

**THE ROLES OF AMICUS CURIAE (FRIEND OF THE COURT)  
IN JUDICIAL SYSTEMS WITH EMPHASIS  
ON CANADA AND ALBERTA**

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*In administrating their judicial functions, courts can resort to different devices. One of these devices is the appointment of an amicus curiae or a friend of the court. There have been many debates on the origins of this institution and even its definition due to its evolving nature. In this article, the author will consider what this nature is and whether judicial systems are prepared to appreciate this evolution or departure from the amici's origins. The author is of the opinion that, at least in Canada, the judicial system is required to be careful in expanding the roles of amici and to appoint them in exceptional cases where their appointment is necessary for advancing the administration of judicial functions. In Alberta in particular, some cases are more prone to the amicus' appointments but still the courts are cautious about determining their roles. The author concludes that in Canadian judicial systems, amici generally contribute to furthering the administration of justice in an orderly and fair manner.*

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## I. PRELIMINARY CONSIDERATIONS

### A. DEFINITION OF AMICUS CURIAE

The normal way of understanding new words that we face is looking them up in a dictionary. This method, however, is not always entirely helpful as is the case with the word “amicus curiae.” Searching this term demonstrates that it is a Latin term and literally means “friend of the court.”<sup>1</sup> Nevertheless, this “deceptively simple” definition is more difficult than it seems.<sup>2</sup> The reason for this is because different functions have been assigned to amicus curiae in different national and international jurisdictions.<sup>3</sup> Also, the courts from the very beginning have avoided providing a precise definition of the parameters and attendant circumstances of amicus curiae and through which they sought to increase judicial discretion and maximize the flexibility of this device.<sup>4</sup>

The definition of amicus curiae is a function-based one, and since the role of amicus curiae has changed over time, it should be defined in the special context or jurisdiction under consideration. Yet, as a preliminary definition, amicus curiae is “[a] friend of the Court. A person who calls the attention of the Court to some point of law or fact which would appear to have been overlooked.”<sup>5</sup> There are also some judicial definitions for amicus curiae as “barristers who assist the court, usually at the court’s request, and are disinterested”<sup>6</sup> or as “a person, usually a barrister who, with the court’s permission, may advise the court on a point of law or on a matter of practice”<sup>7</sup> or as “a bystander, usually a lawyer, who interposes and volunteers information upon some matter of law in regard to which the Judge is doubtful or mistaken, or upon a matter of which the Court may take judicial cognizance.”<sup>8</sup>

Regardless of what responsibilities the amici are given, defining their characteristics remains a duty of the courts whose main concern is ensuring the proper administration of justice. In fact, the “amicus’s sole ‘client’ is the court, and an amicus’s purpose is to provide

<sup>1</sup> Even this definition can be criticized based on the evolving role of amicus curiae in judicial proceedings from an impartial intervener to a counsel to the non-represented party. In this regard, S Chandra Mohan has made a fine distinction between “a friend of the court” who, without seeking to influence the outcome, assists the court “by providing information so that the court will not fall into error,” and “[a] friend to the court” who “attempts to persuade the court to adopt a particular point of view whether or not he has a direct interest in the outcome” (S Chandra Mohan, “The Amicus Curiae: Friends No More?” (2010) 2 Sing JLS 352 at 354 [emphasis in original]).

<sup>2</sup> John Bellhouse & Anthony Lavers, “The Modern *Amicus Curiae*: A Role in Arbitration?” (2004) 23 CJQ 187.

<sup>3</sup> Michael K Lowman, “The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?” (1992) 41:4 Am UL Rev 1243 at 1244.

<sup>4</sup> Samuel Krislov called this practice “oral ‘shepardizing.’” Samuel Krislov, “The Amicus Curiae Brief: From Friendship to Advocacy” (1963) 72:4 Yale LJ 694 at 695.

<sup>5</sup> PG Osborne, *A Concise Law Dictionary* (London: Sweet & Maxwell, 1927) sub verbo “Amicus Curiae.” In some dictionaries the role of amicus curiae is only informing the court of a matter of law. See e.g. John Bouvier, *Bouvier’s Law Dictionary and Consise Encyclopedia* (Kansas City: Vernon Law Book; St. Paul: West Publishing, 1914) sub verbo “AMICUS CURIAE.”

<sup>6</sup> *Canada (Attorney General) v Aluminum Company of Canada* (1987), 10 BCLR (2d) 376 (CA) at 382 [*Aluminum Company of Canada*].

<sup>7</sup> Mohan, *supra* note 1 at 365, n 89 (referencing *United States Tobacco Co v Minister for Consumer Affairs*, [1988] 83 ALR 79 (FCA)).

<sup>8</sup> *Grice v R* (1957), 11 DLR (2d) 699 at 702 cited in Anna SP Wong, “Amicus Curiae: Friend of the Court ... to Befriend the Crown?” *The Advocates Journal* (Spring 2018) 35 at 35. To read more definitions made by courts in other jurisdictions, see Mohan, *supra* note 1 at 355, n 9.

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.”<sup>9</sup>

## B. HISTORY AND ORIGIN OF AMICUS CURIAE: COMMON LAW OR ROMAN LAW?

As Covey states, “[l]ike so many things of great age, [amicus curiae’s] roots are lost even though the practice still continues.”<sup>10</sup>

On the one hand, there is a view based upon which the practice of allowing any person present in a court to step forward and inform or advise the court is a historical illustration of *amicus curiae* which dates back to the fourteenth century.<sup>11</sup> According to this view, the practice of using *amicus curiae* is rooted in English law and has been deemed as an accepted practice in the Yearbook cases as far back as 1353.<sup>12</sup> Therefore, the first applications of this practice are attributed to the common law system where the main duty of an *amicus curiae* was reminding the courts of previous judgments in lack of a proper reporting system.<sup>13</sup> It has also been argued that at early common law “[i]t was a very ancient principle that no counsel was allowed to persons charged with treason or felony against the Crown....’ However, a criminal defendant must be protected from any errors of law, and unless he were a lawyer himself, he would be unable to provide this protection.”<sup>14</sup> So the *amicus* practice, “or at least one phase of it, sprang up to fill this gap.”<sup>15</sup>

On the other hand, there is a view, shared by the author, that this practice came out of the inquisitorial system of Roman law. The proponents of this view connect the *amicus curiae* with *ministrator* or *consilium* who gave an advisory opinion to the men in positions of responsibility.<sup>16</sup> These advisory opinions can be traced back to the early third century<sup>17</sup> when the *judex* (judge) called some lawyers to assist him with their counsel (*consilium sibi advocavit ut in consilio adessent*).<sup>18</sup> Basically, Roman custom simply imposed a moral obligation to consult, so even the emperor in carrying out his duties was assisted by a council of advisers, composed of close friends or amici of the emperor.<sup>19</sup> So, with a view to many secondary resources confirming this origin, it is safe to say that the *amicus curiae* makes perfect sense when seen in a purely Roman context.

<sup>9</sup> *Ontario v Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para 118 [*Criminal Lawyers’ Association of Ontario*].

<sup>10</sup> Frank M Covey Jr, “Amicus Curiae: Friend of the Court” (1959) 9:1 DePaul L Rev 30 at 33.

<sup>11</sup> *Ibid.*

<sup>12</sup> Philip J Bryden, “Public Interest Intervention in the Courts” (1987) 66:3 Can Bar Rev 490 at 496.

<sup>13</sup> Samuel Krislov called this practice “oral ‘shepardizing.’” Krislov, *supra* note 4 at 695.

<sup>14</sup> Covey Jr, *supra* note 10 at 34 [footnotes omitted].

<sup>15</sup> *Ibid.*

<sup>16</sup> The *consilium* was “an officer of the Roman court appointed by the judge to advise him on points on which he was in doubt.” *Ibid* at 33–34.

<sup>17</sup> John Crook, *Consilium Principis: Imperial Councils and Counsellors from Augustus to Diocletian*, (Cambridge: Cambridge University Press, 1955) cited in Mohan, *supra* note 1 at 362, n 62.

<sup>18</sup> Bouvier, *supra* note 5; see also Krislov, *supra* note 4 at 695.

<sup>19</sup> Crook, *supra* note 17.

## II. THE ROLE OF AMICUS CURIAE IN DIFFERENT LEGAL SYSTEMS

### A. AMICUS IN THE CIVIL LAW AND COMMON LAW SYSTEMS

Regardless of its origins, today, there is no doubt in the widespread acceptance of amicus curiae practise in different jurisdictions, whether civil law or common law.

#### I. AMICUS CURIAE IN CIVIL LAW SYSTEMS

Although amicus curiae's roots are originally found in Roman law, it is not a civil law concept. The existence of other analogous means of public interest representation<sup>20</sup> or protection of third-party interests in civil law and the more elaborate evidentiary system for a long time seemed to obviate a need for amicus curiae.<sup>21</sup>

It has been argued that amicus briefs do not appear in modern civil law jurisdictions or they are "seldom used."<sup>22</sup> However, the amicus practice in civil law courts, although not comparable with the universal application of common law amici, has been recently, formally or informally, recognized around the world. Formally, various civil law jurisdictions have recognized amicus activity through rules, statutes, or court decisions. For instance, civil law systems that have admitted amicus curiae include, but are not limited to, France, Italy, Columbia, Quebec, Argentina, and Israel.<sup>23</sup>

Nowadays, many non-governmental organizations (NGOs) submit amicus briefs to civil law courts even when the receiving court does not formally recognize amici curiae. This practice is significantly more widespread than the official acknowledgment of amicus briefs in codes or court rules.<sup>24</sup> Therefore, now we witness a rise in amici practice in civil law systems. And these "pushy NGOs" might be one reason for that.<sup>25</sup>

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<sup>20</sup> In France, for example, these alternative forms of public interest representation are the Ministère Public or the Conseil de la Concurrence. Lise Johnson & Niranjali Amerasinghe, *Protecting the Public Interest in International Dispute Settlement: The Amicus Curiae Phenomenon* (Center for International Environmental Law, 2009) at 12.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 13.

<sup>23</sup> With respect to France, the Cour de Cassation in 1988, in a dispute concerning the application of rules regulating the legal profession, invited the President of the Paris Bar to provide all the observations that may enlighten the court in its process of solving the dispute. The court clarified in the case that amicus curiae were neither a witness nor an expert, and that it was subject to the court's discretion. *Ibid.* David Duncan, however, states that that the first instance of a private amicus curiae in France was in 1991. David W Duncan, "A Little Tour in France: Surrogate Motherhood and Amici Curiae in the French Legal System" (1994) 21:2 W St U L Rev 447 at 450. For other systems, see e.g. *ibid.* at 14–17, 20.

<sup>24</sup> Often these NGOs are nonprofit organizations dedicated to specific substantive areas, such as human rights protection. However, because of the diversity and number of NGOs submitting briefs, informal amicus activity covers a broad range of subjects and ideological positions.

<sup>25</sup> Steven Kochevar, "Amici Curiae in Civil Law Jurisdictions" (2013) 122:6 Yale LJ 1653 at 1664.

There are also some forces from international law on national civil law systems, especially in the European Union, which paved the way for appointing amici in legal proceedings.<sup>26</sup>

The institution of amicus curiae is even more compatible with the nature of the civil law system since in the inquisitorial judicial system judges have historically had broad powers to control the litigation through soliciting and gathering information from sources other than parties.

## 2. THE EVOLUTIONARY ROLE OF AMICUS IN COMMON LAW JURISDICTIONS

As mentioned before, the amicus curiae advice was introduced from Roman law into the common law system in the fourteenth century. But the interesting point is that currently this institution is much more applied in common law countries, and it has somehow departed from its classic inceptions in Roman law. One reason for that, as Lowman says, is that “amicus curiae was used as a flexible judicial tool to address the shortcomings of the adversary litigation process, frequently shifting form as the nature of the adversary process changed.”<sup>27</sup> Judges in common law countries used their discretion in applying this institution to address the needs of ongoing litigations and gave new roles to the friends of the courts.

