93 Farley J. went on to cite the *Boe* decision regarding the power of the Court to review discretionary decisions of trustees and concluded at para. 30, without expressly commenting on whether the interpretation of the pension plan text by the administrator was a discretionary decision, that the administrator "operated appropriately" in interpreting the text of the pension plan in accordance with its plain language. He concluded that the administrator's conduct appeared to be reasonable and evenhanded amongst the members and far from arbitrary and capricious.

94 It is noted that the pension plan in *Massaro* did not contain an express provision empowering the Trustees to interpret the provisions of the plan as provided for in the trust agreement in the case at bar. More importantly, *Massaro* was decided before *Schmidt*, in which the Supreme Court of Canada made it clear that in cases where a pension plan is impressed with a trust, the administration of the trust is subject to the requirements of trust law.

95 *Electrical Industry of Ottawa Pension Plan v. Cybulski*, [2001] O.J. No. 4593 (Ont. S.C.J.) involved an application for advice and directions regarding the interpretation of pension plan provisions as to credited service. At issue was the interpretation of "insurance benefit", which was not defined in the pension trust agreement. The trust agreement empowered the trustees to construe its terms and provisions and provided that any such construction adopted in good faith was binding on all parties. Roy J. cited the four factors in *Boe* relating to the review by a court of discretionary decisions of trustees, but went on to state at para. 22:

> The Courts also look to the economic and social purpose of the contract to interpret such documents. In the instance of ambiguous contract language, the interpretation should give effect to reasonable expectations of the parties. Courts are reluctant to interpret a contract in such a way as to produce an unrealistic result. The Supreme Court has held that the most reasonable and fairest interpretation of a contract is one, which promotes the intention of parties to the contract. (See *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551 at para.68 onward.)
>
> The Court after reviewing the documents and the facts must give careful consideration to the complete picture. In interpreting pension plan contracts, the Courts are guided not only by the language of the pension plan document, but also by the parties' conduct, statements, and representation made to each other. (See *Bathgate et al. v. National Hockey League Pension Society et al.* (1994), 16 O.R. (3d) 761 (C.A.) at 768.)
>
> If there is a conflict between Trust Agreements and pension plans text, equitable principles override common law principles, (See *Schmidt v. Air Products Canada Ltd.*, [1994] S.C.R. 611, (See reference at page 641.)

96 Roy J. acknowledged at paras. 18-20 that trustees, in exercising their interpretative function, generally use interpretative principles that are the same or analogous to those applicable to contract interpretation and to a lesser extent, statutory interpretation. However, he also noted that trustees are obliged to interpret trust agreements in a way that is evenhanded as between beneficiaries. He added at paras. 19-20 that where a suggested interpretation of a pension document creates extra benefits for some members, it must be kept in mind that this extra benefit creates a corresponding burden on others, including other beneficiaries and possibly employer and employee contributors. He concluded at para. 31 that the trustees' interpretation of "insurance benefit" was "more reasonable and consistent with the Trust Agreement".

iv) Application to the case at bar

97 In my view, the difficulty in attempting to fit a "correctness" or "reasonableness" standard of review into a trust situation is that neither approach adequately responds to the situation before me, namely the exercise by trustees of their power to construe trust documents. The decisions of the Trustees made "in accordance with the Trust Agreement or the Plan" (per Art. 5.10) are binding on members of the TCPP. Presumably then, if their interpretation of provisions of the TCPP does not accord with the trust agreement or the TCPP, it will be open to challenge. However, in this case, the term at issue, "remuneration", is *not* defined in the TCPP or related documents and is therefore subject to interpretation. The principles of construction of contracts will come into play when reviewing the decisions of trustees as to the interpretation of trust documents. However, in exercising its review jurisdiction the Court must also consider whether the interpretation adopted by the Trustees was fair and equitable in all of the circumstances given the trust context.

98 Accordingly, I am of the view that in reviewing the decision of the Trustees exercising their power to interpret the trust agreement, TCPP and related documents, I must consider whether their decision was: 1) consistent with the intention of the settlors of the trust (as reflected in the trust documents); and 2) fair and equitable in all of the circumstances.

99 Farley J. appears to have exercised his review jurisdiction in a similar fashion in *Rivett* when he concluded at para. 30 that the administrator "operated appropriately" in interpreting the pension plan provisions in accordance with their plain language and "that otherwise its conduct cannot be faulted"; its conduct appears to be "reasonable and evenhanded amongst the members and to be far from arbitrary and capricious."

4. Did the Trustees breach their duty to the Plaintiffs in excluding TRI from pensionable earnings?

100 Three of the four elements of a cause of action in breach of trust have been established by the Plaintiffs on the evidence:

> 1. There was a trust relationship between the Plaintiffs, as beneficiaries of the pension plan, and the Trustees;
>
> 2. The Trustees were required to carry out their duty to provide benefits to the Plaintiffs in accordance with the pension plan (Art.5.01(f)) of the trust agreement); and
>
> 3. The decision of the Trustees not to include TRI in the Plaintiffs' pensionable earnings resulted in the Plaintiffs receiving a pension benefit in a smaller amount than what they would have been entitled to had TRI been included in the calculation of pensionable earnings.

101 Thus, the only issue is whether the Trustees breached their duty to provide benefits to the Plaintiffs in accordance with the TCPP.

102 D.W.M. Waters described the basis of the breach of trust action at pp. 987-88:

> Breach of trust occurs whenever a trustee fails to carry out his obligations under the terms of the trust, the rules of equity or statute. The failure may take the form of doing something contrary to those obligations, or of neglecting to do something which he ought to have done...
>
> (1) The Courts often refer to a "technical breach of trust", and herein lies an important feature of Trustees' liability. A breach of trust occurs when the trustee's duty to act precisely within the terms of his obligations is not fulfilled. If he fails in this, it is of no significance that he had no intention of departing from his duty. Trustees have been found in various conditions of blame worthiness - fraudulent, wilfully neglectful, slovenly in their conduct of trust affairs, and incompetent - but none of these elements need to be proved in order to establish a breach of trust. If the letter of the trustee's obligation has not been adhered to for whatever reason, he is liable to his beneficiaries for any loss which has occurred as a result...

103 As I earlier concluded, the determination of whether the Trustees failed to carry out their obligations to the Plaintiffs should be made by considering whether their decision to exclude TRI from pensionable earnings was consistent with the intention of the settlors of the trust, as reflected in the trust documents, and was fair and equitable in all of the circumstances.

i) TCPP definition of "earnings"

104 The TCPP defines "earnings" as follows:

> 2.01 In the Plan, *unless the context of the subject matter otherwise requires*, the following defined terms shall have the following meanings:

(s) "Earnings" means the remuneration:

(i) paid to an Employee by the Corporation during the taxation year or portion thereof and shall not include a payment for Service Leave where granted and paid in a lump-sum, and

(ii) paid by a Reciprocating Employer during the taxation year or portion thereof to a person who has a period of Credited Employment in that taxation year as a result of an agreement with that Reciprocating Employer;

[emphasis added]

105 The TCPP defines "Member" as follows in Art. 2.01:

(ee) "Member" means an Employee who is required to make or has made Contributions to the Trust Fund, or a former Employee who has retired and is entitled to a pension or is entitled to a deferred pension; ...

106 Art. 6.07 of the TCPP provides for mandatory deductions of pension contributions from earnings:

6.07 The Corporation shall deduct Contributions each pay period from Earnings and pay the Contributions into the Trust Fund, not later than thirty (30) days after the end of the period in respect of which such Contributions were deducted.

107 Stentor's pension plan, effective as of January 1, 1993, defined earnings so as to exclude TRI for those employees who subscribed to Option 2:

Section 2 - Definitions

The following words and phrases, when used in this Plan, unless the context clearly indicates otherwise, shall have the following meanings:

. . .

2.16 Earnings

"Earnings" means a Member's base pay received from Stentor or its Affiliates for the performance of regular duties as an Employee, as reflected in the payroll records of Stentor or its Affiliates, *exclusive of* vacation pay, overtime pay, bonuses, allowances, *total results incentive*, recognition incentive provision, other remuneration and the cash value of benefits or perquisites. It is provided, however, that:

• For purposes of benefits earned under Option 1, Earnings of a Member in a calendar year includes the Member's total results incentive up to the target amount in respect of such calendar year, with any lump sum payments made in respect of a period of more than one month to be assumed to be paid uniformly over the period in respect of which they are made, and

• For purposes of benefits earned under Option A, Earnings of a Member includes lump sum merit payments and bonus payments earned prior to 1971.

The determination by Stentor or its Affiliates as to the amount of a Member's Earnings for purposes of the Plan shall be conclusive and binding on all persons.

[emphasis added]

108 The relevant portions of the Reciprocal Agreement entered into between the Trustees and the Stentor Pension Plan state:

1. Definitions

In this Agreement, the following terms, when capitalized, have the following meanings:

. . .

(g) "Pensionable Employment" means the period of employment which is used to determine the amount of pension benefits under the Stentor Plan or the Telus Plan.

. . .

(j) "Term of Employment" means the period of employment which is used for the purpose of determining eligibility for benefits under either the Stentor Plan or the Telus Plan.

3. Service Credited Under the Importing Plan

(a) . . .

(b) Transfers from the Stentor Plan to the Telus Plan

This paragraph (b) applies to Transferred Employees who are transferring from the Stentor Plan to the Telus Plan.

(i) Employees Who Originally Transferred from the Telus Plan to the Stentor Plan

For a Transferred Employee who originally transferred from the Telus Plan to the Stentor Plan and who is transferring back to the Telus Plan, the Term of Employment and Pensionable Employment that was originally recognized under the Telus Plan and then the Stentor Plan shall be recognized under the Telus Plan.

The transfer value in respect of such Pensionable Employment shall be calculated as described in Section 4(a) below.

The Transferred Employee's Term of Employment recognized under the Stentor Plan for employment with Stentor shall be recognized under the Telus Plan. The Transferred Employee's Pensionable Employment recognized under the Stentor Plan for employment with Stentor shall be recognized under the Telus Plan as follows:

A. For a Transferred Employee who participated in Option 1 of the Stentor Plan ...

B. For a Transferred Employee who participated in Option 2 of the Stentor Plan, the Pensionable Employment of the Transferred Employee under Option 2 of the Stentor Plan shall be recognized under the Telus Plan.

4. Calculation of Transfer Value

The Exporting Plan shall pay a transfer value to the Importing Plan in order to compensate the Importing Plan for the recognition of Pensionable Employment described in Section 3 above. Such transfer values shall be determined as follows:

(a) Transfer Value for Pensionable Employment Transferred Back to the Telus Plan for Employees who Originally Transferred from the Telus Plan to the Stentor Plan as of January 1, 1993.

The transfer value for Pensionable Employment referred to in the first paragraph of s.3(b)(i) above as it relates to employees who transferred from the Telus Plan to the Stentor Plan as of January 1, 1993, shall be equal to the amount of funds originally transferred from the Telus Plan to the Stentor Plan, plus earnings on such amount from

the date of the initial transfer of such funds to the last day of the month preceding the date of the subsequent transfer of funds at a rate equal to the rate of return on the pension fund of the Stentor Plan for such period, determined on a market value basis and net of investment management expenses actually paid as reflected in the audited financial statements.

(b) Transfer Value for All other Pensionable Employment

The transfer value for Pensionable Employment transferred from the Telus Plan to the Stentor Plan or vice-versa, other than the Pensionable Employment described in paragraph (a) above, shall be the actuarial value in respect of the Pensionable Employment of the Transferred Employee determined in accordance with the terms and conditions of the Exporting Plan on the date the Transferred Employee ceased participating in the Exporting Plan. The actuarial value shall be determined initially by the Exporting Administrator, subject to the acceptance by the Importing Administrator, using the actuarial assumptions set out in Appendix A. *Such determination shall be made as of the day prior to the employee transfer.*

[emphasis added]

. . .

ii) The expert evidence

109 Mr. Eric Haynes was called as an expert witness in the area of pension practice by the Plaintiffs. He is a pension consultant with over twenty years' experience and is involved in the design and administration of pension plans. He noted that the TCPP and SPP Option 2 are both defined benefit pension plans, the only significant difference between them being their respective definitions of "earnings".

110 According to Mr. Haynes, the key to the dispute in this case is the Reciprocal Agreement. Common among larger employers, such agreements define the conditions under which employees may move from the pension plan of one employer (the exporting plan) to the pension plan of another employer (the importing plan). A reciprocal agreement provides for the transfer of assets from the exporting plan to the importing plan to compensate for the transfer of liabilities associated with the transfer of service from one employer to another.

111 Mr. Haynes calculated the Plaintiffs' pension entitlement, as repatriated employees of TELUS, based on the TCPP definition of earnings. In his opinion the term "remuneration" in the TCPP refers to *all* remuneration received by the employee. He stated that upon a former Stentor employee being repatriated to TELUS, no distinction should have been made by the Trustees between the old TELUS service transferred to the SPP and then reinstated in the TCPP, and the Stentor service transferred to the TCPP. I note parenthetically that the "old TELUS service" of the Plaintiffs did not include VP, as that program did not exist when the Plaintiffs moved to Stentor in January 1993. Mr. Haynes concluded that the Trustees should not have distinguished between "service" under the TCPP and "service" under the SPP, as all service is classified as service under the TCPP by the operation of the Reciprocal Agreement. In that sense, Stentor was "caught in the definition of earnings" in the TCPP which in the opinion of Mr. Haynes refers to *all* remuneration received by the employee.

112 In Mr. Haynes' opinion, the fact that repatriated employees were not required to make pension contributions on their TRI while employed at Stentor is irrelevant in the context of a defined benefit pension plan, as the pension benefit is paid pursuant to a formula and does not depend on the amount of the contributions to the plan. Also, given that the TCPP pensions are based on a set formula, the inclusion of TRI in the pensionable earnings of the Plaintiffs would have no effect on the pensions of other TCPP members. Mr. Haynes added that the TCPP could simply have asked Stentor for more money to compensate for the inclusion of TRI in the pensionable earnings of repatriated employees.

113 On cross-examination, it was pointed out to Mr. Haynes that Art. 2.01, which defines "earnings", includes the proviso "unless the context of the subject matter otherwise requires". He acknowledged that the only "context" he examined in determining the meaning of "earnings" was the TCPP's definition of "Earnings" in Art. 2.01(s).

114 Mr. William Moore was called as an expert witness by the Trustees in the area of pension practice. He has over twenty years of experience as a consulting actuary to private and public sector pension plan sponsors and is involved in the design and management of pension plans.

115 He stated that in his experience, pensionable earnings invariably reflect only employment earnings on which pension contributions have been made. Mr. Moore observed that: 1) the TCPP contemplates contributions being made by its members, as the definition of a "Member" in Art.2.01(ee) makes this clear; and 2) Art. 6.07 requires TELUS to deduct contributions from earnings. According to Mr. Moore, earnings and pension contributions go hand-in-hand under the TCPP; if no pension contribution has been made on an amount received by the employee, that amount should not be characterized as "earnings" under the TCPP. As no pension contributions had been made on TRI received by the Plaintiffs while employed at Stentor, TRI was properly excluded from their pensionable earnings on their eventual retirement from TELUS.

116 Mr. Moore acknowledged that the pensions of members of the TCPP, other than repatriated employees, would not be affected if TRI received by the repatriated employees were to be included in pensionable earnings. However, Mr. Moore stated that to include TRI would result in: 1) the repatriated employees receiving pension benefits to which they would not have been entitled under the SPP; and 2) TELUS bearing an additional cost, as TRI would not have been included in the calculation of assets transferred from Stentor to TELUS pursuant to the Reciprocal Agreement to fund the transfer of liabilities. Mr. Moore noted that the Plaintiffs' offer to the Trustees in 1999 to make pension contributions on TRI they had received while at Stentor would not have fully addressed the funding issue because the sum of assets proposed to be transferred would not equal the actuarial liability created with the inclusion of TRI in pensionable earnings.

117 Mr. Moore described the Reciprocal Agreement as "quite explicit" in stating in s. 4(b) that the amount of assets transferred reflected the terms and conditions of the exporting plan (the SPP in the context of repatriated employees). The SPP's terms and conditions expressly excluded from "earnings" TRI paid to employees (except those under Option 1). Thus, according to Mr. Moore, s. 4(b) of the Reciprocal Agreement supports the position that pensionable earnings should be calculated based on the SPP definition of earnings which did not include TRI.

118 Mr. Moore did not agree with Mr. Haynes that a distinction had been made by the Trustees between service with TELUS and service with Stentor. Service is generally described in pension plans as "pensionable service" or "credited service". It is defined in the TCPP as the "*period of time* which shall be used in the calculation of a pension or determining eligibility for a pension". Mr. Moore asserted that the same formula was consistently applied for each year of service, whether at Stentor or TELUS.

iii) Was the decision of the Trustees consistent with the intention of the settlors of the trust, as reflected in the trust documents?

119 The Plaintiffs argue that the plain ordinary meaning of "remuneration" in Art.2.01(s) of the TCPP includes *all* income received by the employee member of the TCPP. The *New Oxford Dictionary of English* (Clarendon Press: Oxford, 1998) defines "remuneration" as "money paid for work or a service." Section 100 of the *Income Tax Regulations*, C.R.C., c.945 also contains a very broad definition of "remuneration".

120 The Plaintiffs submit that as a cardinal principle of construction of contracts, words should be given their "plain, ordinary meaning": *Merrill Petroleums Ltd. v. Seaboard Oil Co.* (1957), 22 W.W.R. 529 (Alta. T.D.), at 550; upheld on appeal, (1958), 25 W.W.R. 236 (Alta. C.A.), unless it would result in an absurdity: *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.), at 115. They submit that, in any event, if

the language of a contract cannot be clearly construed, the doctrine of *contra proferentem* applies: see G.H.L. Fridman, *The Law of Contract*, 3d ed. (Toronto: Carswell, 1994) at 470.

121 The Plaintiffs point out that the drafters of the TCPP chose to define earnings as "remuneration" (whether paid by TELUS under Art. 5.02(s)(i) or by a reciprocating employer under Art. 5.02(s)(ii)); they did not expressly restrict the term to remuneration "as defined in the pension plan of a reciprocating employer", or to remuneration "upon which pension contributions have been made." Thus, their clear intent was to include all forms of remuneration in the definition of earnings. Moreover, representations made in TCPP brochures that the amount of the pension benefits did not depend on the contributions made reflect this intention. Accordingly, TRI, which was money paid for a service, should have been included in the Plaintiffs' pensionable earnings.

122 The Trustees submit that principles of contractual interpretation differ from those applicable to trust arrangements. The intentions of the settlor must be discerned from a fair reading of the language of the trust documents: see *Schmidt*, per McLachlin J. (dissenting in part) at para. 196, quoted with approval in *Manitoba Health Organizations Inc. v. Byron*, [1998] M.J. No. 170 (Man. Q.B.) at para. 82. The Trustees point out that a trust is not an agreement between parties involving mutual obligations; rather, it is a method of transferring property. The intention of the settlors of the TCPP was to ensure that the Trustees retain the power to interpret the provisions of the TCPP, including its definition of earnings, and to base pension entitlement on earnings upon which pension contributions have been made.

123 The Trustees are clearly empowered, pursuant to Art. 5.02(y), to interpret the "Trust Agreement, the Plan, and related documents". I am of the view that the interpretation of the term "earnings" by the Trustees to exclude TRI received by repatriated employees while employed by Stentor was consistent with the intention of the settlors of the trust, as reflected in the TCPP and related documents, when considered in the particular context of reciprocating pension plans, for the following reasons:

> 1. As "remuneration" was not defined in the TCPP, the Trustees were empowered to interpret the term pursuant to Art.5.02(y) of the Trust Agreement.
>
> 2. The definition of "earnings" in s.2.01(s) of the TCPP does not refer to "all" remuneration paid by a reciprocating employer.
>
> 3. The contributory defined benefit scheme adopted by the settlors of the pension trust provides for mandatory pension deductions from earnings pursuant to Art.6.07 of the TCPP, which is indicative of an intention on their part to link pensionable earnings to mandatory pension contributions. Moreover, the fact that mandatory pension contributions were taken from variable pay, a TELUS bonus system similar to TRI, is further evidence of this intention.
>
> 4. The preamble of the definition section of the TCPP permits the Trustees, in their interpretative function, to consider the context in which the terms defined in Art. 2.01 are used. The preamble states: "... unless the context of the subject matter otherwise requires". In this case, the context was one of reciprocity as between two employers regarding the pensions of transferring employees. The definition of "earnings" in the TCPP includes reference to remuneration paid by a "Reciprocating Employer", defined in s.2.01 (mm) as "an employer who is participating in a pension or retirement plan with which the Trustees have a reciprocal agreement". Stentor was a reciprocating employer. Although Stentor's pension plan did not define "remuneration", its definition of "earnings" specifically excluded TRI in the case of employees who did not elect Option 1.
>
> 5. Given the proviso in Art.2.01 of the TCPP ("..unless the context of the subject matter otherwise requires"), the Trustees were entitled to consider the Reciprocal Agreement as a "related document" to the TCPP under Art.5.02(y) of the TCPP. As pointed out by Mr. Moore, the interpretation of "earnings" of repatriated employees to exclude TRI is consistent with the Reciprocating Agreement, in the sense that s.4(b) of the agreement requires the transfer value of assets from the Stentor Plan to the TCPP to be determined "in

accordance with the terms and conditions of the Exporting Plan" (the SPP). TRI was not factored into the calculation of the transfer value of assets needed to fund the liabilities associated with the transfer of pension entitlements from one employer to another, as the SPP excluded TRI from its definition of earnings. The interpretation of "earnings" to exclude TRI is consistent with the scheme of the Reciprocal Agreement for the transfer of assets to fund transferred pension entitlements.

6. In defining earnings to exclude TRI, the Trustees did not, as Mr. Haynes suggested, draw a distinction between "service" under the Stentor plan and "service" under the TCPP. The TCPP contains no definition of "service" but, as noted by Mr. Moore, defines "credited service" (in Art. 2.01(o)) as "*the period of time* which shall be used in calculation of a pension or determining eligibility for a pension". The same formula was applied for *each year of service*, whether at Stentor or TELUS.

124 Accordingly, I am of the view that the Trustees' decision to exclude TRI from pensionable earnings in the case of repatriated employees was consistent with the trust documents, which reflected an intention on the part of the settlors that pensionable earnings be tied to mandatory pension contributions. The Trustees' decision did not have the effect of "amending" the TCPP given the particular context (reciprocating employers) in which they were called upon to define "earnings".

iv) Was the decision of the Trustees to interpret "earnings" as excluding TRI fair and equitable in all of the circumstances?

125 The Trustees submit that their decision was fair because to include TRI in pensionable earnings would have provide the Plaintiffs with pension entitlements in excess of what they would have received had they remained employed at Stentor. Moreover, to include TRI would have been unfair to the other members of the TCPP who were required to make pension contributions on their VP.

126 The Plaintiffs submit in response that they had no choice in whether or not they remained with Stentor. As a result of their termination from Stentor, they lost certain guaranteed inflation indexing benefits on their pensions. They note that the inclusion of TRI in their pensionable earnings would not affect the amount of pension benefits of other members of the TCPP, a defined benefit pension plan, and any unfunded liability thereby created would not be the responsibility of pension plan members to defray. The Plaintiffs also suggest that as the SPP accumulated a substantial surplus, a portion of which was turned over to the TCPP, that surplus could have been made available to make up any unfunded liability arising from a decision to recognize TRI as pensionable.

127 The Plaintiffs add that on their reinstatement they were assured by the president of TELUS they would be treated no differently than any other TELUS employee. However, they submit that the decision of the Trustees thrust upon them a different calculation of their pension benefit than was used for other members of the TCPP and a different calculation than was used for repatriated employees who had participated in Option 1 of the SPP. They had also been told on several occasions that their pensions did not depend on the amount of their contributions, yet the fact that they did not make contributions on TRI they received was a reason advanced by the Trustees to justify their decision not to consider TRI as pensionable earnings.

128 The Trustees submit in response that all members of the TCPP are treated in a consistent fashion as their pension entitlements are calculated on the basis of only compensation upon which they have made pension contributions. If TRI the Plaintiffs received at Stentor were to be included in their pensionable earnings, they would be treated differently from other TELUS employees. The Plaintiffs were not obliged to make pension contributions on their TRI, but TELUS employees were required to make pension contributions on their VP. The Trustees also note that Option 1 of the SPP was a non-contributory pension plan, in the sense that only the employer made contributions. Special arrangements were therefore required to re-integrate repatriated employees who had selected Option 1 into the very different pension regime of the TCPP.

129 The Trustees also point out that although repatriated employees were told that their pensions at TELUS did not depend on the *amount* they contributed, the TCPP, being a contributory defined benefit pension plan, still depends on the *fact* of contribution. The Plaintiffs are proposing to receive pension benefits on TRI without contribution.

130 As to the suggested use of surplus funds from the SPP to defray the liability associated with recognizing TRI as pensionable, the Trustees point out that the surplus is not the property of any one group of employees. As noted by Mr. Moore, the surplus, if owned by employees of a pension plan, belongs to all members of the plan. Its existence cannot be the basis of a decision to award higher benefits to a certain group of employees. Mr. Moore also testified that if the Trustees grant benefits which are not fully funded, the amount of surplus that may be available for distribution in future would be affected. As noted by Farley J. in *Rivett* at para.26 "the "extra" money to fund the version of the plaintiff's interpretive version must come from somewhere..."

131 I am of the view that the decision of the Trustees was fair and equitable in all of the circumstances. Although a surplus existed in the SPP, I accept Mr. Moore's testimony, having regard to his experience with pension administration, that surpluses cannot be used for the benefit of a particular group of beneficiaries. Mr. Moore noted that the cost of living benefit in the TCPP's supplementary plan is driven by the amount of surplus in the TCPP. Art. 18.08 and 18.16 of the TCPP permit the Trustees, with the approval of TELUS, to transfer amounts from the surplus to the Supplemental Benefits Account from time to time. Thus, if the Trustees grant benefits that are not fully funded, then less funds are available as surplus for such purposes as this in future.

132 Although the recognition of TRI as pensionable would not diminish the pension benefits of other members of the TCPP, I am of the view that the decision of the Trustees was evenhanded and consistent as between TELUS members and repatriated members of the TCPP, as it linked earnings to pension contributions. Although the repatriated employees were not provided with an opportunity while employed at Stentor to make contributions on TRI, they were able to, and in fact did, take advantage of investing higher amounts into their RRSP's.

133 Accordingly, I am of the view that the decision of the Trustees to exclude TRI from the pensionable earnings of repatriated employees was fair and equitable in the circumstances and should not be interfered with.

