APPEAL NO. 1203-0230-AC
Q.B. NO. 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")

Between:

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

APPELLANTS
(Respondents)

-AND-

PUBLIC TRUSTEE OF ALBERTA

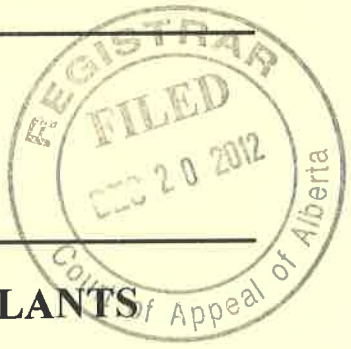
RESPONDENT
(Applicant)

-AND-

SAWRIDGE FIRST NATION, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY and MAURICE STONEY

INTERESTED PARTIES
(Interested Parties)

Appeal from the Order of
The Honourable Justice D.R. Thomas
Dated the 12th day of June, 2012
Filed the 20th day of September, 2012



BOOK OF AUTHORITIES OF THE APPELLANTS
VOLUME 1 of 2

(Tab 1 – Tab 10)

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BOOK OF AUTHORITIES OF THE APPELLANTS

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Volume 1

Volume 2

In the Court of Appeal of Alberta

Citation: Dreco Energy Services Ltd. v. Wenzel, 2008 ABCA 290

Date: 20080826
Docket: 0803-0065-AC
Registry: Edmonton

Between:

Dreco Energy Services Ltd. And Vector Oil Tool Ltd.

Appellants (Plaintiffs)

- and -

Kenneth Hugo Wenzel, Kenneth H. Wenzel Oilfield Consulting Inc. and KW Downhole Tools Inc.

Respondents (Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice S.J. Greckol
Dated the 19th day of February, 2008
Filed on the 11th day of March, 2008
(Docket: 0203-12910)

Memorandum of Judgment

The Court:

[1] The appellants, Dreco Energy Services Ltd. ("Dreco") and Vector Oil Tool Ltd. ("Vector") appeal the case management judge's decision to set aside the interlocutory injunction previously granted to the appellants against the respondents, Kenneth Hugo Wenzel ("Wenzel"), Kenneth H. Wenzel Oilfield Consulting Inc. ("KHW Inc."), and K.W. Downhole Tools Inc. ("Downhole").

Background

[2] The parties are involved in ongoing litigation stemming from a share purchase agreement and an employment agreement (the "agreements") whereby Dreco purchased all of the shares of Vector, previously owned by Wenzel and KHW Inc., and contracted Wenzel as an employee of Vector. Both agreements contained strict non-competition clauses or restrictive covenants, which the appellants allege were breached when Wenzel incorporated Downhole following his resignation on February 21, 2002.

[3] In July 2002, the appellants commenced this action alleging breach of the restrictive covenants contained in the agreements. They also sought an interlocutory injunction, which was granted by this Court on February 26, 2004, and ordered to continue until final disposition of the lawsuit or a contrary order by a Court of Queen's Bench justice: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95, 346 A.R. 356. Later that year, the respondents' application to narrow the terms of the injunction and to have it vacated in early 2005 was denied by the case management judge. A trial date has been set for October 2008.

[4] The restrictive covenants in the agreements were subject to a maximum term of five years following termination or expiry of the respective agreements. On June 21, 2007, the appellants sought to extend the injunction beyond five years from the date Wenzel resigned. On September 25, 2007, the respondents applied to set the interlocutory injunction aside or have it cease March 15, 2008. Both applications were heard by the case management judge, who concluded the injunction should be set aside because the basis for granting the injunction initially was no longer viable.

[5] At the time of their initial applications in 2004, the appellants had made out a strong *prima facie* case for an interlocutory injunction because of the wording of the restrictive covenants and the evidence supporting a breach. The case management judge concluded that Wenzel's termination date was March 15, 2002 and that the restrictive covenants expired five years later, on March 15, 2007. Accordingly, the first element of the applicable tripartite test for granting an injunction – a strong *prima facie* case – was no longer met. Having made this finding, she did not go on to consider the other requirements of the test for injunctive relief. She also determined that the case law did not support a judicially enforced extension of the restrictive covenants, and that doing so would effectively grant the appellants the very remedies which they seek at trial.

Contractual Provisions

[6] The relevant provisions of the agreements are attached to these reasons in Appendix A.

Issues

[7] This appeal raises four issues.

1. Did the case management judge err by failing to consider and apply the 'clean hands' doctrine?
2. Did the case management judge err in her interpretation of the restrictive covenants contained in the agreements?
3. Did the case management judge err by failing to exercise her equitable jurisdiction to extend the duration of the interlocutory injunction beyond the contractual time frame?
4. Is the test for injunctive relief satisfied?

Standard of Review

[8] The granting of, or refusal to grant, an interlocutory injunction involves the exercise of judicial discretion. Discretionary decisions of a case management judge warrant deference and will not be interfered with absent the judge proceeding arbitrarily or on wrong legal principles: *Metropolitan Life Insurance Co. v. Hover*, 1999 ABCA 123, 237 A.R. 30 at para. 10, citing *Russell Food Equipment (Calgary) Limited v. Valleyfield Investment Ltd.* (1962), 40 W.W.R. (n.s.) 292, 1962 CarswellAlta 57 at para. 9 (S.C.).

[9] The standard of review typically applied to a case management judge's decision is reasonableness: *Indian Residential Schools, Re* (*sub nom. Doe v. Canada*), 2001 ABCA 216, 286 A.R. 307 at para. 23. However, on questions of law, the standard of appellate review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.

[10] Correctness will apply where the question is whether the case management judge failed to consider an applicable legal test or principle, or failed to properly apply it. However, where a legal principle is applied to the facts, the assessment of the facts will be afforded deference: *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 363 A.R. 283; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 376 A.R. 133 at para. 18.

[11] Contractual interpretation is subject to similar principles; namely, pure interpretation of contract involves issues of law, reviewable on a correctness standard: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 at para. 11, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 453; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 at para. 14. However, where the interpretation necessitates fact-finding, an appellate court will defer to the facts found

below, so long as there is no palpable and overriding error: see *Double N Earthmovers v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 at para. 16.

[12] Here, we will defer to the case management judge's fact-finding, absent something unreasonable, but will review her articulation and application of the test for interlocutory injunctions, her interpretation of the restrictive covenants, and her analysis of the question of equitable jurisdiction to continue an injunction, using a correctness standard.

Analysis

Clean Hands

[13] The appellants submit that the chambers judge failed to consider whether the respondents' litigation conduct precluded the termination of the injunction. They raise the clean hands doctrine, a doctrine which may prevent a party from obtaining relief to which it would otherwise be entitled. The clean hands doctrine does not, of itself, create a cause of action, or form the basis for granting relief. Accordingly, the issue of which party bears the onus of proof is important.

[14] The appellants initiated the motion to continue the interlocutory injunction and, in the normal course, bore the onus of establishing the test for continuation. However, the appellants say that they filed their motion in order to trigger the respondents' application to set aside the injunction, and that once the respondents' motion was before the court the appellants' motion was moot. They say that the case management judge approached the issue incorrectly. Instead of asking at para. 8: "Should the interim injunction be continued?" she should have asked: "Should the interim injunction be set aside?" The appellants contend that had she adopted the latter approach, she would have appreciated that the onus of proof lay with the respondents, and accordingly, should have applied the clean hands doctrine.

[15] We see no merit to this argument. The case management judge was alive to the order made by the Court of Appeal, the effect of which was that the interim injunction would continue subject to further order. Moreover, as the argument unfolded (as it did before us), the crucial issue was whether the interim injunction could extend beyond the contractual term of the covenant. In the result, mindful of the evidentiary and legal burden, it was not an error to ask whether the interim injunction should be extended beyond the five years specified in the agreements.

[16] Further, the case management judge was well aware of the clean hands issue and referred to the respondents' litigation conduct in her reasons. She had been the case management judge for a number of years and issued several judgments, some of which expressly address the respondents' litigation conduct.

Effective Date of the Restrictive Covenants

[17] The appellants submit that a fair reading of the restrictive covenants at issue, as well as the equitable relief provisions in the agreements, give the appellants ongoing entitlement to non-competition from the respondents. They dispute the case management judge's determination of a starting date for the five years of non-competition, but are most concerned with the end date, arguing that the respondents' breaches of the covenant warrant their being extended.

[18] Before the case management judge, the appellants argued that the employment agreement turned into one of an indefinite term because the employment relationship continued beyond the fixed term delineated in the contract, and that Wenzel did not give twelve clear months notice, as required. Therefore, the five year period of non-competition would have only commenced on February 20, 2003, one year after Wenzel's resignation. In any event, say the appellants, the respondents have acknowledged that they were competing, in breach of the restrictive covenants, until at least March 14, 2004. As a result, five years of competition-free business would have started on that date, making the restrictive covenants still enforceable. The appellants further contend that on a 'purposive' interpretation of the agreements that accounts for equity, they are entitled to five full years of competition-free business.

[19] The respondents argue that on a plain and ordinary reading of the agreements, the period of non-competition ends five years after the start date; that the case management judge's finding regarding the date of termination, being March 15, 2002, should not be interfered with on appeal; and that the appellants should not be granted interlocutory relief based on alleged breaches of contractual provisions that are no longer in effect.

[20] The case management judge made a finding of fact that the appellants knew Wenzel was leaving, and despite some negotiations that resulted in an extension of the definite term until Wenzel's new premises were ready, the employment agreement terminated on the last day Wenzel was paid, March 15, 2002. We will not interfere with that finding. On a plain reading of the provisions, the restrictive covenants expired March 15, 2007, being five years from termination of the employment agreement. The case management judge also commented that in the event the appellants were correct about the notice period, the restrictive covenants would have still expired on February 21, 2008, making the issue academic.

[21] The case management judge's conclusions were made mindful of the Supreme Court of Canada's direction in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337-338, 111 D.L.R. (4th) 385 (reiterated by Côté J.A. when allowing the appeal from the initial denial of an injunction in this case) that a court must refrain from a full examination of the merits

of the case at an interlocutory stage in the proceedings. She also acknowledged the appellants' entitlement to damages should the conclusions differ at trial.

[22] Generally speaking, courts should interpret contracts according to the parties' intentions, as expressed by the plain meaning of the words used. Only where the meaning is ambiguous or the effect would be contrary to the parties' intention, should the court interpret a contract otherwise: *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445 at 1467, 59 D.L.R. (4th) 660; *Kensington Energy Ltd. v. B & G Energy Ltd.*, 2008 ABCA 151 at para. 13. The factual context may be important in determining the intention of the parties: *ATCO Electric Ltd. v. Alberta (Energy & Utilities Board)*, 2004 ABCA 215, 361 A.R. 1 at para. 77; *Morrison v. Pantony*, 2008 ABCA 145 at para. 14.

[23] It has been approximately six years since Wenzel's employment with the appellants ceased, and over four years (54 months) since the interlocutory injunction was first issued. The purpose of the restrictive covenants was to provide the appellants with an opportunity to establish their business and re-acquaint themselves with potential customers. The appellants urged a purposive interpretation of the covenant, and argued that whenever there has been a breach, the court should tack on a period of time reflective of the period of breach and extend the duration of the covenant so as to ensure that the promisee is not deprived of its full operation. In support of their argument, the appellants submit that pre-trial interlocutory injunctive relief is prospective and is not intended to remedy past transgression. Whether the provisions at issue are interpreted based on their plain and ordinary meaning, or using a purposive approach, the passage of time has been significant and it is not reasonable to continue the injunction indefinitely at this interlocutory stage.

[24] At trial, any issues regarding the length and scope of the injunction will be considered and balanced against any continuing right to injunctive relief. Moreover, if the trial judge determines that a few more months ought to have been added to this injunction, the appellants can be compensated with damages.

Equitable Jurisdiction to Continue the Interlocutory Injunction

[25] The appellants say that even if the case management judge was right about the restrictive covenants expiring, she ought to have exercised her equitable jurisdiction to extend the interlocutory injunction in any event based on the respondents' misconduct to date.

[26] We agree with the respondents and the case management judge that the cases dealing with this issue are conflicting, and, more importantly, that if the interlocutory injunction were continued on equitable principles, it would run the risk of predetermining the merits of this case. The applicable analysis here requires an assessment of the case on a lower threshold than its full merits, and an assessment of the potential inconvenience to the parties.

Continuation of the Injunction -The Tripartite Test

[27] On a fresh application for an interlocutory injunction, a court must consider: (1) the merits of the case; (2) whether the applicant would suffer irreparable harm should the injunction be refused; and (3) in whose favour the balance of convenience weighs: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 127-129; *RJR Mac Donald* at 334; *American Cyanamid Co. v. Ethicon Ltd.*, [1974] A.C. 396 (H.L.). The same considerations apply on a motion to continue or to set aside an existing interlocutory injunction, but courts may address additional factors as well, including delay, inequitable conduct, and policy considerations.

The Merits Threshold

[28] Prior to the *American Cyanamid* decision, the first part of the tripartite test required an applicant to demonstrate a strong *prima facie* case. That threshold was lessened in *American Cyanamid*, and subsequently in much of the Canadian jurisprudence, the onus on the applicant is merely to demonstrate that there is a serious question to be tried. Nevertheless, in certain instances, the more stringent standard is still used: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Aurora, ON: Canada Law Book, 1992) at 2-20 to 2-27.

[29] When this Court granted the initial injunction sought by the appellants, Côté J.A. noted that it was not obvious from the authorities cited by the appellants that where a restrictive covenant arises from the sale of a business, as opposed to a pure employment situation, the first part of the test requires the applicant to meet the higher threshold of showing a strong *prima facie* case: see *Elsley v. J.G. Collins*, [1978] 2 S.C.R. 916 at 924-25. Because the appellants had made out a strong *prima facie* case in any event, it was unnecessary to decide what the applicable threshold should be on the facts of this case.

[30] In the employment context, this Court has definitively said that a motion for an interlocutory injunction respecting restrictive covenants warrants the more stringent threshold on the first part of the tripartite test: *Enerflex Systems Ltd. v. Lynn*, 2005 ABCA 62, 363 A.R. 136 at para. 8; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 376 A.R. 133 at para. 10; also see *Elsley, supra*. However, it is still undecided whether the strong *prima facie* case test is also warranted in the context of a restrictive covenant arising from the sale of a business, where it is inextricably tied, as here, to the employment agreement.

[31] Here, the case management judge determined that a strong *prima facie* case no longer existed because, on her assessment of the facts and the applicable contractual provisions, the restrictive covenants had expired. In her analysis, without a strong *prima facie* case, the tripartite test was no longer met. However, that reasoning is only sustainable if we assume that the first part of the tripartite test necessitates the party seeking the injunction to demonstrate a strong *prima facie* case, not merely a serious issue to be tried, which is clearly the basis on which the case management judge and the parties proceeded, as this issue was not raised on appeal.

[32] Without deciding whether the higher threshold applies in this case, we find that based upon the case management judgment's findings, had she gone on to apply the second and third parts of the tripartite test, she would have come to the same conclusion in any event.

Irreparable Harm and Balance of Convenience

[33] The test for irreparable harm has a high threshold and only relates to the harm suffered by the party seeking the injunction: *RJR MacDonald* at 341. The Supreme Court in *RJR MacDonald* described the irreparable harm test as follows: "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": at 341.

[34] In the decision to grant the interlocutory injunction in the first place, at para. 15, Côté J.A. noted:

> [T]he contracts in question contain provisions documenting all parties' agreement that breach of these covenants would produce irreparable harm. Even if that were not viewed as conclusive, it would clearly be some substantial evidence. Harm difficult to compute in money is traditionally recognized as a form of irreparable harm.

[35] Moreover, on the respondents' application to the case management judge in 2004 to narrow and ultimately set aside the injunction, the case management judge deferred to Côté J.A.'s reasons above: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABQB 842, 365 A.R. 135. At para. 62, she stated:

> I am of the view that the Court of Appeal saw the problem to be remedied as Mr. Wenzel marketing inventions within the scope of the Plaintiffs' goodwill and selling those inventions to the Plaintiffs' customers, thereby causing harm to the Plaintiffs' business in an incalculable fashion. This would remain an important feature of the business or undertaking to which Mr. Wenzel would turn, absent an injunction.

[36] While those considerations remain relevant, the passage of time complicates this analysis. The appellants did not purchase non-competition forever, nor could they. It has now been over four years (54 months) since the interlocutory injunction was granted, and six years since the application was initially brought. The case management judge concluded that the restrictive covenants were no longer in effect as of March 15, 2007.

[37] In many cases, the determination of whether to grant or refuse an interlocutory injunction is made based on the balance of convenience analysis, being a determination of which party will suffer greater harm from the granting or refusal of an injunction pending final outcome of the matter on the

merits: *Metropolitan Stores, supra* at 129. When this issue was before the Court of Appeal previously, Côté J.A. stated, at para. 16:

> The plaintiffs bought a business from the individual defendant, and had an established growing business of their own. The individual defendant covenanted to end his separate business, and to work for the plaintiffs alone, and did. It is alleged that later he elected to establish a new competing business in the face of his covenants, and gambled that a court would accept his legal arguments and refuse to enforce his covenants. The plaintiffs can keep track of business which they get and the revenues from it, but no one can keep a record of business which does not come to the plaintiffs. ... In our view the balance favors the plaintiffs. The harm to them without an injunction, if the restrictive covenants are enforceable to any significant degree, is likely to be much greater than the harm to the defendants if the injunction is given but later set aside.