Currently, there are three common situations in which common law courts appoint an amicus: first, where there is a matter of public interest or of importance which could affect many other persons and the court invites the Attorney General or some other capable individual to intervene;<sup>28</sup> second, to prevent injustice, for example, to make submissions on points of law that may have been overlooked; and third is to represent an unrepresented litigant.<sup>29</sup> However, as we move forward, it turns out that some countries, particularly the United States, have given new roles to amicus in addition to the roles mentioned above. The history of amicus curiae practice in Canada, as in England, the United States, and Australia, reveals the unsurprising pattern that “as the practice becomes more common, courts begin to develop rules and guidelines making the practice less ad hoc.”<sup>30</sup>

<sup>26</sup> According to article 15(3) of EC, *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, [2003] OJ, L 1/1 at 12, “[c]ompetition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty.” In this regard, see also *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, [2004] OJ C 101/04 at para 17 (which states under the title of “The Commission as Amicus Curiae” that “[i]n order to assist national courts in the application of EC competition rules, the Commission is committed to help national courts where the latter find such help necessary to be able to decide on a case”).

<sup>27</sup> Lowman, *supra* note 3 at 1244 [footnotes omitted].

<sup>28</sup> Some authors, however, disagree with considering amicus curiae as a public interest intervener. They think the American practice of assimilating the position of the public interest intervener with that of the amicus curiae can lead to confusion and draw a distinction between the party intervener, whose interest is in the outcome of the dispute between the parties, and the public interest intervener, whose interest is in the legal rules that may be adopted in the course of resolving the dispute between the parties.

<sup>29</sup> *Aluminum Company of Canada*, *supra* note 6 at 382; see also *R v Lee*, 1998 CanLII 6939 (NWT SC) at para 11 [*Lee*].

<sup>30</sup> Johnson & Amerasinghe, *supra* note 20 at 11–12.

a. Blurring Non-Partisan and Classic Role of Roman Amicus

In the fourteenth century, when the first examples of *amicus curiae* in the common law system were detected, many trials, as mentioned by the Ontario Court of Appeal in *Morwald-Benevides v. Benevides*, were held outside in public squares.<sup>31</sup> “The first *amici* were actually spectator observers of those trials, who would request standing with the trial judge and who offered ... evidence and opinions on the case that was being tried. Trial judges would often listen to whatever the townspeople had to say.”<sup>32</sup> *Amicus*, however, evolved to a more formal structure wherein lawyers became the *amici*. In these cases, courts delineate an *amicus*’ responsibilities in order to draw a distinction between the adversarial role of a counsel and the impartial role of an *amicus*.<sup>33</sup>

Some features of the *amici*, even today in England and in the former British colonies, are similar to those original Roman or classic *amicus* practices. These features are: being legally trained, appointed by the court, a non-partisan advisor, and having a position of prestige.<sup>34</sup> In other words, neutral legal entities appointed by the court with an unpaid honorary position of prestige in order to advise or assist the court in arriving at its decision are a good fit for the classic *amicus* institution.

This traditional *amicus* is different from a third party who intervenes in litigation. Interveners and *amici* are both common ways through which courts permit non-parties to have a voice in proceedings.<sup>35</sup> “If joined as an intervener, the intervener becomes a party to the proceedings with the benefits and burdens of that status.”<sup>36</sup> Therefore, interveners can “adduce evidence, call witnesses, cross-examine,”<sup>37</sup> and they have all the rights that a party would have, such as a right to appeal a decision.<sup>38</sup> Unlike interveners, the *amici*, at least traditionally, are disinterested advisors to the court on a point of law or fact.<sup>39</sup>

Some courts have had occasions to emphasize this essential difference between *amici* and interveners. In doing so, Justice Seaton in *Canada (Attorney General) v. Aluminum Company of Canada* confirmed that: “I will use the term ‘*amicus curiae*’ to refer to those fulfilling the

<sup>31</sup> *Morwald-Benevides v. Benevides*, 2015 ONCJ 532 at para 6 [*Benevides*].

<sup>32</sup> *Ibid.*

<sup>33</sup> *R v Cairenius*, 2008 CanLII 28219 (ONSC) at paras 52–55.

<sup>34</sup> Mohan, *supra* note 1 at 365–68.

<sup>35</sup> Especially regarding interveners, over the past few decades, intervener participation has become a routine part of the Supreme Court of Canada’s hearing process. See Geoffrey D Callaghan, “Interveners at the Supreme Court of Canada” (2020) 43:1 Dal LJ 33 at 35. Interestingly, the courts have interpreted the intervention provisions somewhat more narrowly in strictly private litigation as opposed to the approach taken in public or constitutional litigation, particularly when dealing with conventional disputes that involve no public law element or evident interest. See generally, *Authorson (Guardian of) v Canada (Attorney General)*, 2001 CanLII 4392 (ONCA) at para 8; *Peixeiro v Haberman* (1994), 20 OR (3d) 666 at 670 (Gen Div) cited in Halsbury’s Laws of Canada (online), *Civil Procedure* at HVC-40 “Fundamental Principles: Accrual of Causes of Action: Standing: Private Interest Standing” (2021 Reissue).

<sup>36</sup> Susan Kenny, “Interveners and *Amici Curiae* in the High Court” (1998) 20:1 Adel L Rev 159 at 159.

See also *United States Tobacco Co v Minister for Consumer Affairs*, (1988) 19 FCR 184.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> It is noteworthy that the expression “friend of the court” in related literature has been used to refer to interveners or persons “who have no right to appear in a suit but are allowed to protect their own interest” and to *amici* “who gives information to the court on some matter of law that is in doubt” or “calls the court’s attention to some errors in the proceedings.” See e.g. *re Pehlke*, [1939] 4 DLR 725 at para 24 (Ont Sup Ct (H Ct J)) cited in *Barron’s Canadian Law Dictionary* (Barron’s Educational Series, 2009) sub verbo “*Amicus Curiae*.”

roles to which I have referred. I would not call them interveners because they do not intervene.”<sup>40</sup> Also, Lord Slynn in *Re Northern Ireland Human Rights Commission* while considering whether the Northern Ireland Human Rights Commission could intervene in proceedings before the Northern Ireland courts and tribunals on points of human rights law, acknowledged the difference between an amicus curiae who keeps within the limits of a non-partisan view of a particular case and an intervener who advocates a cause.<sup>41</sup>

This difference has also been the subject matter of administrative litigation. In *Energy Probe v. Atomic Energy Control Board and Ontario Hydro*, there was a motion brought by the Attorney General of Canada to be added as a party/intervener in an action [T-2807-83] brought by the applicant, Energy Probe, to quash a decision of the Atomic Energy Control Board on the ground of pecuniary bias.<sup>42</sup> The applicant did not object to the Attorney General making arguments to the Court on the issues but contended that he should do so only as an amicus curiae. The Attorney General on the other hand wanted full party status. Justice Reed in this case, pointed out that the immediate cause of this difference was that the Attorney General wished to ensure himself of a right to appeal any decision he might have made on the certiorari motion while the applicant wished to preclude that possibility.

In fact judges did not intend to apply the ancient institution of the amicus curiae to provide a cover for a “radical innovation to the judicial process.”<sup>43</sup> Even in the United States, which in recognizing and granting new roles to amici is more radical than other jurisdictions, there have been cases where the courts have refused a third party who has had a special interest in the case to participate as an amicus.<sup>44</sup> These courts actually relied on the classic notion of amicus curiae to refuse to permit interested non-parties to file amicus briefs, on the theory that only the disinterested are eligible to become amici.<sup>45</sup>

However, by keeping the door open to expand the role of amici,<sup>46</sup> basically via not providing a rigid definition for them,<sup>47</sup> courts indirectly expanded the role of amicus and started to give a partisan role to the amicus. It is safe to say that the evolution in the roles of amici and emerging partisan amici would blur this difference. Courts, especially in England,<sup>48</sup> the United States,<sup>49</sup> and Canada started to appoint amici as counsel or intervener

<sup>40</sup> *Aluminum Company of Canada*, *supra* note 6 at 382.

<sup>41</sup> *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at paras 25–29 cited in Mohan, *supra* note 1 at 367.

<sup>42</sup> *Energy Probe v Atomic Energy Control Board and Ontario Hydro*, [1984] 2 FC 138.

<sup>43</sup> Mohan, *supra* note 1 at 368 [footnotes omitted].

<sup>44</sup> *Sciotto v Marple Newtown Sch Dist*, 70 F Supp 2d 553 at 555 (ED Pa 1999); see also *United States v Andrews*, 1993 US Dist LEXIS 860 (ND Ill 1993). These cases and more cases are cited in Stuart Banner, “The Myth of the Neutral Amicus: American Courts and their Friends, 1790-1890” (2003) 20:1 Const Commentary 111 at 112.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Benevides*, *supra* note 31 at paras 9–12.

<sup>47</sup> Justice Juriensz stated that “amicus curiae appointed by the court have no solicitor-client relationship with the accused, and may be described as counsel to the court. However, the role of amicus curiae is not strictly defined and continues to evolve.... Further, I do not think that appointing amicus curiae to represent the interests of the appellant could have been regarded as inevitably futile” *R v LePage*, 2006 CanLII 37775 (ONCA) at paras 29–30 [*LePage*] [emphasis added].

<sup>48</sup> Bellhouse & Lavers, *supra* note 2 at 189–90.

<sup>49</sup> “[T]he first case referring to the intervention of a friend of the court occurred in 1823 when the US Supreme Court requested Henry Clay’s intervention in *Green v. Biddle* to provide information about an alleged collusion between the parties.” Katia Fach Gómez, “Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest” (2012) 35:2 Fordham Intl LJ 510 at 517 [footnotes omitted].

or accept “amicus briefs”<sup>50</sup> on behalf of unrepresented or self-represented parties and on behalf of the public interest. Accordingly, it may well be argued that the function of an amicus has changed, but the name has not.

## b. The Emergence of Partisan Roles of Amicus

Some common law courts have gradually tended towards the flexibility of amicus participation in litigations and created a new role for amicus curiae which did not exist in its Roman version.

In this new-emerged role, the amicus is not a disinterested person, and simultaneously adopts the roles of an advocate and an amicus in the proceeding. Krislov’s examples of such a blended role date back to the eighteenth century.<sup>51</sup> In his well-researched paper, he acknowledges that the enlargement of the amicus curiae function was a partial solution to one of the most serious shortcomings of the adversary system which was the problem of representation of third parties in a common law suits.<sup>52</sup> He refers to the time when the procedural rules for interveners were not established yet, and amici were actually third parties with a personal and direct interest in one of the parties in the case. This argument is convincing since, at least in Canada, the appointment of amicus curiae or friend of the court is provided under the provisions of interveners to the court.<sup>53</sup>

The partisan amici are commonly appointed or permitted to attend the proceedings in two different cases:

1. *When there is an unrepresented or undefended party*, courts, mainly in order to protect the fairness of the trial and the proper administration of justice,<sup>54</sup> use “their common law power”<sup>55</sup> to appoint amicus curiae. Many of these amici can be seen in criminal cases. In this regard, there are cases where courts have permitted or appointed the accused’s former lawyers to be involved in the proceedings as friend of the court.<sup>56</sup> In these cases, amici’s roles mirror the role of an advocate or “[q]uasi-lawyer,”<sup>57</sup> except that he or she could not be dismissed by the client. Not surprisingly, unlike its traditional Roman counterpart, the partisan amici do not

<sup>50</sup> “Amicus briefs” is a name for amicus submissions. It has been defined as “documents voluntarily submitted to a court (1) by an entity other than a party to a dispute or an officer of the court, (2) such that the entity retains substantial discretion over the content of the submission.” Kochevar, *supra* note 25 at 1654–55 [footnotes omitted]. Courts in the United States have rules governing amicus briefs. For detailed information on procedural rules of amicus briefs in the United States, see Gómez, *ibid* at 518–19.

