

**SUPREME COURT OF CANADA**

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| **Citation** : R. *v.* White, 2010 SCC 59, [2010] 3 S.C.R. 374 | **Date** : 20101117  **Docket** : 33330 |

Between:

John (Jack) Robert White

Applicant

and

Her Majesty The Queen

Respondent

**Coram** : Binnie, Fish and Charron JJ.

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| **Reasons for Judgment** :  (application to fix tariff of fees)  (paras. 1 to 7) | Binnie J. (Fish and Charron JJ. concurring) |

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

John (Jack) Robert White *Applicant*

v.

Her Majesty The Queen *Respondent*

**Indexed as:  R. *v.* White**

2010 SCC 59

File No.:  33330.

2010:  November 17.

Present:  Binnie, Fish and Charron JJ.

application to fix tariff of fees

*Criminal law — Barristers and Solicitors — Court-appointed counsel — Fixing counsel fees — Counsel appointed by Supreme Court of Canada under Criminal Code — Parties disagreeing about counsel rates to be paid by Attorney General — Whether provincial legal aid tariff should apply or whether assessment of what is fair and reasonable in the circumstances is correct method of determining fees — Criminal Code, R.S.C. 1985, c. C-46, s. 694.1.*

**Cases Cited**

**Referred to:** *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13; *R. v. Magda*, [2001] O.J. No. 1861 (QL); *Egan v. Canada*, [1995] 2 S.C.R. 513; *Alberta (Chief Commissioner of the Human Rights and Citizenship Commission) v. Brewer*, S.C.C., No. 32695, August 25, 2009 (reproduced in *Bulletin of Proceedings of the Supreme Court of Canada*, February 19, 2010, p. 224); *R. v. Pietrangelo*, 2008 ONCA 547, [2008] O.J. No. 5137 (QL); *R. v. Kumar* (endorsement of the Court of Appeal for Ontario, C48821, October 2, 2008); *R. v. C.M*. (endorsement of the Court of Appeal for Ontario, C36764/M36765, October 24, 2008); *R. v. Hanemaayer* (endorsement of the Court of Appeal for Ontario, C48928, January 13, 2009).

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 684(3), 694, 694.1.

APPLICATION to fix tariff of fees. Application granted.

James Lockyer and *Joanne McLean*, for the applicant.

Jennifer M. Woollcombe, for the respondent.

The judgment of the Court was delivered by

[1] Binnie J. — This is an application under s. 694 of the *Criminal Code*, R.S.C. 1985, c. C-46, to fix a tariff of fees to be permitted counsel appointed by this Court under s. 694.1(1) to represent the applicant who was convicted of sexual assault in a trial in which he says he was denied the effective assistance of counsel. This Court’s order dated December 3, 2009 granted the applicant’s request for the appointment of counsel for the proceedings in this Court and “any incidental proceedings in the Ontario Court of Appeal”. This Court remanded the case back to the Ontario Court of Appeal for consideration of fresh evidence and to determine whether, in all the circumstances, the applicant’s continued conviction constitutes a miscarriage of justice. Section 694.1 reads as follows:

**694.1** (1) [Legal assistance for accused] The Supreme Court of Canada or a judge thereof may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal to the Court or to proceedings preliminary or incidental to an appeal to the Court where, in the opinion of the Court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

(2) [Counsel fees and disbursements] Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

(3) [Taxation of fees and disbursements] Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the Registrar of the Supreme Court of Canada, and the Registrar may tax the disputed fees and disbursements.

[2] The Attorney General consented to the appointment of James Lockyer as senior counsel and Joanne McLean as junior counsel. Although Legal Aid Ontario (LAO) declined to issue a legal aid certificate in this case, the parties have agreed that the administration and management of the account will be conducted by LAO as if a legal aid certificate were in place. As such, LAO’s policies and procedures, including billing practices and billing rules, are applicable. The parties have not, however, been able to agree on the rate that counsel should be paid. Mr. Lockyer requests that counsel fees be paid at a rate of $225 per hour, as well as $175 per hour for Ms. McLean. The Attorney General proposes that counsel fees should be set at the legal aid rate for complex cases (currently $120.02 per hour). The application to the Registrar to fix the rate of counsel fees in advance of taxation was referred by the Registrar to our panel as we dealt with the applicant’s original leave application.

[3] The Attorney General contends that the legal aid tariff should be presumed to be the normal measurement for a lawyer paid from the public purse (relying on *R. v. Cairenius* (2008), 232 C.C.C. (3d) 13 (Ont. S.C.J.), and *R. v. Magda*, [2001] O.J. No. 1861 (QL) (S.C.J.), at para. 56), but no such limitation is set out in s. 694.1(3). The legal aid tariff is unilaterally set by the Crown based on its own policies and priorities and cannot, in our view, be taken as conclusive, although it is a significant factor to be taken into account. As Sopinka J. commented in *Egan v. Canada*, [1995] 2 S.C.R. 513, “[i]t is not realistic for the Court to assume that there are unlimited funds to address the needs of all” (para. 104).

[4] The determination under s. 694.1(3) should be based on a broader assessment of what is fair and reasonable in the circumstances, including the recognition of the limits of state funding but having regard to such factors as counsel’s experience, the importance of the issues raised and the complexity of the case; see *Alberta (Chief Commissioner of the Human Rights and Citizenship Commission) v. Brewer* (S.C.C., No. 32695, a taxation decision of the Registrar of the Supreme Court of Canada, dated August 25, 2009) and *R. v. Pietrangelo*, 2008 ONCA 547, [2008] O.J. No. 5137 (QL).

[5] The Attorney General has conceded a number of the issues in the proceedings including his anticipation that the Court of Appeal will order a new trial (Factum, at para. 2). The issues are somewhat complex having already been the subject of one trial, one lengthy arbitration hearing, one appeal to the Divisional Court of Ontario, three appeals to the Ontario Court of Appeal, two applications to this Court, and one appeal to this Court. At the same time, the Attorney General notes in his factum that the referral back to the Ontario Court of Appeal was on consent and “the Crown acknowledged before counsel filed any material at all in the Court of Appeal that the conviction should be set aside and this potential miscarriage of justice corrected through the ordering of a new trial” (para. 29). These concessions certainly reduced the scope of the demands made on counsel for the applicant, and (undoubtedly) the time required to be spent to reach a resolution. However, counsel should not be penalized by a reduced hourly rate for the efficiency with which a dispute is resolved. The efficiency will be reflected in the reduced number of hours charged.

[6] Mr. Lockyer and his colleague, Ms. McLean, have over 30 years and 20 years experience respectively, and both have practised criminal law exclusively throughout their careers. Rates equivalent to those requested by counsel in this case, or higher, have previously been set in the Ontario Court of Appeal by the Registrar and by Rosenberg J.A. on applications under the comparable costs regime set out in s. 684(3) of the *Code*; see *Pietrangelo*, *R. v. Kumar* (Ont. C.A., C48821, endorsement dated October 2, 2008), *R. v. C.M*. (Ont. C.A., C36764/M36765, endorsement dated October 24, 2008), and *R. v. Hanemaayer* (Ont. C.A., C48928, endorsement dated January 13, 2009).

[7] In our respectful view, on a consideration of all the circumstances of this case, the rates proposed by Mr. Lockyer are fair and reasonable. His hourly rate should therefore be fixed at $225 per hour and Ms. McLean’s at $175 with respect to proceedings in this Court and “any incidental proceedings in the Ontario Court of Appeal”.

*Application granted.*

Solicitors for the applicant:  Lockyer Campbell Posner, Toronto.

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