[38] There was little question as to the restrictive covenants being enforceable, and there was *prima facie* proof that they were breached when this Court first decided to grant the injunction, not long after Wenzel left the employ of the appellants. The appellants contend that the passage of time does not constitute a change of circumstances significant enough to justify varying the injunction. We disagree. The passage of time has affected both the potential harm to the appellants and the potential enforceability of the covenants. The appellants have had over four years to develop their business. Moreover, compensation for the alleged harm will be addressed at trial.

Conclusion re: Tripartite Test

[39] In our view, not only is there no longer a strong *prima facie* case, but even using the lower threshold for the first part of the test, the balance of convenience now weighs in favour of setting the interlocutory injunction aside. The tripartite test has not been met and the case management judge properly discontinued the interlocutory injunction.

[40] Given our conclusions, it is not necessary to consider the respondents' application to admit fresh evidence. The appeal is dismissed.

Appeal heard on June 4, 2008

Memorandum filed at Edmonton, Alberta
this 26th day of August, 2008

Berger J.A.

Authorized to sign for: Ritter J.A.

Rowbotham J.A.

Appearances:

T.W. Wakeling, Q.C.
P.D. Banks
for the Appellants

R. M. Curtis, Q.C.
T.W. Achtymichuk, Q.C.
for the Respondents

APPENDIX A

Share Purchase Agreement:

ARTICLE 13. NON-COMPETITION AND NON-SOLICITATION

13.1 Non-Competition

Given:

(a) the information skills and detailed knowledge of the business and research and development activities of the Company and its affiliates that each of the Vendors and Directors has acquired and will continue to acquire during the continued employment of the Directors by the Company following closing, and the damage to the Company and its affiliates that would be caused if any Vendors or Directors were to use for its or his own benefit or make available such information, skills and knowledge to any competitor of the Company or any of its affiliates;

(b) that the development of downhole drilling products from the commencement of initial research and design to the date of commercial production frequently encompasses periods of several years or more, and that the Vendors' and the Directors' duties are such that each has been and will continue to be involved in the early stages of research and development in relation to such products; and

(c) the business of the Company and its affiliates is international in scope and consequently protection of the Company's legitimate business interests encompasses broad geographic areas which have made it difficult for the parties to be precise about restricted territories;

each of the Vendors and the Directors agrees that for a period of:

(d) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(e) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(f) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(g) one (1) year;

following the termination or expiry of the Employment Agreements to be entered into on the Closing Date between the Company and the Directors (the "Termination Date"), he or it shall not directly or indirectly (whether as employee, consultant, representative, principal, agent, owner, partner, shareholder, director, officer or otherwise) own, operate, be engaged in the operation of or have any financial interest in any person (as defined in this Agreement) which provides or intends to provide:

(h) any service which involves research, development, design or manufacturing of any downhole drilling products which is similar or related to that which is being provided by the Company or any affiliate on the Termination Date or has been provided by the Company or any affiliate during the two years preceding the Termination Date; or

(i) any research, development, design or manufacturing of any downhole drilling products which is similar or related to any product under development or manufacture by the Company or any affiliate on the Termination Date or within the two years preceding the Termination Date (a "Protected Product") and which would compete with a Protected Product in any of the markets in which it is or (in the case of a product under development) is anticipated to be provided, sold or distributed; or

(j) any service for the purposes of sale or renal or supply of any downhole drilling products which are then provided by the Company or any affiliate;

anywhere:

(k) in any country, jurisdiction or locale in which the Company or any of its affiliates are then engaged or have, within the two years preceding the Termination Date, been engaged to a significant degree in the design, manufacture, supply, sale or rental of downhole products or in which the Company or any of its affiliates generate or have, within the two years prior to the Termination Date, generated 5% or more of its annual revenue except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(l) in any country, jurisdiction or locale in North America and South America in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(m) in any country, jurisdiction or locale in North America in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(n) in any jurisdiction or locale in Canada in which the Company or any of its affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company.

Clauses (d), (e), (f) and (g) of this section 13.1 are separate and distinct and severable covenants and clauses (k), (l), (m) and (n) of this section 13.1 are separate and distinct and severable covenants, and have been inserted to reflect the parties best efforts to protect the legitimate business interests of the Company and its affiliates from and after the Effective Date.

13.4 Non-Solicitation

Each of the Vendors and the Directors agrees that for a period of:

(a) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(b) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(c) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(d) one (1) year;

following the termination or expiring of the employment agreements to be entered into on the Closing Date between the Company and the Directors for any reason, he shall not, directly or indirectly:

(e) induce or attempt to induce any significant customer, the Company or any other person with whom the Company or any affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental activities, to alter or terminate its relationship with the Company or such affiliate; or

(f) induce or attempt to induce any employee of any Customer or of any other person with whom the Company or any affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental activities to alter, leave or terminate his employment with such Customer or person; or

(g) induce or attempt to induce any employee of the Company or any affiliate to alter, leave or terminate his employment; or

(h) provide or offer to provide or solicit the provision of services or products to any Customer or any other person with whom the Company or any affiliate has a relationship of any kind related or similar to and compete with the services or products provided to that Customer or other person by the Company or such affiliate as at or within two years prior to the Termination Date.

Clauses (a), (b), (c) and (d) of this section 13.4 are separate and distinct and severable covenants and have been inserted to reflect the parties best efforts to protect the legitimate business interests of the Company and its affiliates from and after the Effective Date.

. . .

13.7 Equitable Relief on Breach

Each of the Vendors and the Directors recognize that a breach by any of the Vendors or the Directors of any of the covenants contained in this Article would result in damages to the Purchaser or the Company and that the Purchaser or the Company could not be adequately compensated for such damages by monetary awards. Accordingly, each of the Vendors and the Directors agree, that in the event of any such breach, in addition to all other remedies available to the Purchaser or the Company at law or in equity, the Purchaser or the Company shall be entitled as a matter of right to apply to a court of competent equitable jurisdiction for such relief by way of restraining order, injunction, decree or otherwise, as may be appropriate to ensure compliance with the provision of this Agreement.

. . .

13.9 Restrictions Reasonable

Each of the Vendors and the Directors have carefully considered the nature and extent of the restrictive covenants set forth herein and agree that the same are reasonable including with respect to duration, scope of activity and geographical area and necessary to protect the Purchaser's and the Company's legitimate interests, and that they do not prevent any individual from reasonably earning a living.

13.10 Restrictions May be Modified By Court

In the event that a Court of competent jurisdiction should conclude that any of the covenants set out in section 13.1 or 13.4 is too long in duration or too broad in scope or in territory, the said Court shall have the power and the duty to reduce its duration, scope and/or territory to the maximum duration, scope and/or territory it deems reasonable instead of invalidating such covenant and as of such ruling the said covenant shall be deemed modified accordingly.

Employment Agreement:

3.1 Term

The period of employment under this Agreement shall commence on December 1, 1996 (the "Effective Date") and shall continue until October 31, 2001, or until earlier terminated by Vector in accordance with Article 6 below. The term of this Agreement may extend beyond October 31, 2001 for an indefinite period, provided that during

such extended term, either party may terminate this Agreement by giving to the other not less than twelve months prior notice in writing of his or its intention to terminate.

ARTICLE 11. NON-COMPETITION AND NON-SOLICITATION

11.1 Non-Competition

Given:

(a) the information skills and detailed knowledge of the business and research and development activities of the Company and its affiliates that Wenzel has acquired and will continue to acquire during the continued employment of Wenzel by Vector following closing, and the damage to Vector and the Affiliates that would be caused if Wenzel was to use for his own benefit or make available such information, skills and knowledge to any competitor of Vector or any of the Affiliates;

(b) that the development of downhole drilling products from the commencement of initial research and design to the date of commercial production frequently encompasses periods of several years or more, and that Wenzel's duties are such that he has been and will continue to be involved in the early stages of research and development in relation to such products; and

(c) the business of Vector and the Affiliates is international in scope and consequently protection of Vector's legitimate business interests encompasses broad geographic areas which have made it difficult for the parties to be precise about restricted territories;

Wenzel agrees that for a period of:

(d) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(e) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(f) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(g) one (1) year;

following the termination or expiry of this Agreement (the "Termination Date"), he shall not directly or indirectly (whether as employee, consultant, representative, principal, agent, owner, partner, shareholder, director, officer or otherwise) own, operate, be engaged in the operation of or have any financial interest in any person (as identified in this Agreement) which provides or intends to provide;

(h) any service which involves research, development, design or manufacturing of any downhole drilling products which is similar or related to that which is being provided by Vector or any Affiliate on the Termination date or has been provided by Vector or any Affiliate during the two years preceding the Termination Date; or

(i) any research, development, design or manufacturing of any downhole products which is similar or related to any product under development or manufacture by Vector or any Affiliate on the Termination Date or within the two years preceding the Termination Date (a "Protected Product") and which would compete with a Protected Product in any of the markets in which it is or (in the case of a product under development) is anticipated to be provided, sold or distributed; or

(j) any service for the purposes of sale or renal or supply of any downhole products which are then provided by Vector or any Affiliate;

anywhere:

(k) in any country, jurisdiction or locale in which Vector or any of the Affiliates are then engaged or have, within the two year period prior to the Termination Date, been engaged to a significant degree in the design, manufacture, supply, sale or rental of downhole products or in which Vector or any of the Affiliates generate or have, within the said two year period, generated 5% or more of its annual revenue except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(l) in any country, jurisdiction or locale in North America and South America in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(m) in any country, jurisdiction or locale in North America in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of Vector, or if that geographic area is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;

(n) in any jurisdiction or locale in Canada in which Vector or any of the Affiliates are or have been engaged in the activities (to a significant degree) or generate or have generated the revenues described in clause (k) except with the prior written consent of the Company.

Clauses (d), (e), (f) and (g) of this section 11.1 are separate and distinct and severable covenants and clauses (k), (l), (m) and (n) of this section 11.1 are separate and distinct and severable covenants, and have been inserted to reflect the parties best efforts to protect the legitimate business interests of Vector and the Affiliates.

. . .

11.4 Non-Solicitation

Wenzel agrees that for a period of:

(a) five (5) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(b) three (3) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(c) two (2) years, or in the event that time period is found by any Court of competent jurisdiction to be unreasonable or otherwise unenforceable;
(d) one (1) year;

following the termination or expiry of this Agreement for any reason, he shall not, directly or indirectly:

(e) induce or attempt to induce any Customer or any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products, to alter or terminate its relationship with Vector or such Affiliate; or

(f) induce or attempt to induce any employee of any Customer or of any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products, to alter, leave or terminate his employment with such Customer or person; or

(g) induce or attempt to induce any employee of Vector or of any Affiliate to alter, leave or terminate his employment; or

(h) provide or offer to provide or solicit the provision of services or products to any Customer or any other person with whom Vector or any Affiliate has a relationship of any kind relating to research, design, development, manufacturing, sales or rental of downhole products which are related or similar to and compete with the services or products provided to that Customer or other person by Vector or such Affiliate as at or within two years prior to the Termination Date.

Clauses (a), (b), (c) and (d) of this section 11.4 are separate and distinct and severable covenants and have been inserted to reflect the parties best efforts to protect the legitimate business interests of Vector and the Affiliates.

11.5 Equitable Relief on Breach

Wenzel recognizes that a breach by him of any of the covenants contained in this Article would result in damage to Vector or the Affiliates and that Vector or the Affiliates could not be adequately compensated for such damage by monetary awards. Accordingly, Wenzel agrees, that in the event of any such breach, in addition to all other remedies available to Vector or any Affiliate at law or in equity, Vector shall be entitled as a matter of right to apply to a court of competent equitable jurisdiction for such relief by way of restraining order, injunction, decree or otherwise, as may be appropriate to ensure compliance with the provision of this Agreement.

. . .

11.7 Restrictions Reasonable

Wenzel has carefully considered the nature and extent of the restrictive covenants set forth herein and agree that the same are reasonable including with respect to duration, scope of activity and geographical area and necessary to protect the legitimate interests of Vector and the Affiliates and that they do not prevent him from reasonably earning a living.

11.8 Restrictions May be Modified By Court

Without limiting the foregoing, the parties agree that each of the provisions of this Article 11 shall be deemed to be separate and distinct and if, for any reason whatsoever, any of these provisions is held null or unenforceable by the final determination of a court of competent jurisdiction and all appeals therefrom shall have failed or the time for such appeals shall have expired, such provision shall be deemed deleted from this Agreement without affecting the validity or enforceability of any other provisions hereof which shall remain in full force and effect.

Indexed as:

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

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.

And between

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 [page372]

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.

[2003] 3 S.C.R. 371

[2003] S.C.J. No. 76

2003 SCC 71

File Nos.: 28988, 28981.

Supreme Court of Canada

Heard: June 9, 2003;
Judgment: December 12, 2003.

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

(88 paras.)

[page 373]

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Costs -- Interim costs -- Principles governing exercise of court's discretionary power to grant interim costs -- Minister of Forests serving Indian Bands with stop-work orders for logging on Crown land without authorization -- Bands claiming aboriginal title to lands -- Minister applying to have proceedings remitted to trial list -- Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause -- Whether Court of Appeal's decision to grant interim costs should be upheld -- Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion -- Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

Summary:

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The 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 the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, 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. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary [page374] power to order interim costs. It 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 it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. 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. Several conditions 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 public interest litigation special considerations also come into play. 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 [page375] would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: 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; the claim to

be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Each of these criteria is met in this case. The Bands 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 B.C., 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. The conditions attached to the costs order by the Court of Appeal 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, 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 Crown.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. 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. 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 and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his 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 the prospect of the Bands' hiring counsel on a contingency basis seems [page376] unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: 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. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as 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. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this criterion and leave 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. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the

party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking [page377] interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

Cases Cited

By LeBel J.

Referred to: Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23; Ryan v. McGregor (1925), 58 O.L.R. 213; Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464; Skidmore v. Blackmore (1995), 2 B.C.L.R. (3d) 201; Kendall v. Hunt (No. 2) (1979), 16 B.C.L.R. 295; Canadian Newspapers Co. v. Attorney-General of Canada (1986), 32 D.L.R. (4th) 292; Re Lavigne and Ontario Public Service Employees Union (No. 2) (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; Rogers v. Sudbury (Administrator of Ontario Works) (2001), 57 O.R. (3d) 467; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); Jones v. Coxeter (1742), 2 Atk. 400, 26 E.R. 642; Organ v. Barnett (1992), 11 O.R. (3d) 210; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Woloschuk v. Von Amerongen, [1999] A.J. No. 463 (QL), 1999 ABQB 306; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Amcan Industries Corp. v. Toronto-Dominion Bank, [1998] O.J. No. 3014 (QL); Turner v. Telecommunication Workers Pension Plan (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; New Brunswick (Minister of Health and Community Services) v. G. (J.) (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; Earl v. Wilhelm (2000), 199 Sask. R. 21, 2000 SKCA 68; Benson v. Benson (1994), 120 Sask. R. 17; R. v. Regan, [2002] 1 S.C.R. 297, 2002 SCC 12; Pelech v. Pelech, [1987] 1 S.C.R. 801; Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

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By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; R. v. Van der Peet, [1996] 2 S.C.R. 507; McDonald v. McDonald (1998), 163 D.L.R. (4th) 527; Randle v. Randle (1999), 254 A.R. 323, 1999 ABQB 954; Roberts v. Aasen, [1999] O.J. No. 1969 (QL); Watkins v. Olafson, [1989] 2 S.C.R. 750; R. v. Salituro, [1991] 3 S.C.R. 654; Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925.

Statutes and Regulations Cited

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248, 249.

Canadian Charter of Rights and Freedoms, s. 15.

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

Constitution Act, 1982, s. 35.

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

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 123.

Queen's Bench Rules, Man. Reg. 553/88, r. 49.10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 49.10, 57.01(1)(d), (2).

Rules of Court, B.C. Reg. 221/90, rr. 1(12), 37(23) to 37(26), 52(11)(d), 57(9).

Authors Cited

Orkin, Mark M. The Law of Costs, 2nd ed. Aurora, Ont.: Canada Law Book, 1987 (loose-leaf updated November 2002).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (sub nom. British Columbia (Ministry of Forests) v. Jules), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, allowing in part an appeal from a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Appeal dismissed, Iacobucci, Major and Bastarache JJ. dissenting.

Counsel:

Patrick G. Foy, Q.C., and Robert J. C. Deane, for the appellant.

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Louise Mandell, Q.C., Michael Jackson, Q.C., Clarine Ostrove and Reidar Mogerman, for the respondents.

Cheryl J. Tobias and Brian McLaughlin, for the intervener the Attorney General of Canada.

Lori R. Sterling and Mark Crow, for the intervener the Attorney General of Ontario.

René Morin, Gilles Laporte and Brigitte Bussières, for the intervener the Attorney General of Quebec.

Written submissions only by Gabriel Bourgeois, Q.C., for the intervener the Attorney General of New Brunswick.

Written submissions only by George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

Written submissions only by Margaret Unsworth, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and Dominique Nouvet, for the interveners the Songhees Indian Band et al.

Joseph J. Arvay, Q.C., and David M. Robbins, for the intervener Chief Roger William.

The judgment of McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

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 [page380] 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 [page381] 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 *Canadian Charter of Rights and Freedoms* 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, in-

cluding 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 [page382] 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 (QL), 2000 BCSC 1135

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 [page383] 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 [page384] 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

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 [page385] 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, 1982* 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.

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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 [page387] 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 [page388] standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, 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. [Emphasis in original.]