<sup>51</sup> With respect to the United States, Stuart Banner states that in the middle decades of the nineteenth century, amici were “much more likely to be representing the interests of a client than offering disinterested advice.” In his statistics research, he shows the gradual growth of this partisan role of amicus. He acknowledges, for instance, between 1790 and 1890 neutral amici were present in 45 cases while partisan amici were in 207 cases. Banner, *supra* note 44 at 113, 116.

<sup>52</sup> Krislov, *supra* note 4 at 696.

<sup>53</sup> For example Rule 7.06 of the Newfoundland and Labrador *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D are titled “[i]ntervener as amicus curiae.”

<sup>54</sup> *R v Samra* (1998), 41 OR (3d) 434 (CA) [*Samra*]; *R v Tehrankari*, 2008 CanLII 74556 (ONSC) at para 2 [*Tehrankari*].

<sup>55</sup> Patrick LeSage & Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (Ontario Ministry of the Attorney General, 2008), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage\\_code/chapter\\_7.php#footnote4](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/lesage_code/chapter_7.php#footnote4)> .

<sup>56</sup> This partisan role of amicus curiae in Canadian cases will be discussed in more detail later in this article.

<sup>57</sup> Banner, *supra* note 44 at 118.



have a position of prestige, and so they are paid, and the rate would be determined by the appointing judge.

It is noteworthy that some judges set out a non-exhaustive list of factors to consider when deciding whether to appoint amicus in a case involving an unrepresented accused. Some of these factors are: the complexity of the case, the seriousness of the potential penalties, the accused's age and ability to understand the proceedings and to express himself, and the accused's familiarity with the trial process.<sup>58</sup> It seems rational that the appointment of amicus at the early stages of a long, complex trial has many benefits where the accused is either unrepresented or self-represented. Amicus can help to identify those issues and motions that have potential merit and those that do not.

In some occasions, and if the accused gains confidence in the amicus, the role can evolve into a form of representation and thus help to shorten and simplify these very difficult trials.<sup>59</sup>

2. *When public interests are at issue*, courts may always call on a concurrent branch of government, as amicus curiae, to represent the public interest.<sup>60</sup> Therefore, in cases of public interest, amicus curiae are mostly governmental agencies since the government representatives are identified more easily with upholding the public interest and, like their Roman predecessors, the government amici educate the court and help it to avoid error.<sup>61</sup>

Several examples of public interest matters include the distribution of governmental power, constitutional rights, and extensive civil wrongs. "The significance of these public interests emphasizes the benefits of bringing them to the attention of arbitrators through the amicus submissions."<sup>62</sup> Inviting the attorney general as amicus curiae to present their views is very common in this regard. However, "the principle that the Attorney General is the sole representative of the public interest in our courts has been circumscribed greatly by a set of exceptions that have enabled private parties to advance their conception of the public interest by engaging in litigation."<sup>63</sup>

## B. AMICUS IN INTERNATIONAL JUDICIAL SYSTEMS

Along with the development of amicus curiae in the judicial purview of some countries, it could gain recognition and importance in the international justice systems. As amici have been prevalent in most common law and some civil law systems, it has been argued that "most of the initial *amicus curiae* submissions were made by entities from countries with a

<sup>58</sup> Lee, *supra* note 29 at para 6.

<sup>59</sup> LeSage & Code, *supra* note 55.

<sup>60</sup> *Universal Oil Products Co v Root Refining Co*, 328 US 575 at 581 (1946) cited in Lowman, *supra* note 3 at 1261.

<sup>61</sup> Mohan, *supra* note 1 at 371.

<sup>62</sup> Gómez, *supra* note 49 at 544 [footnotes omitted].

<sup>63</sup> Bryden, *supra* note 12 at 493 [footnotes omitted, emphasis added]:

For example, a private plaintiff has long been able to sue to prevent interference with a public right if the interference with that right entails an interference with the plaintiff's private rights, or if the plaintiff suffers special damage as a result of the interference with the public right. Generous construction of these and other exceptions has on occasion enabled *individuals*, and sometimes *even public interest organizations*, to bring many issues of public importance into the judicial arena.

rich *amicus curiae* practice.”<sup>64</sup> It has also been argued that, like civil law systems that were affected by NGOs’ pushes to participate in proceedings, “[a] wave of amici curiae admittance in the procedures of international courts and tribunals resulted from the activism of certain North-American NGOs, with supportive voices also coming from the US Government.”<sup>65</sup>

## 1. DEFINITION OF INTERNATIONAL AMICI

In the international arena, *amicus curiae* is primarily defined as “a person or entity whom a court or tribunal may, in its discretion, permit to participate in legal proceedings in a capacity lesser than that of a party.”<sup>66</sup> So, same as their national counterparts, international amici are never considered parties as a matter of law and have lesser procedural rights than parties.

One distinctive feature of international amici, however, is that a person or an entity in order to participate in an international jurisdiction must demonstrate an interest.<sup>67</sup> This interest, which is generally more significant, can be the interest of amicus participation for the court or for itself. “[T]he court or tribunal’s interest is that *amicus* participation should contribute to the proper administration of justice in the specific proceedings.”<sup>68</sup> The interest of the potential amicus participating can also be important, at least in practice. “That interest is not necessarily of a juridical nature. And the nature of the interest sufficient to enable participation as *amicus* varies across jurisdictions and according to the nature of the proceedings.”<sup>69</sup> The World Trade Organization (WTO) Appellate Body “has asked applicants for leave to participate to ‘specify the nature of the interest that the applicant has in that appeal.’”<sup>70</sup> Also, “[i]n investment arbitration, proof of a ‘significant interest’ is a condition for admission.”<sup>71</sup>

<sup>64</sup> Astrid Wiik, *Amicus Curiae before International Courts and Tribunals*, 1st ed (Baden-Baden: Nomos, 2018) at 73 [footnotes omitted].

<sup>65</sup> Luigi Crema, “Tracking the Origins and Testing the Fairness of the Instruments of Fairness: Amici Curiae in International Litigation” (2012) The Jean Marnet Center for International and Regional Economic Law & Justice, Working Paper 09/12 at 14 [footnotes omitted].

<sup>66</sup> Lance Bartholomeusz, “The Amicus Curiae before International Courts and Tribunals” (2005) 5:2 Non-State Actors & Intl L 209 at 273.

<sup>67</sup> Wiik, *supra* note 64 at 130–31.

<sup>68</sup> Bartholomeusz, *supra* note 66 at 274:

This interest is stated in various ways: “in the interest of the proper administration of justice” (ECHR) [European Court of Human Rights]; “desirable for the proper determination of the case” (ICC; ICTY; ICTR; SCSL) [International Criminal Court; International Criminal Tribunal for Yugoslavia; International Criminal Tribunal for Rwanda; Special Court for Sierra Leon]; “desirable in the interests of achieving a satisfactory settlement of the matter at issue” (WTO Appellate Body) [World Trade Organization’s Appellate Body]; and “the ... submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties” (NAFTA) [*North American Free Trade Agreement*].

<sup>69</sup> For example, an intergovernmental organization may have a strong interest in cases involving disputes over the interpretation of its constituent instrument and it may participate as amicus in them. “The ECHR often permits persons with a clear interest in the domestic proceedings to which an ECHR application relates to participate as amicus on that basis” *ibid* [footnotes omitted].

<sup>70</sup> *Ibid* at 275.

<sup>71</sup> Wiik, *supra* note 64 at 130.

## 2. COMPETENT INTERNATIONAL AMICI

The practice of international jurisdictions on the competent amicus to participate in proceedings shows a wide difference. In some international jurisdictions, especially human rights and criminal law courts which deal with international crimes or human rights breaches, a wide variety of amici including any state, organization (intergovernmental, international, or national), or person (natural or legal), may participate.<sup>72</sup> In other jurisdictions, participation is more limited to states and international organizations.<sup>73</sup>

Like national courts, international jurisdictions retain a broad discretionary power over all aspects of amici's participation from their initial appointment to the formal details of their briefs.<sup>74</sup> It goes without saying that granting leave to an amicus to make a submission does not require the court to address them in their proceedings.

## 3. FUNCTIONS OF INTERNATIONAL AMICI

Borrowing partly from Lance Bartholomeusz, amicus curiae can perform different functions in international proceedings.<sup>75</sup>

First of all, amici can, like an expert, provide specialist legal expertise to the international court or tribunal, especially on subjects out of judges' core competence. However, amici unlike experts, as mentioned before, may have an interest in the outcome of a proceeding. This function can be seen particularly in international criminal or human rights tribunals when courts need to consider breaches or criminal activities under legal scrutiny. This application of amici to provide specialist legal expertise also might contribute to less fragmentation of international law.

Furthermore, an amicus can, like a witness, provide the international court or tribunal with factual information. But unlike a witness, amici might have an interest in the outcome of a case.<sup>76</sup>

In addition, like national amici, international amici can represent public interest considerations. In some ECHR proceedings, for example, members of civil society have performed this function. Also, states that intervene in the International Court of Justice's advisory proceedings will often represent the public interest, especially democratic states with sophisticated mechanisms for consulting civil society.

<sup>72</sup> The examples for this are ECHR, ICC, ICTY, ICTR and SCSL. In some jurisdictions, such as NAFTA chapter 11 tribunals, industry associations, and NGOs can participate as amici, not persons.

<sup>73</sup> The examples for this are International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS).

<sup>74</sup> Gómez, *supra* note 49 at 519–22.

<sup>75</sup> Bartholomeusz, *supra* note 66 at 277–80.

<sup>76</sup> This function has been performed by amici in proceedings in the ICJ like when the International Civil Aviation Organization attend as amicus in *the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, "Observations of the International Civil Aviation Organization" (4 December 1992), ICJH Pleadings 616, and also before the ECHR when the Organization for Security and Cooperation in Europe (OSCE) participated as an amicus in *Blecic v Croatia* [GC], No 59352/00, [2006] III ECHR 51.

### III. AMICUS CURIAE IN CANADIAN JURISPRUDENCE

Canadian courts have inherent jurisdiction to appoint amicus curiae and this inherent jurisdiction is grounded in a court's authority to control their own process and function as a court of law.<sup>77</sup> Courts' abilities in this regard, therefore, are linked to their authority to "request its officers, particularly the lawyers to whom the court afforded exclusive rights of audience, to assist its deliberations."<sup>78</sup>

The courts also have the discretion to delineate the roles given to the amici. Based on this discretion, amici are not only given the role to make submissions on questions of law but also assist the court with respect to both facts and law. In *Reference re Succession of Quebec*, for instance, the role played by the amicus curiae was an obvious example of a case in which an amicus curiae was appointed to make submissions solely on questions of law.<sup>79</sup> In this case, the Quebec government refused to participate in what it saw as nine federally appointed people deciding on the right to self-determination of the Quebec people.<sup>80</sup> Eventually, the Supreme Court had to appoint an amicus curiae under subsection 53(7) to present Quebec's side. André Jolicoeur, a nationalist lawyer, first argued that the Supreme Court had no jurisdiction to hear the case and, in the alternative, that the democratic principle ought to be recognized as giving the people from Quebec the right to secede if they so decided. The federal government was arguing that the principle of the rule of law prevented a unilateral secession. While the case was being heard, Québécois demonstrators picketed in front of the Supreme Court building protesting the Supreme Court's jurisdiction over the right of self-determination of the Quebec people. However, once the decision was rendered, everyone, Quebec separatists and the spokespersons for the federal government alike, cheered.<sup>81</sup>

As mentioned, there have been other cases in which Supreme Court of Canada has appointed an amicus curiae to provide assistance with respect to both facts and law, see *Cooper v. Canada (Human Rights Commission)*,<sup>82</sup> (in which the Supreme Court appointed an amicus curiae to present arguments against the Commission's jurisdiction); *Miron v. Trudel*,<sup>83</sup> (in which the Supreme Court appointed an amicus curiae to make submissions with regard to section 1 of the *Canadian Charter of Rights and Freedoms*<sup>84</sup>); and *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association*,<sup>85</sup> (in which the Supreme Court appointed an amicus curiae because the respondents had declined to take part in the appeal).<sup>86</sup> In addition, there are statutory

<sup>77</sup> *Criminal Lawyers' Association of Ontario*, *supra* note 9 at para 46. In this case, the Supreme Court of Canada also state the limits of the inherent jurisdiction of the courts. See also paras 17–43.