5. Are the Plaintiffs, as members of the TCPP, entitled to costs in any event of the cause, the issue being one of interpretation of a pension plan?

i) Positions of the Parties

134 The Plaintiffs claim costs on a solicitor-client basis in any event of the cause, based on the principles in *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.) . In *Buckton, Re*, Kekewich J. identified three categories of application in which payment of costs from an estate or trust fund is sought:

> 1. An application made by trustees of a will or a settlement, asking the court to construe the trust instrument for their guidance; to ascertain the interests of the beneficiaries; or to answer a question which arises in the administration of the trust. In such instances, the costs of all parties, which are necessarily incurred for the benefit of the estate, should be taxed as between solicitor and client and paid out of the estate;
>
> 2. An application made by the beneficiaries as a result of a difficulty of construction or administration of the trust which would have justified an application by the trustees. Again, the application is necessary for the administration of the trust and the costs of all parties, which are necessarily incurred for the benefit of the estate, are paid out of the estate;
>
> 3. An application made by the beneficiaries who make claims adverse to other beneficiaries. Such litigation is adversarial in nature and, subject to the Court's discretion, the unsuccessful party bears the costs of those whom he or she brings to the Court.

135 The Plaintiffs submit that their claim falls within the second category described by Kekewich J.. The Trustees could have sought advice and direction from the Court on the issue of the interpretation of "earnings" in the TCPP

136 The Plaintiffs cite *Taylor v. Alberta Teachers' Assn.*, 2002 ABQB 554 (Alta. Q.B.), a class action in which the plaintiffs sought injunctive relief and an order directing that the defendant association account for its use of monies from a pension fund to pay administrative costs and to reimburse those costs. In *Taylor*, Sanderman J. granted an order for payment of the plaintiffs' interim costs from the pension fund. He concluded that the litigation concerned an issue central to the management of the fund. The matter was not adversarial; rather, the members of the plan were asking the Court to interpret a course of action followed by the Association. Sanderman J. noted at para.21 that had the association sought the same relief from the Court before embarking on the course of action it did, he doubted very much that the association would have characterized the litigation as adversarial.

137 The Plaintiffs point out that their action does not involve a dispute between beneficiaries and that the success or failure of their claim will have no effect on the amount of pension being received by other TCPP members. In *Turner v. Andrews*, 2001 BCCA 76 (B.C. C.A.), the plaintiff sued as a representative of a class of members of a pension plan and alleged that a scheme under which pension plan surpluses were distributed to members was in breach of the trustees' common law and fiduciary duties to hold an even hand among the beneficiaries of the plan. The class of which the plaintiff was a member earned incentive bonuses which were not included in the "average annual earnings" over the three years prior to retirement, on which surplus distributions were based. The plaintiff applied unsuccessfully prior to the hearing of the action for his costs to be paid out of the plan. On appeal, Newbury J.A. stated, at para. 17:

> This case is truly adversarial in nature, not having been brought for the benefit or in the interests of the Plan as a whole, but for the particular class of Plan members Mr. Turner represents. If he succeeds, other members will necessarily receive less by way of benefits than would otherwise be the case. If he loses, the fund held for the benefit of all members will be diminished (by the amount of his costs) without the prospect of recovery.

138 *C.A.S.A.W., Local 1 v. Alcan Smelters & Chemicals Ltd.*, 2001 BCCA 303 (B.C. C.A.) involved an application by members of a pension plan for a declaration that an amendment to their pension plan eliminating overtime pay from the calculation of pensionable earnings was unlawful. Levine J.A., for the Court, distinguished the circumstances from those in *Turner*, as the case did not involve a dispute between beneficiaries and the success or failure of the appellants would have no effect on the benefits of other members of the plan who did not earn overtime pay. The plan was ordered to pay the reasonable costs and disbursements of the appellants.

139 Finally, the Plaintiffs argue that this case is significant not only for themselves but for several other individuals who were repatriated by TELUS and then terminated before acquiring five years of service with TELUS. They also maintain that given the importance of the issue and the fact that "remuneration" was not defined in the TCPP, the Plaintiffs, in bringing the action, did something that could, and should have been done by the Trustees themselves. Accordingly, they submit they should not be burdened by costs.

140 The Trustees oppose the Plaintiffs' application for costs and seek costs against the Plaintiffs on a solicitor-client basis. They first point out that the application in *Buckton, Re* was commenced by an originating summons (akin to an originating notice) and not by a writ. In the present case, the Plaintiffs elected not to proceed under R.410 of the *Alberta Rules of Court*, but by statement of claim. The Trustees assert that this reflects the adversarial nature of their claim. They refer to *Lloyd v. Imperial Oil Ltd.*, 2001 ABQB 407 (Alta. Q.B.), an action brought by a group of employees challenging an amendment to a pension plan which had the effect of rendering them ineligible for an enhancement provision in the plan. Clarke J. refused the plaintiffs' application for prospective costs payable from the pension plan. He commented at para. 8:

> ... a relatively small group of people from the Plans say that the Defendant is not correctly calculating their entitlement under the Plans. By way of contrast this is not an action where a trustee of a plan is seeking the Court's

advice and direction with respect to how to interpret and apply a clause in the plan nor is it a case where members covered by the plan are bringing an action with respect to the operation of the plan that would benefit all members of the plan.

141 Clarke J. also noted at para. 13 that providing prospective costs to the plaintiffs removes the discipline of the trial process by giving a plaintiff a licence to bring any kind of application without facing the risk of a cost penalty if unsuccessful.

142 The Trustees distinguish *Taylor* as there the claims were brought on behalf of all members of a pension plan alleging various forms of mismanagement of the trust fund. In the present case, a relatively small number of beneficiaries are involved and the action does not involve the protection of the corpus of a trust fund from mismanagement. Finally, the Plaintiffs are seeking a money judgment and costs should thus follow the event.

143 In response, the Plaintiffs point out that there were material facts in dispute so as to render an application under R. 410 inappropriate. They also point out that only trustees can make application for advice and directions under R. 410(f) "pursuant to the *Trustee Act*". Section 43(1) of the *Trustee Act*, R.S.A. 2000, c.T-8, provides that "any *trustee*" may apply in court or in chambers for the opinion, advice or direction of the Court.

ii) Application to the case at bar

144 In my view, there were no circumstances alleged in this case by the Trustees that would justify the award of solicitor-client costs against the unsuccessful Plaintiffs. Their claim, although unsuccessful, was not devoid of merit and there is no suggestion that their conduct of the action was such to attract the exceptional sanction of solicitor-client costs.

145 In *Electrical Industry*, the trustees of a pension plan applied for directions regarding the interpretation of a pension plan provision. Roy J. noted at para. 43 that frequently where the Court is asked to assist in interpreting documents, costs are not awarded to either party. A number of members of the plan had been granted leave to intervene and became respondents in that application. Roy J. observed that these members were encouraged by the trustees of the plan to provide an alternative position to the Court regarding the interpretation of the pension documents, noting that the trustees "had to approach the Court in a completely neutral position". Costs were accordingly awarded to the respondents.

146 The situation in the present case is distinguishable from that in *Electrical Industry* as the litigation was not based on an application for advice and directions. However, the Trustees took the position that their April 21, 1999 determination of the earnings issue was final. There is no suggestion in the evidence that they were at any time prepared to refer the matter to the Court for advice and directions, as *they* were empowered to do under Art. 5.09 of the trust agreement; however, they were not obliged to do so given the trust agreement provisions empowering them to interpret the trust agreement, the TCPP and related documents.

147 I am of the view that the fact that proceedings were commenced by statement of claim and that a remedial order was sought as against the Trustees does not disentitle the Plaintiffs from requesting costs in any event of the cause. The possible alternative of an application by originating notice pursuant to Rule 410(e)(i) would have been problematic given that there were some contentious factual issues.

148 It is noted that "remuneration" was not defined in the TCPP and that when the Trustees met to determine its meaning in the context of repatriated employees, they did not seek a legal or an actuarial opinion. Mr. Block recognized, in the memorandum he included in the package of materials circulated to the Trustees in advance of their April 21, 1999 meeting, that the TCPP "is not clear as there is no definition of what is considered remuneration" and that the Reciprocal Agreement was silent on the exact definition of earnings to be used. In contrast to the Trustees, this Court did have the advantage of a full evidentiary record, legal argument and expert actuarial opinions in exercising its review function.

149 Both Mr. Haynes and Mr. Moore are experienced senior actuaries and well-versed in pension practice, yet each honestly held a different opinion on whether TRI was properly excluded from pensionable earnings. From that perspective, it cannot be said that the Plaintiffs' case lacked merit.

150 It is also noted that: 1) the proceedings were not unduly protracted; 2) only one of the Plaintiffs was examined for discovery, the other Plaintiffs having agreed to be bound by his evidence except where otherwise noted in responses to undertakings; 3) the Plaintiffs did not oppose a late application by the Trustees for an adjournment of the trial; and 4) the parties were able to reduce trial time by compiling a comprehensive Agreed Statement of Facts and an agreed evidence binder in respect of most of the relevant facts and documents.

151 Regardless of the outcome of this action, the pensions of other members of the TCPP will not be affected, which distinguishes this case at bar from *Turner*. Although the corpus of the pension fund will be reduced by the amount of the costs, concerns as to whether costs claimed are reasonable can be addressed through taxation.

152 Finally, in his briefing materials circulated to the Trustees, Mr. Block alluded to a concern about establishing a precedent for other TELUS employees to request the inclusion of other non-pensionable earnings the definition of earnings under the TCPP. Accordingly, clarification as to the meaning of "earnings" in the TCPP is of some importance not only to the Plaintiffs, but to other members of the TCPP.

153 For these reasons, I am of the view that this is an appropriate case for the solicitor-client costs of the Plaintiffs to be paid from the TCPP.

V. Conclusion

154 Accordingly, the Plaintiffs' action is dismissed. The Plaintiffs' costs, taxed on a solicitor-client basis, shall be paid from the TCPP.

Action dismissed.

Footnotes

* Leave to appeal refused (2005), 2005 ABQB 272, 2005 CarswellAlta 1047 (Alta. Q.B.).

10

Most Negative Treatment: Check subsequent history and related treatments.

2003 SCC 71, 2003 CSC 71
Supreme Court of Canada

British Columbia (Minister of Forests) v. Okanagan Indian Band

2003 CarswellBC 3040, 2003 CarswellBC 3041, 2003 SCC 71, 2003 CSC 71, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, [2004] 1 C.N.L.R. 7, [2004] 2 W.W.R. 252, 114 C.R.R. (2d) 108, 127 A.C.W.S. (3d) 214, 189 B.C.A.C. 161, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, 309 W.A.C. 161, 313 N.R. 84, 43 C.P.C. (5th) 1, J.E. 2004-59

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests, Appellant v. Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: June 9, 2003
Judgment: December 12, 2003
Docket: 28988, 28981

Proceedings: affirming (2001), [2001] B.C.J. No. 2279, [2002] B.C.W.L.D. 21, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. British Columbia (Ministry of Forests) v. Jules) 92 C.R.R. (2d) 319 (B.C. C.A.); reversing in part (2000), 2000 BCSC 1135, 2000 CarswellBC 1559, [2000] B.C.J. No. 1536 (B.C. S.C.)

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Subject: Public; Civil Practice and Procedure; Constitutional; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Aboriginal law

I Constitutional issues
I.8 Canadian Charter of Rights and Freedoms

Aboriginal law

X Practice and procedure
X.7 Miscellaneous

Civil practice and procedure

XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.i "Costs in any event"

Civil practice and procedure

XXIV Costs
XXIV.24 Appeals as to costs
XXIV.24.b Interference with discretion of lower court

Constitutional law

XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.h Equality rights
XI.3.h.i General principles

Public law

I Crown
I.6 Practice and procedure involving Crown in right of province
I.6.h Costs
I.6.h.i Costs against Crown

Headnote
Aboriginal law — Practice and procedure — Miscellaneous issues

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have

not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Crown — Practice and procedure involving Crown in right of province — Costs — Costs against Crown

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Civil practice and procedure — Costs — Particular orders as to costs — "Costs in any event"

Courts have inherent jurisdiction to grant costs to litigant, in rare and exceptional circumstances, prior to final disposition of case and in any event of cause, where party seeking interim costs genuinely cannot afford to pay for litigation, claim to be adjudicated is prima facie meritorious, and issues raised are of public importance and have not been resolved in previous cases — Granting of interim costs to respondent Indian Bands claiming logging rights on Crown land by Court of Appeal upheld — Circumstances of this case were exceptional.

Civil practice and procedure — Costs — Appeals as to costs — Interference with discretion of lower court

Court of Appeal had sufficient grounds to review exercise of discretion by trial court and to grant interim costs to respondent Indian Bands claiming logging rights on Crown land — Appellate court may and should intervene with trial judge's exercise of discretion where trial judge has misdirected himself as to applicable law or made palpable error in his assessment of facts — Trial judge erred in overemphasizing importance of avoiding any order that involved prejudging issues.

Droit autochtone — Procédure — Questions diverses

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Couronne — Procédure mettant en cause la Couronne du chef de la province — Frais — Condamnation de la Couronne aux dépens

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile — Frais — Ordonnances particulières en matière de frais — Frais accordés quelle que soit l'issue de la cause

Tribunaux ont le pouvoir inhérent d'accorder des dépens à une partie au litige, dans des circonstances rares et exceptionnelles, avant le règlement définitif de l'affaire et quelle qu'en soit l'issue, lorsque: la partie qui réclame une provision pour frais n'est réellement pas en mesure d'assumer les coûts du litige; la question à trancher est à première vue méritoire; et les questions soulevées sont d'importance pour le public et n'ont pas été tranchées dans

le cadre d'affaires précédentes — Maintien de la décision de la Cour d'appel d'octroyer une provision pour frais aux bandes indiennes intimées, qui alléguaient détenir des droits de couper du bois sur les terres de la Couronne — Circonstances de l'espèce étaient exceptionnelles.

Procédure civile — Frais — Appels relativement aux frais — Intervention dans l'exercice du pouvoir discrétionnaire du tribunal inférieur

Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance et pour accorder une provision pour frais aux bandes indiennes intimées qui alléguaient détenir un droit de couper du bois sur les terres de la Couronne — Tribunal d'appel peut et doit intervenir dans l'exercice du pouvoir discrétionnnaire d'un juge de première instance lorsque ce dernier a mal compris le droit applicable ou a commis une erreur manifeste dans son appréciation des faits — Juge de première instance a commis une erreur en insistant trop sur l'importance d'éviter toute ordonnance nécessitant de préjuger les questions en cause.

Members of respondent Indian Bands began logging on Crown land in British Columbia without authorization under the Forest Practices Code of British Columbia Act, but with authorization from their respective tribal councils. The Minister of Forests served the Bands with stop-work orders and commenced proceedings to enforce them. The Bands, claiming they had aboriginal title to the lands in question and were entitled to log them, filed a notice of constitutional question. The Minister applied to have the proceedings remitted to the trial list, while the Bands urged that the matter be dealt with summarily because they lacked the financial resources for a protracted and expensive trial. Alternatively, they submitted that the matter should go to trial only if the Crown were ordered to pay their legal fees and disbursements in advance and in any event of the cause.

The chambers judge held that the case could not be decided based on the documentary and affidavit evidence alone but should be remitted to trial. He found that the court had a general discretion to award interim costs in exceptional circumstances, but that constitutional norms did not require such an order to be made in the Bands' favour. The chambers judge found that his jurisdiction to order the Minister to pay the Bands' costs in advance of the trial was very narrow, and that he was precluded from making such an order because that would involve prejudging the case on the merits. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

The Court of Appeal upheld the chambers judge's decision that the just determination of the issues required a trial. It agreed that the principle of access to justice did not oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit, and that s. 35 of the Constitution Act, 1982 did not obligate the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. However, the Court of Appeal held that the chambers judge placed too much emphasis on concerns about pre-judging the outcome, which were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. It held that the chambers judge had a discretionary power to order interim costs in favour of the Bands, and that such an order should have been made in the "exceptional" circumstances of this case. The Minister appealed.

Held: The appeal was dismissed.

LeBel J. (McLachlin C.J.C., Arbour, Binnie, Deschamps, Gonthier JJ. concurring): Courts have an inherent discretionary jurisdiction to award costs. The traditional purpose of an award of costs is to indemnify the successful party in respect of the expenses incurred either defending a claim that proved unfounded or in pursuing a valid legal right. However, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. While the principle of indemnity remains a paramount consideration, a costs award may also serve to encourage settlement, deter frivolous actions and defences, and discourage unnecessary steps in litigation.

The traditional approach to costs can also be seen as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Another relevant consideration, which has increased in importance as litigation over matters of public interest has become more common, is access to justice. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of interim costs forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. The discretionary power to award interim costs is limited to very exceptional cases and ought to be narrowly applied. It is most typically exercised in, but is not limited to, matrimonial or family cases. Interim costs may also be available in certain trust, bankruptcy and corporate cases, where they are awarded to avoid unfairness by enabling impecunious litigants to pursue meritorious claims.

The power to order interim costs is inherent in the nature of the court's equitable jurisdiction. Three criteria are relevant to the exercise of this power. First, the party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. Second, the claimant must establish a prima facie case of sufficient merit. Finally, there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. If the court decides to award interim costs in circumstances where key issues remain live and contested between the parties, it will in a sense be predetermining triable issues. While this may raise concerns about fettering the discretion of the trial judge who will eventually adjudicate the merits of the case, it should not in itself preclude the granting of interim costs if the relevant criteria are met.

In cases of public importance, the usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens have access to the courts to determine their constitutional rights and other issues of broad social significance. Moreover, it is often inherent in the nature of such cases that the issues to be determined are of significance not only to the parties but also to the broader community. As a result, the public interest is served by a proper resolution of those issues. It is for the trial court to determine in each instance whether a particular case, which might be considered "special" by its very nature as a public interest case, is special enough that the unusual measure of ordering costs would be appropriate.

The criteria for an award of interim costs to be available to an individual Charter claimant of limited means are therefore as follows: (i) the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; (ii) the claim to be adjudicated is of sufficient merit that it would be contrary to the interests of justice to forfeit the opportunity to pursue the case merely because the litigant lacks financial means; and (iii) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. If these three conditions are established, then courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation.

It was apparent from his reasons that had the chambers judge applied these criteria, he would have ordered interim costs in this case. He found as a fact that the Bands were in extremely difficult financial circumstances and could not afford legal representation; that their claims of aboriginal title and rights were prima facie plausible and supported by extensive documentary evidence; and that the case was one of great public importance, raising novel

and significant issues of profound importance to the people of British Columbia, the resolution of which would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in the province. The circumstances of this case were indeed special, even extreme. Accordingly, the criteria for an award of interim costs were met. The conditions attached to the costs order by the Court of Appeal would encourage the parties to resolve the matter through negotiation and ensure that there would be no temptation for the Bands to drag out the process unnecessarily.

The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to the applicable rules of court and the need to act judicially on the facts of the case. The chambers judge's decision was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it was not to be interfered with lightly. However, an appellate court may and should intervene in discretionary decisions where it finds that the trial judge misdirected himself as to the applicable law or made a palpable error in his assessment of the facts.

Two errors vitiated the chambers judge's decision in this case and called for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred in concluding that his discretion did not extend so far as to empower him to make the requested order. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation was not supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seemed unrealistic.

Major J. (dissenting) (Iacobucci, Bastarache JJ. concurring): Traditionally, costs are awarded at the conclusion of the trial or appellate decision, and almost always to the successful party. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce, but the ratio of the matrimonial cases makes it clear that such awards preserve the traditional indemnification purpose of costs. To award interim costs when liability remains undecided would be a dramatic extension of the precedent. Awarding costs in advance could be seen as prejudging the merits, as in the absence of compelling reasons, the objectivity of the court making such an order will almost automatically be questioned. Moreover, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications. While there may be public law questions where access to justice can be provided through the discretionary award of interim costs, such cases must lie closer to the heart of the interim costs case law. The development of the common law of costs should be initiated by trial courts properly exercising their discretionary power, not by appellate reversal of that discretion. In the circumstances of this appeal, the awarding of interim costs was a form of judicially-imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. That remedy lies with the legislature and law societies, not the judiciary.

While a case must be exceptional in order to attract interim costs, the proposition that "special circumstances" almost always exist where the public interest is invoked was too broad to meet the exceptional requirement. To say simply that the issues transcend the individual interests in the case and have not yet been resolved does not assist the trial judge in deciding what is "special enough" and provides no ascertainable standard or direction. Even if it were contrary to the interests of justice for an opportunity to pursue a case to be forfeited because the litigant lacks financial means, there was nothing to distinguish the present aboriginal land claims from any other. There was no evidence that these land claims should be considered "exceptional" nor was there anything to establish how the new criteria would apply differently between one impecunious aboriginal party and another.

The interim costs case law suggests narrow guidelines. Interim costs have been awarded in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. The legal characteristics which explain why marital cases are an exception to the rule that costs "follow the

event" are guidelines for the exercise of judicial discretion. At common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. It was acknowledged in this appeal that each of the Bands was without funds. Generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where no right under s. 35 of the Constitution Act, 1982 was implicated and the matter involved the provincial rather than the federal Crown, this special relationship could not automatically be presumed. Finally, and dispositive of this appeal, there is a presumption in marital cases that the property that is the subject of the dispute is to be shared in some way. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. The chambers judge's reluctance to prejudge the present case on the merits was appropriate, since it could not be presumed that the Bands would establish even partial aboriginal title.

The ratio of the common law dictates the following guidelines for the discretionary, extraordinary award of interim costs: (i) the party seeking the interim costs cannot afford to fund the litigation and has no other realistic manner of proceeding with the case; (ii) there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and (iii) it is presumed that the party seeking interim costs will win some award from the other party. A court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but also by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances," the distinction between the traditional purpose of awarding costs and concerns over access to justice was blurred. The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by the majority broadened the scope of interim costs to an undesirable extent and were not supported in the case law. The common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature.

A trial judge's discretionary decision on interim costs is owed great deference and should be disturbed only if the judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. If the Supreme Court of Canada were to enlarge the scope for interim costs, it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application, the chambers judge properly exercised his discretion. He was correct in his assessment that liability remained an open question and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that although he had a limited discretion in appropriate circumstances to award interim costs, this case fell far outside that area.

Since the chambers judge committed no error of law and did not commit a "palpable error" in his assessment of the facts, deference should be given to his decision not to exercise his discretion to make the extraordinary grant of interim costs. Each side should bear its own costs.

Autorisés par leurs conseils tribaux respectifs, des membres des bandes indiennes intimées ont commencé à couper du bois sur les terres de la Couronne de la Colombie-Britannique, sans avoir cependant obtenu une autorisation en vertu de la Forest Practices Code of British Columbia Act. Le ministre des Forêts a fait signifier aux bandes indiennes des ordonnances de cessation des travaux et a intenté des procédures afin de les faire respecter. Les bandes indiennes ont déposé un avis de question constitutionnelle, alléguant qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Le ministre a demandé à ce que l'instance soit inscrite pour instruction, tandis que les bandes indiennes insistaient pour que la question soit décidée par procédure sommaire, étant donné qu'elles n'avaient pas de ressources financières suffisantes pour mener un procès long et coûteux. Par ailleurs, elles ont soumis que l'affaire ne devrait se rendre à procès que s'il était ordonné à la Couronne de payer leurs frais juridiques et débours à l'avance, quelle que soit l'issue du procès.

Le juge en chambre a statué que l'affaire ne pouvait être décidée sur la base de la preuve documentaire et de la preuve par affidavit et qu'elle devait être renvoyée à procès. Il a conclu que le tribunal avait compétence pour accorder une provision pour frais, dans des circonstances exceptionnelles, mais que les normes constitutionnelles n'exigeaient pas qu'une telle ordonnance soit faite en faveur des bandes indiennes. Le juge était d'avis que sa compétence pour ordonner au ministre de payer à l'avance les frais des bandes indiennes était très restreinte; il a aussi estimé qu'il ne pouvait rendre une telle ordonnance parce que cela nécessiterait d'examiner le fond de l'affaire. Selon lui, l'instance pourrait probablement procéder si les bandes indiennes arrivaient à conclure une entente d'honoraires conditionnels avec leurs avocats.

La Cour d'appel a confirmé la décision du juge en chambre qu'un règlement équitable de ces questions nécessitait la tenue d'un procès. La Cour était d'accord que le principe de l'accès à la justice n'oblige aucunement le gouvernement à financer les parties qui n'ont pas les moyens de se payer les services d'un avocat dans le cadre d'une poursuite civile, et que l'art. 35 de la Loi constitutionnelle de 1982 n'obligeait pas non plus le gouvernement à fournir du financement à une bande autochtone qui tente de prouver l'existence de droits ancestraux. La Cour a cependant statué que le juge en chambre avait trop insisté sur les préoccupations concernant le danger de préjuger de l'issue de la cause, lesquelles préoccupations étaient atténuées en raison des circonstances spéciales de l'espèce et de l'intérêt du public à ce que les questions en litige soient réglées comme il se doit. Elle a conclu que le juge en chambre avait un pouvoir discrétionnaire d'ordonner une provision pour frais en faveur des bandes indiennes, et qu'une telle ordonnance aurait dû être faite, vu les circonstances exceptionnelles de l'espèce. Le ministre a interjeté appel.

Arrêt: Le pourvoi a été rejeté.

LeBel, J. (McLachlin, J.C.C., Gonthier, Binnie, Arbour, Deschamps, JJ., souscrivant à l'opinion de LeBel, J.): Les tribunaux ont un pouvoir discrétionnaire inhérent leur permettant d'accorder des dépens. L'octroi des dépens vise traditionnellement à indemniser la partie gagnante pour les dépenses qu'elle a encourues en se défendant à l'égard d'une action s'étant révélée sans fondement ou en faisant reconnaître un droit valide. Par ailleurs, les règles modernes en matière de frais tendent aussi à réaliser différents objectifs en plus de l'objectif traditionnel d'indemnisation. Même si le principe de l'indemnisation demeure la considération primordiale, l'octroi des dépens peut également servir à encourager un règlement, à dissuader les actions et les défenses frivoles ainsi qu'à décourager les démarches inutiles.

La règle traditionnelle d'adjudication des dépens est aussi dictée par le souci général d'assurer le fonctionnement équitable et efficace du système judiciaire. L'accès à la justice constitue une autre considération pertinente pour l'application des règles d'attribution des dépens. Dans des cas spéciaux où des parties aux ressources limitées cherchent à faire respecter leurs droits constitutionnels, les tribunaux exercent souvent leur pouvoir discrétionnaire d'adjudication des dépens de façon à ne pas les mettre dans une situation difficile que pourrait causer l'application des règles traditionnelles. Ils contribuent ainsi à aider les citoyens ordinaires à avoir accès au système juridique lorsqu'ils cherchent à régler des questions qui revêtent de l'importance pour l'ensemble de la collectivité.

Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent également le premier plan dans les rares cas où des provisions pour frais sont accordées. L'octroi d'une telle provision permet d'éviter qu'une argumentation juridique fondée ne soit pas entendue parce qu'une des parties ne dispose pas des ressources financières nécessaires. Le pouvoir discrétionnaire d'accorder une provision pour frais se limite à des cas vraiment exceptionnels et doit être utilisé de façon restreinte. Bien que généralement exercé dans le cadre d'affaires matrimoniales ou familiales, il ne se limite cependant pas à ces seuls domaines. Une provision pour frais peut également être accordée dans certaines affaires en matière de fiducie, de faillite ou de sociétés, afin d'éviter une situation d'iniquité en permettant aux parties sans ressources de faire entendre des demandes fondées.

Le pouvoir d'accorder une provision pour frais est inhérent à la nature de la compétence en equity de statuer sur les dépens. Trois critères sont pertinents à l'exercice de ce pouvoir. Premièrement, la partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans l'ordonnance, de faire entendre sa cause. Deuxièmement, elle doit prouver de façon prima facie que sa cause possède un fondement suffisant. Finalement, il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs. Si le tribunal décide d'accorder une provision pour frais dans de telles circonstances, il se trouvera en un sens à préjuger des questions qui peuvent faire l'objet d'un procès. Même si l'on se demande si cette situation pourrait affecter le pouvoir discrétionnaire du juge qui devra éventuellement se prononcer sur le bien-fondé de la cause, cela ne devrait toutefois pas empêcher l'octroi de provisions pour frais si les conditions pertinentes sont respectées.

Dans les causes d'intérêt public, les objectifs traditionnels de l'attribution des dépens sont généralement supplantés par d'autres objectifs de politique, dont, notamment celui de garantir que les citoyens ordinaires auront accès aux tribunaux afin de faire préciser leurs droits constitutionnels et de faire trancher d'autres questions sociales de portée générale. De plus, de par leur nature, les causes de ce genre soulèvent fréquemment des questions importantes non seulement pour les parties au litige mais aussi pour la collectivité en général. L'intérêt public est donc servi par le règlement adéquat de ces questions. Il incombe au tribunal de première instance de décider dans chaque cas si une affaire, qui peut être considérée comme étant « particulière » de par son caractère d'intérêt public, est suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée.

Par conséquent, le test à appliquer pour déterminer si une personne sans ressource invoquant un droit protégé par la Charte canadienne peut se voir accorder une provision pour frais est le suivant: i) la partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions au tribunal; ii) la demande paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers; iii) les questions soulevées dépassent le cadre des intérêts du plaideur, elles revêtent une importance pour le public et elles n'ont pas encore été tranchées. Si ces trois conditions sont remplies, les tribunaux disposent alors d'une compétence limitée pour ordonner que les dépenses de la partie sans ressources suffisantes soient payés préalablement. De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite.

Il ressortait clairement des motifs du juge en chambre que, s'il avait appliqué ces conditions, il aurait ordonné le paiement d'une provision pour frais en l'espèce. De fait, il a conclu que les bandes indiennes éprouvaient d'importantes difficultés financières et n'avaient pas les moyens d'être représentées par avocat. Leurs revendications concernant leur titre aborigène et d'autres droits ancestraux étaient à première vue plausibles et étaient étayées par une preuve documentaire abondante. L'affaire revêtait une très grande importance pour le public et elle soulevait des questions nouvelles et importantes ayant une importance cruciale pour la population de la Colombie-Britannique; une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Les circonstances de l'espèce étaient effectivement particulières, voire même exceptionnelles. Les conditions d'attribution d'une provision de frais étaient donc remplies. Les conditions dont la Cour d'appel a assorti l'ordonnance garantissaient que les parties seraient encouragées à régler le litige par la négociation et que les bandes ne seraient pas tentées d'étirer le processus inutilement.

On a qualifié d'absolu et d'illimité le pouvoir discrétionnaire du tribunal de première instance de décider s'il y a lieu d'adjuger des dépens, sous la seule réserve des règles de pratique applicables et de la nécessité d'agir de façon judiciaire selon les faits de l'espèce. La décision du juge en chambre était fondée sur son expérience judiciaire, sa perception des exigences de la justice et son appréciation de la preuve; cette décision ne devait pas être modifiée à la légère.

Une cour d'appel peut et doit cependant intervenir dans l'exercice d'un pouvoir discrétionnaire lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits.

En l'espèce, deux erreurs viciaient la décision du juge en chambre et nécessitaient une intervention en appel. Premièrement, le juge a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige et il a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant au financement du litige n'était étayée par aucun élément de preuve; la perspective que les bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semblait irréaliste.

Major, J., dissident (Iacobucci, Bastarache, JJ., souscrivant à l'opinion de Major, J.): Les dépens sont traditionnellement attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Dans certains cas, une provision pour frais peut être accordée à un conjoint qui intente un procès au sujet du partage des biens, par suite d'une séparation ou d'un divorce; en droit matrimonial, la justification de telles provisions pour frais est par ailleurs claire, soit préserver le but traditionnel de l'adjudication des dépens que constitue l'indemnisation. Accorder une provision pour frais alors que la question de la responsabilité n'a pas encore été tranchée aurait pour effet d'étendre considérablement la portée de la jurisprudence. Octroyer des dépens avant l'instruction pourrait être perçu comme laissant préjuger de l'issue de la cause, étant donné que, en l'absence de motifs sérieux, l'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question. De plus, agir de la sorte dans une affaire qui présente des considérations constitutionnelles importantes et dans laquelle la Couronne est la partie défenderesse constituerait une transposition inhabituelle d'une jurisprudence de droit privé très exceptionnelle dans un domaine comportant de nombreuses autres facettes. Même s'il se peut que des questions de droit public justifient l'octroi discrétionnaire de provisions pour frais afin de permettre l'accès à la justice, de tels cas doivent être largement comparables à ceux que reconnaît la jurisprudence en matière d'attribution de provisions pour frais. L'évolution de la common law en matière de provision pour frais devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard. En l'espèce, l'adjudication par la Cour d'appel d'une provision pour frais apparaissait comme une forme d'aide juridique imposée par le tribunal. La provision pour frais ne devrait pas être utilisée aux fins d'amener, essentiellement, le tribunal à financer le litige pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. La solution du problème relève du législateur et des ordres professionnels des avocats et non de la magistrature.

S'il est vrai que l'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais, la proposition que les causes où l'on invoque l'intérêt public font presque toujours intervenir des circonstances extraordinaires était forcément trop large pour satisfaire à l'exigence du caractère exceptionnel. Dire simplement que les questions soulevées dépassent le cadre des intérêts individuels en cause et qu'elles n'ont pas encore été tranchées n'aide pas le juge de première instance à décider de ce qui est « suffisamment spécial » et ne constitue pas une norme ou une directive identifiable. Même s'il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers, rien ne distinguait les présentes revendications territoriales autochtones de toute autre revendication. Rien dans la preuve ne démontrait le caractère exceptionnel des présentes revendications territoriales ni ne permettait d'établir comment l'application des nouveaux critères varierait selon la partie autochtone sans ressources suffisantes dont il est question.

La jurisprudence relative à l'octroi des provisions pour frais propose des lignes directrices étroites. Des provisions pour frais ont été accordées dans des affaires de droit matrimonial où l'on a présumé une certaine responsabilité et où l'octroi des dépens répondait à l'objectif d'indemnisation; d'autres ont été accordées dans des affaires en matière de sociétés ou de fiducie où le tribunal a ordonné à la société ou à la fiducie pour laquelle l'action était intentée de payer

la provision pour frais. Les caractéristiques juridiques qui expliquent pourquoi les affaires de droit matrimonial constituent une exception à la règle habituelle voulant que les dépens « suivent l'issue de la cause », constituent des lignes directrices pour l'exercice du pouvoir discrétionnaire. En common law, du fait que l'argent et les autres biens de la famille étaient légalement la propriété du mari, qui en assurait également la maîtrise, l'épouse n'avait souvent pas les ressources financières nécessaires pour faire valoir ses droits devant les tribunaux. Dans le présent appel, on reconnaissait que les bandes indiennes n'avaient aucun moyen financier. Si on généralise au-delà du contexte matrimonial, la relation entre les parties doit être telle que l'adjudication de dépens serait particulièrement appropriée. Dans les cas où aucun droit fondé sur l'art. 35 de la Loi constitutionnelle de 1982 n'est en cause et où l'affaire concerne la Couronne provinciale plutôt que la Couronne fédérale, cette relation spéciale ne peut être automatiquement présumée. Finalement, mais élément déterminant en l'espèce, il existe une présomption que le bien faisant l'objet du litige sera partagé d'une façon ou d'une autre. En un sens, le tribunal présume une certaine responsabilité; la seule chose à débattre, c'est l'étendue de cette responsabilité. La réticence du juge en chambre à préjuger de l'affaire quant au fond était justifiée, puisque l'on ne pouvait présumer que les bandes indiennes arriveraient à prouver l'existence, même partielle, d'un titre aborigène.

Pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais, il faut satisfaire aux conditions suivantes: i) la partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement; ii) il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien serait particulièrement approprié; iii) on présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie. Dans le cadre d'affaires où l'on doit résoudre des questions d'intérêt public controversées, un tribunal doit se montrer particulièrement prudent dans l'exercice de son pouvoir inhérent d'adjudication des dépens. Non seulement un tel précédent n'était pas exigé par la common law, mais l'adoption d'une notion aussi nébuleuse, sans définition claire de ce que l'on entend par « circonstances spéciales », estompait la distinction entre l'objectif traditionnel de l'adjudication des dépens et les préoccupations quant à l'accès à la justice. La common law doit évoluer graduellement tout en respectant d'une manière générale les objets sous-jacents à ses règles. Les nouveaux critères approuvés par les juges majoritaires élargissaient le champ d'application des provisions pour frais dans une mesure qui n'était pas souhaitable et ils n'étaient pas étayés par la jurisprudence. Les règles de common law en matière de provisions pour frais ne devraient pas être modifiées par l'intervention d'une cour d'appel infirmant la décision que le juge de première instance a rendue en usant judicieusement de son pouvoir discrétionnaire. Une telle modification relève davantage du législateur.

Il faut faire preuve de grande déférence à l'égard du pouvoir discrétionnaire du juge de première instance d'accorder des provisions pour frais et n'intervenir que si le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Si la Cour suprême du Canada élargissait le champ d'application des provisions pour frais, il faudrait interpréter cela comme une nouvelle règle et non pas comme une adaptation des règles de droit existantes. Le juge en chambre a correctement exercé son pouvoir discrétionnaire en fonction des règles de droit qui existaient en matière de dépens à l'époque où la demande a été présentée. Il a eu raison de conclure que la question de la responsabilité demeurait entière en l'espèce et que, s'il ordonnait le paiement de provisions pour frais, il se trouverait à préjuger de façon inopportune de l'issue de l'affaire. Il a donc eu raison de conclure que bien qu'il possède un pouvoir discrétionnaire limité dans les circonstances appropriées d'accorder des provisions pour frais, la présente affaire relevait d'un tout autre domaine.

Comme le juge de première instance n'a pas commis d'« erreur manifeste » dans son appréciation des faits, il fallait s'en remettre à sa décision de ne pas exercer son pouvoir discrétionnaire pour accorder exceptionnellement des provisions pour frais. Chaque partie devait assumer ses propres dépens.

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Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201, [1995] 4 W.W.R. 524, 27 C.R.R. (2d) 77, 55 B.C.A.C. 191, 90 W.A.C. 191, 35 C.P.C. (3d) 28, 122 D.L.R. (4th) 330, 1995 CarswellBC 23 (B.C. C.A.) — considered

Turner v. Andrews (2001), 2001 BCCA 76, 2001 CarswellBC 224, 85 B.C.L.R. (3d) 53, [2001] 3 W.W.R. 620, 147 B.C.A.C. 305, 241 W.A.C. 305, (sub nom. *Turner v. Telecommunication Workers Pension Plan*) 197 D.L.R. (4th) 533, 38 E.T.R. (2d) 126, 26 C.C.P.B. 313, C.E.B. & P.G.R. 8424 (note) (B.C. C.A.) — considered

Woloschuk v. Von Amerongen (1999), 1999 ABQB 306, 1999 CarswellAlta 354 (Alta. Q.B. [In Chambers]) — considered

Cases considered by *Major J.*:

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

McDonald v. McDonald (1998), 163 D.L.R. (4th) 527, 1998 CarswellAlta 847, 223 A.R. 48, 183 W.A.C. 48, 41 R.F.L. (4th) 392, 68 Alta. L.R. (3d) 328, 1998 ABCA 241 (Alta. C.A. [In Chambers]) — considered

R. v. Salituro (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 124, 1991 CarswellOnt 1031 (S.C.C.) — referred to

R. v. Vanderpeet (1996), 50 C.R. (4th) 1, *(*sub nom. *R. v. Van der Peet)* 137 D.L.R. (4th) 289, *(*sub nom. *R. v. Van der Peet)* 109 C.C.C. (3d) 1, *(*sub nom. *R. v. Van der Peet)* 200 N.R. 1, *(*sub nom. *R. v. Van der Peet)* 80 B.C.A.C. 81, *(*sub nom. *R. v. Van der Peet)* [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, *(*sub nom. *R. v. Van der Peet)* [1996] 4 C.N.L.R. 177, *(*sub nom. *R. v. Van der Peet)* 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

Randle v. Randle (1999), 1999 CarswellAlta 1045, 3 R.F.L. (5th) 139, 254 A.R. 323, 1999 ABQB 954 (Alta. Q.B.) — considered

Roberts v. Aasen (1999), 1999 CarswellOnt 1674 (Ont. S.C.J.) — referred to

Watkins v. Olafson (1989), 50 C.C.L.T. 101, [1989] 2 S.C.R. 750, [1989] 6 W.W.R. 481, 61 D.L.R. (4th) 577, 100 N.R. 161, 39 B.C.L.R. (2d) 294, 61 Man. R. (2d) 81, 1989 CarswellMan 333, 1989 CarswellMan 1 (S.C.C.) — referred to

Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.) (1997), 152 D.L.R. (4th) 193, 1997 CarswellMan 475, 1997 CarswellMan 476, 31 R.F.L. (4th) 165, *(*sub nom. *Child & Family Services of Winnipeg Northwest v. D.F.G.)* 219 N.R. 241, 121 Man. R. (2d) 241, 158 W.A.C. 241, [1998] 1 W.W.R. 1, 39 C.C.L.T. (2d) 203 (Fr.), [1997] 3 S.C.R. 925, 39 C.C.L.T. (2d) 155 (Eng.), 3 B.H.R.C. 611 (S.C.C.) — referred to

Statutes considered by *LeBel J.*:

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 248 — referred to

s. 249(4) — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 15 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131(1) — referred to

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159

Generally — referred to

s. 96 — considered

s. 123 — considered

Statutes considered by *Major J.*:

Business Corporations Act, R.S.O. 1990, c. B.16
s. 249 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Company Act, R.S.B.C. 1996, c. 62
s. 201 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — referred to

Rules considered by *LeBel J.*:

Queen's Bench Rules, Man. Reg. 553/88
R. 49.10 — referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 49.10 — referred to

R. 57.01(1)(d) — referred to

R. 57.01(2) — referred to

Rules of Court, 1990, B.C. Reg. 221/90
Generally — referred to

R. 1(12) — considered

R. 37(23)-37(26) — referred to

R. 52(11)(d) — considered

R. 57(9) — considered

APPEALS by provincial Crown from judgment reported at *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), allowing in part appeals by Indian Bands from order refusing to order that Crown pay Bands' costs of trial in advance.

POURVOIS de la Couronne provinciale à l'encontre de l'arrêt publié à *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 2001 BCCA 647, 2001 CarswellBC 2355, 95 B.C.L.R. (3d) 273, [2002] 1 C.N.L.R. 57, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, (sub nom. *British Columbia (Ministry of Forests) v. Jules*) 92 C.R.R. (2d) 319 (B.C. C.A.), qui a accueilli en partie les pourvois des bandes indiennes à l'encontre de l'ordonnance refusant d'ordonner à la Couronne de leur payer une provision pour frais.

***LeBel J.*:**

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal, and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159 (the "*Code*"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the *Code*, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the *Code* as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90, to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial — which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Charter* and flows from the primacy of the rule of law; the protection of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority

over funding litigation. One of the most urgent needs is new housing — the very purpose for which, they say, they want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90:

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> > (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) ...costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. British Columbia Supreme Court, [2000] B.C.J. No. 1536, 2000 BCSC 1135 (B.C. S.C.)

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general jurisdiction to award interim costs in a proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider providing funding to ensure that the cases, which had elements of test cases, would be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B. British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647 (B.C. C.A.)

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance — meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

> AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:
>
> (a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
>
> (b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;

(c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;

(d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;

(e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. The Court's Discretionary Power to Grant Interim Costs

(1) Traditional Costs Principles — Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M.M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee Inc.* (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.), at p. 32, as follows:

(1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.

(2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.

(3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.

(4) They are *not* payable for the purpose of assuring participation in the proceedings.

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1926), 58 O.L.R. 213 (Ont. C.A.), at p. 216, as being "in the nature of damages awarded to the

successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Ont. Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (B.C. C.A.), the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295 (B.C. C.A.). This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23-26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Canada (Attorney General)* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Lavigne v. O.P.S.E.U.* (1987), 60 O.R. (2d) 486 (Ont. H.C.), White J. held that "it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (Ont. C.A.); aff'd [1991] 2 S.C.R. 211 (S.C.C.)), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers Co.* and *Lavigne* in *Rogers v. Greater Sudbury (City) Administrator of Ontario Works* (2001), 57 O.R. (3d) 467 (Ont. S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy D.C.J. cited Osler J.'s statement in *Canadian Newspapers Co.*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see (Ont. Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against state power because of their religious beliefs," was one of national, even international significance ((1992), 10 O.R. (3d) 321 (Ont. C.A.), at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases," but that the case "raised special and peculiar problems". He allowed Whealy D.C.J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy D.C.J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) Interim Costs

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 401, 26 Eng. Rep. 642 (Eng. Ch. Div.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time." Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.). Macdonald J. reviewed the authorities, including *Jones*, *supra*, and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ*, *supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 , 1999 ABQB 306 (Alta. Q.B. [In Chambers]), where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (*supra*, at p. 2-23 (citations omitted)).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason — to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ*, *supra*, was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto Dominion Bank*, [1998] O.J. No. 3014 (Ont. Gen. Div. [Commercial List]), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Andrews* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76 (B.C. C.A.), an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court

may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ*, *supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ*, *supra*, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273 (N.B. Q.B.), that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46 (S.C.C.), but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B.* (*R.*) case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the *unsuccessful* party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. Appellate Review of Discretionary Decisions

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68 (Sask. C.A.), at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (Sask. C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan* (2002), 161 C.C.C. (3d) 97, 2002 SCC 12 (S.C.C.), however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), at p. 814-5, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. Application to the Facts of this Case

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

Major J.:

49 At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs — that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J.

interpreted the applicable principles correctly and can find no basis for reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs — usually party and party costs — are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The ratio of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs — indemnification of the prevailing party — is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate *reversal* of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs — costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded at para. 129:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial

Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.

II. Analysis

A. The Law of Costs

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs — its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. The Law of Interim Costs

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs — costs in advance of trial — has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), and *R. v. Vanderpeet* (1996), 50 C.R. (4th) 1 (S.C.C.). There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A. [In Chambers]). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954 (Alta. Q.B.), where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald*, *supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases *there is a presumption that the property that is the subject of the dispute is to be shared in some way*. See *Randle*, *supra*, at para. 22. Generally, it is the *distribution* of assets and *extent* of support that are at issue in a divorce action, not whether such a division and such support are owed. In a sense, *some liability is assumed*; all that is to be litigated is the *extent* of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification — the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the ratio of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.

3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes "special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different ratio. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (Ont. S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C. The Trial Judge's Discretion

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaption of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.); *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.)]; and *Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 (S.C.C.).

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Appeal dismissed.

Pourvoi rejeté.

End of Document

11

Most Negative Treatment: Distinguished
Most Recent Distinguished: 1985 Sawridge Trust (Trustees of) v. Alberta (Public Trustee) | 2013 ABCA 226, 2013 CarswellAlta 1015, 85 Alta. L.R. (5th) 165, [2013] A.W.L.D. 2729, [2013] A.W.L.D. 2730, [2013] A.W.L.D. 2733, [2013] A.W.L.D. 2768, [2013] A.W.L.D. 2801, [2013] A.W.L.D. 2810, 553 A.R. 324, 583 W.A.C. 324, [2013] 3 C.N.L.R. 411, 230 A.C.W.S. (3d) 54 | (Alta. C.A., Jun 19, 2013)

2007 SCC 2
Supreme Court of Canada

Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)

2007 CarswellBC 78, 2007 CarswellBC 79, 2007 SCC 2, [2007] 1 S.C.R. 38, [2007] B.C.W.L.D. 538, [2007] B.C.W.L.D. 548, [2007] B.C.W.L.D. 612, [2007] S.C.J. No. 2, 150 C.R.R. (2d) 189, 153 A.C.W.S. (3d) 46, 215 C.C.C. (3d) 449, 235 B.C.A.C. 1, 275 D.L.R. (4th) 1, 356 N.R. 83, 37 C.P.C. (6th) 1, 388 W.A.C. 1, 53 Admin. L.R. (4th) 153, 62 B.C.L.R. (4th) 40, 78 W.C.B. (2d) 316, J.E. 2007-211

Little Sisters Book and Art Emporium (Appellant) and Commissioner of Customs and Revenue and Minister of National Revenue (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Bar Association, Egale Canada Inc., Sierra Legal Defence Fund and Environmental Law Centre (Interveners)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: April 19, 2006
Judgment: January 19, 2007
Docket: 30894

Proceedings: affirming *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue)* 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.); reversing *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2004), 31 B.C.L.R. (4th) 330, 2004 CarswellBC 1370, 2004 BCSC 823 (B.C. S.C.)

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J.J. Camp, Q.C., Melina Buckley for Intervener, Canadian Bar Association
Cynthia Peterson for Intervener, Egale Canada Inc.
Chris Tollefson, Robert V. Wright for Interveners, Sierra Legal Defence Fund, Environment Law Centre

Subject: Civil Practice and Procedure; Customs; International; Corporate and Commercial; Constitutional; Family

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XXIV Costs
XXIV.7 Particular orders as to costs

XXIV.7.n Miscellaneous

Constitutional law

XIV Procedure in constitutional challenges
XIV.4 Costs

International trade and customs

IV Appraisal of value and determination of tariff classification
IV.3 Appeal, re-determination or re-appraisal
IV.3.c Appeal to court
IV.3.c.ii Appeal to other courts

Headnote

Civil practice and procedure — Costs — Particular orders as to costs — Miscellaneous orders

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

International trade and customs — Appraisal of value and determination of tariff classification — Appeal, re-determination or re-appraisal — Appeal to court — Appeal to other courts

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

Constitutional law — Procedure in constitutional challenges — Costs

Plaintiff was bookstore and art emporium that catered to lesbian and gay community in city — Customs prohibited importation of certain publications as obscene — Plaintiff applied for declaration that legislation was applied in unconstitutional manner — Plaintiff filed notice of constitutional question challenging validity of definition of obscenity previously established by Supreme Court of Canada — Plaintiff's application for order of advance costs was granted in part — Customs successfully appealed, and order was set aside — Plaintiff appealed further — Appeal dismissed — Public interest advance costs orders are to remain special and, as result, exceptional — Such orders must be granted with caution, as last resort, in circumstances where need for them is clearly established — In present case, there was serious issue justifying decision to have matter proceed to trial — However, it was error to hold that public importance requirement was satisfied — "Systemic Review" aspect of claim did not bring case within scope of advance costs remedy; Systemic Review was not necessarily based on prohibition, detention, or even delay of any books belonging to plaintiff — Plaintiff did not provide prima facie evidence that it continued to be targeted — "Four Books Appeal" concerned no interest beyond that of plaintiff, and therefore was not special enough to justify award of advance costs — It is only when public importance of a case can be established regardless of ultimate holding on merits that a court should consider this requirement satisfied.

Procédure civile — Frais — Ordonnances particulières en matière de frais — Ordonnances diverses

Demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville — Douanes interdisaient l'importation de certaines publications parce qu'elles étaient obscènes — Demanderesse a demandé qu'il soit déclaré que la loi était appliquée de manière inconstitutionnelle — Demanderesse a déposé un avis de question constitutionnelle, ayant l'intention de contester la validité de la définition de l'obscénité déterminée antérieurement par la Cour suprême du Canada — Demanderesse a demandé une provision pour frais et celle-ci a été accordée en partie — Douanes ont interjeté appel avec succès, et l'ordonnance a été infirmée — Demanderesse a interjeté appel de nouveau — Pourvoi rejeté — Ordonnances octroyant une provision pour frais pour des motifs d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles — De telles ordonnances doivent être accordées avec circonspection, comme dernier recours, lorsque leur nécessité a été clairement établie — Dans ce cas-ci, la question était sérieuse et elle justifiait la décision qu'elle se rende jusqu'à procès — Il était cependant erroné de soutenir que l'exigence qu'il s'agisse d'une question d'importance pour le public était satisfaite — « Révision systémique » alléguée ne donnait pas droit à la provision pour frais; la révision systémique ne découlait pas nécessairement de l'interdiction, de la détention ou même du retard de livres appartenant à la demanderesse — Demanderesse n'a pas démontré de façon prima facie qu'elle continuait d'être ciblée — Seule la demanderesse avait un intérêt dans l' « appel concernant les quatre livres » et, par conséquent, ce dernier n'était pas assez spécial pour fonder l'octroi d'une provision pour frais — Tribunal ne peut considérer que cette exigence est satisfaite que s'il est établi que l'affaire a une importance pour le public peu importe la décision finale au fond.

Commerce international et douanes — Estimation de la valeur et détermination de la classification du tarif — Pourvoi, nouvelle détermination ou nouvelle estimation — Appel au tribunal — Appel devant d'autres tribunaux

Demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville — Douanes interdisaient l'importation de certaines publications parce qu'elles étaient obscènes — Demanderesse a demandé qu'il soit déclaré que la loi était appliquée de manière inconstitutionnelle — Demanderesse a déposé un avis de question constitutionnelle, ayant l'intention de contester la validité de la définition de l'obscénité déterminée antérieurement par la Cour suprême du Canada — Demanderesse a demandé une provision pour frais et celle-ci a été accordée en partie — Douanes ont interjeté appel avec succès, et l'ordonnance a été infirmée — Demanderesse a interjeté appel de nouveau — Pourvoi rejeté — Ordonnances octroyant une provision pour frais pour des motifs d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles — De telles ordonnances doivent être accordées avec circonspection, comme dernier recours, lorsque leur nécessité a été clairement établie — Dans ce cas-ci, la question était sérieuse et elle justifiait la décision qu'elle se rende jusqu'à procès — Il était cependant erroné de soutenir que l'exigence qu'il s'agisse d'une question d'importance pour le public était satisfaite — « Révision systémique » alléguée ne donnait pas droit à la provision pour frais; la révision systémique ne découlait pas nécessairement de l'interdiction, de la détention ou même du retard de livres appartenant à la demanderesse —

Demanderesse n'a pas démontré de façon prima facie qu'elle continuait d'être ciblée — Seule la demanderesse avait un intérêt dans l' « appel concernant les quatre livres » et, par conséquent, ce dernier n'était pas assez spécial pour fonder l'octroi d'une provision pour frais — Tribunal ne peut considérer que cette exigence est satisfaite que s'il est établi que l'affaire a une importance pour le public peu importe la décision finale au fond.