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* (1925), 58 O.L.R. 213 (App. Div.), 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 [page389] 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 (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, 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 [page390] legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295. 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) to 37(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 [page391] 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. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), 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 *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), 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 [page392] 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 (C.A.), aff'd [1991] 2 S.C.R. 211), 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* and *Lavigne* in *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (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, 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 Gen-

eral to pay the applicants' costs. Whealy Dist. Ct. J. cited Osler J.'s statement in *Canadian Newspapers, 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 [1989] O.J. No. 205 (QL) (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, 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 [page393] problems". He allowed Whealy Dist. Ct. 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 Dist. Ct. 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. 400, 26 E.R. 642 (Ch.), 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 [page394] 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 (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.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her posi-

tion (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 (QL), 1999 ABQB 306, 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 (QL) (S.C.J.), also a custody case, where [page395] 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, *supra*, at p. 2-23, 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" (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* 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 (QL) (Gen. Div.), 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. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, an action for breach of fiduciary duty in respect of a pension fund, the British Columbia [page396] 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 [page397] 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 and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, [page398] 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, 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 deter-

mine 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 [page399] 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.

[page400]

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, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice [page401] required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, 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, 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.

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, [page402] 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 [page403] 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, 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.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

49 MAJOR J. (dissenting):-- 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 [page404] 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 [page405] 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 [page406] 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:

> 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.
>
> ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129)

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 [page407] 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.

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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 [page409] the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507. 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 [page410] (Alta. C.A.). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, 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 [page411] 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.

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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 (QL) (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, [page413] 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 had 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 adaptation of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

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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" (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; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

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.

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cp/e/qw/qlls

Housen *v.* Nikolaisen, [2002] 2 S.C.R. 235, 2002 SCC 33

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

Indexed as: Housen *v.* Nikolaisen

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for saskatchewan

Torts -- Motor vehicles -- Highways -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals -- Courts -- Standard of appellate review -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the

speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper

relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising ordinary care could approach the curve at greater than the speed at

which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal

councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of

disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

Cases Cited

By Iacobucci and Major JJ.

Applied: *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2; *McCannell v. McLean*, [1937] S.C.R. 341; *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; **considered:** *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670; **referred to:** *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574; *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504; *Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Palsky v. Humphrey*, [1964] S.C.R. 580; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Dube v. Labar*, [1986] 1 S.C.R. 649; *C.N.R. v. Muller*, [1934] 1 D.L.R. 768; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497; *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402; *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557.

By Bastarache J. (dissenting)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Partridge v. Rural*

Municipality of Langenburg, [1929] 3 W.W.R. 555; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, rev'g (1980), 112 D.L.R. (3d) 297 (*sub nom. Taylor v. The Queen in Right of British Columbia*), rev'g (1978), 95 D.L.R. (3d) 82; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491; *Williams v. Town of North Battleford* (1911), 4 Sask. L.R. 75; *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627; *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Schreiber Products Ltd. v. Currie Brothers Ltd.*, [1980] 2 S.C.R. 78; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68; *R. v. Jennings*, [1966] S.C.R. 532; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884; *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260.

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APPEAL from a judgment of the Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, setting aside a decision of the Court of Queen's Bench, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Appeal allowed, Gonthier, Bastarache, Binnie and LeBel JJ. dissenting.

Gary D. Young, Q.C., *Denis I. Quon* and *M. Kim Anderson*, for the appellant.

Michael Morris and *G. L. Gerrand, Q.C.*, for the respondent.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND MAJOR JJ. --

I. Introduction

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than

> that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. *Standard of Review for Findings of Fact*

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

Deans v. Thachuk

Dennis Black Deans, Nelson Russling, Terence Day, and James Sharp on their own behalf and on behalf of all beneficiaries of the Edmonton Pipe Industry Pension Plan (Appellants / Plaintiffs) and Bob Thachuk, Cliff Williams, Rob Kinsey, M.B. Strong, R. Garon, H. Cicconi, J. Curtis, J. Falvo, H. Morissette, R. Shirriffs, R. Auger, G. Dobson, N. Frederiksen, R. Dubord, W. Shaughnessy, P. Stalenhoef, G. Panas, H. Blakely and L. Matychuk (Respondents / Defendants)

Alberta Court of Appeal

Fraser C.J.A., Russell J.A., Sirrs J. (ad hoc)

Heard: May 9, 2005
Judgment: October 27, 2005[FN*]
Docket: Edmonton Appeal 0403-0156-AC

Proceedings: reversing *Deans v. Thachuk* (2004), [2005] 1 W.W.R. 522, 356 A.R. 303, 8 E.T.R. (3d) 75, 41 C.C.P.B. 27, 32 Alta. L.R. (4th) 102, 2004 CarswellAlta 514, 2004 ABQB 265 (Alta. Q.B.)

Counsel: J.C. Lloyd for Appellants

B.G. Kapusianyk for Respondent

J. Rosselli for Board of Trustees of the Edmonton Pipe Industry Pension Fund (Not a Party to the Appeal)

Subject: Corporate and Commercial; Civil Practice and Procedure; Estates and Trusts

Pensions --- Practice in pension actions — Costs

Unionized employees were members of pension plan which was established by declaration of trust — Trust agreement provided that legal costs for proceedings against trustees were to be paid by trust fund, except where action was for gross negligence or bad faith by trustees — Review conducted for Superintendent of Pensions found significant lack of due diligence by board of trustees of pension fund — Members of union brought action on behalf of all beneficiaries of plan against existing and former trustees for breach of duty, gross negligence and wilful misconduct — Plaintiffs applied on close of pleadings for interim costs to be paid from trust fund — Application was dismissed — Chambers judge found that plan had over 5,000 members who had not been actively solicited for funds, and since only small minority of members responded to call for funds, it was fair to infer that majority were satisfied with trustees and that plaintiffs had not established that they were impecunious — Chambers judge found that there was insufficient evidence that members' other potential funding resources had been depleted — It was uncertain that action was in best interests of all members given expense and possible inability of trustees to pay damages — There was insufficient

evidence of special circumstances warranting order — Employees brought appeal — Appeal allowed — Chambers judge did not err in applying Supreme Court of Canada's three-part test for interim costs in instant pension trust litigation, as test was applicable to case at bar — Chambers judge did err in using canvass of other members in determination of interim costs award, because proceedings commencing before introduction of Class Proceedings Act did not require that notice to all members of class be given — Chambers judge's conclusion that action was not worthy of pursuit because of poor prospect of recovery was not supported by evidence of respondents' net worth, nor was inquiry into likelihood of recovery required under second step of test — Chambers judge failed to take into account fact that trust litigation entails unique obligation to preserve fund for beneficiaries, which gave rise to special circumstances required by third step of test — Chambers judge failed to take into account that damages were sought on behalf of beneficiaries, not merely for named plaintiffs — Interim funds to be awarded to plaintiffs through examinations for discovery, with leave to reapply thereafter.

Civil practice and procedure --- Costs — Funds liable for payment of costs

Unionized employees were members of pension plan which was established by declaration of trust — Trust agreement provided that legal costs for proceedings against trustees were to be paid by trust fund, except where action was for gross negligence or bad faith by trustees — Review conducted for Superintendent of Pensions found significant lack of due diligence by board of trustees of pension fund — Members of union brought action on behalf of all beneficiaries of plan against existing and former trustees for breach of duty, gross negligence and wilful misconduct — Plaintiffs applied on close of pleadings for interim costs to be paid from trust fund — Application was dismissed — Chambers judge found that plan had over 5,000 members who had not been actively solicited for funds, and since only small minority of members responded to call for funds, it was fair to infer that majority were satisfied with trustees and that plaintiffs had not established that they were impecunious — Chambers judge found that there was insufficient evidence that members' other potential funding resources had been depleted — It was uncertain that action was in best interests of all members given expense and possible inability of trustees to pay damages — There was insufficient evidence of special circumstances warranting order — Employees brought appeal — Appeal allowed — Chambers judge did not err in applying Supreme Court of Canada's three-part test for interim costs in instant pension trust litigation, as test was applicable to case at bar — Chambers judge did err in using canvass of other members in determination of interim costs award, because proceedings commencing before introduction of Class Proceedings Act did not require that notice to all members of class be given — Chambers judge's conclusion that action was not worthy of pursuit because of poor prospect of recovery was not supported by evidence of respondents' net worth, nor was inquiry into likelihood of recovery required under second step of test — Chambers judge failed to take into account fact that trust litigation entails unique obligation to preserve fund for beneficiaries, which gave rise to special circumstances required by third step of test — Interim funds to be awarded to plaintiffs through examinations for discovery, with leave to reapply thereafter.

Cases considered:

Andrews v. Barnes (1887), 39 Ch. D. 133 at 134 (Eng. Ch. Div.) — referred to

Andrews v. Barnes (1888), 39 Ch. D. 133 at 137 (Eng. C.A.) — referred to

Bankers Trust Co. v. Shapira (1980), [1980] 3 All E.R. 353, [1980] 1 W.L.R. 1274 (Eng. C.A.) — referred to

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 114 C.R.R. (2d) 108, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161 (S.C.C.) — followed

Buckton, Re (1907), [1907] 2 Ch. 406 (Eng. Ch. Div.) — considered

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

Cummings v. McFarlane (1851), 2 Gr. 151, 1851 CarswellOnt 8 (U.C. Ch.) — referred to

Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba (2004), *(* sub nom. *Dominion Bridge Inc. (Trustee of) v. Dominion Bridge Inc. Manitoba Retirement Income Plan))* 245 D.L.R. (4th) 751, *(* sub nom. *Dominion Bridge Inc. (Re))* C.E.B. & P.G.R. 8130, *(* sub nom. *Dominion Bridge Inc. (Bankrupt), Re)* 190 Man. R. (2d) 225, *(* sub nom. *Dominion Bridge Inc. (Bankrupt), Re)* 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316, 2004 MBCA 180, 2004 CarswellMan 473 (Man. C.A. [In Chambers]) — referred to

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Liddell v. Deacou (1873), 20 Gr. 70, 1873 CarswellOnt 20 (Ont. Ch.) — referred to

McDonald v. Horn (1994), [1995] 1 All E.R. 961 (Eng. C.A.) — considered

Pelech v. Pelech (1987), [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, 38 D.L.R. (4th) 641, 76 N.R. 81, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 7 R.F.L. (3d) 225, 1987 CarswellBC 147, 1987 CarswellBC 703 (S.C.C.) — referred to

Thompson v. Lamport (1945), [1945] S.C.R. 343, [1945] 2 D.L.R. 545, 1945 CarswellOnt 97 (S.C.C.) — referred to

Townsend v. Florentis (2004), [2004] O.T.C. 313, 2004 CarswellOnt 1402 (Ont. S.C.J.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), 94 Alta. L.R. (3d) 1, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, *(*sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, 272 N.R. 135, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, [2001] 2 S.C.R. 534 (S.C.C.) — considered

Statutes considered:

Class Proceedings Act, S.A. 2003, c. C-16.5

Generally — referred to

s. 20 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)

Generally — referred to

APPEAL by employee members of pension fund from judgment reported at *Deans v. Thachuk* (2004), [2005] 1

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

W.W.R. 522, 356 A.R. 303, 8 E.T.R. (3d) 75, 41 C.C.P.B. 27, 32 Alta. L.R. (4th) 102, 2004 CarswellAlta 514, 2004 ABQB 265 (Alta. Q.B.), denying that their interim legal costs should be paid by pension fund.

***Per curiam*:**

Nature of Proceedings

1 This is an appeal (with leave) from the dismissal of an application for the appellants' interim legal costs to be paid from the Edmonton Pipe Industry Pension Trust Fund (the "Fund").

Background

2 The appellants are members of a union representing plumbers and pipe-fitters. As such, they are entitled to benefits under the Edmonton Pipe Industry Pension Plan (the "Plan"). The Plan was established in October 1968 by an Agreement and Declaration of Trust, which was amended in December 2001. The Declaration of Trust created the Fund to provide retirement, death and disability benefits for Plan members. It provided for the appointment of a Board of Trustees (the "Trustees") consisting of representatives from both the union and the employers.

3 Under the Trust Agreement, the Trustees had discretion to invest the Fund's assets in compliance with applicable statutes and regulations. It provided, amongst other things, that:

> the costs and expenses of any action, suit or proceeding brought by or against the Trustees or any of them (including counsel fees), shall be paid from the Trust Fund, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such Trustees were acting in bad faith, or were grossly negligent in the performance of their duties hereunder.

The appellants contend that provision preserves the right of beneficiaries seeking redress against the Trustees to have their legal costs paid by the Trust Fund. However, the 2001 amendment deleted that provision from the Trust Agreement. The appellants allege any amendment thereto is of no force and effect.

4 As a result of complaints of non-compliance with provincial and federal pension legislation, the Provincial Superintendent of Pensions (the "Superintendent") instructed Price Waterhouse Coopers ("PWC") to conduct a review of the Plan. That review culminated in a report, dated June 30, 2000, which identified several significant breaches of compliance and unsound administrative practices. The Superintendent viewed those breaches as "serious". They included: investing the Plan's assets in excess of the limits prescribed by the *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.), Schedule III ("*PBSA*") and the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"); acquiring excess voting interest in a golf course in breach of the *PBSA*; pledging the Plan's assets as security in contravention of the *ITA*; and investing in self-directed, high risk investments.

5 The PWC report also found a significant lack of due diligence by the Trustees prior to entering into self-directed investments, including: failure to undertake a thorough risk analysis of investments; failure to consult legal counsel and the Superintendent to determine if the investments were in compliance with the legislation; and failure to establish a methodology to assess the performance of self-directed assets. The report concluded that, had the self-directed assets been left with professional money managers, the present net assets of the Plan would have been $27.5 million higher, and that:

> It would be difficult not to conclude that the failure to comply with legislation and failure to adhere to basic governance procedures has made a significant contribution to the current financial difficulties facing the Plan.

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

6 In November 2000, Plan members were informed that the Superintendent had engaged PWC to review the governance, administration, management, compliance, finances and investments of the Fund, and that the review had disclosed some concerns.

7 In March 2001, the Trustees reported to Plan members that concerns disclosed in the PWC report had arisen during the terms of some former Trustees. The current Trustees, some of whom were also Trustees when the concerns arose and are respondents in this appeal, assured Plan members that their focus was on resolving the issues in the best interests of the Plan and its members.

8 Although the Trustees did not distribute the PWC report to Plan members, the appellant, Dennis Black Deans, obtained a copy from the office of the Provincial Information and Privacy Commission. On June 26, 2002, the appellants filed a statement of claim on their own behalf and on behalf of all of the beneficiaries of the Plan, alleging breach of fiduciary duties, gross negligence and wilful misconduct by present and former trustees of the Plan and its employee administrator, Bob Thachuk. The Trustees declined to finance the lawsuit from the Fund.

9 As of September 30, 2002 there were 5,547 active members of the Plan and 1,308 pensioners. Approximately 200 of the Plan members who were informally canvassed voluntarily contributed financially toward the appellants' legal costs. Based on the number of contributors to the costs of the action, the respondents contend the appellants represent only two to three percent of the beneficiaries of the Plan.

10 On February 3, 2004, the appellants' first application to have their legal fees and disbursements paid from the Fund was dismissed as pleadings had not yet closed. However, they were granted leave to reapply at a later date. A second application, which is the subject of this appeal, was dismissed on April 2, 2004. Leave to appeal was granted June 9, 2004.

11 The chambers judge rejected suggestions that the appellants were required to challenge the Trustees through the electoral process before commencing litigation. However, she found there was no organized funding campaign to collect donations to fund the litigation.

12 Evidence suggests that the majority of the members of the Plan were not dissatisfied with the manner in which the Trustees responded to the concerns identified by the Superintendent: union members refused the resignations tendered by the 4 union trustees in office in June, 2001; three of the current union trustees, who are respondents in this appeal, were re-elected in the January, 2003 election; and each of the appellants was unsuccessful in his bid for election as a union trustee at the same election.

Issues

13 Did the chambers judge err in law in determining that the test prescribed by the Supreme Court of Canada to determine interim costs applies in the context of pension litigation?

14 If the chambers judge did not err in relying on the Supreme Court of Canada's test, did she err in her application of that test?

Standard of Review

15 The standard of appellate review on questions of law is correctness, and on questions of fact is palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.) at paras. 10, 25 & 27.

16 A discretionary decision as to costs may be set aside if an appellate court finds that a judge has misdirected

herself as to the applicable law or made a palpable error in her assessment of the facts. "[T]he 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": *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.) at para. 43 ("*Okanagan*"), citing *Pelech v. Pelech*, [1987] 1 S.C.R. 801 (S.C.C.), at 814-15.

Analysis

Did the chambers judge err in law in determining that the test prescribed by the Supreme Court ofCanada to determine interim costs applies in the context of pension litigation?

17 The chambers judge applied the three-part test for an exercise of the discretionary power to award interim costs prescribed by the Supreme Court of Canada in *Okanagan* at para. 36. There, LeBel J., speaking for the majority, prescribed the following criteria for an award of interim costs:

> (a) the claimant must be impecunious to the extent that without such an order, the claimant would be deprived of the opportunity to proceed with the case;
>
> (b) the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and
>
> (c) 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.

However, in this case, the chambers judge was not satisfied the appellants met these criteria.

18 In their application before the chambers judge, the appellants invited her to invoke the principles from *Okanagan*. However, they now argue in this Court that *Okanagan* should not be applied to pension trust litigation cases. Instead, they claim the only questions to be asked are whether the claim is *prima facie* meritorious and whether the litigation is brought for the benefit of all the beneficiaries of the plan, citing *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.) ("*Buckton, Re*") and *McDonald v. Horn* (1994), [1995] 1 All E.R. 961 (Eng. C.A.) ("*Horn*"). They say that where both questions are answered in the affirmative, the interim order should be granted.

19 The appellants submit that, in considering an award of interim costs in the context of pension and trust litigation, the focus must be on the nature of the issue to be addressed in the litigation and not on the characteristics of the applicant for the award. In particular, they argue that an applicant for such an award in pension trust cases should not be required to demonstrate impecuniosity. They also contend they should not be required to demonstrate the likelihood of recoverability, as found by the chambers judge.