<sup>78</sup> *Ibid* at para 46.

<sup>79</sup> *Named Person v Vancouver Sun*, 2007 SCC 43 at para 155 [*Named Person*].

<sup>80</sup> Lucien Bouchard, "Premier Lucien Bouchard Reflects on the Ruling" in David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company, 1999) at 95, cited in Nathalie Des Rosiers, "From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes" (2000) 13:2 Can JL & Jur 171 at 176–83.

<sup>81</sup> Des Rosiers, *ibid*.

<sup>82</sup> [1996] 3 SCR 854.

<sup>83</sup> [1995] 2 SCR 418.

<sup>84</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>85</sup> [1993] 3 SCR 724.

<sup>86</sup> *Named Person*, *supra* note 79.

provisions, mostly found in the intervention provisions, that provide for the appointment of an amicus in certain circumstances.<sup>87</sup> Reading cases in which amici have been appointed by the courts leads us to this conclusion that in Canadian jurisprudence this device is mostly and commonly applied when the party before the court (mostly the accused) is unrepresented or self-represented. To put it accurately, when there are interests which are not represented.<sup>88</sup>

### A. NON-PARTISAN AMICI IN CANADIAN COURTS

Canadian courts were initially and continue to be cautious in appointing amicus. They tried not to stray from the traditional non-partisan role of amici, the main function of which was “to protect the integrity of the judicial system.”<sup>89</sup> These courts either refused to appoint an amicus where there was a suspicion that the amicus could be considered partisan or interested in the outcome of the case or appointed an amicus but emphasized that the amicus’ role is non-partisan and to assist the court.<sup>90</sup> A leading case in this regard is *Samra* which was the starting point for considering the role of amicus curiae in Canadian courts.<sup>91</sup> In this case, the accused, Mr. Samra, had legal advisors but was basically self-represented, and Mr. Black, who had previously and briefly been his lawyer, was appointed by the trial judge as amicus curiae. Samra, however, argued that he had lost confidence in Black because his submissions did not coincide with his wishes and appealed the case. The Ontario Court of Appeal, affirming the trial judge’s approach, emphasized the fact that the amicus’ submissions not coinciding with the appellant’s wishes did not prevent Black from continuing to act as amicus curiae. The test is not whether the appellant believes he received an unfair trial but whether a reasonable bystander or observer would have that opinion. The Court also clarified that amicus curiae is not a party to the action but a friend of the court. His role is not to simply adopt or parrot the submissions of the appellant or his advisors. Moreover, Black’s role was limited. He was to advise or make suggestions. He would not be cross-examining or examining any witnesses nor making submissions in the presence of the jury. It was expected that he could provide the trial judge with legal submissions that would be of assistance.<sup>92</sup>

This approach is not abandoned and still taken in more recent cases like *R. v. Chemama* where the Ontario Court of Justice stressed that the amicus curiae does not act for or take

<sup>87</sup> *Rules of the Supreme Court of Canada*, SOR/2002-156, r 91; *Queen’s Bench Rules*, (2013) Sask Gaz 1 at 1370, r 2-13(1); *Court of Queen’s Bench Rules*, Man Reg 553/88, r 13(2); *Rules of Civil Procedure*, RRO 1990, Reg 194, r 15(3); *Rules of Court*, NB Reg 82-73, r 15(3); *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96, r 92.

<sup>88</sup> Séverine Menétrey, “L’immixtion de tiers amicaux dans le mécanisme juridictionnel” (2004) 45:4 C de D 729 at 737.

<sup>89</sup> David Scriven & Paul Muldoon, “Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure” (1986) 6:4 Adv Q 448 at 452-53.

<sup>90</sup> See e.g. *Borowski v Minister of Justice of Canada*, where various organizations wanted to intervene in a case concerning the legality of abortion legislation as friends of the court. The Saskatchewan Court of Queen’s Bench, however, denied their intervention and observed that “[i]ntervention should not be permitted, prior to trial, to groups advocating a partisan position under the guise of amicus curiae.” *Borowski v Minister of Justice of Canada and Minister of Finance of Canada and Canadian Civil Liberties Association, Canadian Abortion Rights Action League and Campaign Life Canada* (1983), 144 DLR (3d) 657 (Sask QB) at 668.

<sup>91</sup> *Benevides*, *supra* note 31 at para 7.

<sup>92</sup> *Samra*, *supra* note 54. Some commentators believe that the Court of Appeal took great pains to explain why, given the facts of that case and the traditional role of an amicus, there would not have been any prejudice to the accused. David Berg, “The Limits of Friendship: The Amicus Curiae in Criminal Trial Courts” (2012) 59:1 Crim LQ 67 at 73.

instructions from the accused nor, of course, may the accused discharge him or her.<sup>93</sup> The amicus is a servant of the court, not the accused.<sup>94</sup>

In *Reference re Secession of Quebec*, the Supreme Court of Canada had to appoint an amicus curiae “in view of the complexity of the issues raised and the fact that some aspects of these issues would not otherwise be argued by the parties who [had] intervened in the reference.”<sup>95</sup> The Supreme Court also clarified what is frequently misunderstood: “such counsel, traditionally called ‘a Friend of the Court,’ *does not represent a party but is tasked with assisting the Court and arguing issues or matters on which the Court wishes to hear representations that the parties to the reference would not otherwise put forward.*”<sup>96</sup> Therefore, traditional amici or non-partisan amici are not supposed to play a substantial role regarding the parties, they simply make submissions so that the court becomes aware of all relevant points of law or fact. In *R. v. Brown*, for instance, one of the three co-accused was self-represented, and an amicus was appointed but performed a very limited role. The amicus did not cross-examine any witnesses, did not give advice to the accused, or receive any confidential information from the accused and only made submissions to the court on the basis of the evidence adduced.<sup>97</sup>

## B. PARTISAN AMICI IN CANADIAN COURTS

As mentioned before, the traditional approach to neutral amici in the common law system, particularly in the United States, has gradually evolved. This trend affected the approach of Canadian courts to appointing partisan amici and giving new roles to them.

The most significant case that has been influential in expanding the role of amicus curiae at trial is *LePage*. In this case, Justice Juriensz, on behalf of the panel in the Ontario Court of Appeal, admitted the role of amici in representing the appellant. He pointed out that the appointed amici “have no solicitor-client relationship with the accused, and may be described as counsel to the court. *However, the role of amicus curiae is not strictly defined and continues to evolve.*”<sup>98</sup> As Davis Berg mentions in his well-researched article, this passage was the starting point for expanding, or better to say blurring, the traditional role of amici in Canadian courts.<sup>99</sup> This statement of Justice Juriensz was later on adopted by the Federal Court in *Khadr v. Canada (Attorney General)*<sup>100</sup> and similarly in other courts of inherent jurisdiction. The British Columbia Court of Appeal, for instance, in *R. v. Martin* stated that “[t]he role of the amicus is that of ‘friend of the court’; and is generally appointed to assist the court on a point of law. However, it is not uncommon for an *amicus* to provide legal assistance to an unrepresented accused... [A]n experienced trial judge will quickly recognize whether an accused is incapable of conducting his or her defence.”<sup>101</sup>

<sup>93</sup> *R v Chemama*, 2008 ONCJ 31 at para 36 [*Chemama*].

<sup>94</sup> *Ibid.*

<sup>95</sup> Supreme Court of Canada, News Release “News Release of July 28, 1997” (28 July 1997), online: <decisions.scc-csc.ca/scc-csc/news/en/571/1/document.do> [SCC, News Release]. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 13.

<sup>96</sup> SCC, News Release, *ibid* [emphasis added].

<sup>97</sup> *R v Brown*, [1999] OJ No 4866 (Ct J (Gen Div)) cited in LeSage & Code, *supra* note 55.

<sup>98</sup> *LePage*, *supra* note 47 at para 29 [emphasis added].

<sup>99</sup> Berg, *supra* note 92 at 67.

<sup>100</sup> *Khadr v Canada (Attorney General)*, 2008 FC 46 at para 31.

<sup>101</sup> *R v Martin*, 2010 BCCA 526 at para 49.

In spite of the fact that the role of amici has been expanded to a lawyer or defence counsel, their responsibilities are still determined based on the court's discretion which shows a spectrum of their involvement in the proceeding.<sup>102</sup> In some criminal cases, for example, the bases for these involvements can be found in different sections of the *Criminal Code* pertaining to an unrepresented accused<sup>103</sup> or where an accused is not permitted to cross-examine the witnesses himself.<sup>104</sup> Thus, an amicus, at the discretion of the court, can cross-examine witnesses, make objections to inadmissible evidence, raise legal arguments on behalf of an accused, take instructions from him or her, and act on behalf of an accused in all respects as he or she would in a traditional solicitor-client relationship. The interchangeable use of counsel and amicus in these cases has not been uncontroversial, however.<sup>105</sup>

It is noteworthy that in addition to the case law, the *Report of the Review of Large and Complex Criminal Case Procedures*<sup>106</sup> commissioned at the direction of the Attorney General in response to a variety of increasing concerns related to unusually complex and lengthy criminal trials, acknowledges such an expanded role where the accused is unrepresented or chooses to be self-represented.<sup>107</sup>

Therefore, now we see amicus curiae playing “a blended role.”<sup>108</sup> Although the primary duty of the amici is still to the court, they, in order to assist the court, are required to advocate the position of the accused.

But the main question is how this partisan amicus can assist the court while representing an unrepresented or self-represented litigant or accused. The answer to this question can be found in the judges' justifications for appointing amicus curiae.

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<sup>102</sup> These potential roles of amicus depend “on the circumstances under which the appointment is made, with the primary role being to assist the court”: *R v Greenspon*, 2009 CanLII 65814 (ONSC) at para 21 [*Greenspon*].

<sup>103</sup> Section 672.24(1) of the *Criminal Code*, RSC 1985, c C-46, provides that: “[w]here the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel.” See e.g. *HMQ v Waranuk*, 2008 YKSC 49 at para 53; *R v Iverson*, 2014 BCSC 627; *R v Proctor (ED)* (1993), 89 Man R (2d) 236 (QB).

<sup>104</sup> Section 486.3(1) of the *Criminal Code*, *ibid*, reads that:

In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or an application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

See e.g. *Lee*, *supra* note 29 at para 8. See also *Tehrankari*, *supra* note 54 at para 8.

<sup>105</sup> Berg, *supra* note 92 at 79–81 (stating that these misuses of the term amicus curiae and referring it to as other distinct creatures seen in the criminal trial courts may cause confusion).

<sup>106</sup> LeSage & Code, *supra* note 55.

<sup>107</sup> According to recommendation 40, *ibid* at 163:

Trial Judges should exercise their common law power to appoint *amicus curiae* in a long complex trial where the accused is unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.

