsel group. Our Amicus panel lawyers support the boycott in general terms for all of the reasons stated publicly by the CLA and in the inmate duty counsel's correspondence to the Court. Specifically, we can well understand why the Inmate Duty Counsel Program lawyers felt "compelled to suspend their services to unrepresented appellants given the current legal aid crisis and the government's failure to meaningfully respond to these issues."

The current boycott by the Criminal Lawyers' Association and the Inmate Duty Counsel Program protests the inadequate funding of the legal aid program generally. We will not repeat here the history of the issue as has been laid out in greater detail in the letter we have reviewed and you have received, but we agree that the situation constitutes a crisis and we are approaching the tipping point, if we have not already reached it.

We have been providing amicus assistance to unrepresented mentally disordered accused who come before this Court since 2001. Our panel assists self-represented Not Criminally Responsible (NCR) or unfit accused who appeal decisions of the Ontario Review Board. At the tribunal level these individuals are almost universally legally aided. We have provided our services as Amicus appointed on the appeals at legal aid's hourly rates because we are committed to the principle of equal access to justice. The Amicus counsel program for this client group was established under the leadership of Justice Rosenberg in response to the Court's concern that mentally disordered appellants were not able to navigate the appellate process in their own interest due to their extraordinary vulnerability. The demands on the Court's own resources in accommodating these appellants was also a contributing factor. Based on average volume of appeals annually, our lawyers have now very likely handled close to two hundred such appeals. Demand for our services has expanded and our roster has grown from four to six lawyers. Each panel member has between ten and twenty years of experience as an appellate litigator and has special expertise in the law of mental disorder. The work is collaborative and assists the appellants as well as the Crowns and this Honourable Court. Given the success and the unique nature of the program, it has begun to garner international attention and has been the topic of presentations at several educational events. We are very proud of our contribution to access to justice and in assisting in reducing delays in the hearing of inmate mental disorder appeals. We are most proud, however, of our unique ability to facilitate the meaningful participation of mentally disordered individuals in their own appeals.

We are all of the opinion that a vibrant, independent, properly funded defence bar is essential to our democracy. In particular we are of the view that we cannot simply stand by while the government repeatedly increases funding to all the participants in the justice system except for those who represent the most marginalized. The Attorney-General of Ontario's most recent announcements in respect of funding for legal aid demonstrate a complete failure to grasp the need for comparable funding of both sides in an adversarial system. We have all tolerated the imbalance in the system for too long. We have all stood by watching bright, highly qualified lawyers scramble without proper resources. Much of the time they are kept going by little more than grim determination. We see young lawyers emerge from law school with crushing debt loads inevitably spurn a career representing society's most vulnerable. The government through its failure to fund legal aid is causing long term damage to the defence bar and therefore long term damage to Ontario's criminal justice system.

We agree with the Inmate Duty Counsel Program lawyers when they say that: “The Legal Aid crisis cannot be remedied by solutions that do not include a meaningful increase in the legal aid tariff. The current state of legal aid has driven senior counsel away from the handling of serious cases both at trial and on appeal. The loss to the justice system as a whole and the significant contribution this has caused to delays and overall costs cannot be underestimated.” Their comments apply equally in the context of litigation before the Ontario Review Board and appeals from those proceedings.

For all these reasons we feel that we must take action. We are acutely aware that the people we represent are among the most vulnerable and marginalized Ontarians. We have, because of this, been through lengthy and at times difficult discussions before taking the step we are about to take. We wish to advise you therefore that as of December 15, 2009 none of us will accept any new appointments as amicus curiae as part of the Court of Appeal’s inmate mental disorder appeals program. We wish to emphasize that this is not about proper funding for the amicus program. This action is taken as part of the wider effort to restore legal aid funding and restore a balance between the two sides of our adversarial process. Our sincere hope is that the Attorney-General will take steps immediately so that our action will become unnecessary.

Yours very truly,

Paul Burstein

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- Cc: Caroline Mandell
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Cc: John McCamus
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Cc: Wayne Van Der Meide
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Cc: Joe Wright
Legal Counsel (ORB)

Cc: Marshall Swadron
Chair (Mental Health Legal Committee)

Cc: Ryan Fritsch
Legal Counsel (PPAO)