20 Relying on a statement in *Okanagan* at para. 34, that interim costs are available in "certain trust, bankruptcy and corporate cases", the appellants argue that the majority in that case did not intend to extend the *Okanagan* test to those types of cases. According to the appellants, costs in pension and trust cases are determined by different principles and are ordinarily granted on a solicitor-and-client basis, payable from the pension or trust fund regardless of the outcome of the case.

21 However, the statement in *Okanagan* relied on by the appellants was made in the context of a discussion of the types of cases in which interim costs have historically been granted and the policy reasons for doing so. At para. 31, LeBel J. stated:

> Concerns about access to justice and the desirability of mitigating severe inequality between litigants . . . feature

> prominently in the rare cases where interim costs are awarded.

He found that cases falling within that realm include matrimonial or family cases, as well as "certain trust, bankruptcy and corporate cases." The three part test he prescribed established the parameters within which a court's discretion to award interim costs should be exercised. Nothing in his reasons suggests the test was not intended to apply in the context of pension trust litigation.

: see also *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba*, 2004 MBCA 180 (Man. C.A. [In Chambers]) at para. 24.

22 It is not disputed that the appellants have established personal impecuniosity. What is at issue is the extent to which an applicant for interim costs, acting in a representative capacity in an action involving a pension trust fund, is required to canvas all the members of the plan for financial support for the litigation or pursue contingency fee arrangements, in order to satisfy the first criteria of the three part test in *Okanagan* The second issue is whether the likelihood of recoverablity is a proper factor to consider in weighing the merit of the case. Neither of those issues obviates the application of the three part test. Rather each of those issues can be addressed in the application of that test.

23 As no error of law has been shown in the decision of the chambers judge to apply the three-part test prescribed in *Okanagan*, the first ground of appeal is dismissed.

Did the chambers judge err in her application of the three-part test established in Okanagan?

(a) Impecuniosity

24 In *Okanagan* at para. 34, LeBel J. held that impecuniosity should not prevent litigants from pursuing meritorious claims. [para.34] He stated that

> [t]he 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:
>
> *Okanagan* at para. 36.

25 In this case, the chambers judge rejected the Trustees' argument that the Fund's assets were relevant to the determination of impecuniosity, but found insufficient evidence that the appellants' other potential funding resources had been depleted. In her view, before asserting they could not afford the litigation, the appellants should have formally canvassed all members of the Plan on whose behalf the action was brought, or pursued a contingency fee arrangement.

26 However, because only a small percentage of members responded to the informal canvassing for funds, it can be inferred that the majority of them were satisfied with the Trustees' response to concerns regarding the administration of the Fund. Moreover, since the majority of members refused to accept the resignation of, and even re-elected, the four union Trustees, it seems patent that any formal canvas for funds to support the litigation would have been futile.

27 This litigation predates the Class Proceedings Act, S.A 2003, c. C-16.5. Section 20 of that Act requires a representative plaintiff to give class members notice that the action has been certified to proceed as a class proceeding. However, before that Act was proclaimed, the Supreme Court of Canada held that, because a judgment in a representative action is not binding on a class member unless that member has been notified of the suit, "prudence suggests

that all potential class members be informed of the existence of the suit . . . ": *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (S.C.C.) at para. 49. So while notice may be prudent, it appears that prior to the enactment of the *Class Proceedings Act*, notice was not essential for a representative action to proceed. But, in the absence of notice to the class members, the cost of conducting such an action falls on the representatives. Since formal notice was not a prerequisite to a representative action when this proceeding arose, it follows that the support of the majority of Plan members need not be established.

28 It is not clear from the chambers judge's reasons how any subsequent application for interim costs should be resolved if a formal canvas proved entirely unsuccessful. But it seems implicit that in such an event, the intent of the chambers judge is that the action would not be able proceed, whether or not the suit is meritorious. That being so, the requirement to canvas Plan members for financial support cannot be justified, because it would effectively preclude the possibility of interim costs in such cases.

29 While the prospect of a contingency fee arrangement might dictate against the remedy of interim costs, there must be evidence that such an arrangement is a viable alternative: *Okanagan* at para. 44. Although there was no such evidence in this case, it seems clear that such an arrangement is not realistic in view of concerns expressed by the chambers judge regarding the poor prospect of recovery.

30 Accordingly, the chambers judge erred in relying on the lack of evidence of a formal canvas or the prospect of a contingency arrangement, and disregarding undisputed evidence of the appellants' personal impecuniosity.

(b) Prima Facie Case

31 The chambers judge was satisfied there was sufficient evidence of gross negligence or wilful misconduct to justify the matter going forward "at least to the conclusion of the discoveries." However, she concluded that, because it was not clear whether the respondents had sufficient funds to make pursuit of the lawsuit worthwhile, any victory for the appellants would be hollow. It is implicit in her reasons that she relied on that factor in declining interim costs. However, the conclusion that the action was not worthy of pursuit due to a poor prospect of recovery does not appear to be supported by evidence of the net worth of the respondents. The chambers judge also placed reliance on the decision of the Trustees not to pursue the litigation themselves in declining the remedy. It must be noted that some of those Trustees are also some of the respondents in this action.

32 The appellants acknowledge that *prima facie* merit is a reasonable prerequisite to an interim costs order. But they quarrel with the onus placed on them by the chambers judge to demonstrate the ability of the respondents to satisfy a damages award, and to provide assurance that the lawsuit is in the long-term interests of Plan members. No authorities have been cited in support of their position.

33 In *Okanagan*, LeBel J. held that the case must be strong enough to step past the preliminary threshold of being worthy of pursuit, but the order should not be refused merely because key issues remain live and contested between the parties. Nor should it be refused because of concerns about fettering the discretion of the trial judge in adjudicating the merits of the case.

34 In *Horn*, *supra*, Hoffmann L.J. reasoned that unlike ordinary trust beneficiaries, pension plan members, as contributors to the trust fund, have a commercial relationship with it and are therefore entitled to be satisfied the trust fund is being properly administered. Because pension funds are a special form of trust, he found an analogy between beneficiaries and corporate shareholders. Thus, he determined that when beneficiaries of pension trusts bring an action on behalf of the trust, they should enjoy the same right of indemnity as corporate shareholders in derivative actions.

35 Hoffmann L.J., at 974, cautioned that the power to order "preemptive" costs in a pension fund case should be exercised with considerable care, although in his view that did not require a close examination of the merits of the

dispute. Rather, the question is whether a sufficient case for further investigation has been established. If so, the most economical form of investigation should be chosen. Hoffmann L.J. noted that even if further investigation is required, it need not necessarily take the form of a full scale trial, and might extend only to discovery or involve the appointment of judicial trustees with power to take possession of the documents and investigate for themselves.

36 Here, the chambers judge recognized that although there are some elements of this litigation analogous to a derivative action, leave is required to commence such actions and will only be granted if the court is satisfied that the proceeding is in the best interests of the corporation. Inferentially, she was thus disinclined to follow the reasoning of Hoffmann L.J. in *Horn.* However, since it was open to her to determine whether it was in the best interests of the Plan members to provide interim costs funding, that was not a proper ground on which to distinguish *Horn.*

37 In pension trust cases, the obligation to preserve the trust fund for the beneficiaries, to the extent reasonably possible, requires a balancing of the cost of the litigation with the prospect of recovery if successful. But those factors must also be balanced against what Hoffmann L.J. agreed was a moral right of beneficiaries to be satisfied that the trust fund is being properly administered, given their commercial relationship with it: *Horn* at 973.

38 Moreover, in the face of allegations of significant breaches of trust, which are substantiated in an independent report, reliance on the prospect of recoverability is contrary to public policy interests of ensuring that wrongdoers are held legally responsible for their actions regardless of their financial circumstances. And in any event, those circumstances may change dramatically throughout the course of the litigation and the life of any ensuing judgment.

39 The second part of the test established in *Okanagan* requires only that the case be strong enough to get over the preliminary threshold of being worthy of pursuit. It does not require a close examination of the merits of the dispute, nor the prospects of success, including the likelihood of recovery. The action here is of sufficient merit to warrant pursuit and the appellants have therefore met the second part of the test for interim costs.

(c) Special Circumstances

40 The third step in determining whether interim costs should be granted requires proof of "special circumstances sufficient to satisfy the court that the case is within a narrow class of cases where this extraordinary exercise of its powers is appropriate": *Okanagan* at para. 36.

41 The Court in *Okanagan* at para. 36 made the general observation that the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs. Accordingly, factors of an equitable nature may be relevant considerations in determining the existence of special circumstances. With respect to special circumstances, Lane J. in *Townsend v. Florentis*, [2004] O.T.C. 313, 2004 CarswellOnt 1402 (Ont. S.C.J.) at paras. 56-57 noted:

> [T]here must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required. . . . The mere 'leveling of the playing field', although an admirable objective, would deprive the Third Test [in ***Okanagan***] of any real meaning . . . .

42 Issues specific to trust cases may also be relevant in this context. Trust litigation may entail unique obligations to preserve the trust fund for the beneficiaries: see *Liddell v. Deacou* (1873), 20 Gr. 70 (Ont. Ch.); *Cummings v. McFarlane* (1851), 2 Gr. 151 (U.C. Ch.); and *Andrews v. Barnes* (1887), 39 Ch. D. 133 at 134 (Eng. Ch. Div.) per Kay J., aff'd *Andrews v. Barnes* (1888), 39 Ch. D. 133 at 137 (Eng. C.A.). In *Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft G.m.b.h.* (December 1, 1978, Eng. C.A.) [unreported], cited in *Bankers Trust Co. v. Shapira*, [1980] 3 All E.R. 353 (Eng. C.A.) at 357, Templeman L.J. noted that the courts of equity would not hesitate to use their powers to protect and preserve a trust fund in interlocutory proceedings to ensure that it is not entirely depleted before trial. The obligation to protect the Fund from depletion includes not only the duty to protect it from costs of an un-

meritorious suit, but as well the duty to protect it from mismanagement.

43 In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund. The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply.

44 The chambers judge held that the present case is adversarial because damages are being sought rather than declaratory relief. That factor weighed against an award of interim costs in her decision, presumably because she was concerned that a damage award in favour of the appellants could jeopardize the Fund. Ultimately, she determined there was insufficient evidence of special circumstances to warrant the exercise of the Court's authority to grant interim costs.

45 However, the chambers judge overlooked the following factors:

1. The action involves allegations of bad faith, conflict of interest, gross negligence, wilful misconduct, lack of due diligence, and failure to comply with statutory requirements on the part of the Trustees, resulting in financial difficulties now facing the Plan;

2. Many of those allegations are substantiated by an independent report prepared by an expert accounting body;

3. The independent report was initiated and issued by the Superintendent;

4. The decision not to pursue litigation with respect to the administration of the Fund was made by the Trustees, and concerned the actions of some of their fellow Trustees;

5. The appellants, acting on behalf of all the beneficiaries, are entitled to be satisfied that the Fund was being administered properly; and

6. Damages are sought on behalf of all the beneficiaries of the Fund, and not merely for the named appellants.

Those factors are sufficient to constitute special circumstances, which are not outweighed by concerns regarding the prospect of recoverability. Failure to give adequate weight to those circumstances in addressing the best interests of the beneficiaries constitutes an error of law.

Did the chambers judge err in interpreting the indemnification provision of the agreement?

46 Although it is not strictly necessary for the resolution of this appeal to address the interpretation of the indemnification provision in the agreement, having heard oral submissions on the issue we do wish to offer the following comment.

47 Generally, trustees are entitled to indemnity for all costs and expenses properly incurred in the due administration of the trust, including solicitor-client costs "in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly": *Thompson v. Lamport*, [1945] S.C.R. 343 (S.C.C.), at 356.

2005 CarswellAlta 1518, 2005 ABCA 368, 48 C.C.P.B. 65, 20 E.T.R. (3d) 19, C.E.B. & P.G.R. 8177, 52 Alta. L.R. (4th) 41, 261 D.L.R. (4th) 300, 376 A.R. 326, 360 W.A.C. 326, [2006] 4 W.W.R. 698, 23 C.P.C. (6th) 100

48 The indemnification provision in the agreement in this case specifies that no costs are payable if the trustees are found to have acted in bad faith or to have been grossly negligent. If the provision is interpreted as permitting any party to recover its costs from the Fund, it would lead to the anomalous result that parties bringing an action against the Trustees would be able to claim their costs from the Fund if the Trustees acted properly in respect of the matter adjudicated, but not if the Trustees had acted improperly. The more reasonable interpretation of the intent of this provision was to allow the Trustees to recover their costs, both in actions they commenced on behalf of the Fund and in actions brought against them, rather than to allow the other parties to these actions to recover their costs from the Fund. That interpretation leads to the conclusion that the appellants can only claim interim costs on the basis of the common law principles enunciated in *Okanagan*.

49 Thus the chambers judge did not err in declining to interpret the indemnification provision to apply to the appellants' application for legal costs in their action against the Trustees.

Conclusion

50 While the chambers judge did not err in finding that the three-part test prescribed in *Okanagan* applies in applications for interim costs in pension trust fund cases, she did err in her application of that test by finding the appellants were obliged to canvas the Plan members for financial support for the litigation to establish impecuniosity, and by finding that the prospect of recoverability outweighed other, more critical, special circumstances warranting interim costs.

51 Accordingly, the appeal is allowed and interim costs are awarded to the appellants from the Fund through examinations for discovery, with leave to reapply thereafter.

Appeal allowed.

FN* Leave to appeal to the S.C.C. refused: *Deans v. Thachuk* (2006), 2006 CarswellAlta 447, 2006 CarswellAlta 448 (S.C.C.)

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Indexed as:

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

Little Sisters Book and Art Emporium, Appellant;
v.
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.

[2007] 1 S.C.R. 38

[2007] S.C.J. No. 2

2007 SCC 2

File No.: 30894.

Supreme Court of Canada

Heard: April 19, 2006;
Judgment: January 19, 2007.

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

(162 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Civil procedure -- Costs -- Advance costs -- Whether requirements to award advance costs met.

Summary:

L is a small corporation that operates a bookstore catering to the lesbian and gay community. Book sales represent 30 to 40 percent of its business. L, which still struggles to make a profit, is engaged in litigation to gain the release of four books prohibited by Customs on the basis that they were obscene. Frustrated after years of court battles with Customs over similar issues, L chose to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. When this litigation began, L had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"), where it held that Customs' practices at the time infringed ss. 2(*b*) and 15 of the *Canadian Charter of Rights and Freedoms*. L [page39] now seeks to have Customs bear the financial burden of its fresh complaint. It applied for advance costs to cover the four books appeal as well as a systemic review of Customs' practices. In its appeal, L asks for a reversal of Customs' obscenity determinations and a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. The chambers judge granted an advance costs order for the appeal and the systemic review, concluding that the three requirements of the *Okanagan* test were satisfied. The Court of Appeal set aside the order.

Held (Binnie and Fish JJ. dissenting): The appeal should be dismissed.