<sup>108</sup> *Benevides*, *supra* note 31 at para 21.

a. Ensuring a Fair Trial

One of the main purposes of appointing partisan amici in unrepresented or self-represented cases by the court is to ensure the *Charter* right of the accused or litigant to a fair trial. There are circumstances, therefore, where the court will be justified in taking steps, over the objections of the accused, to ensure that the accused's rights are protected and, in so doing, further the interests of justice.<sup>109</sup> One common example of this sort of amicus can be seen in immigration cases where, due to national security and confidentiality concerns, the claimants are not allowed to attend the proceeding or be informed of their entire case. In these cases, appointing the amici from security-cleared advocates who would appear at the *ex parte* hearings to make submissions and cross-examine government witnesses is a solution to guarantee the claimants' section 7 *Charter* rights.<sup>110</sup> However, as we will see, taking this as a general approach so that there is no difference between an unrepresented and self-represented accused is criticized by the Supreme Court of Canada in *Ontario v. Criminal Lawyers' Association of Ontario*.

b. Stabilizing the Proceeding

Judges also appoint amicus curiae in order to maintain the orderly conduct of trials or to avoid delay in proceedings. When an accused is unrepresented, a defence counsel will be appointed to represent him or her pursuant to a legal aid certificate or under a Rowbotham order.<sup>111</sup> There are cases where the court establishes that the accused is unable to maintain a lawyer and his or her history shows the serial discharge of counsels.<sup>112</sup> Therefore, in order to ensure that the trial will start and progress in a reasonable fashion, an amicus is appointed. The reason for this is that, unlike the counsel even appointed under a Rowbotham order, amici cannot be discharged by the accused, and similarly, in the event of a breakdown in the relationship, the amici can apply to the court for their role to be circumscribed but they cannot withdraw their services on that basis.

In *R. v. Imona Russel*, for instance, "William Imona Russel was charged with first degree murder. He retained and then discharged several experienced lawyers who had been retained pursuant to legal aid certificates."<sup>113</sup> As a result, LAO refused to fund any new lawyers.<sup>114</sup> Then, at the request of the Crown counsel, the court appointed an amicus to ensure that the proceedings could continue if the accused continued his serial discharge of defence counsels.<sup>115</sup>

<sup>109</sup> See among others, *Tehrankari*, *supra* note 54 at para 8; *R v Ryan (D)*, 2012 NLCA 9 at para 119; *Chemama*, *supra* note 93 at para 1; *R v Clarke*, 2009 CanLII 55715 (ONSC) at para 40; *R v Melvin*, 2017 NSSC 273 at para 2.

<sup>110</sup> See e.g. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 79.

<sup>111</sup> The three prerequisites for a Rowbotham order are that: the accused must have been refused legal aid; the accused must lack the means to employ counsel; and representation for the accused must be essential to a fair trial. See e.g. *R v Tang*, 2015 ONCA 470 at para 9.

<sup>112</sup> When an accused discharges his or her lawyers several times, legal aid of the province may refuse to fund any new lawyers. Also, an accused who has a history of not conducting himself reasonably in his relations with counsel may be denied a Rowbotham order by a motion or trial judge. See e.g. *R v Imona Russel*, 2011 ONCA 303, discussed below.

<sup>113</sup> *Ibid* at para 4.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid* at paras 4–8.



Also, in a recent family law case, *Benevides*, the Ontario Court of Justice confirmed the trial judge's appointment of two amici for unrepresented parents in order to stabilize the proceeding, prevent delay and ensure a fair trial process. The trial judge in this case faced numerous challenges. Although he was familiar with the usual legal issues which arise in contentious child custody, support, and equalization cases, he required an understanding of the interplay between Bermuda law (national country of the father), Canadian family law and the application of the rules governing the signatories to the Geneva Convention. The mother (Canadian citizen) insisted on representing herself which was her right. However, she was emotionally fragile and distraught, and the trial judge's belief that she was incapable of providing helpful assistance to him or adequately representing her own or the interests of her three children was reasonable. With respect to the appointment of the second amicus for the father, the judge stated that many of the reasons for appointing an amicus for the mother also applied to this second appointment for the father. He concluded that it was unlikely that the father would qualify for legal aid, and being from Bermuda, the father would experience challenges in navigating the Ontario legal system. The trial needed to be stabilized and he required the benefit of robust cross-examinations. He was also aware that he would require assistance from counsel for the father if it became necessary to involve the Bermuda courts if the application of Bermuda law became an issue.<sup>116</sup>

### C. THE MOMENTOUS JUDGMENT OF THE SUPREME COURT OF CANADA

In 2013, the Supreme Court of Canada raised concerns about and criticized the blended role of amicus curiae in *Ontario v. Criminal Lawyers' Association of Ontario*.<sup>117</sup> Although this case was basically related to the competent authority to fix the fees of amicus curiae, the majority and the dissent agreed on the general principles applicable to the scope of amicus orders. As Alice Woolley and Jonnette Watson Hamilton state, "[w]hat participants found most controversial about the decision was not the court's 5:4 split on the compensation issue, but rather the court's unanimity on the inappropriateness — and henceforth, presumably, inability — of courts to appoint *amicus curiae* to act as *de facto* defence counsel."<sup>118</sup>

The decision was about the appeal of three decisions in Ontario where the fee of amici fixed by the courts exceeded the legal aid rate since the amicus curiae in these cases refused the lower legal aid rate.<sup>119</sup> Therefore, the attorney general was ordered to pay that fee.<sup>120</sup> In each one of these criminal cases, the accused was unrepresented or self-represented and the trial judge appointed an amicus who mirrored the responsibilities of a defence counsel.<sup>121</sup> None of the cases were decided under the *Charter*, therefore none of them required an order under section 24(1) of the *Charter* providing state-funded counsel in order to ensure a fair

<sup>116</sup> *Benevides*, *supra* note 31 at paras 41–48.

<sup>117</sup> *Criminal Lawyers' Association of Ontario*, *supra* note 9.

<sup>118</sup> Alice Woolley & Jonnette Watson Hamilton, "Roundtable on *Ontario v Criminal Lawyers' Association of Ontario*" (30 August 2013), online (blog): <ablawg.ca/2013/08/30/roundtable-on-ontario-v-criminal-lawyers-association-of-ontario/>.

<sup>119</sup> *Criminal Lawyers' Association of Ontario*, *supra* note 9 at para 3.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

trial. Accordingly, the main objective of appointing amici was to maintain the orderly conduct of the trials or to avoid delay.<sup>122</sup>

In *R. v. Imona Russell*, the amicus was appointed at the request of the Crown.<sup>123</sup> The amicus took instructions from and acted on behalf of the accused as if he were defence counsel except he could not be discharged or withdraw.<sup>124</sup> In *R. v. Whelan*, a dangerous offender application, the accused had difficulty finding a legal aid lawyer due to a boycott of legal aid cases by many members of Ontario's criminal defence bar.<sup>125</sup> An amicus was appointed to establish a solicitor-client relationship with the accused in order to stabilize the litigation process. In *R. v. Greenspon*, the former counsel was appointed as an amicus to avoid delay in the event that the accused could not find counsel ready to act in time.<sup>126</sup> Finally, he found counsel, and the amicus was not required.<sup>127</sup>

Justice Karakatsanis, on behalf of the majority, reserved the right of fixing the rates of compensation for amici for the attorney general and held that the inability of the trial court to set rates would not weaken the court's appointment power and integrity of the judicial process.<sup>128</sup>

## 1. TWO-TIERED TEST FOR APPOINTING AMICI

The Supreme Court, in this case, recognized the "ample authority for judges [to appoint] *amici curiae* where this is necessary to permit a particular proceeding to be successfully and justly adjudicated" but at the same time determined certain conditions for exercising this authority.<sup>129</sup> "First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second ... the authority to appoint *amici* should be used sparingly and with caution, in response to specific and exceptional circumstances."<sup>130</sup>

## 2. CRITICISMS OF AMICUS CURIAE AS A COUNSEL

The Supreme Court also criticized the role of amicus as a defence counsel. Justice Fish while expressing his concerns about blurring the line between these two roles, observed that even though that is not the issue before the court, the majority and minority did not differ on the issue of the proper scope of an *amicus* order.<sup>131</sup> Here are the criticisms of the court with respect to the role of amicus as counsel.

<sup>122</sup> *Ibid* at para 7.

<sup>123</sup> *Ibid* at para 8, citing *R v Imona Russel*, 2009 CarswellOnt 9725 (Sup Ct J).

<sup>124</sup> *Criminal Lawyers' Association of Ontario*, *ibid*.

<sup>125</sup> *Ibid* at para 9, citing *R v Whelan*, 18 September 2009, No 2178/1542 (Ont Ct J).

<sup>126</sup> *Criminal Lawyers' Association of Ontario*, *ibid* at para 10, citing *Greenspon*, *supra* note 102.

<sup>127</sup> *Criminal Lawyers' Association of Ontario*, *ibid* at paras 7–11.

<sup>128</sup> *Ibid*.

<sup>129</sup> *Ibid* at para 44.

<sup>130</sup> *Ibid* at para 47.

<sup>131</sup> *Ibid* at para 121.

a. Confusion in the Terms

The Supreme Court unanimously agreed 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.’”<sup>132</sup>

b. Conflict with Constitutional Rights  
of Self-Represented Accused

Justice Karakatsanis raised another concern that “the appointment of an *amicus* for such a purpose [representing the accused] may conflict with the accused’s constitutional right to represent himself.”<sup>133</sup> 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.<sup>134</sup> 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*.

c. Conflict with Denial of Granting  
State-Funded Defence Counsel

When an earlier judge decided to deny state-funded defence counsel following an application invoking the accused’s fair trial rights under the *Charter*, appointing an *amicus* with an expanded role of a counsel defeats the judicial decision to refuse to grant state-funded counsel.<sup>135</sup> Thus, in *Imona Russel*, by expanding the role of the *amicus*, first to act as a counsel defending a client who remained mute, and later to take instructions from the accused, the trial judge undermined the court’s earlier decisions to deny state-funded defence counsel.<sup>136</sup>

d. Tension Between Different Roles  
of Amicus to the Court and Accused

[T]here 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 ... 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 favorable to the accused or are contrary to the accused’s wishes.<sup>137</sup>

This is exactly what happened in *Samra* when the accused argued that the *amicus*’ submissions did not coincide with his wishes and appealed the case and the court confirmed that the court, and not the accused, is the *amicus*’ client.<sup>138</sup> This issue subsequently muddies

<sup>132</sup> *Ibid* at paras 49, 114 [citation omitted].

<sup>133</sup> *Ibid* at para 51.

<sup>134</sup> *R v Cunningham*, 2010 SCC 10 at para 9.

<sup>135</sup> *Criminal Lawyers’ Association of Ontario*, *supra* note 9 at para 51.

<sup>136</sup> *Ibid* at para 52.

<sup>137</sup> *Ibid* at para 53.

