# Case Comment: Cavalier v. Ramshaw

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During his time sitting on the Estates List, Justice David M. Brown has not been hesitant in expressing his views about the need for change. In his decisions, Justice Brown has not shied from frank comment on trends he has observed from the bench, whether discussing costs awards in estate litigation;commenting on the conduct of contested guardianship litigation under the *Substitute Decisions Act*; or recognizing the impact of technology on the practice of law in Ontario, from his appellate decision discussing the discoverability of Facebook material3 to overseeing addition of the Estates List in Toronto to the computerized OSCAR (Online System for Court Attendance Reservations) system.

Another recent decision, *Cavalier v. Ramshaw*, again demonstrates Justice Brown's initiative. James Cavalier appealed from a decision of the Consent and Capacity Board ("CCB"), which found him incapable with respect to certain treatment. Justice Brown, in an Appeal Management Memorandum, directed that amicus be appointed to present the issues from Mr. Cavalier's point of view. Appointment of amicus in an appeal from the CCB is often necessary, as treatment of the individual cannot begin until the court has disposed of an appeal of the decision of the CCB, yet the process to appeal a CCB decision is difficult to fulfill unless the appellant has a lawyer. In particular, the requirement that the appellant file a factum often holds up the appeal process, as an unrepresented appellant is often unable to do so due to limits created by his or her mental condition.

One effort made to address this problem has been the appointment of amicus to assist the appellant. However, Justice Brown notes in the endorsement that, during a recent Estates List Bench and Bar Committee meeting, a lawyer who belonged to the Mental Health Legal Committee (the "Committee") brought to his attention a dispute between its members and Legal Aid Ontario ("LAO") in respect of amicus acting on CCB appeals.

The dispute centred on docketing practices for court-appointed *amicus* for CCCB appeals. While amicus appointed by the Court of Appeal in Ontario Review Board ("ORB") appeals were permitted to docket up to 50 hours for an appeal, subject to increase in extraordinary cases, amicus appointed in appeals from the CCB were only permitted by LAO to docket up to 16 hours for an appeal. Justice Brown raised concern that the *amicus* appointment process could suffer, due to the possibility that "some qualified counsel [may] not [be] prepared to have their names put forward because LAO is imposing, without direction from the Court, a cap on the number of hours that counsel can spend on an appeal from the CCB".

Justice Brown ordered another Appeal Management Conference in the matter, at which counsel for the Attorney General of Ontario ("AGO"), LAO and the Committee were asked to attend. The LAO was asked to file materials explaining tariff rates and hours being used for amicus appointed on CCB appeals to the Ontario Superior Court of Justice.

That Appeal Management Conference was held on September 27, 2010.6 The materials filed informed Justice Brown that, because the *Legal Aid Services Act*, 1998 and Tariff did not provide specifically for court-appointed amicus for which the court sought payment from the AGO, the AGO analogized the situation to one in which a legal aid certificate was issued. Consequently, the AGO applied the requirements and limitations on billings to amicus appointed for CCB appeals, including Civil Fees Tariff stipulations and

the “Maximum Hours Allowed” provision of 16 hours of preparatory work. The Maximum Hours may be extended on a discretionary basis in “exceptional cases” where counsel submits a letter justifying the above-tariff number of hours docketed (a “discretion letter”).

In contrast, for amicus appointed for unrepresented appeals from the ORB to the Court of Appeal, the Ministry of the Attorney General customarily waives the need to write a discretion letter, so long as the lawyer’s dockets do not exceed 50 hours.

Justice Brown asked the AGO representative if his client would be prepared to have a system for the CCB that mirrored that for the ORB, whereby the need for amicus to submit a discretion letter for dockets under 50 hours was waived. The AGO responded that the deal reached in 2001 for amicus working on ORB appeals was not available now for amicus working on CCB appeals.

While the AGO submitted that courts do not have jurisdiction to set the number of hours for which the Province is required to pay amicus, Justice Brown noted the court clearly possessed the authority to fix remuneration rates for amicus, and from this logically flowed the jurisdiction to fix or approve the number of hours billable by amicus.

Justice Brown outlined three options to structure the amicus regime for CCB appeals going forward. In brief, those approaches were:

1. the court reverts to the prior system, in which CCB appeals were not case-managed and appellants were required to move their own appeals along;
2. *amicus* would be appointed to assist pursuant to the procedure set out in Justice Brown’s earlier decision in *Bon Hillier v. Milojevic*, and amicus would be subject to the fees and billings requirements in the Legal Aid tariffs, including maximum hours subject to the discretion letter process;
3. the model used by the Court of Appeal for ORB appeals would be adopted: a fixed panel of counsel who could be appointed as amicus would be established, hourly rates fixed, and hours monitored for reasonableness by the judge hearing the appeal by way of accounts submitted by counsel at the appeal.

Justice Brown indicated his view was that implementing Option 3 was the only practical solution. Justice Brown then requested that the AGO advise, no later than November 15, 2010, whether it was prepared to fund amicus appointed by the court in accordance with Option 3. If not, Justice Brown stated he could “see no point in continuing with the appeal management process for appeals by unrepresented patients from decisions of the CCB. Option 1 will then prevail, and [he] will conclude that the executive of this province is content that such a state of affairs will be consistent with the Legislative direction to fix for the hearing of the appeal the earliest date that is compatible with its just disposition’.”

The decision is notable for Justice Brown’s exploration of what he describes as the “symbiotic” relationship between the judiciary and the other two branches of government in respect of administrative matters. Though the court may have jurisdiction to set rates of remuneration for amicus, and even to fix or approve the number of billable hours, what was left undecided in this case was whether the court could compel the Province “to write a cheque to pay micus”.8 While Justice Brown did not compel the AGO to open its chequebook, he did make a direct judicial request for a governmental office to explain and reconsider its policy. This was an unusual step in its own right, particularly given that the AGO was not seeking to intervene and was not a party to the proceeding. Ultimately, whether this judicial nudge will prompt the AGO to revise its policy remains to be seen, as no further endorsements were available at the time of the writing of this article.

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1 See e.g. Smith v. Rotstein, 2010 ONSC 4487, on sanctioning the pursuit of baseless will challenges through costs awards; Salter v. Salter Estate, [2009] O.J. No. 2328 (Sup. Ct.), on the need to reform the prevailing view of costs awards in estates cases from “estate pays” to “loser pays”.

2 Abrams v Abrams, 2010 ONSC 1254; see also Abrams v. Abrams, 2010 ONSC 2703, leave to appeal both decisions denied 2010 ONSC 4714 (Div. Ct.), on the inherent jurisdiction of the court to case manage litigation.

3 Leduc v. Roman, [2009] O.J. No. 681 (Sup. Ct.).

4 2010 ONSC 5402.

5 2010 ONSC 4386.

6 Memorandum cited as 2010 ONSC 5402.

7 2010 ONSC 435.

8 See para. 26.

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