Per Bastarache, LeBel, Deschamps, Abella and Rothstein JJ.: Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential costs treatment. Public interest advance costs orders must be granted with caution, as a last resort, in circumstances where their necessity is clearly established. The standard is a high one: only the "rare and exceptional" case is special enough to warrant an advance costs award. Accordingly, when applying the three requirements set out in *Okanagan*, a 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. The injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. Since an advance costs award is an exceptional measure, the applicant must explore all other possible funding options, including costs immunities. If the applicant cannot afford the litigation as a whole, but is not completely impecunious, the applicant must commit to making a contribution to the litigation. No injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. If advance costs are granted, the litigant must relinquish some manner of control over how the litigation proceeds. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed. Accordingly, courts should set limits on the rates and hours of legal work chargeable and cap advance costs awards at an appropriate global amount. The possibility of setting the advance costs award off against damages actually [page40] collected at the end of the trial should also be contemplated. [paras. 35-43]

L's claim is insufficient to support a finding that the requirement of special circumstances is met. The context in which merit is considered is conditioned by the need to show that the case is exceptional. The four books appeal, in which L alleges a discriminatory attitude on the part of Customs to

some of its merchandise, is extremely limited in scope. L has advanced no evidence suggesting that these four books are integral, or even important, to its operations. In this context, it is impossible to conclude that L is in the extraordinary position that would justify an award of advance costs. With the systemic review, L is essentially attempting to expand the scope of the litigation in the hope of bolstering its legal rights in individual cases. This approach does not 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 L. [paras. 51-53]

While L's constitutional rights should not be understated, it has not provided *prima facie* evidence that it remains the victim of unfair targeting. The fact that Customs continues to detain large quantities of imported material, including high proportions of gay and lesbian material, is not, in itself, *prima facie* evidence that Customs officials are performing their task improperly, much less unconstitutionally. With respect to the systemic review, the efficacy of Customs' changes to its practices in the wake of *Little Sisters No. 1* cannot be determined to be insufficient on the basis of the number of decisions that have been unfavourable to L. [paras. 54-56]

The history of L's relations with Customs should not be understated either, but it does not justify the advance costs application. This history cannot be used to establish that an injustice will result if insufficient funds preclude L from arguing the systemic review. The battle L seeks to fight through the systemic review is, strictly speaking, unnecessary. It is the four books appeal that lies at the heart of L's claim against Customs; the systemic review is simply an attempt by L to investigate [page41] Customs' practices independently of this context. [paras. 57-58]

In the present case, the issues raised do not transcend the litigant's individual interests. Because L has chosen to investigate Customs' general operations under the systemic review, the four books appeal concerns no interest beyond that of L itself and, as a consequence, is not special enough to justify an award of advance costs. The legal issues being raised by L in the four books appeal were already considered, and ruled upon, in *Little Sisters No. 1*. At most, the four books appeal deals with the application of *Little Sisters No. 1* to a specific set of facts. Moreover, the constitutional issues underlying L's claim do not satisfy the public importance criterion. The four books appeal does not address the issue of whether Customs is, in general, correctly applying the legal test for obscenity; rather, 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, the broader issues raised by L are being considered separately, as part of the systemic review. Under the systemic review, L 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. 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. Such a finding does not rise to the level of general public importance simply because it concerns a public body. Finally, not all *Charter* litigation is of exceptional public importance, even if it involves allegations of infringements of freedom of expression. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest. Where, as here, 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 the public importance requirement satisfied. [paras. 60-66]

[page42]

Absent exceptional circumstances, it is not necessary to address L's impecuniosity. Had the three parts of the *Okanagan* test been met, the court would still have to 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. In the case at bar, these concerns would have prompted the chambers judge to exercise her discretion against an advance costs award in respect of the systemic review since the possibility of hearing the four books appeal before conducting the systemic review was an alternative to her advance costs award. [para. 67] [para. 72] [para. 75]

Per McLachlin C.J. and Charron J.: In certain cases raising special circumstances, judges, invoking their equitable jurisdiction, may order one party to pay the other's interim costs where it is necessary to avoid unfairness or injustice. When interim costs are ordered in public interest cases, the issues raised must transcend the individual interests of the particular litigant and have special interest for the broader community. However, even in public interest litigation, the common law requirement for special circumstances must still be established as a pre-condition of interim costs. The three criteria for an order for advance costs therefore are: (1) impecuniosity; (2) a meritorious case; and (3) special circumstances making this extraordinary exercise of the court's power appropriate. The order is in the court's discretion, provided the conditions are made out. [para. 83] [paras. 86-88]

Here, the chambers judge failed to consider whether the case displayed special circumstances and the Court of Appeal correctly set aside the interim costs order. While the chambers judge's findings concerning L's inability to finance the litigation and the merit of the case should not be disturbed, the third pre-condition for an order of interim costs is not met, not because the case entirely lacks public interest, but because it does not rise to the level of the special circumstances required to give the court jurisdiction to make the order. At stake in this case is the prospect of not learning how Customs proceeded on the four books appeal. The possible insight into Customs' practices and the limited potential remedy do not rise to the level of compelling [page43] public importance or demonstrate systemic injustice. 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. [paras. 89-90] [para. 94] [para. 99] [para. 101] [para. 109]

Per Binnie and Fish JJ. (dissenting): The ramifications of *Little Sisters No. 1* go to the heart and soul of L's present application. Systemic discrimination by Customs officials and unlawful interference with free expression were clearly established in the earlier case, and numerous *Charter* violations and systemic problems in the administration of Customs legislation were found. In its application for advance costs in this case, L contended that the systemic abuses established in the earlier litigation have continued, and that Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination. The question of public importance is this: was the Minister as good as his word in 2000 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 L had established a *prima facie* case that the promised reforms had not been implemented. Having listened to evidence and argument, she ordered interim funding subject to a stringent costs control order, the terms of which have now been agreed to. The present proceeding is not the beginning of a litigation journey. It is 12 years into it. [para. 114] [para. 116] [para. 120]

If shown to be true, L's allegations mean that it has suffered special damage as a result of a systemic failure of Customs to respect the constitutional rights of readers and writers as well as importers. The public has an interest in whether 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 L's private interest. [para. 130]

In this case, the pre-conditions set out in *Okanagan* for an order of advance costs are satisfied. First, as found by the chambers judge, and as accepted by the Chief Justice, the impecuniosity requirement is met. Alternate sources of funding were explored, and a finding of impecuniosity should not depend on the existence of other parties able to bring a similar claim. Second, as the Chief Justice also agrees, the claim to be adjudicated is *prima facie* meritorious. Third, the issues raised are [page44] of public importance and transcend individual interests. Given that 70 percent of Customs detentions are of gay and lesbian material, there is unfinished business of high public importance left over from *Little Sisters No. 1*. While the proposed systemic review would be an impermissible expansion of the four books appeal, the four books appeal permits L to explore, within a limited context, the process under which the importation of these books was banned, and to that extent provides an opportunity for the systemic issues to be canvassed. Whether the chambers judge's discretion is formulated in terms of "rare and exceptional" circumstances (as held in *Okanagan*), or the "special circumstances" formulated by the Chief Justice in this case, the test is satisfied. Although the chambers judge erred in principle in ordering advance costs for the so-called systemic review (because there is no such action pending), she properly exercised her discretion in awarding advance costs with respect to the four books appeal. There is no basis on which to interfere with the exercise of her discretion that this is an exceptional case of special public importance that should not be defeated by L's lack of funds. [para. 131] [para. 133] [para. 141] [para. 145] [para. 148] [para. 153] [paras. 156-158]

It is appropriate to cap the maximum potential public contribution to the four books appeal at $300,000, subject to further order of the case management judge. To the extent that L can make a contribution to the costs, it should also be required to do so. If L is successful and substantial damages are awarded, it should be 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. [paras. 159-161]

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By Bastarache and LeBel JJ.

Applied: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71; **referred to:** *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Office and Professional Employees' [page45] International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120; *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395, aff'd (1995), 126 D.L.R. (4th) 437; *R. (Corner House Research) v. Secretary of State for Trade and In-*

dustry, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192; *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 2004 SCC 9; *R. v. Keating* (1997), 159 N.S.R. (2d) 357.

By McLachlin C.J.

Referred to: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, aff'g (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ v. Barnett* (1992), 11 O.R. (3d) 210; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321.

By Binnie J. (dissenting)

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, 2000 SCC 69; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 18 B.C.L.R. (3d) 241; *R. v. C. Coles Co.*, [1965] 1 O.R. 557; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), 15(1), 24(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 163(8).

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Customs Tariff, S.C. 1987, c. 49, Sch. VII, Code 9956.

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[page46]

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Thackray and Oppal JJ.A.) (2005), 249 D.L.R. (4th) 695, 208 B.C.A.C. 246, 344 W.A.C. 246, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 127 C.R.R. (2d) 165, [2005] B.C.J. No. 291 (QL), 2005 BCCA 94, setting aside a decision of Bennett J. (2004), 31 B.C.L.R. (4th) 330, [2004] B.C.J. No. 1241 (QL), 2004 BCSC 823. Appeal dismissed, Binnie and Fish JJ. dissenting.

Counsel:

Joseph J. Arvay, Q.C., and *Irene Faulkner*, for the appellant.

Cheryl J. Tobias and *Brian McLaughlin*, for the respondents.

Janet E. Minor and *Mark Crow*, for the intervener the Attorney General of Ontario.

George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

J. J. Camp, Q.C., and *Melina Buckley*, for the intervener the Canadian Bar Association.

Cynthia Petersen, for the intervener Egale Canada Inc.

Chris Tollefson and *Robert V. Wright*, for the interveners the Sierra Legal Defence Fund and the Environmental Law Centre.

The judgment of Bastarache, LeBel, Deschamps, Abella and Rothstein JJ. was delivered by

BASTARACHE and 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 [page47] order contemplated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71. 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 [page48] 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 Sisters 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 [page49] 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 and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*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 [page50] 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.).

[page51]

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 & 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".

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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). 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

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 [page53] 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, 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, [page54] 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).

[page55]

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, 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

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 [page56] 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 [page57] "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 [page58] 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 [page59] 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. I, at s. 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; *Office and Professional Employees' International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. 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 and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (B.C.S.C.) [page60]. 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 [page61] 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 [page62] 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. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

[page63]

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 [page64] 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 [page65] 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.*, [2004] 1 S.C.R. 303, 2004 SCC 9, 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 [page66] 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 [page67] 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 [page68] 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 [page69] 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. [page70] 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. [page71] 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.

[page72]

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 [page73] 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.

[page74]

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 sat-

isfy 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: [page75] 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. Keating* (1997), 159 N.S.R. (2d) 357 (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 been 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 [page76] 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 [page77] 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.

[page78]

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.

The reasons of McLachlin C.J. and Charron J. were delivered by

80 McLACHLIN C.J.:-- 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.

[page79]

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. 400, 26 E.R. 642 (Ch.). 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, 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 [page80] 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 described there 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 [page81] 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 [page82] para. 40 of *Okanagan* ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823). 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). 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 [page83] 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 [page84] 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 it was "speculati[ve]" 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 and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"): the "cost of challenging [prohibitions] through the various levels of administrative review" make it difficult -- if not "completely impracticable" 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 [page85] 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 (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). [page86] Similarly, La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 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.)* 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 [page87], 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 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 [page88] 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 [page89] 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 [page90] 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 *Okanagan* ((2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647), which were approved by this Court, at para. 47, when it dismissed the appeal. It seems reasonable that an advance costs award cannot [page91] 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.

The reasons of Binnie and Fish JJ. were delivered by

114 BINNIE J. (dissenting):-- 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 and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*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 center for the homosexual community" in Vancouver ((1996), 18 B.C.L.R. (3d) 241, 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

[page92]

(*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;

[page93]

(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 [page94] 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 [page95] 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* that relevant provisions of the *Customs Tariff* and [page96] *Customs Act*] have been construed and applied in a manner contrary to s. 2(b) and [s.] 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 ... .

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 & 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 [page97] 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.*, [1965] 1 O.R. 557 (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... .

[page98]

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 [page99] 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 obscen-

ity 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 [page100] 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 [page101] 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 [page102] 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, *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 [page103] 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, 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.

[page104]

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.]

[page105]

As does our Chief Justice (at 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.

[page106]

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.F., at para. 51). 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:

[page107]

> 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. 101) 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 [page108] 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 (Minister of Education)* [[2003] 3 S.C.R. 3, 2003 SCC 62]. [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]
>
> ...

[page109]

> 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 "[w]hile 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 [page110] 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 [page111] 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 [page112] 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.

[page113]

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 [page114] 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 [page115] 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.

Solicitors:

Solicitors for the appellant: Arvay Finlay, Vancouver.

Solicitor for the respondents: Deputy Attorney General of Canada, Vancouver.

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

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener Egale Canada Inc.: Sack Goldblatt Mitchell, Toronto.

Solicitor for the interveners the Sierra Legal Defence Fund and the Environmental Law Centre: Sierra Legal Defence Fund, Toronto.

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R. v. Caron

Her Majesty The Queen in Right of the Province of Alberta, Appellant;
v.
Gilles Caron, Respondent, and
Commissioner of Official Languages for Canada, Canadian Civil Liberties Association, Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, Women's Legal Education and Action Fund, Association canadienne-française de l'Alberta and David Asper Centre for Constitutional Rights, Interveners.

[2011] 1 S.C.R. 78

[2011] 1 R.C.S. 78

[2011] S.C.J. No. 5

[2011] A.C.S. no 5

2011 SCC 5

File No.: 33092.

Supreme Court of Canada

Heard: April 13, 2010;
Judgment: February 4, 2011.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(55 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Courts -- Jurisdiction -- Interim costs -- Serious constitutional issue arising in provincial court -- Superior court making order for interim costs in provincial court proceeding -- Whether superior court has inherent jurisdiction to grant interim costs in litigation taking place in the provincial court -- If so, whether criteria for an interim costs order were met.

Costs -- Interim costs -- Whether superior court has inherent jurisdiction to grant interim costs in litigation taking place in the provincial court -- If so, whether criteria for an interim costs order were met.

[page79]

In the course of a routine prosecution for a minor traffic offence, the accused C claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted on his right to use French in "proceedings before the courts" of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*, arguing that the province could not abrogate French language rights and that the Alberta *Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, was therefore unconstitutional.

At issue in this case are interim cost orders made by the Alberta Court of Queen's Bench -- a *superior* court -- to fund an accused defending the regulatory prosecution in the *provincial* court. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

Summary:

C had applied to the provincial court for interim funding late in his trial after the Crown filed a "mountain" of historical evidence in reply. He established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial. The provincial court, over the Crown's objection, ordered the payment of C's lawyer and his experts pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*. The Alberta Court of Queen's Bench later set aside the provincial court order; this decision was not appealed. Subsequently, the Court of Queen's Bench held that it could (and did) make a costs order itself in respect of the provincial court proceedings. This decision was upheld on further appeal. The Crown now seeks not only to have the interim funding order set aside but also repayment of monies already provided under the order of the Court of Queen's Bench.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted C's financial resources. By that time [page80] substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges program. The Crown insisted on pursuing the prosecution in provincial court; C insisted on his French language defence. Neither side expressed any interest in a stay of proceedings. The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the

provincial court, an unfair advantage over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A decision based on an incomplete record would not have put the languages issue to rest. C's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the continuation of the constitutional challenge be adequately resourced and properly dealt with.

Superior courts possess an inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively, although this assistance can be rendered only in circumstances where the inferior tribunals are powerless to act and the intervention of the superior court is essential to avoid a serious injustice in derogation of the public interest. The very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. That being said, the apparent novelty of the interim costs order is not fatal. Indeed, the superior court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

The fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid a serious injustice. In this respect, the criteria formulated in *British Columbia (Minister of Forests) v. Okanagan Indian Band* and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* (*Little Sisters (No. 2)*) are helpful in determining whether the intervention of the Court of Queen's Bench is essential to enable the provincial court to "administer justice fully and effectively". These criteria are: (1) the litigation would be unable to proceed if the order were not made; (2) the claim to be adjudicated is *prima facie* meritorious; (3) the issues raised transcend the individual interest of the particular litigant, are of public importance, and have not been resolved in previous cases. The superior court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests [page81] of justice to deny the funding application, or whether it should consider other methods to facilitate the hearing of the case. The court is to consider all relevant factors that arise on the facts.

Here the provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away. It would be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because C -- the putative standard bearer for Franco-Albertans in this matter -- lacked the financial means to complete what he started.

The courts below made no palpable error in finding that the accused had exhausted his funds and that he had no realistic means of paying the further costs resulting from the continuance of the litigation. All other possibilities for funding had been exhausted. The Queen's Bench judge was impressed with the "responsible manner" in which C had pulled together finances for the anticipated length of trial and its unexpected continuances. C's claim had *prima facie* merit. Finally, the case is of public importance. It was an attack of *prima facie* merit on the validity of the entire *corpus* of Alberta's unilingual statute books. The public interest requires that the case be dealt with now. It is "sufficiently special" under the *Okanagan/Little Sisters (No. 2)* criteria.

Per Abella J.: The unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles in *Okanagan* and *Little Sisters (No. 2)*. It is important to note, however, that the issue of the jurisdiction of the provincial courts to award such costs was not before us. This case, therefore, should not be seen as unduly expanding the superior court's inherent jurisdiction into a broad plenary power to "assist". Instead, inherent jurisdiction should be inter-

preted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. When considering the proper limits of a superior court's inherent jurisdiction on matters on which a statutory court or tribunal is seized, any such inquiry should reconcile the common [page82] law scope of inherent jurisdiction with the implied legislative mandate of a statutory court or tribunal to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives.

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By Binnie J.

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By Abella J.

Referred to: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Cunningham*, [page83] 2010 SCC 10, [2010] 1 S.C.R. 331; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Children's Aid Society of Huron County v. P. (C.)*, 2002 CanLII 45644; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4) 287; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Hunt, Ritter and Rowbotham JJ.A.), 2009 ABCA 34, 1 Alta. L.R. (5) 199, 446 A.R. 362, [2009] 6 W.W.R. 438, 241 C.C.C. (3d) 296, 185 C.R.R. (2d) 9, 71 C.P.C. (6) 319, [2009] A.J. No. 70 (QL), 2009 CarswellAlta 94, affirming a judgment of Ouellette J., 2007 ABQB 632, 84 Alta. L.R. (4) 146, 424 A.R. 377, [2008] 3 W.W.R. 628, [2007] A.J. No. 1162 (QL), 2007 CarswellAlta 1413. Appeal dismissed.

Counsel:

Margaret Unsworth, Q.C., and *Teresa Haykowsky*, for the appellant.

Rupert Baudais, for the respondent.

Amélie Lavictoire and *Kevin Shaar*, for the intervener the Commissioner of Official Languages for Canada.

Benjamin L. Berger, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Gwen Brodsky* and *Melina Buckley*, for the interveners the Council of Canadians with Disabilities, the Charter Committee on Poverty Issues, the Poverty and Human Rights Centre and the Women's Legal Education and Action Fund.

Written submissions only by *Michel Doucet*, *Q.C.*, *Mark Power* and *François Larocque*, for the intervener Association canadienne-française de l'Alberta.

Written submissions only by *Cheryl Milne* and *Lorne Sossin*, for the intervener the David Asper Centre for Constitutional Rights.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

1 **BINNIE J.**:-- This appeal raises anew the difficult issue of whether and to what extent the [page85] courts can (or should) order funding by the state of what may broadly be described as public interest litigation. The novel twist in this case is that an interim costs order was made by the Alberta Court of Queen's Bench - a *superior* court - in favour of an accused defending a regulatory prosecution in the *provincial* court of Alberta. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

2 The context in which this appeal arises is as follows.

3 In the course of a routine prosecution for a minor traffic offence - a wrongful left turn - the accused, Mr. Caron, claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted that he has the right to use French in "proceedings before the courts" of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*. His position is that French language rights may not now be abrogated by the province, and that the Alberta *Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, is therefore unconstitutional.