<sup>138</sup> *Samra*, *supra* note 54.

the privilege that would be afforded to communications between the accused and his or her so-called counsel when the amicus' client is in fact the trial judge.<sup>139</sup>

e. Conflict with Judge's Duty Toward Unrepresented Accused

Not only does the current practice of appointing amici as defence counsel blur the traditional roles of the trial judge, the Crown attorney as a local minister of justice, and counsel for the defence, it also 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 ... the court's lawyer takes on a role that the court is precluded from taking."<sup>140</sup>

f. Conflict with the Legal Aid Scheme

There is this risk that appointing amici with an expanded role will undermine the provincial legal aid scheme. In this case, for instance, "the Ontario legislature had passed the *Legal Aid Services Act, 1998*,<sup>141</sup> ... 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."<sup>142</sup>

Therefore, the Supreme Court of Canada, while confirming the authority of the judicial system in receiving assistance from amici, observes that a lawyer appointed as an amicus with roles of a defence counsel is no longer "a friend of the court." The problem here is not what we call such a lawyer but what we expect him or her to do.<sup>143</sup> Regardless of the fact that the principles of fundamental justice require that an accused "who has not been found unfit to stand trial must be considered capable of conducting his or her defence,"<sup>144</sup> the blended role for an amicus would jeopardize the client-solicitor privilege which, in fact, the golden thread of the client-solicitor relationship.<sup>145</sup>

All the above mentioned criticisms do not mean that the courts cannot appoint an amicus where the self-represented accused is incompetent and the appointment of an amicus is necessary to avoid a potential miscarriage of justice. The issue here is the purpose of

<sup>139</sup> *Criminal Lawyers' Association of Ontario*, *supra* note 9 at para 53.

<sup>140</sup> *Ibid* at para 54 [emphasis added].

<sup>141</sup> SO 1998, c 26.

<sup>142</sup> *Criminal Lawyers' Association of Ontario*, *supra* note 9 at para 55.

<sup>143</sup> Even in this respect, it has been suggested that these lawyers can be called "special duty counsel" as it is currently in courts in Toronto. See Berg, *supra* note 92 at 79.

<sup>144</sup> *R v Swain*, [1991] 1 SCR 933 at 972.

<sup>145</sup> For example in *Imona Russel*, the trial judge wanted to assure the accused of the client-solicitor privilege by explaining that his communications with amicus would be privileged "just as if he was your lawyer, although he's not." It would have been preferable for the trial judge to have used the word 'confidential' instead of 'privileged.'" *R v Imona-Russel*, 2019 ONCA 252 at para 82 [*Imona-Russel*].

appointing the amici which originally is providing assistance to the court, not to defend the litigant. In this regard, Justice Fish cited Justice Durno in *R. v. Cairenius*, that

[w]hile 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.<sup>146</sup>

Among decisions that have followed this judgment,<sup>147</sup> some courts interpret it and observe that an *amicus curiae* could be assigned a mandate to “act for the accused”<sup>148</sup> and to discuss legal issues and speak to the court “on behalf of the accused” without taking on the role of defence counsel.<sup>149</sup> However, this last restriction may be difficult to apply in reality,<sup>150</sup> and still, *amicus* may be appointed to act in way that is tantamount to counsel<sup>151</sup> or can be regarded as a partisan role.<sup>152</sup>

### 3. EXPANDING THE PRINCIPLES OF THE CASE TO PRIVATE FAMILY LAW CASES

Justice Lauwers in *Benevides*, referring to the Supreme Court’s judgment in *Ontario v. Criminal Lawyers’ Association of Ontario*, applied the principles of appointing *amicus* in that case to family law litigation with some modifications.<sup>153</sup> These modified principles are:

First, the assistance of *amicus* must be essential to the adequate discharge of the judicial functions in the case.

<sup>146</sup> *Criminal Lawyers’ Association of Ontario*, *supra* note 9 at para 119 [emphasis in original].

<sup>147</sup> It has been cited in nearly 200 judgments since its publication, mostly when superior courts tend to express their inherent jurisdiction in appointing *amicus* (see among others *Robertson v Dr Ashwati Raghunath*, 2020 ONSC 520 at para 3; *Toronto Standard Condominium Corporation No 2297 v Ruivo*, 2017 ONSC 2887 at para 13; *R v BCS*, 2019 ONCJ 467 at para 6; *R v Peepeetch*, 2019 SKQB 132 at para 25), to apply the Supreme Court’s two-tiered test for appointing amici (see *Sup v Alberta (Attorney General)*, 2015 ABQB 453 at para 22 [Sup]; *Janjanin v Canada (Attorney General)*, 2015 ONSC 134 at para 7; *R v Verma*, 2018 BCSC 2311 at para 13; *R v Podolski*, 2017 BCCA 169 at para 13; *Emonts v Canada (Attorney General)*, 2015 ONSC 135 at para 7; *Children’s Aid Society of Toronto v SA*, 2017 ONCJ 553 at para 44), to justify that the role of *amicus* does not mirror the role of a defence counsel (see *Chemama*, *supra* note 93 at para 2), or conversely, to refuse an application for appointing an *amicus* due to, *inter alia*, the *amicus*’ desire to assist the accused in a matter (see *R v Wruck*, 2015 ABQB 165 at para 13 [Wruck]), to stipulate and limit responsibilities of *amicus* (see *R v Girou*, 2017 ABCA 214 at para 7 [Girou]), to confirm the right of the attorney general in fixing remuneration for amici (see *Benevides*, *supra* note 31 at para 20).

<sup>148</sup> *R v Jaser*, 2014 ONSC 2277 at para 39.

<sup>149</sup> *Imona-Russel*, *supra* note 145 at para 88.

<sup>150</sup> *Brar v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 at paras 169–71. In this case, Justice Noël suggests that he is not permitted to assign the amici a mandate that would have them act “on behalf” of the litigants. However, his inherent powers do permit him to assign them a mandate to “represent the interests” of the litigant. He also added that the differences between acting “on behalf” of an individual and “representing the interests” of an individual are the “state of mind in which the *amicus curiae* acts and the tactics and strategies that are appropriate when acting ‘on behalf’ of an individual as compared to presenting interests to assist the Court where they are unrepresented.”

<sup>151</sup> *Elder v Klukach*, 2017 ONSC 1151 at para 24.

<sup>152</sup> *Saad Gaya v Canada (Public Safety and Emergency Preparedness) and Attorney General of Canada*, 2020 FC 731 at para 21.

<sup>153</sup> *Benevides*, *supra* note 31 at paras 27–43.

Second, a party has the right to self-represent. However, there are situations in which the appointment of amicus might be warranted, such as when the self-represented party is ungovernable or contumelious, when the party refuses to participate or disrupts trial proceedings, or when the party is adamant about conducting the case personally but is hopelessly incompetent to do so, risking real injustice.

Third, while amicus may assist in the presentation of evidence, amicus cannot control a party's litigation strategy, and, because amicus does not represent a party, the party may not discharge amicus.

Fourth, the authority to appoint amicus should be used sparingly and with caution in response to specific and exceptional circumstances. So a trial judge should consider whether a legal aid certificate would be available and whether the matter should be adjourned to permit a party to apply for it. A trial judge should also consider whether other resources could be gathered together to suffice.

Fifth, the trial judge must consider whether he or she can personally provide sufficient guidance to an unrepresented party in the circumstances of the case to permit a fair and orderly trial without the assistance of amicus, even if the party's case would not be presented quite as effectively as it would be by counsel.

Sixth, it will sometimes, though very rarely, be necessary for amicus to assume duties approaching the role of counsel to a party in a family case. While the general role of amicus is to assist the court, the specific duties of amicus may vary. This is a delicate circumstantial question. If such an appointment is to be made and the scope of amicus' duties mirror the duties of traditional counsel, care must be taken to address the issue of privilege. Finally, the order appointing amicus must be clear, detailed, and precise in specifying the scope of amicus' duties. The activities of amicus must be actively monitored by the trial judge to prevent mission creep so that amicus stays well within the defined limits.

#### IV. AMICUS CURIAE IN ALBERTA'S JUDICIAL SYSTEM

Legal databases illustrate that amicus appointment in some provinces such as Ontario and British Columbia is by far more frequent and older than in other provinces. In terms of the volume of cases where an amicus attended the court, Alberta after Ontario, Federal Courts, British Columbia, and Quebec takes fifth place. The history of amicus curiae in Alberta has a strong connection with family law cases in this province. It has been argued that amicus procedure in Alberta is the creation of the judges of the Supreme Court of Alberta (now the Court of Queen's Bench) exercising the court's *parens patri* power.<sup>154</sup>

As Alexander Hogan observed, the genesis of amicus curiae procedure in Alberta comes from the judgment of Justice Manning in 1966 in the unreported decision of *Woods v. Woods* regarding child custody.<sup>155</sup> Since then, other judges began to follow this practice, and

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<sup>154</sup> *Parens patriae* is Latin for "parent of the nation." It refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the parent of any child or individual who is in need of protection.

<sup>155</sup> Alexander Hogan, *The Amicus Curiae Procedure in Alberta*, (Edmonton, 1980) at 2.

gradually the experimental procedure which was adumbrated in *Woods v Woods* was shaped into a system.<sup>156</sup> It is true, at least according to the reported cases because the application of this institution in criminal cases has been mainly developed since the 1980s.<sup>157</sup>

As mentioned before, the amicus, by nature, is a discretionary institution. This discretion makes it difficult to find a clear-cut, standardized framework for the requirements of amici's appointments and their roles.

Despite this uncertainty, it is fair to say that amici are appointed by Alberta courts in different areas of law. Going through the subject matter of cases in Alberta Court of Queen's Bench and Alberta Court of Appeal where an amicus has been appointed by the court, the author believes that the first place in this regard belongs to family law cases, particularly child custody and access. Criminal law cases takes the second place. There are also civil litigations which are mostly covered by an innovative mechanism to support self-represented litigants (SRLs) in Alberta called the Queen's Bench Amicus Program which covers some civil litigations. These cases will be considered in the same order.

#### A. ALBERTA AMICI IN CHILD CUSTODY CASES

Children's situations in family disputes is of utmost importance for the courts. They are vulnerable to their parents' misconduct, cannot defend themselves, and may not be capable of instructing lawyers. So, they need to be represented in a special manner.

Generally speaking, there are three possible roles for counsels appointed to represent a child: the friend of the court, the best interests' guardian, and the child's advocate.<sup>158</sup> In Alberta, superior court judges first appointed counsels for children in custody and access cases in the 1960s. These lawyers were also expected to adopt a friend of the court or amici's role.<sup>159</sup> The first case in this regard was *Woods v. Woods*, where two married couples had exchanged partners. One resulting couple applied for the custody of two children. The

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<sup>156</sup> Institute of Law Research and Reform, *Protection of Children's Interest in Custody Disputes, Report No 43* (Edmonton: Institute of Law Research and Reform, 1984) at 10 [*Report No 43*].

<sup>157</sup> There is a case dating back to 1978, in which an amicus helped the Court in finding and referring to previous authorities of the Provincial Court of Alberta. There is no reference in this case of why an amicus was appointed or what his role was, but apparently, the accused, whose charge was refusing to send his children to public school on religious grounds, was unrepresented, and this was the reason for attendance of an amicus. See *R v Wiebe*, [1978] 3 WWR 36 (Alta Prov Ct); however, the main trend to appoint an amici in criminal cases can be observed since 1980s.

<sup>158</sup> The amicus curiae and best interests' roles, while different from each other, share more commonalities than with a traditional advocate role. Neither an amicus nor a best interests' advocate has loyalty to any party. Individuals in both roles gather information, may hire experts to prepare reports (if funds are available), and may decide to make recommendations. An amicus' loyalty is to the court. An amicus ensures the court is fully informed and has all of the relevant facts and case law. The best interests' advocate assists a judge in reaching a best interests decision with respect to the child, but the court is not the client — the best interests advocate apparently has no client. A best interests advocate may argue a position that may be contrary to that expressed by the child. For detailed comparison between these three roles see Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) 43:4 Alta L Rev 871 at 876–79. If the child has the capacity to instruct a counsel, he or she can have counsel. Counsel who adopts the role of child's advocate will treat the child as any other client, and in particular, the child should be informed that what the child tells the lawyer will only be disclosed with the permission of the child except when the lawyer learns that the child has been abused and may be placed in a setting where death or bodily harm (which includes sexual abuse) is likely to result, he or she is required to disclose this information.