Droit constitutionnel — Procédure dans le cadre de contestations constitutionnelles — Frais

Demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville — Douanes interdisaient l'importation de certaines publications parce qu'elles étaient obscènes — Demanderesse a demandé qu'il soit déclaré que la loi était appliquée de manière inconstitutionnelle — Demanderesse a déposé un avis de question constitutionnelle, ayant l'intention de contester la validité de la définition de l'obscénité déterminée antérieurement par la Cour suprême du Canada — Demanderesse a demandé une provision pour frais et celle-ci a été accordée en partie — Douanes ont interjeté appel avec succès, et l'ordonnance a été infirmée — Demanderesse a interjeté appel de nouveau — Pourvoi rejeté — Ordonnances octroyant une provision pour frais pour des motifs d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles — De telles ordonnances doivent être accordées avec circonspection, comme dernier recours, lorsque leur nécessité a été clairement établie — Dans ce cas-ci, la question était sérieuse et elle justifiait la décision qu'elle se rende jusqu'à procès — Il était cependant erroné de soutenir que l'exigence qu'il s'agisse d'une question d'importance pour le public était satisfaite — « Révision systémique » alléguée ne donnait pas droit à la provision pour frais; la révision systémique ne découlait pas nécessairement de l'interdiction, de la détention ou même du retard de livres appartenant à la demanderesse — Demanderesse n'a pas démontré de façon prima facie qu'elle continuait d'être ciblée — Seule la demanderesse avait un intérêt dans l' « appel concernant les quatre livres » et, par conséquent, ce dernier n'était pas assez spécial pour fonder l'octroi d'une provision pour frais — Tribunal ne peut considérer que cette exigence est satisfaite que s'il est établi que l'affaire a une importance pour le public peu importe la décision finale au fond.

The plaintiff book store and art emporium catered to the lesbian and gay community in the city. The plaintiff fought a protracted legal battle against Customs over the detaining of obscene material, culminating in a decision of the Supreme Court of Canada ("decision No. 1"). In that case, the Court found that Customs' practices were unconstitutional, but found that the requested remedy of an injunction was not warranted. Having been told that Customs had addressed the institutional and administrative problems in the six years since the trial, but without more detailed information as to measures taken, the Court added that its findings should provide the plaintiff with a platform from which to launch any further action considered necessary.

Subsequently, in 2001, Customs detained several titles. In superior court, the plaintiff sought a reversal of the Customs' obscenity determinations, and a declaration that the relevant legislation was applied in an unconstitutional manner. The plaintiff sought an injunction, damages and special or increased costs. The plaintiff also filed a notice of constitutional question, alleging a breach of s. 2(b) of the Canadian Charter of Rights and Freedoms. The constitutional question broadened the injunction sought to prevent Customs from applying the relevant provisions to anyone or, alternatively, to the plaintiff, until the unconstitutional administration ceased.

The plaintiff applied in superior court for advance costs, claiming it had run out of money to pursue the litigation. The first issue with regard to which advance costs were sought was whether Customs properly prohibited four titles that the plaintiff wanted to import (the "Four Books Appeal"). The second issue was whether Customs had addressed the systemic problems identified in decision No. 1 (the "Systemic Review"). The third issue was whether the definition of obscenity established by the Supreme Court of Canada in a 1992 decision was unconstitutional (the "constitutional question"). The superior court judge determined that the requirements were satisfied with respect to the Four Books Appeal and the Systemic Review, and exercised discretion in favour of ordering advance costs. Customs successfully appealed, and the Court of Appeal set aside the order for advance costs. The plaintiff appealed further.

Held: The appeal was dismissed.

Per Bastarache, LeBel JJ. (Deschamps, Abella, Rothstein JJ. concurring): Public interest advance costs orders are to remain special and, as a result, exceptional. Such orders must be granted with caution, as a last resort, in circumstances where need for them is clearly established. Despite the deference owed to the exercise of a discretion by a trial judge, in this case the trial judge went beyond the applicable boundaries. As found by the trial judge, there was obviously a serious issue justifying a decision to have the matter proceed to trial. However, it was an error to find that the public importance requirement for advance costs was satisfied. The Four Books Appeal was extremely limited in scope, and the plaintiff advanced no evidence that the four books in question were integral or even important to its operations. It could not be concluded that the accused was in the extraordinary position that would justify an award of advance costs in the Four Books Appeal. The same could be said of the Systemic Review. The Systemic Review was not necessarily based on the prohibition, detention, or even delay of any of the plaintiff's books. The plaintiff did not provide prima facie evidence that it continued to be targeted. There was no prima facie evidence that Customs was performing its task improperly, much less unconstitutionally. Because the plaintiff chose to investigate Customs' general operations under the Systemic Review, the Four Books Appeal concerned no interest beyond that of the plaintiff itself, and therefore it was not special enough to justify an advance costs award. Although the plaintiff argued that the dispute was unique because of the constitutional rights involved, what must be proved is that the alleged Charter breach begs to be resolved in the public interest. It is only when the public importance of a case can be established regardless of the ultimate holding that a court should consider this requirement to be satisfied. In this case, it was not necessary to consider the plaintiff's impecuniosity.

Per McLachlin C.J.C. (Charron J. concurring) (concurring): The appeal should be dismissed, although for somewhat different reasons based on a different formulation of the test and a different analysis. The three criteria for an order for advance costs are impecuniosity, a meritorious case, and special circumstances making this extraordinary exercise of the court's power appropriate. This formulation differs from that used by Bastarache and LeBel JJ. in the present case in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances.

The evidence supported the trial judge's finding of inability to finance the litigation. The party seeking the order must be impecunious to the extent that without such an order that party would be deprived of the opportunity to proceed with the case. The fact that other plaintiffs are pursuing similar claims might impact the overall assessment of public importance, but does not negate impecuniosity. The threshold set by the prima facie merit criterion is relatively low. The trial judge correctly considered this requirement and found it to be met. The third condition was not met in this case, not because the case entirely lacked public interest, but because it did not rise to level of special circumstances required. As was found by the Court of Appeal, this case was not shown to be special as to its circumstances or to be special by its very nature as a public interest case. At stake was the prospect of not learning how Customs proceeded on the Four Books Appeal and, in the event it proceeded wrongly, not having a remedial order. Possible insight that may be gained into Custom's practices through the prosecution of this case and the limited remedy, while of interest to the plaintiff, did not rise to the level of compelling public importance or demonstrate systemic injustice.

Per Binnie J. (Fish J. concurring) (dissenting): The appeal should be allowed with the award of advance costs reinstated for the Four Books Appeal only, with a maximum potential limit of $300,000. The ramifications of decision No. 1 went to the heart of the present matter. Canada is committed to freedom of expression, to non-discrimination and to government conducted according to law. The issues raised by the plaintiff were of pressing public interest. As the trial judge correctly observed, this case was about Charter compliance. Therefore, it should not be analyzed in business terms. The fight was not just about four books, it was about alleged systemic discrimination exemplified by the Four Books Appeal.

In light of decision No. 1, this was a special case. There was no principled reason to find that public and private interests cannot co-exist in a case that is deserving of advance costs. In this case, the impecuniosity requirement was met. The present issue was whether the rights established in principle had or would become rights in reality. The plaintiff should not have to prove that there is no one else in Canada with a potential interest in the subject matter with pockets deep enough to take up the cause. The issue of public importance was whether Customs had learned the lessons from decision No. 1 and, was performing its mandate without discrimination on grounds of sexual orientation and had lived up to the assurances it gave. A positive answer to these questions would have as much significance as a negative one. The trial judge determined that this case was special enough to rise to the level where the unusual measure of ordering costs would be appropriate. Absent a demonstration that she erred in her appreciation of the facts or the law, her assessment on this point should be upheld. The trial judge erred in principle in ordering advance costs for the extended Systemic Review because there was no such action pending. The error was with regard to the scope of the proceeding, not the appropriateness of its advanced funding. The plaintiff estimated the costs of the Four Books Appeal at $300,000. It was reasonable to cap the maximum potential public contribution at that amount, subject to further order of the trial court. A cap was fair to the public and the plaintiff because it would give notice of the upper limit to which the public purse would potentially finance the litigation.

La demanderesse exploitait un magasin de livres et d'arts qui desservait la communauté gaie et lesbienne de la ville. La demanderesse menait depuis longtemps une bataille juridique contre les Douanes en ce qui concernait la détention de matériel obscène et qui avait atteint son paroxysme par une décision de la Cour suprême du Canada (« décision no 1 »). Dans cette affaire-là, la Cour avait conclu que les pratiques des Douanes étaient inconstitutionnelles, mais que l'injonction demandée à titre de réparation ne se justifiait pas. Ayant été informée que les Douanes s'étaient attaquées aux problèmes institutionnels et administratifs au cours des six années passées depuis le procès, mais n'ayant pas reçue d'information plus détaillée sur les mesures mises en place, la Cour a ajouté que ses conclusions pourraient servir de fondement à la demanderesse pour toute autre action qu'elle pourrait estimer nécessaire.

Les Douanes ont retenu plusieurs ouvrages ultérieurement, en 2001. La demanderesse s'est adressée à la Cour suprême provinciale afin de faire casser les décisions des Douanes et afin qu'il soit déclaré que les dispositions législatives pertinentes étaient appliquées de manière inconstitutionnelle. La demanderesse a réclamé une injonction, des dommages-intérêts et des frais spéciaux ou majorés. Elle a aussi déposé un avis de question constitutionnelle, alléguant une atteinte à l'art. 2b) de la Charte canadienne des droits et libertés. La question constitutionnelle élargissait la portée de l'injonction recherchée, voulant qu'il soit interdit aux Douanes d'appliquer les dispositions en cause à l'égard de n'importe qui, ou au moins à l'égard de la demanderesse, jusqu'à ce que cesse l'administration inconstitutionnelle.

La demanderesse s'est adressée à la Cour suprême provinciale afin d'obtenir une provision pour frais, alléguant n'avoir plus les moyens de poursuivre l'action. La première question à l'égard de laquelle la provision pour frais était réclamée était celle de savoir si les Douanes avait interdit à bon droit les quatre ouvrages que la demanderesse voulait importer (« l'appel concernant les quatre livres »). La deuxième question était celle de savoir si les Douanes s'étaient attaquées aux problèmes systémiques relevés dans la décision no 1 (la « révision systémique »). La troisième question était celle de savoir si la définition de l'obscénité donnée par la Cour suprême du Canada dans une décision de 1992 était inconstitutionnelle (la « question constitutionnelle »). La juge de la Cour suprême provinciale a estimé que les exigences étaient remplies quant à l'appel concernant les quatre livres et la révision systémique et, exerçant son pouvoir discrétionnaire, a ordonné la provision pour frais. Les Douanes ont interjeté appel avec succès, et la Cour d'appel a annulé l'ordonnance accordant la provision pour frais. La demanderesse a interjeté appel de nouveau.

Arrêt: Le pourvoi a été rejeté.

Bastarache, LeBel, JJ. (Deschamps, Abella, Rothstein, JJ.): Les provisions pour frais accordées dans l'intérêt du public doivent demeurer spéciales et, de ce fait, exceptionnelles. De telles ordonnances doivent être accordées avec circonspection, comme dernier recours, lorsqu'il a été clairement établi qu'elles étaient nécessaires. Même s'il y a lieu de faire preuve de retenue à l'égard de l'exercice par un juge de première instance de son pouvoir discrétionnaire, il demeurait que, en l'espèce, la première juge était allée au-delà des limites applicables. Elle a conclu avec raison qu'il y avait manifestement une question sérieuse à trancher justifiant que l'affaire se rende à procès. Elle a cependant commis une erreur en concluant que l'affaire satisfaisait à l'exigence que la question soit d'importance pour le public pour qu'une provision pour frais soit accordée. L'appel concernant les quatre livres avait une portée extrêmement limitée, et la demanderesse n'avait présenté aucune preuve que les quatre livres en cause faisaient partie intégrante de son commerce ou était d'une importance capitale pour celui-ci. On ne pouvait conclure que la demanderesse était dans une situation exceptionnelle qui justifierait qu'une provision pour frais lui soit accordée relativement à l'appel concernant les quatre livres. La même chose pouvait être dite à propos de la révision systèmique. Celle-ci ne découlait pas nécessairement de l'interdiction, de la détention ou du retard à traiter des livres de la demanderesse. La demanderesse n'a pas établi de manière prima facie qu'elle continuait d'être ciblée. Il n'y avait aucune preuve prima facie que les Douanes exécutaient leurs fonctions de façon inappropriée et encore moins de façon inconstitutionnelle. Étant donné que la demanderesse avait choisi d'enquêter sur les opérations générales des Douanes en vertu de la révision systémique, l'appel concernant les quatre livres relevait du seul intérêt de la demanderesse et n'était donc pas assez spécial pour fonder l'octroi d'une provision pour frais. Même si la demanderesse soutenait que le litige était unique en raison des droits constitutionnels en cause, il fallait néanmoins prouver que l'atteinte alléguée à la Charte méritait d'être abordée dans l'intérêt du public. Le tribunal ne devrait considérer que cette exigence a été remplie que lorsqu'on réussit à établir l'importance pour le public d'une affaire, et ce, peu importe son issue finale. En l'espèce, il n'y avait pas lieu de tenir compte du manque de ressources de la demanderesse.

McLachlin, J.C.C. (Charron, J., souscrivant à son opinion) (souscrivant à l'opinion des juges majoritaires): Le pourvoi devrait être rejeté, mais pour d'autres motifs fondés sur une autre formulation du critère et sur une autre analyse. Les trois critères à remplir pour obtenir une ordonnance de provision pour frais sont le manque de ressources, une affaire méritoire et des circonstances spéciales qui rendent opportun l'exercice exceptionnel de ce pouvoir de la Cour. En l'espèce, la formulation diffère de celle retenue par les juges Bastarache et LeBel: la troisième condition ne nécessite pas seulement que la question soit d'intérêt public, il faut aussi qu'il y ait des circonstances spéciales.

La preuve appuyait la conclusion de la première juge que la demanderesse n'avait pas les moyens de financer le litige. La partie qui demande une telle ordonnance doit manquer de ressources au point de se voir privée de l'opportunité de poursuivre le litige si elle n'obtient pas une telle ordonnance. Le fait que d'autres demandeurs aient entrepris des poursuites similaires peut avoir un impact sur l'évaluation globale de l'importance pour le public, mais cela ne fait pas abstraction du manque de ressources. Le seuil établi par l'exigence que l'affaire apparaisse bien fondée à première vue est relativement peu élevé. La première juge a tenu compte à bon droit de cette exigence et a conclu qu'elle était satisfaite. La troisième condition n'était par ailleurs pas satisfaite en l'espèce, parce que les circonstances n'étaient pas assez spéciales, et non parce que l'affaire n'était aucunement d'intérêt public. Tel que l'a conclu la Cour d'appel, cette affaire n'était pas spéciale en regard des circonstances qui l'entouraient ou de sa nature même comme affaire d'intérêt public. Ce qui était en jeu était la possibilité de ne pas savoir comment les Douanes agissaient dans le cadre de l'appel concernant les quatre livres et, advenant qu'elle eu agit de façon fautive, de ne pas obtenir d'ordonnance de réparation. Les éclaircissements que pourraient apporter la poursuite de cette affaire et la réparation limitée à l'égard des pratiques des Douanes étaient certes d'intérêt pour la demanderesse, mais ils n'étaient pas d'une importance capitale pour le public ni ne démontraient une injustice systémique.

Binnie, J. (Fish, J., souscrivant à son opinion) (dissident): Le pourvoi devrait être accueilli et la provision pour frais octroyée devrait être rétablie à l'égard seulement de l'appel concernant les quatre livres, et ce, pour un maximum de 300 000 $. Les ramifications de la décision no 1 étaient cruciales en ce qui concernaient la présente affaire. Le Canada

est dévoué au respect de la liberté d'expression, à la non-discrimination et au respect de la loi par le gouvernement. Les questions soulevées par la demanderesse étaient urgentes et d'intérêt public. Tel que souligné avec raison par la première juge, cette affaire en était une de respect de la Charte. Par conséquent, elle ne devait pas être analysée de façon commerciale. La bataille n'avait pas que trait à des livres, elle alléguait une discrimination systémique, dont l'appel concernant les quatre livres était un exemple.

L'affaire était spéciale, étant donné la décision no 1. Il n'y avait aucune raison de principe justifiant de conclure que les intérêts publics et privés ne pouvaient coexister dans une affaire qui méritait l'octroi d'une provision pour frais. En l'espèce, l'exigence du manque de ressources était remplie. La question était celle de savoir si les droits établis en principe étaient devenus ou deviendraient réalité. La demanderesse ne devrait pas avoir à prouver qu'il n'y avait pas personne d'autre au Canada ayant possiblement un intérêt dans cette question et qui aurait assez de moyens pour reprendre l'affaire. La question d'importance pour le public était celle de savoir si les Douanes avaient tiré des leçons de la décision no 1, si elles accomplissaient leurs tâches sans faire de discrimination fondée sur l'orientation sexuelle et si elles avaient respecté leurs engagements. Une réponse positive à ces questions aurait tout autant d'importance qu'une réponse négative. La première juge a estimé que cette affaire-ci était assez spéciale pour qu'elle donne droit à l'octroi de la mesure exceptionnelle que constitue la provision pour frais. À moins qu'il ne soit démontré que la juge s'était trompée dans son appréciation des faits ou du droit, sa décision sur cette question devrait être maintenue. Par ailleurs, elle avait commis une erreur de principe en ordonnant la provision pour frais à l'égard de la révision systémique élargie, étant donné qu'il n'y avait aucune action de la sorte en l'instance. L'erreur avait trait à la portée des procédures, et non au caractère approprié de son financement au préalable. La demanderesse a estimé que l'appel concernant les quatre livres coûterait 300 000 $. Il était raisonnable de limiter à ce montant la contribution éventuelle du public, sous réserve d'une autre ordonnance du tribunal de première instance. Un tel plafond était juste en regard du public et de la demanderesse, puisqu'il informait du montant maximal de financement public qui pourrait être obtenu pour ce litige.

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APPEAL by plaintiff from judgment reported at *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue*) 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.), allowing appeal from judgment granting, in part, plaintiff's application for advance costs.

POURVOI de la demanderesse à l'encontre de l'arrêt publié à *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue)* (2005), (sub nom. *Little Sisters Book & Art Emporium v. Minister of National Revenue*) 344 W.A.C. 246, 208 B.C.A.C. 246, 249 D.L.R. (4th) 695, [2005] B.C.J. No. 291, 127 C.R.R. (2d) 165, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 2005 CarswellBC 321, 2005 BCCA 94 (B.C. C.A.), qui a accueilli le pourvoi à l'encontre du jugement qui avait accueilli en partie sa demande visant à obtenir une provision pour frais.

Bastarache, LeBel JJ.:

1. Introduction

1 The appellant, Little Sisters Book and Art Emporium, is a corporation that operates a bookstore serving the gay and lesbian community in Vancouver. The issue in this appeal is whether it is proper for the appellant to have the costs of its court battle against the respondents (collectively referred to as "Customs") funded by the public purse by means of the exceptional advance (or interim) costs order contemplated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.). In our view, the appellant cannot succeed.

2 The situation in *Okanagan* was clearly out of the ordinary. The bands had been thrust into complex litigation against the government that they could not pay for, and the case raised issues vital both to their survival and to the government's approach to aboriginal rights. The issue before the Court in that case was whether the bands' inability to pay should have the effect of leaving constitutional rights unenforceable and public interest issues unresolved. Mindful of the serious consequences to the bands and of the contours of the anticipated litigation, this Court decided that a real injustice would result if the courts refused to exercise their equitable jurisdiction in respect of costs and if, as a consequence, the bands' impecuniosity prevented the trial from proceeding.

3 The situation in the present case differs from that in *Okanagan*. A small business corporation is in particular engaging in litigation to gain the release of merchandise that was stopped at the border. On its face, this dispute is no different from any other one that could be initiated by the many Canadians whose shipments may be detained and scrutinized by Customs before they are allowed to receive them. But the history of this case reveals more. Understandably frustrated after years of court battles with Customs over similar issues, this corporation has chosen to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. The appellant wants its present interests, as well as its (and other importers') future interests, settled for good, and it wants to stop Customs from prohibiting any more imports until its complaints are resolved.

4 The question in this appeal is not whether the appellant has a good cause of action, but whether the cost of the corporation's attempt to get Customs to release its merchandise, or the costs of its broad inquiry into Customs' practices, should be borne by the Canadian taxpayer. An exceptional order such as this can be made only in special circumstances, like those in *Okanagan*, subject to stringent conditions and to the appropriate procedural controls. In our opinion, the appellant's application meets none of the requirements developed by the Court in that decision.

5 The fact that the appellant's claim would not be summarily dismissed does not suffice to establish that interim costs should be granted to allow it to proceed. That is not the proper test. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation. Legal aid programs remain underfunded and overwhelmed. Self-

representation in courts is a growing phenomenon. *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. This Court's *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed.

2. Facts

6 The appellant is a business corporation that operates the Little Sister's Book and Art Emporium, an establishment that caters to the lesbian and gay community of Vancouver. Book sales represent 30 to 40 percent of the appellant's business. Although the appellant's asset value has grown significantly in recent years, from $218,446 in 2000 to $324,618 in 2003, it still struggles to make a profit. It has never netted more than $25,000 in one year, and in 2003 it lost almost $60,000. Recent losses are at least partly attributable to an embezzlement of $85,000.

7 The appellant's claim for advance costs must be considered in the context of the history of litigation between these two parties. When the present litigation began, the appellant had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.) ("*Little Sisters No. 1*"). In that case, the appellant, along with its shareholders, James Eaton Deva and Guy Bruce Smyth, challenged the constitutionality of Customs' procedures for detaining obscene material and of the legislative foundation for those procedures. Writing for the majority of this Court, Binnie J. agreed that Customs' practices at the time infringed ss. 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also determined that the burden of proving obscenity rested with the person alleging it. However, Binnie J. held that the provisions of the *Customs Act* themselves were constitutional.

8 The remedy sought by the appellant and its shareholders in *Little Sisters No. 1* was an injunction whose terms were generally the same as those of the injunction requested by the appellant in the case at bar. Binnie J. felt that a remedy of this nature was not warranted. He wrote the following, at para. 157:

> I conclude, with some hesitation, that it is not practicable to [offer a structured s. 24(1) remedy]. The trial concluded on December 20, 1994. We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265). Equally, however, we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that in the appellants' view would remedy any continuing problems.

He added that the "findings [in that case] should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (para. 158). Costs were awarded to the appellant and its shareholders on a party-and-party basis.

9 The present litigation, the appellant suggests, is the "further action" that Binnie J. anticipated. Counsel for the appellant drew a direct line tracing his client's current legal battle to this Court's refusal to offer injunctive relief back in 2000. Still arguing that it was denied the appropriate remedy nearly six years ago, the appellant seeks to have Customs bear the financial burden of its fresh complaint on these new facts.

10 This dispute over costs is related to litigation spawned by Customs' July 5, 2001 detention of books destined for the appellant. On that date, eight titles — comprising 34 books — were detained by Customs on the basis that they were obscene. The appellant was able to obtain the release of four of these titles within a month. With four titles still being detained, the appellant chose to request a redetermination for only two: *Meatmen*, vol. 18, *Special S&M Comics Edition* and *Meatmen*, vol. 24, *Special SM Comics Edition* (the "Meatmen comics"). Customs again determined that these

two titles were obscene. Arguing that they were incorrectly classified, on February 14, 2002, the appellant appealed the redetermination to the British Columbia Supreme Court, as it was entitled to do pursuant to ss. 67 and 71 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

11 While the litigation with respect to the Meatmen comics proceeded, Customs detained another shipment of books destined for the appellant. Once again, some of the titles detained by Customs were released without the need for a redetermination. But after a redetermination, Customs still found two titles to be obscene: *Of Men, Ropes and Remembrance — The Stories from Bound & Gagged Magazine* and *Of Slaves & Ropes & Lovers* (the "Townsend books"). On September 26, 2003, the appellant appealed this decision to the British Columbia Supreme Court, seeking the same relief it was seeking with respect to the Meatmen comics.

12 The parties have agreed to have the appeals relating to the Meatmen comics and the Townsend books heard together. The prohibition of these four titles provides the factual basis for the appellant's claim on the merits.

13 In its appeals, the appellant asks for a reversal of the Customs' obscenity determinations, as well as a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. As a remedy, it seeks an injunction restraining Customs from applying certain sections of the *Customs Tariff*, S.C. 1997, c. 36, and the *Customs Act* to its goods. The appellant also requests damages and "[s]pecial or increased costs".

14 On August 14, 2002, the appellant also filed a Notice of Constitutional Question. Alleging a breach of s. 2(*b*) of the *Charter*, it is seeking the same remedies as specified above, but is using the constitutional question to broaden the scope of the injunction it seeks. In its Notice of Constitutional Question, the appellant states that it wants an order preventing Customs from applying the relevant sections of the *Customs Tariff* and the *Customs Act* to "anyone or, in the alternative, to the Appellant, until such time as the Court is satisfied that the unconstitutional administration will cease".

15 Bennett J. of the British Columbia Supreme Court, who is both the presiding judge in this case and the case management judge, defined the scope of the litigation in her ruling of February 6, 2003 ((2003), 105 C.R.R. (2d) 119, 2003 BCSC 148 (B.C. S.C.)). Specifically, she approved the appellant's constitutional question and found that the appeal of Customs' decision to prohibit the appellant's books "gives a factual context to the issues raised by Little Sisters" (para. 24). That decision was not appealed.

16 On January 22, 2004, about a month after this Court released its decision in *Okanagan*, the appellant applied for advance costs, claiming, in the words of Bennett J., that it had "run out of money to pursue the litigation" (para. 6). As James Eaton Deva, a shareholder in the appellant, stated in his affidavit:

> After hearing [the testimony of Anne Kline, the official of Canada Customs who is responsible for making the final determination of obscenity], we were convinced that if her testimony reflected the way Canada Customs approached this issue, then it still had deep systemic problems. If true, then our ten-year battle, and partial victory in the Supreme Court of Canada, had failed to effect any significant change. In that case, a court determination that the *Meatmen* comics were not obscene would not be sufficient. Instead, we became convinced that the only way to rectify the problems in Canada Customs was a systemic remedy, not simply a ruling on individual books. We decided that we had an obligation to seek that remedy.