4 The only issue before our Court at this time is two orders for interim costs made by the Court of Queen's Bench. Mr. Caron's application came late in his trial before the provincial court when, after about 18 months of on-again-off-again hearings, the Crown filed in reply what Mr. Caron's counsel described as a mountain of historical evidence. Mr. Caron - having run out of money - established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial unless he were provided with interim costs. The provincial court made such an order. The Alberta Court of Queen's Bench, setting aside the provincial court order as being made without jurisdiction, nevertheless held that it could [page86] (and did) make the interim costs orders itself. It is the validity of the Queen's Bench orders for interim funding of the provincial court defence that is now before us.

5 The Crown takes the view that even though the Alberta Court of Queen's Bench identified what it regarded as an unacceptable outcome facing the provincial court in a constitutional challenge of great public significance, the *superior* court was powerless to intervene with a funding order to keep the *provincial* court proceedings on the rails. I agree that such orders must be highly exceptional and made only where the absence of public funding would work a serious injustice to the *public* interest, but I disagree with the Crown's argument that faced with this exceptional situation the Court of Queen's Bench was powerless to invoke its inherent jurisdiction to right the injustice perceived by the courts below. As to whether that discretionary jurisdiction ought to have been exercised in favour of Mr. Caron on the facts of this case, I defer to the affirmative answer given by the Alberta Court of Queen's Bench and upheld by a unanimous Court of Appeal (2009 ABCA 34, 1 Alta. L.R. (5th) 199). Those courts have primary responsibility for the administration of justice in the province and, in my view, made no legal error in the exercise of their jurisdiction. I would dismiss the appeal.

I. Overview

6 As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for [page87] instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359 (C.A.). In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, extended the class of civil cases for which public funding on an interim basis could be ordered to include "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). *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 ("*Little Sisters (No. 2)*"), the majority affirmed that

> 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. [para. 39]

Neither *Okanagan* nor *Little Sisters (No. 2)* concerned an interim funding order made in respect of matters proceeding in a lower court. Nevertheless, the Alberta courts were faced here with a constitutional challenge of great importance.

7 At issue was (and is) a fundamental aspect of the rule of law in Alberta. While the Crown argues that French language rights in that province were settled by this Court in *R. v. Mercure*, [1988] 1 S.C.R. 234, and *R. v. Paquette*, [1990] 2 S.C.R. 1103, Mr. Caron was able to distinguish these cases to the satisfaction of the Alberta provincial court [page88] (see *R. v. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307). That decision on the merits was reversed by the Alberta Court of Queen's Bench in *R. v. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321, but even in upholding the Crown's

position the Queen's Bench declared that "the Supreme Court's decision in *Mercure* does not answer the issue raised at trial and in this appeal" (para. 143). Mr. Caron's application for leave to appeal on the merits was granted in part by the Alberta Court of Appeal (2010 ABCA 343, [2010] A.J. No. 1304 (QL)).

8 As stated, the Alberta *Languages Act* enacted following this Court's decision in *Mercure* purports to abolish minority French language rights in the province. The impact of Mr. Caron's challenge, if ultimately successful, could be widespread and severe and include, according to Mr. Caron, the requirement for Alberta to re-enact most if not all of its laws in both French and English. The case, in short, has the potential (if successful) to become an Alberta replay of the *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and [1992] 1 S.C.R. 212. This is what makes the case "sufficiently special" in terms of *Okanagan/Little Sisters (No. 2)*.

9 The courts in Alberta saw sufficient merit in Mr. Caron's legal argument to necessitate its resolution in the broader public interest. This was an outcome beyond the financial capacity of Mr. Caron and the Alberta courts were not willing to allow the issue to go unresolved for want of a champion with "deep pockets". The exercise of the superior court's inherent jurisdiction to fashion an exceptional remedy to meet highly unusual circumstances must be seen in that light.

II. Facts

10 On December 4, 2003, Mr. Caron was charged with the regulatory offence of failure [page89] to make a left turn safely. If convicted, he faced a fine of $100. Five days later, he gave notice to the provincial court that his defence would consist of a constitutional languages challenge. Indeed, Mr. Caron did not contest the facts of the offence and advised the Crown that he would be presenting evidence only on the languages question. In taking this position he followed in the well-trodden path of other minority language advocates including Georges Forest's English-only parking ticket in *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; the unilingual traffic summons of Roger Bilodeau in Manitoba (*Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449) and Duncan Cross MacDonald in Quebec (*MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460); the English-only trial of André Mercure in *Mercure* and the unilingual provision of police services available to Marie-Claire Paulin in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383. See also *Lefebvre v. Alberta* (1993), 135 A.R. 338 (C.A.), leave to appeal refused, [1993] 3 S.C.R. vii, and *R. v. Rémillard*, 2009 MBCA 112, 249 C.C.C. (3d) 44.

11 Mr. Caron took the necessary steps to ensure payment of his costs for what his lawyers (unrealistically, it might be said) indicated could be a two- to five-day affair. These steps included mobilizing his own limited funds, seeking funding from the Alberta francophone association (Association canadienne-française de l'Alberta) (although the Association refused to fund his case, he obtained two loans of $15,000 each from its supporters), and securing some additional donations and $70,000 from the federal Court Challenges Program (paid in increments as the trial lengthened from month to month). He also solicited support over the Internet. Legal Aid was not available.

12 Following presentation of the defence evidence in March 2006, the Crown requested an adjournment in order to prepare reply evidence [page90] from expert witnesses. Given the continuing length of the trial, Mr. Caron made a further request of the Court Challenges Program for additional funding, but the Program was abolished by the federal government on September 25, 2006, before

additional funding could be considered. Subsequent requests for reconsideration by Legal Aid were also unsuccessful.

13 The trial resumed in October 2006 to hear the Crown's expert evidence. The scale of the battle of the experts became clear, and Mr. Caron's finances left the defence unable to proceed further. The provincial court judge had denied an *Okanagan* order (2006 ABPC 278, 416 A.R. 63, at para. 160), but later ordered the Crown to pay the fees of Mr. Caron's lawyer and his experts' fees from and after that date pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*. Subsequently, the Court of Queen's Bench quashed the trial judge's s. 24(1) order. However, the merits of the *Okanagan* application were not further dealt with on appeal because, in the view of the Queen's Bench judge, "the learned provincial court judge did not have jurisdiction to award *Okanagan* interim costs in any event" (*R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287, at para. 131). No appeal was taken from the decision to quash (which is therefore not before us) because on May 16, 2007, the superior court itself rendered an interim order that the expert fees be paid for the continuation of the trial anticipated to take place from May 22 to June 15, 2007. On October 19, 2007, it rendered an additional order requiring the Crown to pay Mr. Caron's costs for the surrebuttal component of the trial (2007 ABQB 632, 84 Alta. L.R. (4th) 146, *per* Ouellette J.).

14 The Crown requested an adjournment, to a date after completion of the trial to argue the question of defence counsel's fees, on the agreed term that such delay would not prejudice the defence application.

[page91]

15 The trial ended on June 15, 2007. The historical record was substantial. It included 12 witnesses, 8 of whom were experts, 9,164 pages of transcripts and 93 exhibits (2008 ABPC 232, [2008] A.J. No. 855 (QL), at paras. 14 and 16). As stated, the provincial court was persuaded by this record to declare the English-only prosecution a nullity.

16 The Crown now seeks to have set aside the interim funding orders made on May 16 and October 19, 2007. It also seeks an order requiring Mr. Caron to repay about $120,000 provided thereunder as fees and disbursements for lawyers and experts, presumably long since disbursed to the intended recipients.

III. Issues

17 The case raises two main issues:

1. Does the Court of Queen's Bench have inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court?
2. If so, were the criteria for an interim costs order met in this case?

IV. Analysis

18 The parties fundamentally disagree about what is at stake in this case. The Crown characterizes the dispute as a traffic offence which has a constitutional element, as have many criminal and quasi-criminal cases. In Mr. Caron's view the traffic offence is irrelevant except as a backdrop to his

constitutional challenge. As such, he says, the ordinary rules governing costs in traffic court are irrelevant to the outcome of the appeal. The courts in Alberta essentially agreed with Mr. Caron on this point and I believe they were correct in that approach.

[page92]

19 This being said, the history of this litigation - with its numerous adjournments, mutual recriminations about "trial by ambush" and periodic trips to the appellate courts - demonstrates once again that a prosecution in a provincial court does not generally provide, from a procedural point of view, an efficient institutional forum to resolve this sort of major constitutional litigation: *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at paras. 142-44. There is no mutuality between the prosecution and the defence in the discovery of documents or pre-trial disclosure. The procedural powers of the provincial court are limited (although, as stated in para. 13, above, the quashing of the provincial court order for costs for want of jurisdiction was not appealed and we therefore refrain from expressing any opinion on its validity). Nevertheless, Mr. Caron's having announced his intention to use the prosecution as a springboard to launch his constitutional challenge to the validity of the Alberta *Languages Act*, the Crown persisted in the provincial court rather than seeking to have the constitutional question (as opposed to the minor driving infraction) brought before the superior court.

20 The Crown agrees that if the language issue had been litigated in the superior court (perhaps as a direct challenge to the Alberta *Languages Act*), that court would have had jurisdiction in relation to a case pending before it to make a costs order in the terms now complained of.

21 The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted Mr. Caron's financial resources. By that time, substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges Program. In mid-trial the provincial court, so to speak, had a tiger by the tail. The Crown insisted on pursuing the prosecution in [page93] provincial court; Mr. Caron insisted on his French language defence. Neither side expressed any interest in a stay of proceedings.

22 The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage ("lop-sided", Ritter J.A. called it) over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A lopsided trial would not have put the languages issue to rest. Mr. Caron's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the challenge be properly dealt with.

23 I should make it clear that the present decision does not constitute a general invitation for applications to fund the defence of ordinary criminal cases where constitutional (including *Charter*) issues happen to be raised. In those cases the gravamen is truly the criminal offence. Here the traffic court context is simply background to the constitutional fight. A more appropriate analogy, as will be discussed, is the *Okanagan/Little Sisters (No. 2)* paradigm for public interest funding in a civil case.

A. *Does the Inherent Jurisdiction of the Alberta Court of Queen's Bench Extend to Making the Interim Costs Order in Respect of Proceedings in the Provincial Court?*

24 The inherent jurisdiction of the provincial superior courts, is broadly defined as "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the [page94] Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32.

25 One of the earliest manifestations of the superior court's inherent jurisdiction was the appointment of counsel to represent impecunious litigants *in forma pauperis* (W. S. Holdsworth, *A History of English Law*, vol. IV (3rd ed. 1945), at p. 538, and G. O. Morgan and H. Davey, *A Treatise on Costs in Chancery* (1865), at p. 268).

26 The Crown argues that whatever may be a superior court's inherent jurisdiction in relation to matters pending before it, such jurisdiction cannot extend to an order of interim funding of a litigant in a matter pending in the provincial court. However, as Jacob points out, superior courts *do* possess inherent jurisdiction "to render assistance to inferior courts to enable them to administer justice fully and effectively" (p. 48). For example, superior courts have long intervened in respect of contempt not committed "in the face of" the inferior court because "the inferior courts have not the power to protect themselves" (p. 48). See, e.g., *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.), and *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901. In the same vein, Mr. Keith Mason, Q.C., a former President of the New South Wales Court of Appeal, has written in an article titled [page95] "The Inherent Jurisdiction of the Court" (1983), 57 *Austl. L.J.* 449, that

> [i]t is not surprising that a general concern with the "due administration of justice" has been invoked to justify the Supreme Court creating or enforcing procedural rights applicable to other courts and tribunals. Such helpful intervention has been offered where the other body has been considered powerless to act or where undue expense or delay might be caused if parties were forced to resort to it.
>
> ...
>
> Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice. [Emphasis added; p. 456.]

The Mason article was also cited with approval by Lamer C.J. in *MacMillan Bloedel* (para. 33).

27 Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. Novelty has not been treated as a barrier to necessary action. In the *Peel Regional Police* case, the superior court cited the Regional Police Service and the Police Services Board for contempt based on repeated delays in transferring prisoners to court rooms for hearings. This caused days of court time to be lost and inconvenienced lawyers, witnesses, and members of the public (paras. 20-28). The delays were said to undermine the rule of law. Citing *MacMillan Bloedel*, the court explained the basis for its action:

[page96]

> This court acted in order to terminate the systemic delays in the timely delivery of prisoners to courtrooms throughout the Peel Courthouse. The court was desirous of averting a multiplicity of coercive proceedings. As well, the superior court was conscious of its duty to assist provincially created courts to restore the paramountcy of the rule of law ... . [Emphasis added; para. 68.]

28 In *United Nurses of Alberta*, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal.

29 While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, *e.g.*, to admit to bail" (Jacob, at pp. 48-49). In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p. 23 (emphasis added)). I agree with this analysis. A "categories" approach is not appropriate.

30 Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken. This requirement is consistent with the "sufficiently special" circumstances required for interim costs orders by *Little Sisters (No. 2)*, at para. 37, as will be discussed.

31 Accordingly, I would not accept the argument that the apparent novelty of the interim costs [page97] order in this case is, on account of its novelty, beyond the inherent jurisdiction of the Court of Queen's Bench.

32 The Crown argues that even if the making of such an interim costs order could *in theory* fall within the inherent jurisdiction of the superior court, such jurisdiction has been taken away by statutory costs provisions. In this respect the Crown relies on the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, and the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 809 and 840, which provides for example $4 a day for witnesses. The Crown argues that while not expressly limited, the inherent

jurisdiction of the Court of Queen's Bench is *implicitly* ousted by these enactments. However on this point, as well, the Jacob analysis is helpful:

> ... the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. [Emphasis added; p. 24.]

I agree with Jacob on this point as well.

33 The Crown's premise here and elsewhere in its argument is that this case is an ordinary "garden variety" regulatory proceeding of the sort to which these provincial court costs provisions were intended to apply, a premise which I cannot accept. The provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away.

34 The Crown also relies on various statutes dealing with costs in matters pending before the Court of Queen's Bench itself, including the *Court [page98] of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 21, the *Judicature Act*, R.S.A. 2000, c. J-2, s. 8, and the *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 600 and 601. Certainly these enactments authorize the award of costs in various circumstances, but words of authorization in this connection should not be read as words limiting the court's inherent jurisdiction to do what is essential "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (Jacob, at p. 28). It would be contrary to all authority to draw a negative inference against the inherent jurisdiction of the superior court based on "implication" and conjecture about legislative intent: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

35 I am satisfied that the supervisory jurisdiction of the superior courts over the provincial courts in Alberta includes the power to order interim funding before an inferior tribunal where it is "essential to the administration of justice and the maintenance of the rule of law" (*MacMillan Bloedel*, at para. 38 (emphasis added)). It remains to determine, of course, the conditions under which such jurisdiction should be exercised in the present case. In my view, the *Okanagan/Little Sisters (No. 2)* criteria are helpful to this delineation.

B. *Criteria for the Grant of a Public Interest Funding Order*

36 Although Mr. Caron seeks what he calls an *Okanagan* order, the Crown points out that there are many distinctions between that case and the one before us. *Okanagan* was a civil case. The fight here arose in the context of a quasi-criminal proceeding and, generally speaking, as the Crown emphasizes, the costs regimes in civil and criminal cases are very different. Secondly, *Okanagan* did not involve the exercise of the court's inherent jurisdiction, but addressed the equitable exercise of a statutory costs authority. Thirdly, the original *Okanagan* order was made in relation to proceedings before the court that ordered the funding, [page99] namely the superior court of British Columbia. It dealt with an award of advance costs to a plaintiff, not an accused. The same distinctions apply to *Little Sisters (No. 2)*.

37 The Crown argues that the courts cannot create an alternative legal aid scheme by judicial fiat. Nor, says the Crown, can the courts judicially reinstate the Court Challenges Program. These points are valid so far as they go, but in my opinion they do not control the outcome of the appeal.

38 Clearly, this case is not *Okanagan* where the Court viewed the funding issue from the perspective of a proposed civil trial not yet commenced. We are presented with the issue of public interest funding in a different context. Nevertheless, *Okanagan/Little Sisters (No. 2)* provide important guidance to the general paradigm of public interest funding. In those cases, as earlier emphasized in the discussion of inherent jurisdiction, the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice.

39 The *Okanagan* criteria governing the discretionary award of interim (or "advanced") costs are three in number, as formulated by 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 [page100] 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.

Even where these criteria are met there is no "right" to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)*:

> 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. [Emphasis added; para. 37.]

While these criteria were formulated in the very different circumstances of *Okanagan* and *Little Sisters (No. 2)*, in my opinion they apply as well to help determine whether the costs intervention of the Court of Queen's Bench was essential to enable the provincial court to "administer justice fully and effectively", and may therefore be said to fall within the superior court's inherent jurisdiction.

C. *Application of the Public Funding Criteria to the Present Case*

40 The courts below addressed each of the above criteria.

(1) Impecunious Litigant

41 As to Mr. Caron's financial circumstances, the superior court judge concluded that, while he was willing to expend (and had expended) his own and borrowed money (as well as funding from the Court Challenges Program) to the limit, Mr. Caron's resources had been exhausted by the time the applications for the orders in issue were made. He could not finance the last leg of his protracted trial. The Crown argues that Mr. Caron [page101] ought to have pursued a more aggressive fund-raising campaign, particularly within Alberta's francophone community. The Queen's Bench judge,

on the contrary, was impressed with the "responsible manner" in which Mr. Caron had pulled together finances for the anticipated length of trial and its unexpected continuances. However, as the scope of the expert evidence continued to expand, it was not "realistically possible" for him to launch a formal fundraising campaign given the trial schedule and its demands (2007 ABQB 632, [2007] A.J. No. 1162 (QL), at para. 30). The Queen's Bench judge declared himself "satisfied that Mr. Caron has no realistic means of paying the fees resulting from this litigation, and that all other possibilities for funding have been canvassed, but in vain" (para. 31). The Crown's objection on this point was not accepted in the courts below and those courts made no palpable error in reaching the conclusion they did.