<sup>159</sup> Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43:4 Alta L Rev 845 at 848.

exchange of partners had caused bitterness between the two couples. Thus, the Judge suggested to counsels that he would like to have a third counsel, an amicus, appear “whose only interest would be that of the two children.”<sup>160</sup> He gave these reasons for appointing the amicus: “[c]ounsel for the disputing parents must obviously take instructions from their clients and some matters concerning the best interests of the children may be overlooked in the conflict between the parents.”<sup>161</sup> Although even before this unreported case, Alberta courts appointed amici or accepted their attendance in family cases, in cases before *Woods v. Woods* courts used the word “amicus curiae” only for the institution that attended the proceedings with no adversarial standing.<sup>162</sup> There was no reference to the amici, their roles, or submissions. One could only see their names mentioned at the beginning or the endnote of a judgement.

As the Alberta Court of Appeal expressed in *Tucker v. Tucker*, child custody cases are unique. For many years, the courts in Alberta have appointed amici (paid for by the Government where necessary) to act on behalf of the child. The amicus obtains home study reports or psychological assessments for the use of the court and calls evidence on behalf of the child.<sup>163</sup> Amicus appointed by the court is regarded as an “even-handed” actor<sup>164</sup> who might retain a social worker or psychologist to investigate the case<sup>165</sup> and express his or her opinion based on their investigations.<sup>166</sup> Amici may interview the child and provide evidence to the court about the child’s wishes.<sup>167</sup> Alberta courts, in some cases, have even given the role of cross-examining witnesses to them.<sup>168</sup> Granting such an active role (cross-examining witnesses) however, has raised concerns and been considered as “only a privilege granted to an amicus curiae by the court in the interests of the children.”<sup>169</sup> Although the amicus reports in child custody cases are but a tool or recommendation which may or may not be accepted by the judge,<sup>170</sup> they play an important role in inducing the parties to settle the case.<sup>171</sup>

<sup>160</sup> *Report No 43, supra* note 156 at 9.

<sup>161</sup> *Ibid.*

<sup>162</sup> Legal databases illustrate that the oldest case in Alberta where an amicus was present before the court dates back to 1929 when in *Emeny v Emeny*, an undefended divorce action brought by the wife residing in the state of Missouri against the husband residing in Alberta, a solicitor attended, out of courtesy: *Emeny v Emeny* (1929), 24 Alta LR 303 at 304 (CA).

<sup>163</sup> *Tucker v Tucker*, 1998 ABCA 281 at para 38. See also *SLG v RTG*, 2016 ABCA 186; *Rennich-Cherkowski v Cherkowski*, 2013 ABCA 52.

<sup>164</sup> *Y v Y*, 1985 CanLII 1265 (Alta QB) at para 23.

<sup>165</sup> *Singh v Singh*, [1981] 34 AR 271 at 273–74 (CA).

<sup>166</sup> *Romaniuk v Alberta*, 1988 CarswellAlta 42 at para 33 (QB) [*Romaniuk*].

<sup>167</sup> Bala, *supra* note 159 at 848.

<sup>168</sup> *Romaniuk, supra* note 166 at para 17 (“[i]t would be impossible, however, for the amicus at trial to cross-examine all witnesses in an impartial manner. It would, however, be reasonable to expect the amicus to cross-examine witnesses fairly and without prejudice”), *ibid* at para 33.

<sup>169</sup> *M v M*, 1985 CanLII 1279 (Alta QB) at para 8.

<sup>170</sup> *Stewart v Stewart*, [1990] 112 AR 137 at 139 (CA).

<sup>171</sup> Leonard J Pollock, “Representation of Children: The Alberta Experience” in Katherine Connell-Thouez & Bartha Maria Knoppers, eds, *Contemporary Trends in Family Law: A National Perspective* (Toronto: Carswell, 1984) 189 at 197, cited in *Romaniuk, supra* note 166 at para 36.



To summarize the position of Alberta's courts concerning the role and status of the amicus in these kinds of disputes, the author would like to cite the opinion of Associate Chief Justice Miller of the Alberta Court of Queen's Bench in *Romaniuk v. Alberta*. In his decision, he states that:

(a) The amicus is a person appointed by an order of a Justice of the Court of Queen's Bench of Alberta primarily for the purpose of gathering information relevant to the issues of custody and/or access involving children (as defined by the Divorce Act) and who, by making this information available to the competing parties and the court, may assist in a reasonable resolution of the dispute which is, hopefully, in the best interest of the children who are caught in the middle and who, almost invariably, are unable to speak for themselves.

(b) The amicus should be a lawyer who is independent of the disputants and who can bring to the attention of the courts and the disputants what he or she believes to be in the best interests of the children involved.

(c) The amicus is not a party to the action and should, therefore, with leave of the court, limit cross-examination of the disputants and their witnesses to areas of clarification. He should strive to be as even-handed as possible as between the disputants.

(d) While the amicus or members of the amicus team may be asked to express his or her opinion as to what is in the best interest of the child it must always be understood by all concerned that this opinion is only one more piece of evidence that the court will weigh in coming to a conclusion.

...

(e) [T]he amicus should be free to determine the scope and direction of the investigation in each case as his or her conscience and experience dictate. If the court feels that more information is required to help reach a decision benefiting the child or children it can ask the amicus to help provide the same. At no time should the disputants be able to direct the course of the amicus investigation although they may certainly offer suggestions. To treat the matter any other way would destroy the concept of an independent report and might expand the investigation way beyond what is reasonably required to assist the court.<sup>172</sup>

## B. ALBERTA AMICI IN CRIMINAL CASES

Since the 1980s, superior courts in Alberta have shown a tendency towards appointing amici especially when the accused discharges his or her counsel and remains unrepresented<sup>173</sup> or initially is self-represented.<sup>174</sup> When the accused chooses to represent himself or herself, the trial judge first tries to persuade them to change their mind, but if the judge is not successful, he or she can, if necessary, appoint an amicus to help the court while the accused

<sup>172</sup> *Romaniuk*, *ibid* at para 41.

<sup>173</sup> In these cases, the accused usually is not eligible for legal aid maybe because he or she has discharged several counsels or declines legal aid. As an example of the latter case, see *R v JMG*, 2004 ABCA 214 at para 2. As a recent case, see *R v Sharif*, 2019 ABQB 954 at para 3 [*Sharif*].

<sup>174</sup> Among others see *R v Ledesma*, 2020 ABCA 410 at 13 [*Ledesma*]; *R v CM*, 2018 ABCA 214 at para 3 [*CM*].

is representing themselves.<sup>175</sup> Basically, the trial judge is in the best position to determine if and when the assistance of an amicus curiae becomes necessary.<sup>176</sup> It goes without saying that the accused is not required to cooperate with the amici and they may want to even see the amici.<sup>177</sup>

An Alberta judge also may appoint amici when the accused does not appear before the court<sup>178</sup> or is excused from further attendance in the court.<sup>179</sup>

In all these cases, the main concern of the court is ensuring that the accused has a fair trial<sup>180</sup> and the court's function of administering justice according to the law is carried out in a regular, orderly, and effective manner.<sup>181</sup>

It is noteworthy that the courts in Alberta, following the Supreme Court of Canada's judgment in *Ontario v. Criminal Lawyers' Association of Ontario*, use their discretion to appoint an amicus curiae sparingly<sup>182</sup> and exceptionally which means that it would not likely be ordered unless the case raises potential significant jeopardy for the accused.<sup>183</sup> Therefore, the courts based on the nature of the appeal itself and the grounds brought forward by the Crown decide whether or not the appointment of an amicus is necessary.<sup>184</sup> They usually emphasize that the appointment of an amicus is not the appointment of a counsel and delineate his or her responsibilities.<sup>185</sup> They also are careful not to undermine the provincial legal aid scheme and appointments must be to aid the court, not for the amicus to act as defence counsel.<sup>186</sup>

Sometimes the accused themselves makes an application to the court for the appointment of an amicus. This application is not welcomed by the Alberta courts in criminal cases. It is allowed when the court is going to deal with the accused's Rowbotham application and considers certain factors in order to determine whether or not the accused should be provided with counsel at the state's expense. So when a self-represented accused is seeking a Rowbotham order, he or she may want to enjoy the assistance of an amicus in order to be successful in getting this order. But the practice of the courts in Alberta demonstrates that they do not tend to appoint an amicus in such cases. There are some reasons for the courts to decline the accused's request in this regard. First of all, as pointed out before, it has been

<sup>175</sup> The Alberta Court of Appeal in *R v Bowles* has confirmed that in such cases where the accused dismisses his counsel and persists in representing himself and the trial judge cannot persuade him to reconsider his decision, an amicus can be appointed. This amicus can be the same discharged counsel. See *R v Bowles*, [1985] 62 AR 167 at 170 (CA). See also the same approach in *R v Tremblay*, 2003 ABCA 33 at para 3; *R v Levin*, 2014 ABCA 142 at para 75 [*Levin*]; *CM*, *ibid* at para 79.

<sup>176</sup> *R v Iyer*, 2014 ABQB 684 at para 148 [*Iyer*].

<sup>177</sup> Like what happened in *Sharif*, *supra* note 173.

<sup>178</sup> *Girou*, *supra* note 147 at para 3. In this case, the accused did not appear at the date scheduled for the hearing so the court appointed an amicus curiae to prepare and file a brief in response to the Crown and to make representations at the appeal hearing. *Ibid* at para 8.

<sup>179</sup> *R v Youngpine*, 2009 ABCA 89 at para 7 [*Youngpine*].

<sup>180</sup> *R v Biever*, 2015 ABQB 301 at para 407 [*Biever*]; *Sharif*, *supra* note 173 at para 3; *Girou*, *supra* note 147 at para 6.

<sup>181</sup> *Sup*, *supra* note 147 at para 27.

<sup>182</sup> *Girou*, *supra* note 147 at para 6.

<sup>183</sup> *Sup*, *supra* note 147 at para 27 (where the applicant sought the appointment of an amicus for the purposes of assisting him and the Court with respect to a summary conviction appeal by the Crown from a Rowbotham order granted in Provincial Court).

<sup>184</sup> *Ibid*.

<sup>185</sup> *Biever*, *supra* note 180 at para 47.

<sup>186</sup> *Iyer*, *supra* note 176 at para 141.

made clear by the Supreme Court of Canada that the discretion to appoint an amicus must be used sparingly. Second, at the Rowbotham application, what an accused is required to do is to provide evidence of his or her financial circumstances so that a proper analysis of certain factors can be done. So while there are many avenues for the self-represented accused at the Rowbotham application to obtain information, the courts usually do not find it necessary to provide him or her with legal advice or tell him or her what to do.<sup>187</sup> Also, some courts take the position that the appointment of an amicus, in this case,

would then justify the appointment of an *amicus* in any summary conviction appeal by the Crown of an acquittal where the respondent is unrepresented. In such a case, the accused is in greater immediate jeopardy by having an acquittal reversed or the matter returned for a new trial than in this case, where the only jeopardy is the possible reinstatement of charges not yet determined on their merits in the event the appeal is successful.<sup>188</sup>

### C. ROLES OF AMICUS RECOGNIZED BY THE COURTS IN ALBERTA

When the trial court decides to appoint an amicus or accept the application of appointing an amicus made by the Crown or by the accused, she issues an order containing the roles and responsibilities of that amicus. Some of these roles are reflected in the courts' judgments.