3. Judicial History

3.1 British Columbia Supreme Court (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823 (B.C. S.C.)

17 On the application for advance costs in the British Columbia Supreme Court, Bennett J. ruled in favour of the appellant. She identified three "discrete, yet linked, arguments" being advanced by the appellant (para. 15). The first issue for which the appellant sought an advance costs award was whether Customs had properly prohibited four titles that the appellant wanted to import (the "Four Books Appeal"). The second issue was whether Customs had addressed the systemic problems identified in *Little Sisters No. 1* (the "Systemic Review"). The third issue was whether the definition of

obscenity established by this Court in *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), is unconstitutional (the "Constitutional Question").

18 Focussing first on the question of financial capacity, Bennett J. linked the "prohibitive" cost of appealing prohibition decisions to the fact that so few of them are brought to court (para. 19). In her brief analysis on this point, she applied a test of whether the litigant "genuinely cannot afford to pay for the litigation" and concluded that the appellant could not (paras. 21-22). Bennett J. also found that replacing the appellant's current counsel was not a "realistic option" (para. 24).

19 Bennett J. then turned to apply this Court's analysis from *Okanagan* separately to each of the three issues raised by the appellant. On the *prima facie* merit requirement, Bennett J. found that there was *prima facie* evidence that Customs was not applying the obscenity test from *Butler* correctly (para. 29). She also gave some credence to the argument that Customs' procedures, under which the decision maker in the internal appeal did not look at the materials presented to the adjudicators at first instance, were flawed (para. 30). This convinced her that the Four Books Appeal satisfied the *prima facie* merit prong of the *Okanagan* test. Bennett J. then disposed of this requirement in respect of the Systemic Review and the Constitutional Question, referring, on the former, to her holding on public importance and, on the latter, to changes in the decade since *Butler* (paras. 32-33).

20 Bennett J. turned next to the question of whether the issues raised "[go] beyond individual interests, are of public importance and have not been decided in other cases" (para. 34). For the Four Books Appeal, she concentrated on the detentions that continue to affect the appellant, the "dearth of case law in this area" and the importance of freedom of expression in a democracy (paras. 35-43). She concluded that, if Customs is indeed applying the legal test for obscenity incorrectly, the issue affects all book importers and is therefore of public importance.

21 On the public importance of the Systemic Review, Bennett J. began her analysis by noting the "large magnitude of detentions" by Customs (para. 48). She found that there was "some evidence" of continual targeting of gay and lesbian material, noted that the time requirements for review were not being met, and expressed her concern about some alleged inconsistencies in Customs' detention practices (paras. 49-52). Based on the past litigation between the parties, Bennett J. was sceptical of Customs' claim that it had recently changed its practices (paras. 53-58). In fact, she stated that there was a *prima facie* case that the problems in *Little Sisters No. 1* had not been "sufficiently addressed" (para. 59). Moving from this finding, Bennett J. held that the third requirement of *Okanagan* was satisfied, based on the constitutional issues at stake and the public's interest in knowing whether the government had failed to comply with a court order (para. 61).

22 However, Bennett J. did not find that the public importance requirement had been met with respect to the Constitutional Question. Referring to this Court's decisions in *Butler*, *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), and *Little Sisters No.1*, she held that the Constitutional Question did not raise an issue of public importance that had not been resolved in a previous case, as required by *Okanagan* (paras. 75-87). This holding has not been appealed.

23 Having determined that the three requirements in *Okanagan* were satisfied in respect of the Four Books Appeal and the Systemic Review, Bennett J. exercised her discretion in favour of ordering advance costs (paras. 44 and 63). She left the determination of the structure of the advance costs order and the quantum of the award to a later date (para. 94).

3.2 British Columbia Court of Appeal (2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94 (B.C. C.A.)

24 Leave to appeal Bennett J.'s advance costs decision to the British Columbia Court of Appeal was initially denied by Prowse J.A., in chambers. Two months later, a three-member panel of the Court of Appeal varied Prowse J.A.'s order and granted leave.

25 Writing for a unanimous court, Thackray J.A. allowed Customs' appeal. He began by commenting upon what he considered to be an "incompleteness" in the process (para. 25). Specifically, he felt that Bennett J.'s failure to consider the structure of the advance costs order and the quantum of the award undermined her order. After Bennett J.'s original order, the parties themselves had reached an agreement on structure and quantum.

26 Turning to the *Okanagan* criteria, Thackray J.A. focussed his attention on the impecuniosity and public importance requirements. On the *prima facie* merit requirement, he simply held that it was satisfied because the "case has attained a status above that of being merely frivolous" (para. 28).

27 Considering the appellant's impecuniosity, Thackray J.A. asked whether it might be possible for the court to hear the Four Books Appeal before the Systemic Review. The effect of doing so would be potentially large cost savings for the public purse, insofar as the result on the Four Books Appeal might shed light on whether the Systemic Review needed to be heard at all and, if so, whether it should be publicly funded (paras. 29 and 45). To the Court of Appeal, the inclusion of the Systemic Review in the litigation represented "an enormous escalation from [the case's] original purpose", making it proper to consider whether an advance costs award — if necessary — could be confined to the Four Books Appeal, at least at first (paras. 36-39 and 44). The Court of Appeal was also reticent to extend this Court's decision in *Okanagan* to a for-profit corporation (para. 41).

28 Thackray J.A. then turned to the public importance requirement. He noted that the Four Books Appeal was a narrow matter that was confined to four specific titles (para. 49). It did not involve broad issues that would affect all book importers.

29 On the Systemic Review, Thackray J.A. canvassed Bennett J.'s reasons in detail. He took issue with the latter's conclusions based on the fact that Customs continues to detain a large number of books, noting that this fact does not indicate that Customs' practices are in any way improper (para. 55). He also observed that the appellant was relying on evidence collected before Customs had purportedly changed its system; at most, such evidence could be relied upon to show how quickly Customs had reacted to *Little Sisters No. 1*, but it could not serve to determine whether all the problems in *Little Sisters No. 1* had eventually been addressed. This "efficiency" question was significantly less important to the public than the question of whether the problems were addressed at all (para. 57).

30 Finally, Thackray J.A. pointed out that Bennett J. had not considered whether the present litigation could be defined as "special" enough to merit advance costs, as opposed to simply being important (para. 60). Freedom of expression, he stated, is always of public interest, but not every freedom of expression case can satisfy the public importance requirement. In the present case, it was worth considering the fact that the communities on which the appellant's claim would have the greatest impact did not view this case as sufficiently important to undertake funding it (para. 63). What is more, Thackray J.A. was hesitant about spending public funds on litigation that could result in a significant award for the applicant (para. 62).

31 In all, the Court of Appeal concluded that the appellant's claim was not of sufficient significance that the public purse should be obligated to help it move forward. Thackray J.A. concluded that "the public has not appointed Little Sisters to this role" as a watchdog, and he was "not satisfied that it is necessary for Little Sisters to be the instrument of reform of Customs" (paras. 72 and 74). Although recognizing the deference owed to Bennett J., the court nonetheless felt that this was an appropriate circumstance to find that the trial judge had erred (para. 66). Accordingly, it set aside her order for advance costs.

4. Analysis

4.1 Rule in Okanagan

32 *Okanagan* concerned logging rights of four Indian bands on Crown land in British Columbia. These bands had begun logging in order to raise funds for housing and desperately needed social services. Contending that they had no right to do so, the Minister of Forests served them with stop-work orders and then commenced proceedings to enforce the orders. The bands tried to prevent the matter from going to trial, seeking to have it determined summarily by arguing that it would be impossible for them to finance a full trial.

33 An exceptional convergence of factors occurred in *Okanagan*. At the individual level, the case was of the utmost importance to the bands. They were caught in a grave predicament: the costs of the litigation were more than they could afford, especially given pressing needs like housing; yet a failure to assert their logging rights would seriously compromise those same needs. On a broader level, the case raised aboriginal rights issues of great public importance. There was evidence that the land claim advanced by the bands had *prima facie* merit, but the courts had yet to decide on the precise mechanism for advancing such claims — the fundamental issue of general importance had not been resolved by the courts in other litigation. However the case was ultimately decided, it was in the public interest to have the matter resolved. For both the bands themselves and the public at large, the litigation could not, therefore, simply be abandoned. In these exceptional circumstances, this Court held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward.

34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. 1, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.

35 *Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 (S.C.C.); *O.P.E.I.U., Local 378 v. British Columbia Hydro & Power Authority*, [2005] B.C.J. No. 9, 2005 BCSC 8 (B.C. S.C.); *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412 (B.C. S.C.). By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.) at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (B.C. S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C. S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C. C.A.).

36 *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

38 It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

39 First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40 Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (on the application of Corner House Research) v. Secretary of State for Trade & Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192 (Eng. C.A.), at para. 76. We agree with this nuanced approach.

41 Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring

an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.

42 Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse — or another private party — takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

43 For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.

44 A court awarding advance costs must be guided by the condition of necessity. For parties with unequal financial resources to face each other in court is a regular occurrence. People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them all through the mechanism of advance costs awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.

4.2 Applying the Rule in Okanagan to the Facts of this Appeal

45 The appellant has asked this Court to award it advance costs with respect to two separate issues it raises in its litigation against Customs. The Four Books Appeal concerns Customs' prohibition of four books imported by the appellant for sale in its store. The Systemic Review, on the other hand, involves a broad investigation of Customs' practices relating to obscenity prohibitions.

46 We will first consider the merit of these claims, and will then discuss their public importance. We want to emphasize that the impecuniosity requirement, though listed first in *Okanagan*, cannot be used to give impecunious litigants a *prima facie* right to advance costs, as some interveners before this Court have suggested. Accordingly, we will consider it last. The question of impecuniosity will not even arise where a case is not otherwise special enough to merit this exceptional award.

4.2.1 Standard of Review

47 A trial judge enjoys considerable discretion in fashioning a costs award. This discretion has two corollaries.

48 First, a plethora of options are available to a judge when rendering a decision on costs. While the general rule is that costs follow the cause, as we have seen, this need not always be the case.

49 Second, a judge's decision on costs will generally be insulated from appellate review. In the past, this Court has established that costs awards should not be interfered with lightly: see *Odhavji Estate*, at para. 77. But this does not mean that no decision on costs should ever be interfered with. For instance, in *Okanagan*, advance costs were granted

on appeal after having been denied by the trial judge. A costs award can be set aside if it is based on an error in principle or is plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), [2004] 1 S.C.R. 303, 2004 SCC 9 (S.C.C.), at para. 27. In exercising their discretion regarding costs, trial judges must, especially in making an order as exceptional as one awarding advance costs, be careful to stay within recognized boundaries.

50 Despite the deference owed to the exercise of a discretion by a trial judge, we conclude that, in the present case, Bennett J. went beyond the boundaries this Court set in *Okanagan*.

4.2.2 Prima Facie Merit and Public Importance

51 As was explained in *Okanagan*, the merit requirement involves the following consideration:

> 2. The claim to be adjudicated [must be] *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> [Emphasis added; para. 40.]

The explicit reference in this passage to the interests of justice suggests that the test requires something more than mere proof that one's case has sufficient merit not to be dismissed summarily. Rather, an applicant must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation. The very wording of the requirement confirms that the interests of justice will not be jeopardized every time a litigant is forced to withdraw from litigation for financial reasons. The reason for this is that the context in which merit is considered is conditioned by the need to show that the case is exceptional. This does not mean that the case must be shown to have exceptional merit; rather, it must be shown to have sufficient merit to satisfy the court that proceeding with it is in the interests of justice. In the case at bar, as found by Bennett J., there is obviously a serious issue justifying a decision to have the matter proceed to trial. The question is whether a claim such as the one made by the appellant is sufficient to support a finding that the requirement of special circumstances is met. It is difficult to dissociate one from the other. We think there is no need to do so and will proceed accordingly.

52 Operating a business with some dependence on imports, the appellant is right to be concerned about what it alleges to be a discriminatory attitude by Customs towards its merchandise. Yet, the Four Books Appeal is extremely limited in scope. The appellant has advanced no evidence suggesting that these four books are integral, or even important, to its operations; furthermore, as mentioned above, book sales represent only 30 to 40 percent of its operations. In this context, we find it impossible to conclude that the appellant is in the extraordinary position that would justify an award of advance costs in the Four Books Appeal.

53 The same can be said of the Systemic Review. What the appellant is essentially attempting to achieve with the Systemic Review is to expand the scope of the litigation in the hope of bolstering its legal rights in individual cases; as a frequent importer, it will ultimately benefit more from a general investigation now than it would if it were left to challenge each and every detention and prohibition when it happened. This is an efficient and commendable approach, and one that Bennett J. approved. However, it is not one that would bring the case within the scope of the advance costs remedy. Specifically, the Systemic Review is not necessarily based on the prohibition, detention, or even delay of any books belonging to the appellant.

54 We do not wish to understate the appellant's constitutional rights or the history of its relations with Customs. In fact, we agree that the appellant's history of litigation against Customs provides important context for the present dispute. From the appellant's perspective, this history represents the height of frustration with the government: the appellant already took Customs to court years ago, argued all the way to this Court that it was the victim of unconstitutional practices, and succeeded in securing an important victory that stopped just shy of providing it with the remedy it sought. The appellant says that any institutional changes made since then are insufficient, and that Customs may still

be victimizing it in the exact same way. It wants this investigated. Why, it demands to know, must it now abandon its quest of so many years simply because it lacks the funds to do so?

55 The answer, we submit, is not as frustrating as the appellant implies. First of all, the appellant has not provided *prima facie* evidence that it continues to be targeted. On the contrary, when probed on this issue, counsel for the appellant simply suggested that Customs was cunning enough to stop its targeting once litigation had commenced. The appellant relies mainly on the fact that Customs continues to detain large quantities of imported material generally, including high proportions of gay and lesbian material; it then concludes that a significant percentage of these detentions must be improper. With respect, we cannot agree that this is *prima facie* evidence of targeting. Customs' own decisions, on which the appellant relies, to overturn a high percentage of its detentions only lend credence to Customs' argument that it has tried to scrutinize fairly those titles — like the appellant's — that remain detained. The fact that Customs continues to detain a number of titles is not, in itself, *prima facie* evidence of anything. There is no *prima facie* evidence that Customs is performing its task improperly, much less unconstitutionally.

56 Since there is insufficient *prima facie* evidence to conclude that the appellant remains the victim of unfair targeting, the Court's focus for the Systemic Review must turn to the more general question of the efficacy of Customs' changes to its practices in the wake of *Little Sisters No. 1*, and how the effect of those changes on the appellant may still be such as to make individual challenges pointless. In fact, if one accepts that the Systemic Review is merely about the speed with which Customs reacted to *Little Sisters No. 1* in the past, it must be concluded that the appellant is at present enjoying the very outcome it sought in that first series of court battles. Customs' changes cannot be determined to be insufficient on the basis of the number of decisions that have been unfavourable to the appellant.

57 The appellant is wrong to suggest that the history of its relations with Customs justifies its advance costs application. Binnie J.'s anticipation, at the conclusion of his majority reasons in *Little Sisters No. 1*, of subsequent litigation between the parties did not give the appellant the right to proceed by drawing on the public purse or even suggest that this was a possibility. Nor can this history be used to establish that an injustice will result if insufficient funds preclude the appellant from arguing the Systemic Review. In making the comment in question, Binnie J. merely recognized that the appellant, like any other importer, could rely on this Court's decision should any further disputes with Customs arise. What is more, his comments were clearly premised on the expectation that Customs would change — and was already changing — its practices to accord with the Court's ruling. None of the evidence that has been presented has convinced us that this premise should now be rejected.

58 But even if the appellant had provided more convincing evidence on this point, and even if the Systemic Review had been framed with more pressing concerns in mind, we still believe that the requirement of exceptional circumstances has not been met. The reason for this is that the battle the appellant seeks to fight through the Systemic Review is, strictly speaking, unnecessary. It is the Four Books Appeal that lies at the heart of the appellant's claim against Customs; the Systemic Review is simply an attempt by the appellant to investigate Customs' practices independently of this context. This observation is underscored by the fact that the appellant initially did not even intend to pursue the Systemic Review, but changed its strategy once it began to believe that systemic problems remained after *Little Sisters No. 1*. Simply put, the appellant's direct interest in this litigation disappears if its books are released — something that it seeks to achieve uniquely through the Four Books Appeal.

59 The nature of the injustice at stake in the case at bar can be contrasted with the one that was at stake in *Okanagan*. In that case, the bands, having been thrust into a situation requiring litigation, could not afford to pay for the litigation themselves, but could not afford the costs of forfeiting it either. The appellant in the instant case, on the other hand, has taken the Systemic Review upon itself even though it characterizes the fight as one that "makes no business sense".

60 The requirement that the issues raised transcend the litigant's individual interests and that it be profoundly important that they be resolved in the interests of justice (*Okanagan*, at para. 46) can be disposed of with little difficulty where the Four Books Appeal is concerned. Because the appellant has chosen to investigate Customs' general operations under the Systemic Review, it is clear that the Four Books Appeal concerns no interest beyond that of the appellant itself and, as a

consequence, is not special enough to justify an award of advance costs. This is especially so given that all the legal issues the appellant has canvassed in that appeal were already considered, and ruled upon, by this Court in *Little Sisters No. 1*. As the appellant itself observes at para. 10 of its factum, Binnie J. left the door open to further actions by the appellant with the words, "[t]hese findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (*Little Sisters No. 1*, at para. 158). At most, the Four Books Appeal deals with the application of *Little Sisters No. 1* to a specific set of facts.

61 Bennett J. held that the public importance of the constitutional issues underlying the appellant's claim and the broad impact of Customs' procedures sufficed to satisfy the public importance criterion. As mentioned above, she failed to address the special circumstances criterion. Yet, the Four Books Appeal does not address the issue of whether Customs is, in general, correctly applying the legal test for obscenity (para. 43). It is limited to the question of whether Customs reached the right result in prohibiting four specific titles. While evidence about Customs' general practices may arise incidentally in the course of the Four Books Appeal, and while some of those concerns may have been addressed in the course of the discovery of one witness for Customs, the broader issues raised by the appellant are being considered separately, as part of the Systemic Review. The appellant has defined the Four Books Appeal in a narrow, fact-specific manner such that this appeal cannot meet the requirements for public importance set out above that would have brought it within the category of special cases discussed by the Court in *Okanagan*.

62 Following the same reasoning, the Systemic Review offers greater promise on the public importance prong, however. To the extent that the narrowness of the Four Books Appeal discounts any potential for public importance, the breadth of the Systemic Review should satisfy this prong of the test. Because the review was framed so expansively, the appellant argues that a court's decision on this point will be of great interest both to importers and to Canada's lesbian, gay, bisexual and trans-identified communities.

63 The appellant has sought to demonstrate the far-reaching importance of this litigation by arguing that proof that Customs has disobeyed a court order would have great ramifications. To the appellant, it seems, the integrity of Customs, if not of the entire government, is at stake in this appeal. And indeed, we would surmise that a finding that Customs had deliberately misled the court would be shocking to most Canadians. This country boasts a proud history of compliance by the executive with orders of the judiciary, and we should be loath to take it for granted. However, short of imputing bad faith to Customs, a finding that its present practices do not meet this Court's dictates would not impugn the integrity of the government at large. This would merely indicate that Customs has not met its specific obligations as defined by this Court. The appropriate remedy in such a situation could range from an award of damages to injunctive relief. But a finding such as this, even if supported by the kind of evidence this Court found lacking in *Little Sisters No. 1*, does not rise to the level of general public importance simply because it concerns a public body. If it did, the same logic would seem to imply that it is an exceptional matter every time a public actor is alleged to be acting illegally — from a Crown corporation involved in a labour dispute to an administrative agency acting beyond its jurisdiction.

64 The appellant also argues that this dispute is unique because of the constitutional rights involved, which engage the critical value of freedom of expression. It portrays itself as a champion of *Charter* values. But not all *Charter* litigation is of exceptional public importance, even if it involves allegations of infringements of freedom of expression. It is not enough to contend that the *Charter* breach, if proven, would have implications beyond the individual litigant. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest. In the context of *Okanagan*, this meant proving that there were issues that had to be resolved one way or the other. The exceptional circumstances in that public interest case were related not so much to obtaining a certain result as to ensuring that the state's and bands' rights and obligations were defined properly — and definitively — in a context where it seemed important that the court develop a proper method for adjudicating land claims. Thus, not every case that could, once decided, be seen as being of public importance should be viewed as a special case within the meaning of *Okanagan*. Recognizing a case as special cannot be justified solely by reference to one particular desired or apprehended outcome of the litigation. It must be based on the nature of the litigation itself.

65 In the present appeal, the argument is that the litigation is of exceptional public importance because Customs might be shown to be acting unconstitutionally. The corollary to this statement is that the litigation would not be of exceptional public importance if Customs were shown to be acting in accordance with its constitutional duties. Thus, a valid claim that a case is of public importance would depend on the outcome of the case. But if, in a case like the one at bar, the exceptional importance criterion, as properly defined, is found to be met, there is a danger that this would amount to prejudging the case on its merits. If the appellant succeeds on the merits, one might then conclude, based on the *Charter* breach it has proved, that the case is at the appropriate level of public importance. But if the appellant does not succeed, the court endorses Customs' current system and no finding of unconstitutionality is made, nothing in this case will have implications beyond the appellant. For a court to hold, in this situation, that the exceptional public importance criterion is met could therefore imply that the court has already decided what its holding on the merits will be.

66 Bennett J. was very sensitive to concerns about prejudging issues and approached her advance costs analysis with great caution. However, we respectfully believe that it was an error, in a case like this, to hold that the public importance requirement was satisfied. Where only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met. It is in general only, when the public importance of a case can be established regardless of the ultimate holding on the merits, that a court should consider this requirement from *Okanagan* satisfied.

4.2.3 Impecuniosity

67 In a case like the present one, it is not even necessary for a court to consider the applicant's impecuniosity. The access to justice purpose of advance costs cannot be triggered absent the kind of exceptional circumstances that the Court discussed in *Okanagan*.

68 We agree that corporations are not barred from receiving advance costs awards. However, the judge should ask in every case whether the applicant has made the effort that is required to satisfy a court that all other funding options have been exhausted. In *Okanagan*, this requirement was described as follows:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made. [para. 40]

69 In evaluating whether the impecuniosity requirement is met, a court should also consider the potential cost of the litigation. In the present appeal, the cost estimate for the trial is well over $1 million. The Four Books Appeal alone is somewhat more affordable according to the appellant's estimate: approximately $300,000. Such cost estimates form an integral part of the evidence; the court should subject them to scrutiny, and then use them to consider whether the litigant is impecunious to the extent that an advance costs order is the only viable option.

70 A court should generally consider whether the applicant has tried to obtain a loan. In the criminal law context, financing litigation through credit is something that courts will look for before deciding that an accused's failure to obtain counsel merits a constitutional remedy: *R. v. K. (K.K.)* (1997), 159 N.S.R. (2d) 357 (N.S: C.A.). An application for advance costs should demand no less.

71 The impecuniosity requirement from *Okanagan* means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered. Advance costs should not be used as a smart litigation strategy; they are the last resort before an injustice results for a litigant, and for the public at large.

5. Conclusion

72 Once the three-part test from *Okanagan* has been met, the court must exercise its discretion to decide whether advance costs ought to be awarded or whether another type of order is justified. In exercising its discretion, the court

must remain sensitive to any concerns that did not arise in its analysis of the test. Although the appellant in the case at bar has failed to meet the *Okanagan* test, we believe that this case also raises issues that should in any event have prompted Bennett J. to exercise her discretion against an advance costs award in respect of the Systemic Review even if the *Okanagan* test had satisfied.

73 As we have stressed, the *Okanagan* test requires that an advance costs award be used only as a last resort in order to protect the public interest. The test prevents an applicant from succeeding in an advance costs application where legal action is unnecessary (the merit requirement) or where private funding has not been diligently sought (the impecuniosity requirement). But there will sometimes be other options that are not contemplated by the *Okanagan* analysis.

74 Before the appellant raised the advance costs issue, Bennett J. had decided that it could proceed with three issues before the British Columbia Supreme Court: the Four Books Appeal, the Systemic Review, and the Constitutional Question. In her ruling on advance costs, Bennett J. dealt with each of these issues separately. This was a proper approach to take. However, after finding that the three steps of the *Okanagan* test had been satisfied, Bennett J. should still have addressed the question of whether there was any way to prevent the injustice she had identified other than through an advance costs award.

75 There was in fact another possibility: to consider the Four Books Appeal before hearing the Systemic Review. Resolving — or at least hearing evidence on — the Four Books Appeal offered the hope of avoiding an advance costs award for the Systemic Review. Bennett J. should therefore have considered this approach as an alternative to her award. In these circumstances, it would be premature to award advance costs for the Systemic Review. Though her subsequent decision on advance costs in respect of the Systemic Review would still need to stop short of prejudging the issues raised therein, it is possible that the evidence and argument presented in the Four Books Appeal would be helpful in scrutinizing the Systemic Review for merit and exceptional public importance — and perhaps for determining whether it was even necessary.

76 On the other hand, we recognize that the possible advantages of pursuing the Four Books Appeal first could be outweighed by the disadvantages of doing so. When issues are segregated, the potential for inefficiency abounds. Witnesses examined on the first issue may need to be recalled to address the second. Redundant expert reports may be sought. The length of the trial itself may grow exponentially. If it were eventually determined that advance costs in respect of the Systemic Review were warranted, these additional costs would be borne by the public purse; this result should definitely be avoided.

77 To proceed in this way is consistent with the principle stated above that an applicant must be willing to relinquish some control over the litigation to benefit from an advance costs award. Since a litigant who has been awarded advance costs is proceeding with the aid of funds received from another party, the litigant must accept certain limitations. These may be strictly financial — e.g., caps on spending — but they may also go more directly to the litigant's litigation strategy. For instance, spending limits will mean that litigants proceeding with the aid of advance costs awards may be limited in their choice and in the number of counsel and experts. Also, the court awarding advance costs must consider whether the litigant's chosen method of proceeding at trial is compatible with the notion of advance costs being a last resort and may thus need to establish a framework for the conduct of the planned litigation. In the present appeal, while the appellant understandably wants to resolve the issues in the Systemic Review as quickly as possible, it may be preferable to proceed first with the Four Books Appeal before deciding the issues arising out of the Systemic Review. In response to an argument of this sort, an applicant must be able to prove either that modifying its litigation strategy would not be more efficient and would not lead to demonstrable savings, or that retaining its original litigation strategy is necessary to ensure that justice is done.

78 The rule in *Okanagan* arose on a very specific and compelling set of facts that created a situation that should hardly ever reoccur. As this Court held in *Okanagan*, an advance costs award should remain a last resort. The costs award in the instant case did not meet the required standards.

