

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>	)	<i>D. Manning</i>
	)	<i>for the Appellant</i>
<i>Respondent</i>)	
	)	<i>J. A. Hyman</i>
<i>- and -</i>	)	<i>for the Respondent</i>
)	
<i>JENNIFER DIANE HILL</i>	)	<i>D. G. Gu�nette</i>
	)	<i>for the Attorney General of</i>
<i>(Accused)</i>	)	<i>Manitoba</i>
)	
<i>- and -</i>	)	<i>J. L. Ostapiw</i>
	)	<i>for the Criminal Defence</i>
<i>ALAN JAY KARL GOWENLOCK</i>	)	<i>Lawyers Association of</i>
	)	<i>Manitoba</i>
<i>Appellant</i>)	
	)	<i>Chambers motion heard and</i>
	)	<i>Decision pronounced:</i>
	)	<i>August 28, 2017</i>

CHARTIER CJM

[1] On October 1, 2016, r 2.03 of the *Criminal Proceedings Rules of the Manitoba Court of Queen’s Bench*, SI/2016-34, came into force. That rule provides that the Court may order costs, payable by counsel personally, if counsel fails, without reasonable excuse, to comply with the Court of Queen’s Bench Rules. There does not appear to be any other provincial jurisdictions with a criminal rule similar to Manitoba’s r 2.03.

[2] On April 6, 2017, in the course of criminal proceedings in the Court of Queen’s Bench, the presiding judge found that counsel for the

accused had failed to comply with a court-imposed deadline for filing a motion brief. He imposed \$1,000 costs on counsel personally. Counsel for the accused appeals from that order.

[3] On May 12, 2017, the Supreme Court of Canada rendered judgment in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26. In that case, the Crown sought an order of costs against counsel, unlike the case at bar. The Supreme Court of Canada held that courts have an inherent ability to order costs against counsel in certain circumstances. It also noted that, in situations where a problem arises because of defence counsel's conduct, the Crown's role is limited. Crown counsel must not become the prosecutor of defence counsel.

[4] On May 16, 2017, the Federal Crown Attorney, prosecuting the criminal proceedings, requested, pursuant to r 37.1 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, that the Chief Justice convene a meeting of the parties for the purpose of giving direction for the conduct of the appeal hearing. One of the issues discussed at the meeting was who would present to the Court the response to the appellant's position. As a result of *Jodoin*, the Crown cannot take an active role in defending the order of the presiding judge.

[5] A court has, on its own motion, the discretion to appoint *amicus* where it considers it necessary to do so to assist the court in discharging its function. In our adversarial system, opposing counsel present their respective positions to the court. In this case, the appellant will argue that the judge erred in imposing the cost order, but no one will advance the opposing view.

[6] Pursuant to section 3(2) of *The Legal Aid Manitoba Act*, CCSM c L105, Legal Aid Manitoba may provide an *amicus* at the request of a judge. The Federal Crown has provided notice to Legal Aid Manitoba of this motion.

[7] In my view, it is in the interests of justice for *amicus* to be appointed in order for the Court to receive the benefit of complete and balanced submissions. This appeal will be a case of first impression. The material already filed in these proceedings has raised numerous questions that this Court may want to consider as it goes about making its initial pronouncements in this area of the law.

[8] As a result, in the particular and rare circumstances of this case, I am requesting, pursuant to section 3(2), that Legal Aid appoint *amicus* to argue the position opposite to that of counsel for the accused and to pay counsel's reasonable fees and disbursements as may be determined.

Chartier CJM