Generally speaking, the main role of amici is assisting the court with discharging its function. Considering judgments rendered by Alberta's courts in criminal cases, one can count some more exact examples of amici's roles as follows: attending the court to answer any questions the court may have,<sup>189</sup> completing the argument when amici has been former counsel of accused,<sup>190</sup> assisting the court in obtaining accused's instructions,<sup>191</sup> making the argument on the accused's behalf when he or she is not present before the court,<sup>192</sup> suggesting to the court of breaches of the accused's rights,<sup>193</sup> assisting the accused in understanding the law and process,<sup>194</sup> assisting the accused in difficult task of defending himself in court,<sup>195</sup> asking the judge to make an order with respect to the accused's rights,<sup>196</sup> cross-examining witnesses,<sup>197</sup> assisting the court in gathering case authorities in relation to legal or evidentiary issues not addressed in the pre-trial applications,<sup>198</sup> assisting the accused in conducting research,<sup>199</sup> providing some advice and direction to the accused which the trial judge may feel

<sup>187</sup> *Wruck*, *supra* note 147 at paras 16–19. See also *R v Hamiane*, 2016 ABQB 409 at para 60.

<sup>188</sup> *Sup*, *supra* note 147 at para 28.

<sup>189</sup> *Girou*, *supra* note 147 at paras 5, 7.

<sup>190</sup> *Levin*, *supra* note 175 at para 75 (where the court appointed the former counsels when their service was terminated by the accused as an amicus in order to complete the section 598 application that had been underway. The Alberta Court of Appeal confirmed this practice as a fair and reasonable one).

<sup>191</sup> *CM*, *supra* note 174 at para 31.

<sup>192</sup> *Youngpine*, *supra* note 179 at para 7.

<sup>193</sup> *Biever*, *supra* note 180 at para 39.

<sup>194</sup> *Ibid* at para 47.

<sup>195</sup> *Ibid* at para 48.

<sup>196</sup> *Ledesma*, *supra* note 174 at para 19 (where the amicus asked the trial judge to order a fitness assessment under section 672.11(a) of the *Criminal Code*, *supra* note 103).

<sup>197</sup> *Ledesma*, *ibid* at para 39.

<sup>198</sup> *Iyer*, *supra* note 176 at para 148; *Sharif*, *supra* note 173 at para 25.

<sup>199</sup> *Biever*, *supra* note 180 at para 81.

unable to give for fear of interfering with trial strategy or his right to silence,<sup>200</sup> and providing assistance to the court in providing a review of the court's final instructions to the jury.<sup>201</sup>

Although in Alberta, particularly after the Supreme Court of Canada's decision in *Ontario v. Criminal Lawyers' Association of Ontario*, the courts emphasize that an amicus is not a defence counsel, sometimes, especially when the amici is providing assistance to the accused and acting in their interest, the amici's roles mimic counsel's roles.<sup>202</sup> However, the author is of the opinion that appointing amici by the courts for self-represented accused is very frequent and if in some cases the amici under the courts' order act for the accused, their role is still fundamentally distinctive from that of a defence counsel. The main difference here is that the amici can neither be dismissed by the accused nor can they be instructed by them. Even in cases where the amici are assigned with the blended roles, the best argument would be the one proposed by the dissenting judges in *Ontario v. Criminal Lawyer's Association of Ontario* that "[f]urthering the best interests of the accused may be an incidental result but is not the purpose, of an *amicus* appointment."<sup>203</sup>

#### D. ALBERTA QUEEN'S BENCH AMICUS PROGRAM

In recent years, Alberta has expanded the application of amicus curiae to civil law cases so that SRLs in Calgary and Edmonton who cannot afford legal advice and are going to appear in Queen's Bench Justice and Masters Chambers in civil cases can benefit from this device. Two points are important to keep in mind regarding this program which is called "Alberta Queen's Bench Amicus Program."

First, this program does not assist with family, criminal, or corporate matters, matters in Provincial Court or other Appeal Courts, or pre-trial conferences and mediations. The Queen's Bench Amicus Program assists with civil matters only. So it can, for instance, be used for foreclosure, landlord and tenant disputes, contract, other civil litigation, or estate litigation matter.

Second, the volunteer lawyers do not represent, go on the record for, or give legal advice to the SRLs. They remain neutral and provide in-court assistance to help with the overall administration of court processes.

This innovative practice is a collaboration among Pro Bono Law Alberta (PBLA), Pro Bono Students Canada, private law firms, Student Legal Assistance, the Children's Legal and Educational Resource Centre, and the Court of Queen's Bench, which began as a Calgary-based pilot in October 2013.<sup>204</sup>

<sup>200</sup> *Iyer*, *supra* note 176 at para 148.

<sup>201</sup> *Ibid* at para 148.

<sup>202</sup> In the author's view, for example, the role of amicus in *R v Marek*, where the amicus practically acts in the accused's interest. *R v Marek*, 2016 ABQB 18.

<sup>203</sup> Majority and dissenting judges agreed on this subject. *Criminal Lawyers' Association of Ontario*, *supra* note 9 at para 119 [emphasis omitted].

<sup>204</sup> National Self-Represented Litigants Project, "Innovative Alberta QB Amicus Program for SRLs Now Expanding" (2 December 2017), online: <representingyourselfcanada.com/innovative-alberta-qb-amicus-program-for-srls-now-expanding/> [Innovative Alberta QB Amicus Program].

The main purpose of this program is to improve SRLs' access to justice and at the same time, bring volunteer lawyers into chambers, where they act as "amicus curiae" and help the court understand the issues related and the positions taken by unrepresented litigants. By doing so, these lawyer and law student volunteers are given an opportunity for courtroom advocacy in a positive environment, which is a great skills-building experience for them.<sup>205</sup> It is also "beneficial for overall professional development, mentoring, networking, building collegiality, and enhancing the public image of the legal profession."<sup>206</sup>

As expressed by Gillian Marriot, Executive Director of PBLA, "The QB Amicus is a win-win for lawyers and the unrepresented individual. The lawyer has an opportunity to learn valuable court-based skills while helping the public and assisting the court in the administration of justice, and the unrepresented individual obtains legal assistance and referrals to help them through the process."<sup>207</sup>

In both the Calgary Courts Centre and Edmonton Law Courts, volunteer lawyers and articling students (when permitted by their principal) can take part in this program and provide assistance to SRLs. Also, law students and internationally trained lawyers completing the National Committee on Accreditation (NCA) process are welcomed to assist with the intake and triage of clients. This gives students the opportunity to shadow experienced lawyers, hone soft and hard skills, and gain an understanding of the legal process.<sup>208</sup>

Self-represented litigants may receive this service on a first-come, first-serve basis, but there is no limit to the number of times you can use the service.<sup>209</sup> They need to complete intake forms and hold on to them until a volunteer is available.<sup>210</sup> There are, however, some slight differences between Calgary and Edmonton in providing this service.

#### 1. ALBERTA COURT OF QUEEN'S BENCH AMICUS PROGRAM IN CALGARY

The Amicus program in Calgary covers both morning chambers and advice clinic. This means that not only does the program assist those who have to appear before Masters or Justice in Chambers that morning on Tuesday and Thursday but also offers, on the same days, an afternoon summary legal advice clinic where SRLs get to consult with a lawyer for about 30 minutes and are provided with legal advice, information on court procedures, assistance with document preparation and review, and help preparing for trials, motions and, other appearances.<sup>211</sup>

<sup>205</sup> Law Central Alberta, "Court Assistance Program (Queen's Bench Amicus Program)," online: <[www.lawcentral.alberta.ca/en/court-assistance-program-queens-bench-amicus-program](http://www.lawcentral.alberta.ca/en/court-assistance-program-queens-bench-amicus-program)>.

<sup>206</sup> *Ibid.*

<sup>207</sup> Innovative Alberta QB Amicus Program, *supra* note 204.

<sup>208</sup> Pro Bono Law Alberta, "Volunteer at PBLA," online: <[pbla.ca/volunteer/volunteer-at-pbla/](http://pbla.ca/volunteer/volunteer-at-pbla/)>.

<sup>209</sup> Rukaiyat Lawal, "Alberta Legal Resources – Court Assistance Program" (26 March 2019), online: <[edmontonlawlibraries.ca/2019/03/alberta-legal-resources-court-assistance-program/](http://edmontonlawlibraries.ca/2019/03/alberta-legal-resources-court-assistance-program/)>.

<sup>210</sup> Pro Bono Law Alberta, "Queen's Bench Court Assistance Program," online: <[pbla.ca/get-legal-help/queens-bench-court-assistance-program/](http://pbla.ca/get-legal-help/queens-bench-court-assistance-program/)>.

<sup>211</sup> *Ibid.*

## 2. ALBERTA COURT OF QUEEN’S BENCH AMICUS PROGRAM IN EDMONTON

The program is more restricted in Edmonton. It does not provide an advice clinic. This means that volunteer lawyers assist only those who have to appear before Masters or Justice in chambers that morning. It is provided in Edmonton on Wednesday mornings.

According to the program guideline, as this service is provided by volunteers, assistance is not guaranteed.<sup>212</sup>

Finally, it is noteworthy that sometimes Alberta Court of Queen’s Bench itself refers the litigant to this program,<sup>213</sup> simply recognizes this assistance at the end of their decisions,<sup>214</sup> or appreciates this program since the amicus lawyers streamline the process by relieving the Court of the obligation of having to explain the procedure and their presence promotes settlement of disputes.<sup>215</sup>

## V. CONCLUSION

The amicus curiae, or “friend of the court,” is a long-lasting practice in almost all national legal systems. It is more frequent in common law jurisdictions than civil law systems, however. This practice expanded to international judicial systems, whether their functions are individual or state dispute settlement or international criminal proceedings.

Traditionally, courts using their discretionary power in administering their judicial functions appointed an amicus as an assistant to prevent the occurrence of possible mistakes of facts or law in their decisions. These amici were neutral, non-partisan, and disinterested in the litigations with limited roles. Over time, as there was no strict definition of the amicus and their roles, courts have expanded the roles and responsibilities of this institution such that especially in criminal cases amici’s roles have mimicked counsel’s roles. This partisan role, which departs from the traditional role, has been recognized by some Canadian authorities in criminal law cases. In these cases, when the accused is self-represented or unrepresented an amicus has been appointed to assist the court and ensure the fair trial of the accused by cross-examining the witnesses, advising the accused, and so forth. The Supreme Court of Canada, however, has criticized this expanded role of amicus in *Ontario v. Criminal Lawyers’ Association of Ontario* and warned the Canadian courts that this expansion, *inter alia*, would jeopardize the constitutional rights of self-represented accused and confuse the duties of an amicus to the court and to the accused. After this judgment, courts are more careful in appointing amici and determining their role.

The amicus practice in Alberta’s judicial system was initially established in child custody cases and then expanded to criminal cases where the accused is self-represented or

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<sup>212</sup> *Ibid.*

<sup>213</sup> *Allen v Okeny*, 2014 ABQB 210 at para 33.

<sup>214</sup> *Paradigm Quest Inc v Vezina*, 2018 ABQB 441.

<sup>215</sup> *Boardwalk General Partnership v Montour*, 2015 ABQB 242 at para 2 (saying that most of the tenants, and many of the landlords, are self-represented and the Amicus Program promotes settlement of disputes).

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unrepresented. The common point between these two fields of litigation is that in both of them the litigants do not enjoy representation and need legal support which, whatever the reason, cannot be provided by a retained counsel. The Alberta Court of Queen's Bench has also developed an innovative program aiming at supporting self-represented litigants in certain civil law claims which have been efficient in achieving its purpose.

Considering judgments rendered by courts in Alberta, despite the judgment of the Supreme Court of Canada, in some cases amici are not completely disinterested and may act for the accused. This approach, however, did not drive us to conclude that these courts do not follow the Supreme Court's judgment because, when an amicus is acting based on the court's order, he or she may incidentally further the best interests of the accused. This may be considered as an incidental result, but the purpose of an amicus appointment is mainly to assist the court with discharging its function, especially administrating a fair trial. In other words, amicus is always a friend of the court, but sometimes this friendship incidentally has advantages for litigants, but it does not make amicus a friend of the litigant.

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