6. Disposition

79 The appeal is dismissed, with the parties to bear their own costs.

***McLachlin C.J.C.*:**

80 I have read the joint reasons of my colleagues Justices Bastarache and LeBel to dismiss the appeal, as well as those of Justice Binnie to allow it.

81 I would dismiss the appeal, although for somewhat different reasons than Bastarache and LeBel JJ. I cannot, with respect, concur entirely in the statement of the test put forth in either the reasons of Bastarache and LeBel JJ., nor in the reasons of Binnie J. This disagreement leads me to a different formulation of the test and a different analysis.

I. Test for Awarding Interim Costs

82 The law does not require a party to provide advance financing of the claim of its opponent as a general rule. Litigation proceeds on the basis that each party must finance its own case, subject to post-litigation costs awards. Sometimes, the state provides assistance to an impecunious party, through legal aid. Sometimes, lawyers assist a needing party by offering *pro bono* services or by working on a contingency fee arrangement. These possibilities do not negate the general rule that each party must finance its own litigation.

83 However, in certain cases raising special circumstances, judges, invoking their equitable jurisdiction, may order one party to pay the other's interim costs if "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time": *Jones v. Coxeter* (1742), 2 Atk. 401, 26 E.R. 642 (Eng. Ch. Div.). Such an order is rare, and may be made only in "special circumstances", where necessary to avoid unfairness or injustice. Such orders have been made in certain trust, bankruptcy, corporate and family cases. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.), this Court held that the public interest in litigation could support a finding of exceptional circumstances sufficient to permit an award of interim costs. In such cases, policy interests often supersede the interest to the litigant, and the issues are of significance not only to the parties, but to the broader community. As LeBel J., for the Court, wrote:

> In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case.... [para. 38]

84 In *Okanagan*, the third condition that must be met before a court can order interim costs is described in terms of "special interest", more particularly special interest established by the public importance of the litigation. The test for interim costs orders generally as set out in *Okanagan* reads as follows:

> There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.... in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.
>
> [Emphasis added; para. 36.]

85 Again, in applying the test, the Court, *per* LeBel J., stated:

> Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.
>
> [Emphasis added; para. 46.]

86 However, in setting out the test in the context of public interest litigation at para. 40 of *Okanagan*, the third condition of special circumstances was expressed in terms of public interest without express reference to special circumstances. The third branch is there described as follows: "3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases".

87 Notwithstanding the restricted formulation of the third requirement of the test at para. 40 of *Okanagan*, it is clear from the overall tenor of the reasons in *Okanagan* that the Court did not intend to depart from the common law requirement that special circumstances be established as a pre-condition of interim costs. The test for interim costs in public interest litigation should not be less exacting than the test for interim costs generally. Indeed, there is no reason why they should not be the same. In applying the test, as discussed, the Court confirmed that the search is not merely for a matter of public interest, but for the very special circumstances required to justify this extraordinary order.

88 I therefore proceed on the basis that the three criteria for an order for advance costs are: (1) impecuniosity; (2) a meritorious case; and (3) special circumstances making this extraordinary exercise of the court's power appropriate. This formulation differs from that used by my colleagues Bastarache and LeBel JJ. in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances in the sense indicated. The third requirement of special circumstances has been found in cases involving trusts, family maintenance, corporate and bankruptcy matters, and, in *Okanagan*, in cases involving issues of public importance. However, public importance is not enough in itself to meet the third requirement. The ultimate question is whether the matter of public interest rises to the level of constituting special circumstances. As with all equitable orders, the order is in the court's discretion, provided the conditions are made out. However, absent these conditions, it cannot be made.

II. Application of the Test to this Case

89 How the third requirement of the test is formulated makes a difference in this case. Indeed, it makes a critical difference. The chambers judge applied the formulation of the test found at para. 40 of *Okanagan* ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823 (B.C. S.C.)). She found impecuniosity, merit and public interest. Having done so, she explained the exercise of her residual discretion in two short paragraphs. In all of this, she never discussed the critical condition that the case displayed "special circumstances".

90 The Court of Appeal, in setting aside the chambers judge's order for interim costs, relied on this error ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94 (B.C. C.A.)). Thackray J.A. pointed out that the chambers judge did not consider whether the litigation could be defined as "special" enough — as opposed to simply being important — to merit advance costs (para. 60).

91 I agree with the Court of Appeal that this constituted a critical error, justifying disturbing the chambers judge's order for interim costs.

92 The standard for an appellate court setting aside an order for interim costs is stated succinctly by LeBel J. in *Okanagan* (at para. 43):

> An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

93 Major J., at para. 82, agreed and added:

> I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

Here, as the Court of Appeal held, the chambers judge misapplied the criteria relevant to the exercise of her discretion by failing to consider whether the case was special enough to justify the extraordinary measure of ordering the respondents to pay the appellant's interim costs. That constitutes an error of law, attracting appellate review.

94 For the reasons that follow, I conclude, as do my colleagues Bastarache and LeBel JJ., that the third pre-condition of an order for interim costs is not met in this case, not because the case entirely lacks public interest, as they assert, but because it does not rise to the level of the special circumstances required to give the court jurisdiction to make the order. In my view, this case does not fall into the narrow class of cases where one party may be ordered to pay the interim costs of the other party. If this case qualifies for advance costs, so will many other cases involving constitutional issues and other issues of public importance. This Court's decision in *Okanagan* was not intended to provide a general funding mechanism for important cases.

1. Inability to Pay

95 Under *Okanagan*, the first question is whether Little Sisters "genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, [whether] the litigation would be unable to proceed if the order were not made" (para. 40). This involves an examination of the cost of the projected litigation and the appellant's ability to meet those costs.

96 The scope of the case is central to this issue. Customs argued that an appeal regarding four of the books may determine whether a broader review of systemic practices is necessary, and that therefore the question of whether Little Sisters could afford the Four Books Appeal should be determined first. The Court of Appeal found that Bennett J. erred in failing to consider whether Little Sisters could afford to pursue the appeal of the four books, rather than the broader systemic appeal.

97 Like my colleagues, I am content to proceed on the basis of the Four Books Appeal. However, I disagree with the Court of Appeal's conclusion that is was "speculativ[e]" for Bennett J. to find the cost of that appeal exceeded Little Sisters' financial resources. The high cost of appealing specific prohibitions was noted by this Court in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.) (*Little Sisters No. 1*): the "cost of challenging [prohibitions] through the various levels of administrative review" make it difficult — if not "completely impractical" to contest them (*per* Iacobucci J., at para. 230). More importantly, Little Sisters presented extensive evidence of the resources required to advance this appeal, and established to the motion judge's satisfaction that the cost was beyond its means.

98 The intervener Attorney General of Ontario submitted that, much like the test for public interest standing, the test for advance costs should consider whether there are other parties capable of bringing the issue before the courts. It proposes this as a way of ensuring that interim costs orders only be issued where absolutely necessary, while also reducing the risk of plaintiff shopping. Bastarache and LeBel JJ. adopt this submission, while Binnie J. rejects it. I agree with Binnie J. on this point. As LeBel J. stated in *Okanagan*, the "party seeking the order must be impecunious to the extent that, without such an order, *that party* would be deprived of the opportunity to proceed with the case" (para. 36 (emphasis added)). The fact that other plaintiffs are actually pursuing similar claims might impact the overall assessment

of the public importance of the case, but it does not negate impecuniosity. To hold otherwise would place on the applicant the impossible task of proving no one else could or would pursue the litigation.

99 I conclude that the evidence supports the chambers judge's finding of inability to finance the litigation.

2. Prima Facie Merit

100 Both the chambers judge and the Court of Appeal concluded that this threshold is relatively low, and that it is met on the facts of the instant case.

101 I agree that the threshold set by the *prima facie* merit criterion is relatively low. Imposing too high a threshold at this stage risks engaging courts in the very exercise of pre-determining the merits that it is supposed to avoid. What is required at this stage, on the test for interim costs, applying *Okanagan*, is that "[t]he case is of sufficient merit that it should go forward" (*per* LeBel J., at para. 46). The chambers judge correctly considered this requirement and found it to be met. In my view, her finding on this issue should not be disturbed.

3. Special Circumstances

102 As already discussed, for more than 250 years, courts have insisted that a pre-condition of an order for interim costs is a finding that the case fulfills the requirement of "special circumstances". More precisely, "there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate": *Okanagan*, at para. 36. LeBel J. cited with approval the statement of Macdonald J. in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Ont. Gen. Div.), at p. 215, that the jurisdiction to award interim costs is "limited to very exceptional cases and ought to be narrowly applied" (para. 32). Similarly, La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), stated that an interim costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases" (para. 122).

103 The reasons for this stricture are apparent. They lie in the general rule that parties must bear the costs of their litigation, subject to post-judgment costs orders. It is an extraordinary and unusual thing to make a defendant pay not only its own litigation expenses, but to assist the plaintiff in bringing the case against him. Cases raising issues that transcend the plaintiff's individual interest, are of public importance and are unresolved, are legion. The Court in *Okanagan* did not intend interim costs to be available in all such cases, as confirmed by the requirement of "special circumstances" and the emphasis on a "narrow class of cases" and the "extraordinary" nature of the order (para. 36).

104 What identifies the rare case where "special circumstances" permit an order for interim costs? Some cases emphasize the importance of the subject matter of the suit. This is different from the question of *prima facie* merit at issue in the second requirement, discussed above. The issue is not whether the case has *prima facie* merit — that has already been established — but whether it is of such great importance that justice requires it to go forward. The importance may be private, public, or both. The "profound importance" of the case to the litigants in *Okanagan* was explicitly noted by LeBel J. (para 46). A similar analysis entered the equation in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* where the Ontario Court of Appeal, upholding the award of costs against the intervening Attorney General, noted that the case was one in which "parents rose up against state power because of their religious beliefs" ((1992), 10 O.R. (3d) 321 (Ont. C.A.), at pp. 354-55). Other cases find unfairness not so much in the special subject matter of the suit, as in the circumstances of the parties. For example, it may appear fair that a trustee who is sued bear some of the cost of settling an issue relating to a trust, or that a husband who controls the assets of the marriage pay something toward the cost of resolving how they are to be divided. Often, considerations of subject matter and circumstances intertwine. The ultimate question is whether the order for interim costs is required to prevent systemic unfairness or injustice.

105 What elevates a case to the special and narrow class where advance costs may be ordered cannot be determined by precise advance description. Generally, however, an award should be made only if the court concludes that issues raised are of high importance and are unlikely to proceed in the absence of an advance costs order, thereby producing a serious denial of justice. The injustice at stake here is not denial to the appellant of an anticipated remedy, nor denial

to the public of a desired outcome, but the injustice of denial of an opportunity to have a vital private and/or public issue judged and resolved by the courts. If the statement is confined to systemic injustice in this sense, I agree with the conclusion of Bastarache and LeBel JJ. that "[a]n advance costs award should remain a necessary last resort" (para. 78).

106 Against this background, I turn to whether the evidence adduced before the chambers judge establishes a special case in this sense. The chambers judge did not address this question. The Court of Appeal, *per* Thackray J.A., did consider it, and concluded that the case, while raising issues of public importance, did not meet the third requirement of being "special" enough to permit an order for interim costs:

> Freedom of expression is of public interest at any time, as is compliance with court orders. However, it is only the "special" case that will engage the extraordinary step of requiring the public purse to contribute funds, through advanced costs, to the prosecution or defence of a case. I am of the opinion that the case at bar has not been shown to be special as to its circumstances as compared to *Okanagan Indian Band* nor to be "special" by its very nature as a public interest case. [para. 61]

107 I agree with the Court of Appeal. It cannot be denied that the present case raises issues of some public importance. Free expression, as Thackray J.A. states, is always of public importance. And as Binnie J. points out, inferences may be drawn from the decision-making process for these books to the processes used for other material. This may be important to other booksellers relying on imports and, more broadly, to citizens concerned with how Customs defines obscenity and the contest between state power and freedom of expression. The public also has an interest in compliance with court orders.

108 I note the suggestion of both the Court of Appeal and Customs that Little Sisters' difficulty in collecting money to fund this case indicates that the lesbian and gay community does not regard this issue as particularly important. In my view, this argument should be rejected. First, this reasoning appears to penalize an applicant for not being able to raise money and flies in the face of the requirement to show that it genuinely cannot afford to pay for the litigation. Second, lack of concern is not the only inference that can be drawn from lack of financial support from the community. For example, other issues may be competing for its pecuniary attention. Finally, the question of public importance is not about popularity; indeed, the issues of greatest importance may sometimes be the least popular and hence the least supported. It is true, as the Court of Appeal noted, that the main issues concerning free speech were resolved in *Little Sisters No. 1*. However, the evidence supports residual issues of public importance in this litigation.

109 The real question is whether the issues of public importance raised by the present case rise to the level of being special enough to justify an order for interim costs. Is this one of those rare cases where justice demands that the questions raised be litigated? Here again, I agree with the Court of Appeal. At stake is the prospect of not learning how Customs proceeded on the Four Books Appeal and, in the event it proceeded wrongly, not having a remedial order. In my view, the possible insight that may be gained into Customs' practices through the prosecution of this case and the limited remedy, while of interest to Little Sisters, do not rise to the level of compelling public importance or demonstrate systemic injustice.

110 It is argued that the history of the litigation raises "special circumstances" elevating this case to the narrow and exceptional category where advance costs may be ordered. The intervener EGALE puts it thus: "[h]aving effectively *invited* the Bookstore to return to court in the event of further problems with Customs [in *Little Sisters No. 1*], it would be contrary to the interests of justice to now deny the Bookstore the funding it requires to pursue its *prima facie* meritorious claims" (I.F., at para. 58 (emphasis in original)). In my view, the words of the majority of the Court in *Little Sisters No. 1*, in declining to order a more structured remedy, do not move the case beyond the general rule that litigants must finance their litigation, subject to post-judgment costs awards. Referring to the findings of the Court, Binnie J. wrote: "These findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (para. 158). This is a comment on the legal foundation of future claims, not a statement that they should be supported by advance costs.

111 Notwithstanding some sympathy for the appellant, I find nothing in this case which establishes the special circumstances necessary to support the extraordinary remedy of an order that the respondents pay the appellant advance costs to defray the interim expense of its litigation. If advance costs are justified here, they will be justified in a host of other cases. I cannot read *Okanagan* as requiring this result.

112 I wish to add a note on the scale of costs. The chambers judge said nothing about the scale of costs. My colleagues appear to endorse a capped limit on spending, having regard to the projected costs of the litigation and litigation strategy. It is not clear to me that interim costs, where justified, should be awarded on the basis of indemnification or partial indemnification. In the seminal case of *Jones v. Coxeter*, the court spoke of directing the defendant "to pay something to the plaintiff in the mean time" (p. 642). In *Okanagan*, the costs were explicitly stated to be "'costs' in the way it is usually used in the *Supreme Court Rules* [B.C. Reg. 221/90] and in litigation parlance — i.e., taxable costs described in R. 57 [party and party costs]": see para. 10 of Newbury J.A.'s reasons in (*British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647 (B.C. C.A.)), which were approved by this Court, at para. 47, when it dismissed the appeal. It seems reasonable that an advance costs award cannot give the applicant more than it would receive were it successful at trial.

III. Conclusion

113 I would dismiss the appeal, with the parties bearing their own costs.

***Binnie J.*:**

114 I differ from my colleagues about what is truly at stake in this appeal and this leads to our disagreement about the appropriate outcome. In my view, the earlier case of *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.) ("*Little Sisters No. 1*"), provides more than "important context" (as my colleagues Bastarache and LeBel JJ. describe it at para. 54). The ramifications of that decision go to the heart and soul of the appellant's present application. Were it not for the findings of serious abuses on the part of Customs authorities in *Little Sisters No. 1*, I doubt if the appellant's request for advance costs in the present follow-up case would have had the legs to make it this far. This case is not the beginning of a litigation journey. It is 12 years into it.

A. What the Court Decided in Little Sisters No. 1

115 In the earlier proceedings, the appellant (a book and art shop described by the trial judge in *Little Sisters No. 1* as the "nerve-centre for the homosexual community" in Vancouver ((1996), 18 B.C.L.R. (3d) 241 (B.C. S.C.), at para. 90) challenged the constitutional validity of provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), and the *Customs Tariff*, S.C. 1987, c. 49, Schedule VII, that provide for border screening and prohibition of entry into Canada of:

> **9956** Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that
>
> (*a*) are deemed to be obscene under subsection 163(8) of the *Criminal Code*;

The Customs legislation was challenged in *Little Sisters No. 1* as an unlawful prior restraint on freedom of expression, and its administration by Customs officials as targeting the lesbian and gay community contrary to principles of fair procedure in administrative law and the freedom of expression and equality provisions of the *Canadian Charter of Rights and Freedoms* (ss. 2(*b*) and 15(1)).

116 Based on the findings of the trial judge, and after examining the ample evidentiary record, our Court concluded unanimously that systemic discrimination by Customs officials and unlawful interference with free expression were clearly established. As it was put in the majority reasons:

> Government interference with freedom of expression in any form calls for vigilance. Where, as here, a trial judge finds that such interference is accompanied "by the systemic targeting" of a particular group in society (in this case

> individuals who were seen as standard bearers for the gay and lesbian community), the issue takes on a further and even more serious dimension. Sexuality is a source of profound vulnerability, and the appellants reasonably concluded that they were in many ways being treated by Customs officials as sexual outcasts. [para. 36]

More specifically, the majority attributed the numerous *Charter* violations to systemic problems in the administration of the Customs legislation as follows (at para. 154):

> 2. The rights of the appellants under s. 2(*b*) and s. 15(1) of the *Charter* have been infringed in the following respects:
>
> (a) They have been targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard;
>
> (b) In consequence of the targeting, the appellants have suffered excessive and unnecessary prejudice in terms of delays, cost and other losses in having their goods cleared (if at all) through Canada Customs;
>
> (c) The reasons for this excessive and unnecessary prejudice include:
>
> (i) failure by Customs to devote a sufficient number of officials to carry out the review of the appellants' publications in a timely way;
>
> (ii) the inadequate training of the officials assigned to the task;
>
> (iii) the failure to place at the disposal of these officials proper guides and manuals, failure to update Memorandum D9-1-1 and its accompanying illustrative manual in a timely way, and the failure to develop workable procedures to deal with books consisting mostly or wholly of written text;
>
> (iv) failure to establish internal deadlines and related criteria for the expeditious review of expressive materials;
>
> (v) failure to incorporate into departmental guides and manuals relevant advice received from time to time from the Department of Justice;
>
> (vi) failure to provide the appellants in a timely way with notice of the basis for detention of publications, the opportunity to make meaningful submissions on a re-determination, and reasonable access to the disputed materials for that purpose; and
>
> (vii) failure to extend to the appellants the equal benefit of fair and expeditious treatment of their imported goods without discrimination based on sexual orientation.

117 The Court divided on the issue of remedy. The majority (McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ.) concluded that the Customs legislation was valid but its administration by Canada Customs was deeply flawed. Systemic problems within the bureaucracy could and should, it was held, be addressed at the bureaucratic level. However, the fact that it had taken six years for the case to reach our Court meant the evidence before us was already six years out of date. The Minister of Justice assured the Court that the systemic problems had been properly addressed as of the date of our hearing. Because of the staleness of the evidence, the majority declined at para. 157 to grant a structured s. 24(1) remedy:

> We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265)....

118 It was anticipated, however, that there could well be follow-up litigation if, in fact, the systemic problems condemned by all three levels of court continued. According to the majority:

> A more structured s. 24(1) remedy might well be helpful but it would serve the interests of none of the parties for this Court to issue a formal declaratory order based on six-year-old evidence supplemented by conflicting oral submissions and speculation on the current state of affairs. The views of the Court on the merits of the appellants' complaints as the situation stood at the end of 1994 are recorded in these reasons and those of my colleague Iacobucci J. These findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary. [para. 158]

119 The minority (Iacobucci, Arbour and LeBel JJ.) joined in the condemnation of Customs' practices but proposed a more drastic remedy, namely to declare the relevant Tariff Item to be of no force and effect (para. 283) and thereby to eliminate the statutory authority of Customs officials to detain at the border *any* material they allege to be obscene:

> Particularly in a case like the one before us, where there is an extensive record of the improper detention of non-obscene works, the only choice to ensure full protection of the constitutional rights at stake is to invalidate the legislation and invite Parliament to remedy the constitutional infirmities.
>
> [Emphasis added; para. 167.]

120 The present application for advance costs comes before us precisely because the appellant says that the Minister's assurances proved empty in practice, that the systemic abuses established in the earlier litigation have continued, and that (in its view) Canada Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination. Of course there are two sides to the story. Although for good reason the majority declined to strike down the legislation, it was never doubted that Customs has been given a difficult job to do by Parliament, and that solutions to entrenched problems would take time to put in place. The question of public importance is this: was the Minister as good as his word when his counsel assured the Court that the appropriate reforms had been implemented? The chambers judge, from whose decision the present appeal has been taken, concluded that Little Sisters had established a *prima facie* case that the promised reforms had *not* been implemented.

B. The Appellant's Four Books Appeal

121 As noted by my colleagues, the present application arises out of the detention by Canada Customs of four books sought to be imported by the appellant. By originating Notice of Appeal dated February 13, 2002, the appellant sought the following orders pursuant to s. 67 as modified by s. 71 of the *Customs Act*:

> 1. A declaration pursuant to s. 24 of the *Charter* relevant provisions of the *Customs Tariff* and *Customs Act* "have been construed and applied in a manner contrary to s. 2(b) and 15(1) of the *Charter*";
>
> 2. An injunction restraining Customs from applying and administering these provisions "to goods of Little Sisters Book and Art Emporium permanently or until such time as there is no risk that the unconstitutional administration will continue";
>
> 3. Damages, including aggravated and punitive damages;
>
> 4. Special or increased costs;
>
> 5. Such further relief, etc.

The *Charter* and "systemic" issues were therefore part of the proceedings from the outset. Little Sisters says that in the course of examinations for discovery it became convinced that the banning of the four books showed little had changed

in the Customs treatment of gay and lesbian literature. It then sought to broaden greatly the scope of the inquiry by way of the so-called "Systemic Review".

122 The four books remain banned. Other books sought to be imported by Little Sisters have been detained and released only after the cost and delay of a challenge. Some of the banned material consists of comics but at least one of the books is described as "a paperback compilation of short stories originally published in *Bound & Gagged* magazine between 1993-1997" (*Of Men, Ropes and Remembrance* (1997), on copyright page). As counsel for the appellant acknowledges, much of this material is "not ... for the faint of heart" (A.F., at para. 95). In the end, a court may conclude that the books *are* obscene within the meaning of s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46. The result cannot be pre-judged either way. But the chambers judge concluded that the Little Sisters' complaint has *prima facie* merit, stating:

> ... an administrative review to determine if the systemic changes as identified by [*Little Sisters No. 1*] have, in fact been made, is appropriate. There is a *prima facie* case to suggest they have not been sufficiently addressed.
>
> ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, at para. 59)

123 Book censorship has long been considered particularly offensive to civil liberties:

> The freedom to write books, and thus to disseminate ideas, opinions, and concepts of the imagination — the freedom to treat with complete candour of an aspect of human life and the activities, aspirations and failings of human beings — these are fundamental to progress in a free society. In my view of the law, such freedom should not, except in extreme circumstances, be curtailed. . . .

(*R. v. C. Coles Co.* (1964), [1965] 1 O.R. 557 (Ont. C.A.), at p. 563, dismissing obscenity charges in relation to *Fanny Hill — Memoirs of a Woman of Pleasure*)

124 The majority said in *Little Sisters No. 1* in relation to banning books at the border:

> The evidence is that Customs officials failed in general to deal properly with books. Few, if any, were read in their entirety. The usual procedure was for a Customs official to thumb through the pages of a book and as soon as three passages replicating material considered to be obscene under Memorandum D9-1-1 were identified in the text the book was deemed obscene and prohibited. The procedure would be clearly inadequate in all but the most egregious cases. No attempt was made to gain an impression of the book as a whole on which "artistic merit" *could* be assessed.
>
> [Emphasis in original; para. 96.]

125 The minority also expressed particular concern about the apparent unwillingness or inability of Customs officials to deal responsibly with books, *per* Iacobucci J. at para. 196:

> I also wish to make it absolutely clear that a book must be read in its entirety when determining whether or not it is obscene....

126 The appellant's position is that while the books are different the problems are the same problems that have troubled every court that dealt with *Little Sisters No. 1*. There is no doubt that the Customs legislation, while valid, is open to abuse. The appellant contends that the pattern of discrimination and abuse of freedom of expression documented in *Little Sisters No. 1* has continued and that the ban of the four books in issue demonstrate that Little Sisters won the battle but is losing the subsequent bureaucratic war. My colleagues Bastarache and LeBel JJ. write that "Simply put, the appellant's direct interest in this litigation disappears if its books are released — something that it seeks to achieve uniquely through the Four Books Appeal." (para. 58) I do not agree. The four books in question here will be followed by other importations of gay and lesbian erotica and no doubt other book bans. A flawed procedure can from time to time produce a correct result just as a good procedure can produce mistakes. For that reason, as will be seen, the Crown agreed that the Notice of Appeal under the Act properly initiated an enquiry into the Customs process that was followed as well as the result and the reasons arrived at for the ban in these cases. As counsel for the Crown acknowledged at the

hearing before us, "it would make sense, given the breadth of the powers of the court [under s. 67], that it is possible to look past simply the end result" (transcript, at p. 82).

127 Canada is committed to freedom of expression, to non-discrimination and to government conducted according to law. The issues raised by Little Sisters are of pressing public interest.

C. The Appellant's Application for Advance Costs

128 It is against this background that the appellant's current application must be addressed. This case, as the chambers judge (who is also the case management judge) correctly observed, is about *Charter* compliance. I therefore do not agree with the assertion of my colleagues Bastarache and LeBel JJ. that the appellant's case should be analysed in business terms. They write:

> Yet, the Four Books Appeal is extremely limited in scope. The appellant has advanced no evidence suggesting that these four books are integral, or even important, to its operations; furthermore, ...book sales represent only 30 to 40 percent of its operations. [para. 52]

It can be stated with absolute confidence that there is no "business case" that could possibly justify Little Sisters' continuation of its battle with Canada Customs. The chambers judge noted that the Four Books Appeal involves only a few dozen individual copies. The profit on the sale of those books would not pay for half an hour of the appellant's lawyer's time. The Four Books Appeal necessarily comprises four obscenity cases in one combined with an examination of how those obscenity determinations came to be made by Canada Customs. This fight is not just about four books. As was the case in *Little Sisters No. 1*, the real fight is about alleged systemic discrimination *exemplified* by the Four Books Appeal. As stated, the Crown concedes that the systemic issues are to be explored to some extent in the Four Books Appeal. The chambers judge's order of February 6, 2003 noted the concession:

> 6. The Appellant's application for an order compelling answers on examination for discovery is adjourned generally, save for the part of the application with respect to "the process that was followed and the reasons that the Comic Books (*Meatmen*, Volume 18, Special S&M Comics Edition and volume 24, Special SM Comics Edition) were determined to be obscene" which is granted by consent;

[Emphasis added.]