(2) *Prima Facie* Meritorious Case

42 The order for interim costs in this case did not prejudge the outcome. Mr. Caron, however, persuaded the Alberta courts that his challenge differs from *Mercure*, *Paquette*, and *Lefebvre*. In *Mercure*, it will be recalled, minority language rights on the prairies were addressed in terms of the *North-West Territories Act, 1875*, S.C. 1875, c. 49. The key provision, which is essentially the same as s. 133 of the *Constitution Act, 1867*, was reproduced in the 1886 consolidation as s. 110 (rep. & sub. 1891, c. 22, s. 18):

> **110.**Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and [page102] publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

Mercure itself held that in Saskatchewan this provision was subject to repeal by virtue both of ss. 14 and 16(1) of the *Saskatchewan Act* and s. 45 of the *Constitution Act, 1982* (p. 271).

43 Mr. Caron's contention is that the *Mercure* case did not consider much of the relevant historical evidence including, in particular, the *Royal Proclamation* of December 6, 1869, annexing to Canada what was then the North-West Territories, whose effect was characterized by the provincial court judge as follows:

> [TRANSLATION] I therefore believe that the proclamation had to be constitutional to appease the Métis by giving them greater certainty. A political guarantee can be cancelled more easily than a constitutional guarantee... . In my opinion, in light of the historical context, the proclamation is a constitutional document. This means that "all your civil ... rights" mentioned in the proclamation are protected by the Constitution. As I held above, relying on the historical evidence, the expression "civil rights" was broad enough to include language rights, which means that the same protection applies to language rights.

(2008 ABPC 232, 95 Alta. L.R. (4th) 307, at para. 561)

Whether or not this view of the 1869 Proclamation survives final appellate consideration is not, of course, the issue. All the courts below recognized that there was *prima facie* merit to Mr. Caron's claim (*R. v. Caron*, 2006 ABPC 278, 416 A.R. 63, at para. 149; 2007 ABQB 632, 84 Alta. L.R. (4th) 146, at paras. 32-36 and 40; 2009 ABCA 34, 1 Alta. L.R. (5th) 199, at paras. 58-61). It would, in the words of *Okanagan*, be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because Mr. Caron - the putative standard bearer for Franco-Albertans in [page103] this matter - lacked the financial means to complete what he started.

(3) Public Importance

44 The public importance aspect of the *Okanagan* test has three elements, namely that "[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases" (para. 40). Not every constitutional case meets these criteria, as it could not be said in each and every case that it is "sufficiently special that it would be contrary to the interests of justice to deny the advance costs application" (*Little Sisters (No. 2)*, para. 37). What is "sufficiently special" about this case is that it constitutes an attack of *prima facie* merit (as that term is used in *Okanagan*) on the validity of the entire corpus of Alberta's unilingual statute books. The impact on Alberta legislation, if Mr. Caron were to succeed, could be extremely serious and the resulting problems ought, if it becomes necessary to do so, to be addressed as quickly as possible. A lopsided contest in which the challenger, by reason of impecuniosity, had to abandon his defence in the midstream of the trial would not lay the issue to rest. The result of Mr. Caron's collapse at the final stage of the trial would simply be that the costs and judicial resources already expended on resolving this issue by the public, as well as by Mr. Caron, would be thrown away.

45 The injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest. The Alberta courts have taken the view that the status and effect of the 1869 Proclamation was not fully dealt with in the previous litigation. It is in the public interest that it be dealt with now. This makes the case "sufficiently special" under the *Okanagan/Little Sisters (No. 2)* criteria, in my opinion.

[page104]

D. *The Exercise of the Superior Court's Inherent Jurisdiction*

46 The proper perspective from which this case is to be viewed (and was viewed by the Court of Queen's Bench) is that of the provincial court judge who was on the last lap of a complex trial, with substantial costs incurred already, and months of court time under his belt, facing the prospect that all of this cost and effort would be wasted - despite its constitutional significance - because of Mr. Caron's impecuniosity. I believe that in these very unusual circumstances it was open to the Queen's Bench judge to determine, in the exercise of his discretion, whether or not to come to the assistance of the provincial court with the interim costs order, and that such an order was, in the words of *MacMillan Bloedel*, "essential to the administration of justice and the maintenance of the rule of law" (para. 38). Although he did not use these words, they describe in my opinion the tenor of his judgment.

47 Such funding orders, if made, "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" (*Okanagan*, at para. 41). In the present case, the judges were working within the confines of a trial in progress. Nevertheless, the order of Ouellette J. in the Court of Queen's Bench did put a cap on allowable hours for the expert witnesses, and disallowed a payment of $3,504.60 for a "temporary assistant". It seems that Judge Wenden in the provincial court was working with invoices not in the record before us. In his October 18, 2006 order (A.R., vol. 1, at pp. 2-13), Wenden Prov. Ct. J. clearly refused to make an *ex ante* blank cheque. On August 2, 2006, he ordered the Crown to pay Mr. Caron's already incurred (and therefore quantified) legal fees. All in all, I accept the conclusion of the Court of Appeal that the [page105] financial controls in place were adequate and met the *Okanagan* standard.

V. Conclusion

48 In my view, the Alberta Court of Queen's Bench possessed the inherent jurisdiction to make the funding order that it did in respect of proceedings in the provincial court. There was no error of principle in taking into consideration the *Okanagan/Little Sisters (No. 2)* criteria in the exercise of that inherent jurisdiction. On the merits, I defer to what seems to me to be the reasonable exercise of the discretion by the Queen's Bench judge. I would therefore affirm the decision of the Alberta Court of Appeal and dismiss the appeal.

49 Although costs are not generally available in quasi-criminal proceedings (absent special circumstances such as Crown misconduct of which there is none here), this case is more in the nature of regular constitutional litigation conducted (as discussed) by an impecunious plaintiff for the benefit of the Franco-Albertan community generally. In these unusual circumstances, Mr. Caron should have his costs on a party and party basis in this Court.

The following are the reasons delivered by

50 ABELLA J.:-- I agree with Binnie J. that the unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles developed by this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38. I am concerned, however, that the reasons may be seen to unduly expand the scope of the common [page106] law authority of a superior court in the exercise of its inherent jurisdiction.

51 In particular, it is important that these reasons not be seen to encourage the undue expansion of a superior court's inherent jurisdiction into matters this Court has increasingly come to see as part of a statutory court's implied authority to do what is necessary, in the fulfilment of its mandate, to administer justice fully and effectively. (See *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 70 and 71 ("*Dunedin*"); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. See also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1

S.C.R. 174; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), aff'd (1983), 42 O.R. (2d) 731 (C.A.); *Children's Aid Society of Huron County v. P. (C.)*, 2002 CanLII 45644 (Ont. S.C.J.); *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; R. W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at p. 29-1; Ruth Sullivan, *Sullivan on the Construction of Statutes* (2008), at pp. 290-91.)

52 The superior court's inherent jurisdiction, it seems to me, should not be seen as a broad plenary power to "assist", but should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. This includes an awareness of the need to avoid bifurcated proceedings in all but exceptional cases. (See *Nova Scotia (Workers' [page107] Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 29; and, *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 79.) The fundamental purpose of such intervention by the superior court must be limited, as Binnie J. points out, to "what is essential to avoid an injustice" (para. 38). For the first time, that inherent jurisdiction was, interpreted in this case to include the ability to make an interim costs award in a proceeding before a statutory court or tribunal.

53 It is worth remembering, as Binnie J. acknowledged, that this exercise of inherent jurisdiction was based on the premise that the provincial court lacked the jurisdiction to make the order. Regrettably that piece in the jurisdictional puzzle is not, strictly speaking, before us. Mr. Caron had made an unsuccessful application for *Okanagan* funding directly to the provincial court. The court concluded that while the *Okanagan* criteria were met, *Okanagan* costs could not be ordered by the provincial court. That decision was essentially undisturbed by the Court of Queen's Bench, 2007 ABQB 262, 75 Alta. L.R. (4th) 287, *per* Marceau J. and was not appealed by Mr. Caron. He chose instead to seek his funding by way of a new claim to the Queen's Bench, seeking the exercise of its inherent jurisdiction as a superior court to make the order. As a result, the question of whether a statutory court or tribunal has jurisdiction to order *Okanagan* costs will have to be determined in a future case.

54 That leaves us in the problematic position of having to decide Mr. Caron's ability to obtain funding and continue with this litigation *as if* no other jurisdictional course were available to him. I therefore simply raise a cautionary note: this Court's evolutionary acknowledgment of the independence, [page108] integrity and expertise of statutory courts and tribunals may well be inconsistent with an approach that has the effect of expanding the reach of a superior court's common law inherent jurisdiction into matters of which a statutory court or tribunal is seized. When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction *with* the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives. (See *Cunningham*, at para. 19; *ATCO*, at para. 51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128; and *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35.) The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin*, costs awards are significant remedial tools and "integrally connected to the court's control of its trial process" (para. 81).

55 With the above caution in mind, therefore, in the exceptional circumstances of this case I agree with Binnie J. that the award of *Okanagan* costs should be upheld and the appeal dismissed.

Appeal dismissed with costs.

Solicitors:

Solicitor for the appellant: Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Balfour Moss, Regina.

Solicitor for the intervener the Commissioner of Official Languages for Canada: Office of the Commissioner of Official Languages, Ottawa.

[page109]

Solicitors for the intervener the Canadian Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the interveners the Council of Canadians with Disabilities, the Charter Committee on Poverty Issues, the Poverty and Human Rights Centre and the Women's Legal Education and Action Fund: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener Association canadienne-française de l'Alberta: Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

cp/e/qllls

What's New

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The Law of Costs

Mark M. Orkin

Release No. 35, August 2012

What's New in this Update:

- Counsel are not entitled to a special invitation from the court to address the issue of costs: *Regular v. Law Society of Newfoundland and Labrador* (2011), 336 D.L.R. (4th) 1 (Nfld. & Lab. C.A.) (chapter 2, 202.1).
- Advance costs of $325,404 were awarded where the Ministry's negligence and recklessness had serious financial consequences on a plaintiff: *Québec (Procureur général) v. Corneau* (2011), 200 A.C.W.S. (3d) 39 (Que. S.C.) (chapter 2, 203.1).
- A settlement offer that did not provide a genuine incentive to settle was not one that ought reasonably to have been accepted: *P.S.D. Enterprises Ltd. v. New Westminster (City)* (2011), 209 A.C.W.S. (3d) 41 (B.C.S.C.) (chapter 2, 214.6).
- Counsel fee was reduced for work such as drafting a notice of motion that could have been performed by a law clerk: *Royal Bank of Canada v. Tehrani* (2011), 208 A.C.W.S. (3d) 472 (Ont. S.C.J.) (chapter 2, 222.1).

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§203. Inherent Jurisdiction as to Costs — *Continued*

identified three conditions, all of which had to exist, for an interim costs order to be granted: first, the claimant must be impecunious to the extent that the litigation could not proceed without the order and no other realistic option existed for bringing it to trial; second, the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit such that it would be contrary to the interests of justice if the case were forfeited only because the claimant lacked financial means; and third, the issues raised have to transcend the interests of the claimant and be of public importance. In sum, there must be special circumstances sufficient to satisfy the court that this extraordinary exercise of its powers is appropriate. The decision exemplifies what the court called a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

A number of Canadian courts have explicated the three-part test propounded by the Supreme Court. The first part of the test stipulates that the claimant must be impecunious. In the language of the Supreme Court it requires that "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 practice this would require some examination into the claimant's assets and expenses, as well as the possibility of obtaining funding elsewhere. This requirement was not met in a case where, although the claimant's expenses exceeded his modest income, he took an annual vacation, drove a rented car and had not applied for legal aid or sought funding from a community based group.[117.2.1]

The test is strictly applied and an applicant must meet a high standard of proof in order to demonstrate impecuniosity.[117.2.1.1]

The Alberta Court of Appeal held that the second part of the test required only that the case be strong enough to pass the preliminary threshold of being worthy of pursuit; it did not require a close examination into the merits of the dispute or the prospects of success, including the likelihood of recovery.[117.2.2] The British Columbia Court of Appeal was of the view that the requirement of a *prima facie*

(B.C.S.C.) (court may make an order for interim costs in a trust dispute); *Kempo v. Canada (Attorney General)* (2003), 303 N.R. 283 (F.C.A.) (even if discretion to grant interim costs in important and unique actions against Crown, plaintiff failed to justify award); *Horse Lake First Nation v. Horseman* (2003), 223 D.L.R. (4th) 184 (Alta. Q.B.) (making order for interim costs would depend on nature and complexity of issues raised and availability of alternative funding).

117.2.1 *Kelly v. Palazzo* (2005), 78 O.R. (3d) 539 (S.C.J.).

117.2.1.1 *Lavigne v. Canada Post Corp.* (2009), 180 A.C.W.S. (3d) 224 (F.C.). See also *Metrolinx v. Canada (Transportation Agency)* (2010), 185 A.C.W.S. (3d) 40 (F.C.A.).

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dish Network L.L.C. v. Rex,*
2011 BCSC 1105

Date: 20110815
Docket: S094747
Registry: Vancouver

Between:

Dish Network L.L.C.

Plaintiff

And

Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex d.b.a. CanAm Satellites, Richard Rex, d.b.a. www.smalldish.com, Susan Goodwin, Kendra Day, Deborah Wilkinson Katalin Kupser a.k.a. Kathy Kupser, Mario Teixeira, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants

Defendants

Docket: S084517
Registry: Vancouver

Between:

DIRECTV, INC.

Plaintiff

And

Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex d.b.a. CanAm Satellites, Richard Rex d.b.a. www.smalldish.com, Richard Rex d.b.a. www.smalldish.proboards54.com, Susan Goodwin, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants

Defendants

Docket: S085635
Registry: Vancouver

Between:

Bell ExpressVu Limited Partnership

Plaintiff

And

Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex, d.b.a. CanAm Satellites, Richard Rex d.b.a. Can Am Satellites, Richard Rex d.b.a. www.smalldish.com, Richard Rex d.b.a. www.smalldish.proboards54.com, Susan Goodwin, John Doe, Jane Doe and other persons unknown who have conspired with the named Defendants

Defendants

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiff:	P.G. Foy, Q.C. R. Dawkins
Counsel for the Defendants:	J.J.M. Arvay, Q.C. A. Latimer
Counsel for the Attorney General of Canada:	D. Nygard N. Murray
Place and Date of Hearing:	Vancouver, B.C. January 11-13, 2011
Place and Date of Judgment:	Vancouver, B.C. August 15, 2011

Table of Contents

I. INTRODUCTION

[1] **The Court:** The applicant, Richard Rex, seeks an order for advance costs in order to fund a challenge he has brought pursuant to the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, App. II, No. 44, Schedule B. Mr. Rex seeks to strike down certain provisions of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 which he says effectively prohibit Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters.

[2] The present litigation arises from Mr. Rex's "grey market" satellite businesses which involve the sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in the United States, Dish Network L.L.C. ("Dish") and DIRECTV, Inc. ("DIRECTV"). Mr. Rex has carried on business under the names of Can-Am Satellites ("Can-Am"), www.smalldish.com, and Digital Valley Entertainment.

[3] Canadian residents have purchased decoding boxes and ancillary equipment from Mr. Rex's businesses and provided fictitious addresses in the United States to Dish and DIRECTV in order to access encrypted satellite television signals. The grey market is unlike the "black market", where television programming is pirated. In the grey market, Canadian residents pay for their subscriptions.

[4] Dish is incorporated in both Colorado and Texas. Its principal place of business is in Englewood, Colorado. Dish is the plaintiff in VA S094747.

[5] DIRECTV is incorporated in California, and maintains its principal place of business in El Segundo. DIRECTV is the plaintiff in VA S084517.

[6] Neither Dish nor DIRECTV are registered under any Canadian or provincial statute to carry on business in any province in Canada.

[7] Bell ExpressVu Limited Partnership is a limited partnership constituted under the *Limited Partnership Act*, R.S.O. 1990, c. L-16. Bell ExpressVu, now known as

"Bell TV" ("Bell"), is the general partner of the limited partnership. It maintains its main operational office in Toronto. Bell is the plaintiff in VA S085635.

[8] The Attorney General for Canada ("Canada") is an intervenor on Mr. Rex's *Charter* challenge and on this application.

[9] Dish, DIRECTV, and Bell have brought separate proceedings seeking, *inter alia*, injunctive relief and both statutory and common law damages against Mr. Rex and others for facilitating access to encrypted television broadcast signals from the United States contrary to the *Radiocommunication Act*. I have been appointed the case management judge for each of those proceedings. The quantum of damages has yet to be specified.

[10] Mr. Rex's application for advance costs is brought in all three actions.

[11] Mr. Rex argues that the expressive freedom of nearly a million Canadians has been infringed by the *Radiocommunication Act*. In his submission, a *prima facie* case of a *Charter* breach has been established.

[12] The position advanced by Mr. Rex on the *Charter* challenge and on this application is that certain provisions of the *Radiocommunication Act* contravene s. 2(b) of the *Charter*, which guarantees freedom of expression to all Canadians, because they prohibit access by Canadian residents to expression from foreign broadcasters who transmit satellite television programming through encrypted broadcast signals.