The Crown has deep pockets and there is no reason to think the present contest will be any less fiercely fought than the last. Both parties have already advised the case management judge of their intention to call extensive expert evidence, which is itself a major expense.

129 The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight. It takes an unbusinesslike litigant like Little Sisters to elbow aside purely financial considerations (to the extent it can) and carry on what it sees as unfinished *Charter* business against the government. Having done so successfully and at its own expense in *Little Sisters No. 1*, it asks the court for an exceptional order of advance costs to make good the victory it thought it had won in *Little Sisters No. 1*. Little Sisters may be right or it may be wrong in its allegations, but its motive can hardly be financial, and its claim to advance costs should not be assessed on that basis.

D. The "Four Books Appeal" Versus the "Systemic Review"

130 It is difficult to assess the scope of the appellant's proposed "Systemic Review" because there are no pleadings. This is so, at least in part, because the Crown insists that Little Sisters must utilize the appeal procedures under the *Customs Act* rather than proceeding by way of an ordinary action. However, as described by appellant's counsel, the proposal for a "Systemic Review" seems to approximate a privately initiated public enquiry into the workings of Canada Customs,

not only with respect to the appellant's problems, but with respect to those of other importers in similar lines of business as well. The appellant's attempt to assume the role of a private Attorney General operating on public funds, or to escalate the Four Books Appeal into a sort of informal class action without bothering to certify the class, was rightly rejected by the B.C. Court of Appeal. Courts exist to resolve defined issues between litigants. Public enquiries are initiated elsewhere. Nevertheless, the appellant's allegations, if shown to be true, mean that it has suffered special damage as a result of a systemic failure of Canada Customs to respect the constitutional rights of readers and writers as well as importers. The public has an interest in whether or not its government respects the law and operates in relation to its citizens in a non-discriminatory fashion. That is where the interest of this litigation transcends the interests of the appellant.

131 I agree with Thackray J.A. that the so-called Systemic Review is an impermissible expansion of the Four Books Appeal, but I think the courts are quite capable of keeping the Four Books Appeal within proper bounds. I also agree with him that what is of importance to the public now are the procedures that were used to evaluate obscenity at the time these books were banned, not the history of the speed at which those procedures were modified following *Little Sisters No. 1*.

132 My colleagues Bastarache and LeBel JJ. state that:

> It is the Four Books Appeal that lies at the heart of the appellant's claim against Customs; the Systemic Review is simply an attempt by the appellant to investigate Customs' practices independently of this context. [para. 58]

133 Strictly speaking, of course, there is no such proceeding as the "Systemic Review" outside the wish list of appellant's counsel. There is only one proceeding before the Court and it is for the relief claimed in the originating Notice of Appeal dated February 13, 2002 (as expanded from two to four books). The Four Books Appeal provides the appellant with an opportunity to explore, within a limited context, the process under which the importation of these four books was banned, and to that extent provides an opportunity for the systemic issues to be canvassed. The floating by appellant's counsel of a more ambitious idea for a Systemic Review does not empty the originating Notice of Appeal of its original content or in any way restrict or expand its ambit. The Notice of Appeal stands unamended. That is the only application for which advance costs can properly be sought.

E. The Requirements for Advance Costs

134 The courts have always exercised a broad discretion in the matter of costs. Although the appellant made its application pursuant to (and apparently because of) this Court's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.), *Okanagan* is illustrative rather than exhaustive of a broader costs jurisdiction.

135 It is true that an order for advance costs should not be made where a lesser costs order would suffice, such as protective costs orders, which ensure that plaintiffs or applicants in public interest litigation do not have costs orders made against them at the conclusion of proceedings. Here the immediate problem is not the possibility of a calamitous post-trial award of costs. The problem is to get the case to trial in the first place.

136 It is also true that a party seeking advance costs must provide evidence that it has exhausted all realistic alternative avenues to fund its case including, where appropriate, legal aid, *pro bono* representation, contingency fees, private fundraising efforts and class action certification.

137 Further, I agree with my colleagues that an award of advance costs must be rare and exceptional and granted only in "special cases" where it is necessary in the public interest. In light of *Little Sisters No. 1*, I consider this to be a special case.

138 *Okanagan* established a three-part threshold, each of which must be demonstrated to give the trial judge the discretion to make the award in "special" cases, *per* LeBel J. at para. 40:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

139 Although Thackray J.A. seemed to doubt whether an entity that seeks to earn a profit could qualify for advance costs ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94 (B.C. C.A.), at para. 41), I agree with the intervener Canadian Bar Association that "there is no principled reason to find that public and private interests cannot co-exist in a case that is deserving of advance costs" and that "the public interest must be clearly served by the litigation, but it does not have to operate to the exclusion of other interests" (factum, at para. 5). The Attorney General of British Columbia seems to agree (factum, at para. 11). In *Okanagan* itself the band had a private financial interest in the assertion of its claimed logging rights.

140 As did my colleagues, I will address each of the three conditions precedent.

1. The Appellant Genuinely Cannot Afford to Pay for the Litigation, and No Other Realistic Option Exists for Bringing the Issues to Trial — In Short, the Litigation Would Be Unable to Proceed if the Order Were Not Made

141 Whether or not an applicant "genuinely cannot afford to pay for the litigation" is a question of fact. After a four-day hearing and consideration of extensive financial material, the chambers judge made the following observation:

I propose to deal with the financial aspect of the litigation first. The Commissioner submits that I should limit this case to the appeal. If I do that, then says the Commissioner, Little Sisters can afford to bring that aspect of the litigation.

I disagree. Appeals from prohibitions are rarely brought to court, no doubt because the cost is prohibitive. Little Sisters intends to call expert evidence, as does the Commissioner, to establish the factual foundation for their respective arguments.

[Emphasis added; paras. 18-19.]

She concluded that Little Sisters, with its resources in part depleted by the earlier litigation, could not afford to bring even the Four Books Appeal to trial. The appellant says that it realized it could not afford the litigation when Customs filed six expert affidavits in the Four Books Appeal itself. The chambers judge made strong findings of fact on the issue of lack of means:

Having reviewed the evidence, it is clear that Little Sisters cannot genuinely afford to pay for this litigation, or any reasonable aspect of it.

. . . . .

I conclude that Little Sisters meets the first requirement of *Okanagan Indian Band*, regardless of the scope of the litigation.

[Emphasis added; paras. 22 and 25.]

As does our Chief Justice (para. 99), I accept the chambers judge's finding that the impecuniosity requirement is met. The chambers judge was satisfied that sources of alternate funding had been explored. This is not a case where a contingency fee is attractive to lawyers. Even an optimistic view of the damages that might be recovered is insufficient to justify the risk to a law firm of time and disbursements. Nor is this a case where settlement is possible. Customs has given as much ground as it is prepared to give. Thackray J.A. speculated that if this case were of general importance, members of the gay and lesbian community would support it financially, and so they have, but not enough. Speculation of at least equal value is that the supporters are suffering donor fatigue. If Little Sisters is correct that Customs has not changed its ways despite *Little Sisters No. 1* rational people may well conclude that "you can't fight City Hall" and put their money into more productive activities. Disillusionment with the capacity of the legal system to remedy *Charter* wrongs effectively is of public concern.

142 My colleagues Bastarache and LeBel JJ. assert that the impecuniosity requirement cannot be satisfied where "other litigation is pending [which] may be conducted for this same purpose, without requiring an interim order of costs" (para. 41). This is a legitimate consideration, but Customs is in the best position to know of such litigation, and has not disclosed any such cases. I do not believe the appellant should be called on to prove a negative when the party in the best position to raise such a concern — Customs — has not done so. In any event, on these particular facts, Little Sisters has taken on what it refers to as "Big Brother" for the past 12 years and I think it has earned the right to complete what the chambers judge considered to be a work in progress.

143 Over more than a decade Little Sisters has borne the brunt of the battle on this branch of expression and equality rights. In 1996, it financed a two-month trial and two subsequent successful appeals to establish the existence of systemic *Charter* violations at Canada Customs. That case vindicated (at least in principle) the rights generally of the lesbian and gay community, not just Little Sisters. We are told that the costs award in *Little Sisters No. 1* covered only 60 percent or so of actual costs (A.R., at p. 171). The present issue is whether the rights established in principle have (or will) become rights in reality. In the circumstances Little Sisters should not have to prove that there is no one else in Canada with a potential interest in the subject matter with pockets deep enough to take up the cause.

2. The Claim to Be Adjudicated Is Prima Facie Meritorious; that Is, the Claim Is at Least of Sufficient Merit that it Is Contrary to the Interests of Justice for the Opportunity to Pursue the Case to Be Forfeited Just Because the Litigant Lacks Financial Means

144 The courts below, while not prejudging the outcome, considered that the appellant had easily met this requirement. The chambers judge noted that Customs did not "strenuously oppose the granting of costs" on the ground of whether the claim is *prima facie* meritorious (para. 28). Similarly, the Court of Appeal said that Customs "raised, but did not press" this issue (para. 28). The chambers judge nevertheless addressed it in some detail, noting that the determinations of obscenity in issue are those of Ms. Anne Kline, who at the relevant time was the Customs official in Ottawa ultimately in charge of the obscenity determinations. Ms. Kline acknowledged on discovery that she does not recall *ever* having allowed an appeal based on artistic merit (A.R., at p. 2935, Q 3167). The chambers judge stated:

> With respect to the appeal, there is *prima facie* evidence that Ms. Kline may not be applying the *Butler* test correctly [*R. v. Butler*, [1992] 1 S.C.R. 452]. For example, there is some evidence that Ms. Kline uses a "dirt for dirt's sake" approach (cross-examination on affidavit Q. 516-517, 526-7) which was rejected by *Butler* at p. 492, para. 79. There is some evidence to suggest she may not be correctly applying the risk of harm test: See her Examination for Discovery Questions: 2107-2110. Further, there is evidence that Ms. Kline may not be correctly applying the "artistic merit" test. For example, she may not be considering some or all of the factors which define artistic merit: See *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. [para. 29]

Further, the chambers judge added:

> Unbeknownst to Little Sisters, Ms. Kline did not look at anything that was before the s. 58 arbitrators, including Little Sisters' written submissions. [para. 30]

145 The Chief Justice agrees that the "*prima facie* merit" condition is met (para. 22) but our colleagues Bastarache and LeBel JJ. say that to establish *prima facie* merit an applicant must "prove that the interests of justice would not be served" were the action to fail to proceed for want of resources (para. 51). With respect, this conflates a *prima facie* merit test with the "interests of justice" test. A *prima facie* merit test avoids the need for prejudgment and in my view is to be preferred. The potential for injustice should be addressed under the other factors, particularly at the residual discretion stage.

3. The Issues Raised Transcend the Individual Interests of the Particular Litigant, Are of Public Importance, and Have Not Been Resolved in Previous Cases

146 The appellant's position of course is that the issues *ought* to have been resolved in *Little Sisters No. 1* but in the end were not. It seeks a structured s. 24(1) remedy on updated material which would operate as a set of detailed instructions binding on Customs officials, only this time accompanied with ongoing judicial supervision. As appellant's counsel put it,

> we will be pressing very hard for the kind of structural reform that this court I think has opened up in ... *Doucet-Boudreau v. Nova Scotia (Department of Education)* [[2003] 3 S.C.R. 3, 2003 SCC 62 (S.C.C.)]. [transcript, at p. 4]

147 On the issue of public interest, the chambers judge concluded:

> Clearly, if the Commissioner, via Ms. Kline, is not correctly applying the legal test for obscenity, that issue transcends the interests of Little Sisters and touches all book importers, both commercial and private.... [para. 43]

148 The importance of the obscenity issue also affects potential readers. Section 2(*b*) of the *Charter* protects not only writers and artists, but also readers, who are denied access to books they may wish to peruse. The impact of discrimination may start with the appellant but it reaches "through them to Vancouver's gay and lesbian community" (*Little Sisters No. 1*, at para. 123) and beyond.

149 Underpinning her conclusion the chambers judge noted several circumstances she regarded as significant:

> Since 1996, 57 titles imported by Little Sisters have been detained. Nineteen titles have been detained since the decision by the Supreme Court of Canada in *Little Sisters No. 1*... (affidavit of Ms. Kline, para. 17). It is not clear if these four titles are part of the nineteen. Numerous titles have been seized from other book sellers, and in particular, gay and lesbian book sellers. [para. 35]
>
> . . . . .
>
> There is evidence that Customs is detaining hundreds, if not thousands of titles. [para. 37]
>
> Ms. Kline has the final say, prior to court review, on the detentions of all titles imported into this country.... [para. 38]
>
> . . . . .
>
> The legislation prohibiting obscene material violates [the *Charter*], but is saved by s. 1... on the understanding that certain safeguards to protect citizens are in place. One of these safeguards is the defence of artistic merit. [paras. 40-41]
>
> Little Sisters has filed evidence to show that Customs has detained 190,000 items and prohibited 67,000 - 68,000 items in the past five years. This does not equate to titles, but the statistics demonstrate a large magnitude of detentions. [para. 48]
>
> Further, the statistics demonstrate that 70% of detentions are gay and lesbian material. This is some evidence of continual targeting. [para. 49]

150 While I agree with Thackray J.A. that raw numbers of detained books are not necessarily significant, nevertheless the high *percentage* of gay and lesbian material detained *is* significant (70 percent of all items seized). In *Little Sisters No. 1* our Court observed that "While homosexuals are said to form less than 10 per cent of the Canadian population, up to 75 per cent of the material from time to time detained and examined for obscenity was directed to homosexual audiences." (para. 113) We noted then that there was no evidence that gay and lesbian erotica was more likely to be obscene than heterosexual erotica (para. 121). If the systemic problems had been resolved since our decision in 2000, one would expect the percentage of gay and lesbian material detained to now be less than 70 percent of the total. An explanation for this lack of proportionality may lie in "the process that was followed and the reasons [the books] were determined to be obscene" as agreed to by the Crown in the February 6, 2003 consent order. I accept the view of the chambers judge that the 70 percent detention rate six years after *Little Sisters No. 1* is a statistic that taken together with the other evidence seems to signal an ongoing problem.

151 In short, on the issue of public importance, I read the chambers judge as saying she is satisfied on a *prima facie* basis that there is unfinished business of high public importance left over from *Little Sisters No. 1*. She goes on to say:

> There is a strong public interest at stake, and that is ensuring that government does not interfere with the s. 2(*b*) rights of citizens. Further, whether the government has complied with a court order. [para. 61]

152 My colleagues Bastarache and LeBel JJ. further narrow *Okanagan* by observing that "the litigation would not be of exceptional public importance if Customs were shown to be acting in accordance with its constitutional duties." (para. 65) With respect, I cannot agree that the public importance of a case depends on whether the government loses it. The issue of public importance is whether Canada Customs learned the lessons of *Little Sisters No. 1*, and now performs its mandate without discrimination on grounds of sexual orientation, and has lived up to its assurances given to the Court. A positive answer to those questions would have as much significance as a negative one.

153 My colleague the Chief Justice formulates the third criterion differently than Bastarache and LeBel JJ. She writes that her

> formulation differs from that used by my colleagues ... in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances in the sense indicated.... [P]ublic importance is not enough in itself to meet the third requirement. The ultimate question is whether the matter of public interest rises to the level of constituting special circumstances. [para. 88]
>
> . . . . .
>
> How the third requirement of the test is formulated makes a difference in this case. Indeed, it makes a critical difference. [para. 89]

Having found that Little Sisters demonstrated both impecuniosity (para. 99) and *prima facie* merit (para. 101), the Chief Justice nevertheless rejects the Little Sisters application on the basis that its case is not "special enough" and the potential "insight" to be gained by its pursuit "do[es] not rise to the level of compelling public importance or demonstrate systemic injustice." (para. 109)

154 Whether a case though special is not "special enough" or fails to "rise to the level" of compelling public importance is a subjective test whose outcome will inevitably depend to a significant extent on the eye of the beholder. The discretionary nature of the order was, of course, recognized in *Okanagan*, although in that case it was identified as a residual discretion rather than as part of the "public importance" criterion. More significantly, *Okanagan* recognized that the discretion is given to the trial court. LeBel J. wrote for the majority that:

> It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

[Emphasis added; para. 38]

It is ironic that in both cases to reach this Court on the advance costs issue the trial court has been reversed.

155 My view is that the "sufficiently special" test is essentially the same as the "rare and exceptional circumstances" test set out in *Okanagan*, which was dutifully applied by the chambers judge in this case, as I will address in the next section.

F. The Exercise of Discretion in "Rare and Exceptional Circumstances"

156 The chambers judge properly directed herself on the "sufficiently special circumstances" test under the rubric of "rare and exceptional circumstances", as follows:

> Advanced costs are ordered in "rare and exceptional circumstances." The jurisdiction to make such an order in British Columbia was confirmed in *Okanagan Indian Band*. [para. 8]
>
> . . . . .
>
> [*Okanagan*] held ... that even if all the conditions are met, that opens the "narrow jurisdiction" to consider an order for advanced costs. Even if all three criteria are met, it is still within the judge's discretion to make such an order. The order is made in "rare and exceptional circumstances". [para. 10]
>
> . . . . .
>
> Having met the threshold test for advanced costs, I would exercise my discretion in favour of ordering advanced costs to fund these appeals. The issues raised are too important to forfeit this litigation because of lack of funds. [para. 44]

In other words, the chambers judge did what *Okanagan* asked of her, namely to determine whether this case is "special enough to rise to the level where the unusual measure of ordering costs would be appropriate." (LeBel J., at para. 38) She held that it did, and absent a demonstration that she erred in her appreciation of the facts or the law, her assessment on this point should be upheld, in my view.

157 Only one error in principle has been identified, and it goes to the scope of the proceeding not the appropriateness of its advanced funding. For the reasons stated earlier, I accept that the chambers judge erred in principle in ordering advance costs for the "extended" Systemic Review because there is no such action pending. The taxpayers cannot be ordered to finance a piece of litigation that is neither pending nor defined in any concrete form in a proposed statement of claim. All that is before the court is the originating Notice of Appeal under ss. 67 and 71 of the *Customs Act*. The scope of the statutory appeal will have to be determined by the Supreme Court of British Columbia, although the chambers judge (who is also the case management judge) gave some indication of its elasticity. But in terms of scope that is as much elbow room as the law permits.

158 No such error affects the chambers judge's exercise of discretion in relation to the Four Books Appeal. Having found the Little Sisters' allegations to have *prima facie* merit, and considering everything that has gone on in the last 12 years as creating "rare and exceptional" circumstances, she concluded this case justified an order for advance costs. We have been shown no basis on which to interfere with the exercise of her discretion in that respect.

G. A Structured Costs Order

159 The chambers judge properly insisted that "This order does not mean the government must write a blank cheque." (para. 93) I agree. In this Court appellant's counsel estimated the costs of the Four Books Appeal at $300,000 (A.F., at para. 66). It seems to me reasonable to cap the *maximum* potential public contribution to the Four Books Appeal at that amount, subject to further order of the trial court. It is perfectly possible that, properly supervised, the required state contribution to the costs of Little Sisters will be less than $300,000. A cap is fair to the public and fair to

the appellant because it gives notice of the $300,000 upper limit to which the public purse will potentially finance the litigation. The appellant will have to budget accordingly.

160 The chambers judge repeated the stricture set out in *Okanagan*, at para. 41:

> Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards.

Hence, she concluded, "Further submissions are needed on the structure of the order and quantum." (para. 94) Subsequent to her order the parties entered into a funding agreement which requires Little Sisters to submit budgets to a Costs Administrator appointed by Customs, to have all budgets and payments approved by the Costs Administrator and which limits Little Sisters to hourly and daily rates agreed to by the parties. (A.R., at p. 2106) To the extent Little Sisters can make a contribution to the costs it should be required to do so. The case management judge can ensure that the public is getting value for money. It seems to me that this was the proper way to proceed and I would not interfere with it.

H. Impact of the Claim for Damages

161 The appellant seeks substantial damages. The award of such damages would, if made, alleviate the impecuniosity. It would be entirely fair to both the public and the appellant to order that the appellant is obligated to repay the entire amount of the advance costs plus interest at the usual prejudgment rate as a first charge on any such award of damages. Such arrangements are not uncommon in cases of legal aid in civil matters (to the extent that legal aid is still available in such matters) and would be appropriate here.

I. Conclusion

162 I would allow the appeal and reinstate the award of advance costs for the Four Books Appeal only, with a maximum potential limit of $300,000. The appellant should have its costs of the advanced costs motion and appeals on the regular scale throughout.

Appeal dismissed.

End of Document

12

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: R. c. Caron | 2009 CarswellAlta 1400 | (S.C.C., Mar 27, 2009)

2009 ABCA 34
Alberta Court of Appeal

R. c. Caron

2009 CarswellAlta 94, 2009 CarswellAlta 95, 2009 ABCA 34, [2009] 6 W.W.R. 438, [2009] A.W.L.D. 1139, [2009] A.W.L.D. 1140, [2009] A.J. No. 70, 185 C.R.R. (2d) 9, 1 Alta. L.R. (5th) 199, 241 C.C.C. (3d) 296, 442 W.A.C. 362, 446 A.R. 362, 71 C.P.C. (6th) 319, 81 W.C.B. (2d) 674

Her Majesty the Queen (Appellant / Respondent) and Gilles Caron (Respondent / Applicant)

C. Hunt, K. Ritter, P. Rowbotham JJ.A.

Heard: September 4, 2008
Judgment: January 30, 2009
Docket: Edmonton Appeal 0703-0161-AC, 0703-0363-AC

Proceedings: affirming *R. c. Caron* (2007), 84 Alta. L.R. (4th) 146, 2007 CarswellAlta 1413, 2007 CarswellAlta 1414, 2007 ABQB 632, [2008] 3 W.W.R. 628, *(sub nom. R. v. Caron)* 424 A.R. 377 (Alta. Q.B.)

Counsel: T.R. Haykowsky for Appellant / Respondent
R. Baudais for Respondent / Applicant

Subject: Public; Civil Practice and Procedure; Criminal; Constitutional

Headnote

Motor vehicles — Offences and penalties — Prosecutions — Miscellaneous

Interim costs — Accused was charged with regulatory offence of failure to make left turn in safety — Accused gave notice to court that his defence consisted of constitutional languages question — Accused ensured payment of his lawyer's fees for anticipated trial — On adjournment, accused made request of court program for additional funding, but program was abolished before additional funding could be granted — Accused was denied Legal Aid — Interim order provided that Crown's expert fees be paid for continuation of trial — Accused brought application for interim costs — Application was granted — Amount of $91,046.29 was ordered to be paid to accused as interim costs — Case was very special quasi-criminal case that was sufficiently special to justify order for interim costs — Accused had no realistic means of paying fees resulting from litigation, and all other possibilities for funding had been canvassed — Given that question was one of legal interpretation of linguistic rights, it was contrary to interests of justice if chance to pursue case was forfeited due to lack of means — Constitutional question raised transcended individual interests of accused, was of public importance, had not been decided, and was sufficiently special — Court of Queen's Bench had inherent jurisdiction regarding requests for interim costs in case being heard by another court to ensure proper administration of justice by rendering assistance to Provincial Court — Crown appealed — Appeal dismissed — Trial judge made no error in ordering interim costs — Order for costs was available with respect to quasi-criminal proceedings as real issue was not guilt or innocence but was constitutional question of public importance — Scope of superior court's inherent jurisdiction includes assisting trial in inferior court by awarding interim costs — There was no other route for awarding costs in such cases — It was not obvious from wording of legislation that Parliament meant to limit costs awards in specific cases — Inherent jurisdiction to aid

is procedural only, but as proceeding was quasi-criminal, it counted as procedural matter — Decision was entitled to deference in absence of legal errors — Quasi-criminal cases are appropriate avenues for constitutional challenges and Supreme Court had established right to costs, in limited circumstances — Trial judge did not err in applying test — Accused was required to exhaustively seek other funding but was not required to check with absolutely every person, organization or institution that might be remotely interested in question.

Motor vehicles — Offences and penalties — Prosecutions — Jurisdiction of courts — Miscellaneous

Accused was charged with regulatory offence of failure to make left turn in safety — Accused gave notice to court that his defence consisted of constitutional languages question — Accused ensured payment of his lawyer's fees for anticipated trial — On adjournment from trial, accused made request of Court Challenges Program for additional funding, but program was abolished before additional funding could be granted — Accused was denied Legal Aid — Interim order provided that Crown's expert fees be paid for continuation of trial — Accused brought application for interim costs — Application was granted — Amount of $91,046.29 was ordered to be paid to accused as interim costs — Case was very special quasi-criminal case that was sufficiently special to justify order for interim costs — Accused had no realistic means of paying fees resulting from litigation, and that all other possibilities for funding had been canvassed — Given that question was one of legal interpretation of linguistic rights, it was contrary to interests of justice if opportunity to pursue case was forfeited due to lack of financial means — Constitutional question raised transcended individual interests of accused, was of public importance, had not yet been decided, and was sufficiently special — Court of Queen's Bench had inherent jurisdiction regarding requests for interim costs in case being heard by another court to ensure proper administration of justice by rendering assistance to Provincial Court — Crown appealed — Appeal dismissed — Trial judge made no error in ordering interim costs for accused — Order for costs was available with respect to quasi-criminal proceedings as real issue was not guilt or innocence but was constitutional question of public importance — Scope of superior court's inherent jurisdiction includes assisting trial in inferior court by awarding interim costs order — There was no other route for awarding costs in such cases — It was not obvious from wording of legislation that Parliament meant to limit costs awards in specific cases — Inherent jurisdiction to aid is procedural only, but as proceeding was quasi-criminal, it counted as procedural matter — Decision was entitled to deference in absence of legal errors — Quasi-criminal cases are appropriate avenues for constitutional challenges and Supreme Court had established right to costs, in limited circumstances — Trial judge did not err in applying test — Accused was required to exhaustively seek other funding but was not required to check with absolutely every person, organization or institution that might be remotely interested in question.

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s. 840 — considered

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Generally — referred to

s. 34(2) — referred to

APPEAL by Crown of judgment on interim costs reported at *R. c. Caron* (2007), 84 Alta. L.R. (4th) 146, 2007 CarswellAlta 1413, 2007 CarswellAlta 1414, 2007 ABQB 632, [2008] 3 W.W.R. 628, (sub nom. *R. v. Caron*) 424 A.R. 377 (Alta. Q.B.).

K. Ritter J.A.:

I. Background

1 These appeals concern two interim funding orders granted by a Court of Queen's Bench chambers judge. The funding is for expert and legal fees incurred by the respondent, Gilles Caron, in preparing his defence to an alleged violation of s. 34(2) of the *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002, for failing to safely make a lefthand turn. Caron did not dispute the facts underlying the offence; rather, he contended that the ticket was invalid because it was not in French.

2 Caron provided a Notice of Constitutional Question, seeking:

> (a) A declaration pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, that the *Languages Act*, R.S.A. 2000, c. L-6, to the extent that it abolishes or reduces the linguistic rights that were in force in Alberta before its adoption, pursuant to s. 110 of the *Northwest Territories Act, 1875*, as amended, is incompatible with the *Constitution Act* and is inoperative;
>
> (b) An order pursuant to s. 24(1) of the *Charter* that the accusation against Caron be struck out;
>
> (c) A declaration pursuant to s. 52 of the *Constitution Act* that the Legislature of the Province of Alberta must adopt in French and have all Acts and Regulations of the Province of Alberta which are in force beginning with those required by Caron for this trial: *Traffic Safety Act*, R.S.A. 2000, c. T-6; *Use of Highways and Rules of the Road Regulation*, Alta. Reg. 304/2002; *Provincial Court Act*, R.S.A. 2000, c. P-31; and *Constitutional Notice Regulation*, Alta. Reg. 102/1999; and
>
> (d) A declaration pursuant to s. 52 of the *Constitution Act* that everyone has a guaranteed constitutional right to proceedings in French or English in both criminal and civil matters before all courts of the Province of Alberta, including the right to file all documents and forms in French and to be heard and understood by the courts without interpreters.

3 Caron initially sought and obtained funding from the Government of Canada under the Court Challenges Program (CCP). However, that funding proved insufficient to complete the trial, and additional funding from the CCP was unavailable because of the program's abolition in September 2006. Funding through the CCP was re-instated in June 2007, however there was a gap during which CCP funding was not available. Caron applied to the Provincial Court judge conducting the trial for an interim costs order, relying on *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (S.C.C.) [*Okanagan*]. Such an order was granted on November 6, 2006 but set aside on appeal to a Court of Queen's Bench judge who held that the Provincial Court judge lacked jurisdiction to grant *Okanagan* costs orders.

4 Thereafter, Caron applied successfully to the Court of Queen's Bench for further funding orders under *Okanagan*. On May 16, 2007, a chambers judge directed the Crown to pay Caron costs to cover his expenses for his counsel and expert witnesses. On October 19, 2007, the same chambers judge directed the Crown to pay Caron costs of $91,046.29 plus GST, representing the balance of Caron's legal fees for the trial. Caron brought his application before the last stage of the trial but that application was adjourned until after the trial's conclusion at the Crown's request and its undertaking that it would treat the application as one for *Okanagan* funding and not raise any issue of mootness. The Crown's subsequent stay applications, at the Court of Queen's Bench and the Court of Appeal, were dismissed.

5 On July 2, 2008, the trial judge rendered his decision regarding the traffic infraction, concluding that Caron's French language rights had been violated and essentially granting him the relief sought.

II. Issues and Standard of Review

6 The following questions are at issue:

1. Are *Okanagan* interim costs available in quasi-criminal litigation?

2. Does the Court of Queen's Bench have inherent equitable jurisdiction to award *Okanagan* interim costs for the purposes of a Provincial Court summary conviction proceeding?

3. Was the test set out in *Okanagan* properly applied in this case?

7 Within each general issue are several sub-issues. Some of those are pure issues of law, for which the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) at para. 8. Others involve the exercise of a chambers judge's discretion in awarding costs. This Court will only intervene in the exercise of the chambers judge's discretion if he misdirected himself on the law or made a palpable error in assessing the facts: *Okanagan* at para. 43.

III. Analysis

A. Legal Context

8 The traffic charge Caron faced is governed procedurally by the *Provincial Offences Procedures Act*, R.S.A. 2000, c. P-34, s. 3 of which provides that *Criminal Code* procedures apply in respect of every matter to which the Act applies. Such an offence is quasi-criminal in that it can involve a penalty, such as imprisonment, fine or other punishment, for conduct that breaches an Alberta statute.

9 In granting costs to Caron, the chambers judge relied on the Supreme Court of Canada's decision in *Okanagan*. *Okanagan* did not involve a quasi-criminal offence but rather Indian Bands logging on Crown land without legislative authorization. No charges were laid. Instead, the Province of British Columbia sought an order requiring the bands to desist from logging. When the Province sought to have the matter remitted to trial, the bands argued the case should be dealt with summarily since it would be impossible for them to finance a full trial. Alternatively, they contended that the Province should be directed to cover the cost, in advance, of their legal fees and disbursements. Ultimately, the Supreme Court determined that superior courts had the inherent equitable jurisdiction to exercise discretion and award interim advance costs in appropriate cases, of which the bands' case was one.

10 As noted, this appeal raises issues of whether an *Okanagan* costs order is available in the context of quasi-criminal charges and whether a superior court's inherent jurisdiction to assist an inferior court allows the superior court to grant such an order to fund a Provincial Court trial.

11 Linked to the issue of inherent jurisdiction is the question of who or what controls the nature of quasi-criminal litigation. In this case, the relatively minor underlying offence, which ordinarily would involve little in the way of time

and complexity, became a trial that lasted many days over the course of two years. Its length is solely attributable to the constitutional challenges advanced by Caron.

12 The Crown argues that an *Okanagan* order cannot be granted in a quasi-criminal case generally, but that even if one can be granted, it should not have been granted in this case.

B. Availability of Litigation Costs

1. Criminal Context

13 An accused person enjoys the right to counsel when facing criminal charges. In limited circumstances, that right includes having counsel provided at the expense of the state. If the offence is serious and complex, and if the accused person cannot afford counsel, he or she may be entitled to state-funded counsel: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.). In Alberta, an accused's liberty may also have to be at stake; if he or she does not suffer a risk of imprisonment, there may not be a right to funded counsel: *R. v. Rain* (1998), 223 A.R. 359, 68 Alta. L.R. (3d) 371 (Alta. C.A.).

14 To date, no court in Canada has ordered *Okanagan*-type funding in purely criminal contexts. In part this may be because all provinces grant legal aid to indigent persons faced with criminal charges. However, particularly since the advent of the *Charter*, many criminal cases raise serious constitutional issues. Given the cost and complexity of constitutional challenges, many people who do not qualify for legal aid would find it impossible to cover the expense of protracted constitutional litigation within the criminal context. Nevertheless, they must rely on their own funding sources to pursue any constitutional challenge.

2. Quasi-Criminal Context

15 The principles applicable to criminal cases also apply to quasi-criminal cases. The charge must be serious and complicated to justify state-funded counsel, and those types of charges are rare. One example might be an accusation of causing an environmental disaster as a result of a chemical spill.

16 The charge against Caron was neither serious nor complicated. What was potentially complicated was the constitutional challenge he advanced as a defence. Under neither *Rowbotham* nor *Rain* would Caron have been entitled to state funding in Provincial Court.

3. Civil Context

17 In the civil context, advance costs are available to a litigant who meets the test set out in *Okanagan*, and expanded upon in *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (S.C.C.) [*Little Sisters*]. According to *Okanagan* at para. 40, the following three criteria must be present to justify an award of advance costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

18 The Court in *Okanagan* found, at para. 41, that even when all three criteria are met, that may not be sufficient to establish the appropriateness of such an award. The jurisdiction of a court to award prospective costs for an impecunious party is narrow. Any interim costs order should be fashioned carefully and reviewed over the course of the proceedings, with the goal of reasonable and efficient conduct of the litigation. Within these parameters, courts have discretion to determine whether the interests of justice would be served by making the order. As noted by the Supreme Court in *Little Sisters* at para. 37:

> [...] In analysing [the *Okanagan*] requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

19 The Court added a fourth criteria of "special circumstances" to the *Okanagan* test in *Little Sisters*, emphasizing that advance costs should be granted only in exceptional cases.

4. Constitutional Issues Raised in a Quasi-Criminal Context

20 The Crown argues that no award should have been made because, rather than challenging Alberta's *Languages Act*, R.S.A. 2000, c. L-6 in the context of his breach of a traffic law, Caron should have raised his constitutional challenge directly by filing a civil notice of motion. It asserts that a direct challenge to the legislation *via* civil process brought in the superior court, rather than a constitutional defence in a quasi-criminal trial, would attract the protections guaranteed by civil process. The Crown says that Caron should not be able to rely upon the protections of criminal process and, at the same time, access rights that should be restricted to civil processes.

21 There is some suggestion that the appropriate route to challenging the constitutionality of legislation is by civil process: see *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.) at para. 144, *per* LeBel J., concurring; *R. v. Lefthand*, 2007 ABCA 206, [2007] 4 C.N.L.R. 281 (Alta. C.A.) at paras. 25-29, *per* Slatter J.A.; *Tenascon c. Québec (Juge de la Cour du Québec)*, 2007 QCCA 946, [2008] 3 C.N.L.R. 311 (Que. C.A.) at para. 102; and *Ordre des arpenteurs-géomètres (Québec) c. Québec (Commission de la construction)*, 2007 QCCA 475, J.E. 2007-844 (Que. C.A.), at para. 24. Nevertheless, on numerous occasions the Supreme Court has dealt with constitutional challenges raised in defence of alleged breaches of legislation and has never categorically stated that legislative challenges must be made directly *via* civil process: see, for example, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 60 A.R. 161 (S.C.C.); *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713, 55 C.R. (3d) 193 (S.C.C.); *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145. (S.C.C.)

22 Many significant constitutional decisions started with quasi-criminal charges. In addition to the cases cited above, in *Forest v. Manitoba (Attorney General)*, [1979] 2 S.C.R. 1032 (S.C.C.), quasi-criminal litigation became a constitutional case. Before a provincial court judge, Forest asserted his entitlement to receive a document commanding his court appearance in English and French. The provincial court judge disregarded that argument, but the issue was addressed by the county court judge hearing Forest's appeal, where the Crown argued that the notice of appeal, filed in French, was a nullity. The county court judge concluded that the notice of appeal was not a nullity and set the matter down for hearing. Ultimately, that hearing never occurred because Forest's attempts to be provided with official French language versions of certain statutes led to his constitutional challenge of the 1890 *Official Languages Act*, resulting in a final decision on the matter by the Supreme Court: *Forest v. Manitoba (Attorney General)* (1978), 90 D.L.R. (3d) 230 (Man. Q.B.), rev'd (1979), 98 D.L.R. (3d) 405 (Man. C.A.), aff'd [1979] 2 S.C.R. 1032 (S.C.C.).

23 Nevertheless the case law is replete with examples of important constitutional challenges emanating from quasi-criminal proceedings. It has always been open to citizens to challenge the constitutional validity of an enactment by breaching its provisions and then raising the constitutional issue as a defence to charges resulting from a breach. Provided that the constitutional challenge is clear from the outset, there is little difference between a constitutional challenge in the

quasi-criminal sphere and one brought by what is strictly civil litigation. For example, in *Okanagan*, had the province of British Columbia laid a quasi-criminal charge against the bands who breached the tree cutting licensing enactment, the bands may well have defended on the basis of their rights to harvest trees for housing purposes. All the required criteria for an *Okanagan* order would still have been met.

24 I conclude that, in principle, an *Okanagan* order may be available with respect to quasi-criminal proceedings when the real issue is not the guilt or innocence of the accused, but rather a constitutional question of public importance.

C. Scope of Inherent Jurisdiction to Grant Costs

25 The original grant of Caron's costs made by the provincial court judge was overturned on appeal, not based on whether *Okanagan* applied in a quasi-criminal context, but because of the view that provincial court judges do not have jurisdiction to make such orders: see *R. c. Caron*, 2007 ABQB 262 (Alta. Q.B.) at paras. 131-133. The issue on appeal arises from subsequent orders for costs made by the Court of Queen's Bench: *R. c. Caron*, 2007 ABQB 632 (Alta. Q.B.).

26 Does the scope of a superior court's inherent jurisdiction include assisting a trial in an inferior court by awarding an *Okanagan* interim costs order? The chambers judge concluded it did. If he was wrong, the appeal must be allowed.

27 There do not appear to be other reported decisions dealing with the inherent jurisdiction of a superior court to provide orders similar to those under appeal. This may be because *Okanagan* funding is a recent feature of Canadian law. Nevertheless, it appears that *Okanagan* provides the only route for obtaining such orders in this case.

1. Discrete Issues Raised by the Crown

28 The Crown argues that the chambers judge erred in his jurisdictional analysis for five reasons:

> A. There is no gap in the legislation that would permit an exercise of inherent equitable jurisdiction;
>
> B. The inherent jurisdiction to act in aid is procedural and does not include jurisdiction to make an award of costs;
>
> C. The Court's discretionary jurisdiction to award costs is only incidental to substantive matters of which the court is seized, and the Court was not seized of this matter;
>
> D. The chambers judge erred in making an award on the basis of the *Okanagan* principles. Those principles circumscribe discretion but do not create a substantive right to costs; and
>
> E. The Crown prerogative precludes an exercise of the Court's discretion to award costs against the Crown.

29 I deal with each of these points before considering more generally the topic of inherent jurisdiction. I then deal with the case law and the specific situation in Alberta before coming to a conclusion on the matter of inherent jurisdiction.

A. Legislative Gap

30 The Crown argues that the Legislature and Parliament have set the parameters within which a costs award may be granted, thus limiting the ability of courts to grant costs awards in provincial summary procedure offences. The Crown relies on ss. 809 and 840 of the *Criminal Code* and s. 24(2) of the *Charter*.

31 It is not obvious from those provisions that Parliament intended to limit costs awards in specified circumstances. The language of ss. 809 and 840 of the *Criminal Code* is permissive. It merely says that, in certain circumstances, summary conviction courts can award costs. It does not say that costs awards are limited to those circumstances. Moreover, the inherent jurisdiction of superior courts has been jealously guarded over time. As a result, it can only be set aside by a clear and precise expression of legislative intent: see paras. 42-44 below. If legislatures intend to limit the superior court's inherent jurisdiction, one would expect them to do so directly, rather than by adopting federally-enacted legislation.

32 As for s. 24(2) of the *Charter*, it does not mention costs. Costs as a remedy for *Charter* breaches are a judge-made consequence of the interpretation of that section. It does not support the Crown's position either.

33 Thus, neither ss. 809 and 840 of the *Criminal Code* nor s. 24(2) of the *Charter* limit costs awards respecting summary conviction offences to specific circumstances.

B. Inherent Jurisdiction to Aid is Procedural Only and Does not Include Costs

34 The Crown's second argument is also without merit. The award of costs is a matter of procedure: see for example Master Linda S. Abrams & Kevin P. McGuiness, *Canadian Civil Procedure Law* (Markham, Ont.: LexisNexis Canada, 2008) at 976. In Québec, costs are governed by court rules and the *Code of Civil Procedure*. In the rest of Canada, in the civil sphere, costs are governed by court rules and the common law. Since costs are procedural, if there is no governing rule (and the legislature is otherwise silent on the issue), costs awards constitute an exercise of a superior court's inherent jurisdiction: see paras. 44-49 below.

35 Court rules regarding costs and superior courts' inherent jurisdiction supplement each other in achieving the proper administration of justice: see Keith Mason in "The Inherent Jurisdiction of the Court" (August, 1983) 57 The Australian L.R. 449 at 456 and *Alberta Treasury Branches v. Leahy*, 2000 ABQB 575, 270 A.R. 1 (Alta. Q.B.) at para. 103. The inherent jurisdiction of the court cannot be lightly set aside by inference. The legislation must, in clear and direct terms, codify the issue or prevent the court from exercising its inherent jurisdiction with respect to a given subject: see Mason at 458.

36 The mere fact that the costs sought relate to a quasi-criminal proceeding does not change a procedural matter into a substantive one. Costs in civil proceedings are a matter of procedure. They are also procedural when the proceedings are quasi-criminal.

C. Court's Costs Discretion Only Incidental to Matters With Which it is Seized

37 A third point made by the Crown is that the authority of the Court of Queen's Bench to order costs, under the *Court of Queen's Bench Act*, R.S.A. 2000 c. C-31, s. 21, is limited to "the costs of and incidental to any matter authorized to be taken before the Court". The Crown argues that since the merits of the traffic offence and the constitutional challenge were not "matters before the Court", the chambers judge had no authority to award Caron costs in his provincial court trial. Section 21 of the *Court of Queen's Bench Act* provides:

> Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances.

38 This provision does not mention the inherent jurisdiction of the Court of Queen's Bench. Its language is permissive and empowering. It does not limit costs awards to the circumstances specifically mentioned, nor does it preclude the Court from exercising its discretion to order costs in appropriate circumstances.

D. Okanagan Principles Circumscribe Discretion but do not Create a Substantive Right to Costs

39 On a related theme, the Crown submits that the chambers judge erred in making an award based on the *Okanagan* principles, because those principles circumscribe discretion but do not create a substantive right to costs. I reject this argument. In *Okanagan*, the Supreme Court relied on analogous circumstances in creating a new category of cases for which costs could be awarded in advance of a trial. It also set out strict rules limiting the occasions when *Okanagan*-type costs could be awarded. Whether Caron is able to fit the circumstances of this case within those limitations is analyzed in the final part of this judgment.

E. The Crown Prerogative

40 Finally, in this context the Crown says that its prerogative precludes the exercise of the Court's discretion to award costs against it. Neither *Okanagan* nor *Little Sisters* mention the Crown prerogative, although in both cases advance costs orders were sought against the Crown.

41 In *The Law of Costs*, 2d ed. (Toronto: Canada Law Book Company, 2008) at 2-55, Mark Orkin writes:

> The "rule of dignity" which formerly prevailed was that the Crown neither asked nor paid costs save in special cases, but this common law rule has long since been practically superseded.

42 The historic common law prerogative right that the Crown enjoyed with respect to costs has been superseded by legislation that requires the Crown to pay costs, or permits the court to order costs against the Crown. For example, s. 28(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 provides: "In any proceedings to which the Crown is a party, costs may be awarded to or against the Crown."

43 Similarly, s. 16 of the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25 provides:

> Except as otherwise provided in this Act, in proceedings against the Crown the rights of the parties are as nearly as possible the same as in a suit between person and person and the court may make any order, including an order as to costs, that it may make in proceedings between persons and may otherwise give any appropriate relief the case may require.

44 It seems settled now that costs can be awarded against the Crown in both federal and provincial contexts, even if the order is not attached to the failure or success of an action and digresses from the traditional rule that "costs follow the event". The Crown prerogative does not prevent a costs order in this case: see *Ontario v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 (S.C.C.) at para. 80.

2. Analysis and Decision Regarding Inherent Jurisdiction.

45 This case raises unique issues. First, it involves constitutional litigation in a quasi-criminal context. Second, the party pursuing a constitutional remedy initially funded the litigation using CCP funding. That funding then became unavailable for part of the trial but has now been re-instated. Third, the issue, language rights, is an important one. The Government of Canada has signalled its view of the importance of language rights litigation by restricting the re-instated CCP funding to language rights issues only.

46 Moreover, there is binding authority that states that when a right exists, and if there is no other avenue to enforce that right, the Alberta Superior Court has the power to enforce it. In *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), the Privy Council recognized the Supreme Court of Alberta's inherent jurisdiction to address matrimonial issues, when no other avenue of enforcement was available. At 962-963, the Court wrote:

> [... A] well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. [... N]othing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.
>
> [Emphasis added.]

47 I have concluded that quasi-criminal cases are an appropriate avenue for constitutional challenges. The Supreme Court in *Okanagan* established a right to costs, in limited circumstances. However, that right is not capable of being enforced in the Provincial Court. Therefore on the authority of *Board*, the right must be enforceable by the Alberta superior court.

48 The Privy Council's comments in *Board* suggest that the exercise of superior courts' inherent jurisdiction is limited not necessarily by the nature of the proceeding, but rather by the availability, or lack thereof, of a remedy. As Bastarache J., for the majority, noted in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 224 N.R. 241 (S.C.C.) at para. 32: "[...] the doctrine of inherent jurisdiction [...] is simply to ensure that a right will not be without a superior court forum in which it can be recognized". It follows that a superior court's inherent jurisdiction should only be exercised where "no adequate alternative remedy exists": see *St. Anne-Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.) at 727; *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.). In *Board* at 962, the Privy Council contended that "[i] n order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court".

49 Although the parties to this litigation argued for and against an extensive review of the law relating to inherent jurisdiction of the court, given the binding decision in *Board* and the unique funding path that exists with respect to this litigation, I find it unnecessary to engage in analysis of all they presented. Such analysis will have to await another case that compels its consideration.

D. Application of the Okanagan Test

50 The Crown argues that the chambers judge erred either in his statement of the *Okanagan* test or in his application of the test to this case.

51 The chambers judge considered each of the three criteria outlined in *Okanagan*. He held that Caron had established that he "truly has no means to pay the fees as a result of the unanticipated evidence of the Crown and that he has no other realistic source of funding."

52 He disagreed with the Crown's position that the issue in this case had already been dealt with in *R. v. Mercure*, [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1 (S.C.C.) and *Alberta v. Lefebvre* (1993), 135 A.R. 338, [1993] 3 W.W.R. 436 (Alta. C.A.). He noted that neither the Royal Proclamation of December 6, 1869, nor the expert evidence adduced at Caron's trial were before the courts in *Mercure* or *Lefebvre*. He also emphasized that the Crown did not seek a non-suit at the end of Caron's evidence, but instead called several experts and adduced evidence over many days. Given the contrasting expert opinions, the plausible arguments contained in the briefs for the trial argument, and how the case evolved, the chambers judge concluded that it would be contrary to the interests of justice if the opportunity to pursue the main argument in the case were forfeited simply because Caron lacked financial means.

53 Finally, the chambers judge held that the issue transcended Caron's individual interests and was of public importance, observing that if Caron were successful the result might be similar to that in *Forest*. He found the issues before the court were comparable to the situation in *Okanagan* and concluded that the third *Okanagan* criterion was met.

54 The Crown argues that the chambers judge made several errors in his *Okanagan* analysis.

55 First, it says that any reliance on imbalance of resources is inappropriate. This argument is without merit. At para. 41 of *Okanagan*, the Supreme Court observed that even if the person seeking interim costs was impecunious, defendants should not have an unfair burden placed on them. This suggests that, implicitly, there must be an imbalance of resources before an *Okanagan* costs order is made.

56 Moreover, a gross imbalance of resources in a constitutional case leads to the possibility of future arguments that the case was not fully litigated and that the underlying issue should be reconsidered because, for example, the expert evidence only applied to one side. When government is involved in constitutional litigation, it is preferable if the issues are fully resolved. A victory for government because of a lop-sided case will be no victory, since the issue will likely arise again in the future and have to be re-argued. Indeed, that very argument is at the core of this case, because Caron says that *Mercure* and related cases neglected to take account of important history.

57 In this case, the Crown appears to have spared little expense in its conduct of the litigation. On the other hand Caron proved that he was of very limited means. The imbalance of resources would have resulted in only one side of an important constitutional issue being before the provincial court. The chambers judge did not err in this aspect of his analysis.

58 With respect to the second criteria of *Okanagan*, merit, the Crown argued in its factum that Caron's overall legal position lacked merit. However, the trial judge has now rendered his decision and granted the constitutional orders Caron sought. Moreover, the chambers judge considered relevant factors and came to a conclusion regarding this issue. The weight he gave to the factors and the resultant conclusions are entitled to deference.

59 The Crown also argues that the Provincial Court's jurisdiction limits the scope of any order, with the result that the order granted by the trial judge affects only Caron's rights and not those of Alberta citizens generally. As such, *Okanagan* funding is inappropriate. However, the case law discloses many examples of quasi-criminal litigation which led to the establishment of important constitutional principles. The Crown argues that the proper route in this case would have been for Caron to seek a declaration of rights in the superior court. It says that court could then have declared the right on behalf of all Alberta citizens. This, it says, is a preferable route because of the scope of the remedy. However, should Caron successfully pursue this case to an ultimate conclusion in the Supreme Court, its precedential value will be such that any other citizen would be able to rely on it in enforcing their language rights.

60 The Crown alleges that the underlying issue in this appeal is not one of public interest because Caron advanced a strictly "criminal" approach when it worked to his advantage. This argument is also without validity. From the outset, Caron admitted the facts underlying the traffic ticket. Everyone was well aware that this was constitutional litigation.

61 This trial was not conducted as are most criminal trials, but bore several features of a civil trial. At the date set for commencement of trial, the Crown sought and obtained a seven month adjournment so that it could better prepare for the trial. It is unimaginable that it would have needed seven months to prepare for a traffic offence trial. Caron admitted the gravamen of the offence at the outset of the trial and relied on the constitutional challenge as his sole defence. Although the parties were initially reluctant to exchange expert reports, as the trial progressed there was full exchange of documents.

62 The chambers judge failed to consider the second requirement of the first *Okanagan* criteria. Caron had to show both that he could not fund the litigation and that there was no other realistic way to bring the issue to trial. However, I do not consider that this error affects the outcome of this appeal. When the Supreme Court speaks of no other realistic way of bringing the issue to trial it must be speaking about alternative means of proceeding with respect to the charge that is laid against the litigant. For example, if Caron himself possessed the ability to conduct a complicated language challenge, such an alternative would exist. If the Supreme Court is taken to mean another procedure that brings the same issue before the court, then *Okanagan* funding would never be available to challenge legislation that gives rise to a quasi-criminal offence. If a litigant challenged the legislation as a defence to the charges he or she faced, and sought *Okanagan* funding for that challenge, the litigant would be met with the argument of an alternative means of proceeding, namely the litigant should have sought a declaration. On the other hand, if the litigant sought a declaration, the litigant would face the argument that an alternative means of proceeding exists, namely breaching the enactment and raising the defence in any charge that is brought.

63 The Crown contends that the abolition of the CCP cannot provide a juridical basis for the award of costs. It says that Caron and his counsel knew that CCP funding was at an end and nevertheless continued, by choice, to litigate. However, the *Okanagan* criteria requires that an applicant seek funding elsewhere before seeking an *Okanagan* order. The fact that the CCP funding was no longer available helped Caron meet the second requirement.

64 According to the Crown, Caron has not explored all other possible sources of funding. When pursuing other sources of funding, an *Okanagan* applicant will have to make exhaustive efforts to obtain that funding. Provided those

efforts are demonstrated, the applicant does not need to show that it checked with absolutely every person, organization or institution that might be remotely interested in the question. It is sufficient if the applicant sought funding from the primary players interested in the constitutional question before the court. The chambers judge determined that Caron took all possible steps to obtain legal aid and private funding, and the Crown has not shown that this factual determination is palpably wrong.

IV. Conclusion

65 The chambers judge determined that *Okanagan* funding was available in this case. The Supreme Court has directed that absent legal error, such determinations are entitled to deference. I perceive no legal error in the chambers judge's analysis. This appeal is dismissed.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on February 11, 2009 has been incorporated herein.