[13] According to Mr. Rex, the issue in this case is whether that breach can be justified under s. 1 of the *Charter*, applying the analysis of the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 and *Alberta v. Hutterain Brethern of Wilson Colony*, 2009 SCC 37. Section 1 provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[14] The analytical framework for s. 1 of the *Charter* is commonly known as the "*Oakes* test". The following summary of the *Oakes* test, which was set out by the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 108, was recently applied by this Court in *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656 at para. 318:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

[15] Mr. Rex acknowledges that an advance costs order is rarely granted, and only in cases where very specific conditions have been met. He claims to lack financial resources necessary to pursue a *Charter* challenge. As a result, Mr. Rex says that, without an order for advance costs, an injustice will result because he will be unable to litigate a meritorious constitutional question of importance to a great number of Canadian residents.

[16] The respondents resist Mr. Rex's application as well as his *Charter* challenge. The respondents' position is that:

(a) there is no merit to Mr. Rex's claim that the *Charter* has been breached;

(b) Mr. Rex's *Charter* challenge is predicated on fraudulent conduct;

(c) Mr. Rex has failed to establish that he lacks the financial means to fund the litigation; and

(d) the claim is not of sufficient public importance to warrant an exceptional award of advance costs.

> 42 Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public pursue - or another party - takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds.

[40] LeBel J. observed in *Okanagan* at para. 33 that in private civil disputes advance costs are "most typically exercised in", but not limited to, matrimonial or family cases. He said, at para. 34, that advance 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."

B. Advance Cost Awards in Public Interest Litigation

[41] Applications for advance costs in public interest litigation, where "ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance", are treated with additional scrutiny. In *Okanagan* at para. 38, LeBel J. described public interest litigation as a sub-category of civil disputes where costs are not necessarily awarded to a successful party:

> 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.

[42] Public importance and public interest in bringing the issues to court are important factors for a court considering an advance costs application in public

interest litigation. As noted in the excerpt above, LeBel J. wrote at para. 38 that "special circumstances" that "are related to the public importance of the questions at issue in the case" must be present to justify an award of advance costs.

[43] At para. 39, he said that "[c]oncerns about prejudging 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."

[44] Advance costs were ordered in *Okanagan* because all three conditions were met. It is noteworthy that in terms of satisfying the merits condition, LeBel J. said at para. 46 that the issues must be ones requiring determination regardless of outcome:

> The issues sought to be raised at the trial are of a 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.

[45] *Okanagan* is considered to be the leading decision enshrining the rights of Canadians to seek advance costs in public interest litigation. There, certain aboriginal bands were seen as having been "thrust" into litigation involving issues that cried out to be determined.

[46] There are very few cases involving public interest litigation where advance costs have been ordered.

[47] Many of the cases involved claims affecting the interests of the nation. In addition to *Okanagan* and *Caron*, they include: *William v. Riverside Forest Products Limited*, 2001 BCSC 1641, aff'd *Xeni Gwet'in First Nations British* Columbia, 2002 BCCA 434; *R. v. Fournier,* [2004] O.T.C. 260 (S.C.J.); *William v. HMTQ*, 2004 BCSC 610, aff'd *Tsilhquot'in Nation v. British* Columbia, 2006 BCCA 2; *Keewatin v. Ontario (Minister of Natural Resources)* [2006] O.J. No. 348 (S.C.J.); *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574; *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42;

and *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2011 FC 230.

[48] In *Keewatin*, members of the Grassy Narrows First Nation and Grassy Narrows Trappers' Council sought advance costs in order to pursue their application to set aside permits granted by the Minister of Natural Resources, to conduct logging activity within certain trapline areas held by the Grassy Narrows trappers. The logging permits granted to Abitibi-Consolidated Inc. were alleged to have infringed the applicants' harvesting rights enjoyed under a certain treaty known as "Treaty 3". The Trappers Council, consisting of 60 members, was a special interest group representing approximately 1,200 trappers.

[49] N.J. Spies J. conducted a detailed review of the financial status of the applicants and their efforts to obtain financial resources to fund the litigation, and found that the financial criteria had been met. He also determined at para. 239 that the public interest was served "in ensuring that the treaty interpretation issue is tried". Although the order was granted, the Court took steps to craft a process designed to determine the issues in stages in order to avoid placing an unfair financial burden on the defendants, especially Abitibi (whose participation in treaty interpretation issues, the Court noted at para. 244, was not necessary since the dispute was "really an issue as between the plaintiffs and the Crown."

[50] In *Tsilhquot'in Nation*, the Court of Appeal upheld the order of the chambers judge awarding additional advance costs in an action involving aboriginal title and rights to lands located in the Cariboo region of British Columbia. By the time the appeal was heard, the original costs estimate of $1 million provided in 2001 had been surpassed by costs in excess of $10 million. The Court of Appeal refused to undertake an "economic analysis of a law firm engaged in the litigation for the purpose of fixing a fit scale of interim costs in this type of case": para. 115.

[51] In the Court of Appeal's decision in *Tsilhqot'in Nation,* Thackray J.A. said, in concurring reasons, that an order for advance costs should not result in an unfair burden on the party paying for them, including the Crown:

> [122] The order under appeal cannot, in my opinion, be said to be in keeping with the principle of "efficient conduct of the particular litigation". I would not presume to be able to ascertain at what level advance costs come into conflict with the principles set forth by the Supreme Court of Canada. However, I have no hesitation in saying that an order that grants them at the level of "special costs", even with a 20% holdback, throws off the balance struck by *Okanagan Indian Band*. ... Objectively, it cannot be said that to advance to a law firm the full amount of its legal fees in advance, without any requirement that they will be repaid should the client be unsuccessful, can lead to "efficient conduct". That is just not in the nature of human endeavour. As said by Madam Justice Southin, the fundamental problem with the order under appeal "is that there is no incentive to economy. It is an open cheque".
>
> [123] I would further note that, as said by Mr. Justice LeBel in *Okanagan Indian Band*, an award of interim costs must not impose an unfair burden on the other party. The fact that in the case at bar it is the public purse that is bearing the burden does not detract from that principle.

[52] In *Little Sisters (No. 2)*, the Court drew a very clear distinction between the facts of that case, where the applicant sought to raise a *Charter* issue to advance its own economic interests, and *Okanagan*, where the bands had been thrust into complex litigation where the issues raised were vital to their survival. At paras. 2, 3, and 33, Bastarache and LeBel JJ. described the features that called for an advance costs award:

> [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 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.
>
> ...
>
> [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 a claim - 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.

[53] The applicant in *Little Sisters (No. 2)* was a bookstore that catered to the lesbian and gay community. It was engaged in litigation to gain the release of four books prohibited by Canada Customs on the basis that they were obscene. After years of proceedings, the bookstore enlarged the scope of the litigation by pursuing a broad inquiry into Canada Customs' practices in light of the Supreme Court of Canada's prior decision (indexed at 2000 SCC 69) that those practises infringed ss. 2(b) and 15 of the *Charter*. According to Bastarche and LeBel JJ. at para. 14:

> [Little Sisters] 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 *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."

[54] At para. 53 of its decision regarding the application for advance costs, the Court characterized the systemic review of Canadian Customs' practices as an attempt by the applicant to "expand the scope of litigation in the hope of bolstering its legal rights in individual cases". The Court said at para. 53 that as a frequent importer of books, Little Sisters would "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". Although the Court said that this approach was "efficient and commendable", it was not one that attracted advance costs: para. 53.

[55] The Court also determined that the issues raised in the case were not seen as having implications beyond the applicant:

> [53] ... Specifically, the Systemic Review is not necessarily based on the prohibition, detention, or even delay of any books belonging to the appellant.
>
> ...
>
> [58] ... [T]he 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. ...
>
> [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 thought it characterizes the fight as one that "makes no business sense".

[56] When evaluating whether the impecuniosity requirement has been met, the majority in *Little Sisters (No. 2)* said that a court should also consider the potential cost of the litigation. In that case, the cost of the Four Books Appeal (which concerned Canada Customs' seizure of specific books), was estimated to be approximately $300,000. The cost of trial for the proposed systemic review was estimated to be well over $1 million.

[57] The Court dismissed the application for advance costs.

[58] Although agreeing in the result, McLachlin C.J.C. (also writing for Charron J.) applied a slightly different legal formulation than the majority. She added the notion of "special circumstances" to the third requirement:

> [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. ... 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.

[59] In *Little Sisters* (*No. 2*), Bastarache and LeBel JJ. removed any notion that public interest litigation would, as a matter of course, attract advance costs:

> [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.
>
> ...
>
> [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: [citations omitted]. 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: [citations omitted]. Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: [citations omitted].
>
> ...
>
> [64] ... 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.
>
> [Emphasis added]

[60] A decision by the Alberta Court of Appeal (affirming the decision below) to order advance costs was upheld by the Supreme Court of Canada in *Caron*. There, the accused argued that his constitutional language rights were not protected when he received a traffic violation ticket printed in English.

[61] The Supreme Court of Canada reiterated, at para. 6, that special circumstances are required in order to make an advance costs order against the Crown:

> As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* [citation omitted]; *R. v. Rain* [citation omitted]. In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, extended the class of civil cases for which public funding on an interim basis could be ordered to include "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* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice.

[62] Binnie J. described the issue in *Caron* at paras. 6-7 as a "constitutional challenge of great importance" involving "a fundamental aspect of the rule of law in Alberta". He elaborated at para. 8:

> As stated, the Alberta *Languages Act* enacted following this Court's decision in *Mercure* purports to abolish minority French language rights in the province. The impact of Mr. Caron's challenge, if ultimately successful, could be widespread and severe and include, according to Mr. Caron, the requirement for Alberta to re-enact most if not all of its law in both French and English. The case, in short, has the potential (if successful) to become an Alberta replay of the *Reference re Manitoba Language Rights* [citation omitted]. This is what makes the case "sufficiently special" in terms of *Okanagan/Little Sisters (No. 2)*.

[63] The public importance of the issue in *Caron* transcended Mr. Caron's own interests because, as Binnie J. put it at para. 45, "[t]he injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest".

[64] In addition to *Little Sisters (No. 2)*, I am aware of four decisions of courts in Canada denying applications for advance costs in public interest litigation:

Charkaoui (Re), 2004 FC 900; *Robertson v. HMTQ*, 2011 TCC 83; *Roberts v. HMTQ*, 2011 TCC 205; *D.W.H. v. D.J.R.*, 2011 ABQB 119.

[65] In each of those cases the courts did not view the issues raised as presenting the degree of public importance shown in cases such as *Okanagan* and *Caron.*

[66] It is apparent from these authorities that an advance costs order will be rare in public interest litigation and should only be granted in exceptional cases where the issue begs for determination regardless of the result.

C. Special Circumstances

[67] In *Little Sisters (No. 2)*, McLachlin C.J.C., in concurring reasons, distinguished "special circumstances" from proof of *prima facie* merit. She stated at para. 105 that special circumstances exist where the "issues raised are of high importance and are unlikely to proceed in the absence of an advance costs order", resulting in a "serious denial of justice". She also stated that the issues must raise a "vital private" or "public" issue:

> 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.)* 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, 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 last resort" (para. 78).
>
> [Emphasis added]

[68] The case law suggests that the following factors demonstrate special circumstances:

(a) the potential effect of the litigation is widespread and significant: *Caron* at para. 44; *Keewatin* at para. 233; *Okanagan* at para. 46; *William* at paras. 44-45;

(b) the outcome of the litigation would resolve continued legal uncertainty: *Caron* at paras. 44-45; *William* at para. 49;

(c) the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs: *William* at paras. 46, 49;

(d) the issue would not be resolved but for the litigation: *Caron; Hagwilget* at para. 21; *D.W.H.* at paras. 31, 37;

(e) the litigation involves scrutiny of government actions: *L.C.* at paras. 80, 91; *Hagwilget* at para. 24;

(f) determination of the issue is an urgent matter: *Hagwilget* at paras. 20-21;

(g) the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights: *Okanagan; Xeni* at paras. 123-124; *Hagwilget* at para. 22; and

(h) one party controls all of the funds that are at issue in the litigation (e.g. trust and matrimonial litigation): *Little Sisters* at para. 104.

[69] Special circumstances do not exist where the issues do not transcend the applicant and may not exist where the issues affect only a small group of people. For example, *Roberts* involved the personal tax appeals of three individuals involving taxation of a fraction of their income. The Court found that special circumstances did not exist because the outcome of the case was not expected to affect more than 100 taxpayers' pending objections. In *Robertson* and *Charkaoui (Re)*, special circumstances did not exist because there was no evidence that the issue of interest to the applicants would have major repercussions on other persons or groups.

IV. ISSUES

[70] Accordingly, the issues to be determined on this application fall into three categories: the litigant's financial impediments, and the merits and public importance of the litigation.

[71] The financial issues are Mr. Rex's ability to afford to pay for the litigation and whether no other reasonable option exists for bringing the issues to trial, such that the litigation would not be able to proceed if the order were not made.

[72] The merits issue may be stated in the following way: is the *Charter* challenge *prima facie* meritorious, or, in other words, is there sufficient merit such that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited if Mr. Rex lacks the financial means to pursue it?

[73] The public importance issues for determination, arising from the majority decision in *Okanagan*, are whether Mr. Rex's *Charter* litigation is of exceptional public importance such that the case requires determination regardless of Mr. Rex's personal interests. This also involves consideration of whether the issues in the litigation have been resolved in previous cases.

[74] A further issue arises, in the third category, from the concurring reasons for judgment of McLachlin C.J.C. in *Little Sisters (No. 2)* when she spoke of the need for the issue of public importance to involve "special circumstances" before an order for advance costs may be made. I will also consider that requirement in these reasons

BENNETT on RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL®

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1. HISTORY

The term "receiver" is used to describe a person who has been appointed by the court or by a security holder under a security instrument to take possession and control of property belonging to another. Once appointed, the debtor's property is in the state of receivership. The remedy of receivership is flexible. In a court appointment, one purpose of a receiver is to preserve and protect the property on an interim basis pending resolution of the issues between the parties. In most cases, this includes the enforcement of rights for the recovery of money through the sale of the debtor's property. In other cases, the remedy is used to manage and return the property at the conclusion of the dispute. In an appointment under a security instrument,

2. STATUS OF A RECEIVER AND MANAGER

(a) Court Appointment

(i) Receiver as a Principal

As the receiver is court-appointed, the receiver is agent of neither the security holder nor the debtor. The receiver is an officer of the court, appointed by the court and accountable to the court which made the appointment as well as accountable to and owing fiduciary duties to all interested parties, including the debtor.[36] As a court

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36 *Re Philip's Manufacturing Ltd.* (1992), 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161 (B.C. C.A.); *Fotti v. 777 Management Inc.* (1981), 9 Man. R. (2d) 142, 2 P.P.S.A.C. 32, [1981] 5 W.W.R. 48 at p. 54 (Man. Q.B.); *Re Jenny Lind Candy Shops Ltd.*, [1935] O.R. 119, 16 C.B.R. 193, [1935] 1 D.L.R. 654 (Ont. S.C.) citing Halsbury's Laws of England; *Alberta Treasury Branches v. Tetz* (1998), 60 Alta. L.R. (3d) 42, 2 C.B.R. (4th) 119, 1998 CarswellAlta 264 (Alta. Master). In Ontario, prior to the merging of the County and Districts Courts with the Supreme Court in 1984, [then known as the Ontario Court (General Division) and now the Superior Court of Justice,] a receiver appointed in the Supreme Court was answerable in that court and should not become involved in County Court proceedings: *Victoria Insurance Co. of Canada v. Young's-Grave Bloodstock Inc.* (1985), 49 O.R. (2d) 47, 47 C.P.C. 119, 1985 CarswellOnt 437 (Ont. H.C.).

In *Re Philip's Manufacturing Ltd.*, para. 17, the court set out certain fundamental principles governing the office of a court-appointed receiver-manager:

> "1. A receiver-manager appointed by the court in a debenture holder's action is an officer of the court responsible to the court and not to the holder of the debenture at whose instance the appointment is made: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.); *Royal Trust Co. v. Montex Apparel Industries Ltd.*, [1972] 3 O.R. 132, 27 D.L.R. (3d) 551, 17 C.B.R. (N.S.) 45 (C.A.).
>
> 2. A receiver-manager so appointed owes fiduciary duties to all parties, including the debtor: see *Panamericana de Bienes [y] Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.), and cases there referred to.
>
> 3. Such a receiver-manager is at all times subject to the supervision of the court and entitled to the court's directions: see the above authorities, also *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.) [appeal dismissed (1991), 4 O.R. (3d) 608 (C.A.)], and cases there cited."
>
> "There is a clear potential for conflict between the interest of a secured creditor who obtains the court appointment of a receiver under its security and the obligations of that receiver as an officer of the court to the other creditors, the debtor itself, and to the court. Independent legal advice is usually an effective safeguard in that situation": *Bank of Montreal v. Big White Ski Development Ltd.* (1988), 25 B.C.L.R. (2d) 86 (B.C. S.C.) at p. 91.

The role of a court-appointed receiver [*Plisson v. Duncan* (1905), 36 S.C.R. 647, 1905 CarswellNWT 132 (S.C.C.)] has been referred to in comparing the role of an amicus in a custody and access hearing: *Romaniuk v. Alta. (Govt.)* (1988), 58 Alta. L.R. (2d) 114, [1988] 4 W.W.R. 107, 50 D.L.R. (4th) 480 (Alta. Q.B.).

The role of the court in a court-appointment is to supervise the administration for all stakeholders: *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781, 32 C.B.R. (3d) 303, 1995 CanLII 7059 (Ont. Gen. Div. [Commercial List]).

A buyer under the Ontario *Bulk Sales Act*, R.S.O. 1990, c. B.14, subsection 16(2) "occupies the status of a receiver, holding stock in bulk and its proceeds for the benefit of the seller's creditors and having a duty to account therefor": *National Trust Co. v. H & R Block Canada Inc.* (2001), 56 O.R. (3d) 188, 28 C.B.R. (4th) 251 (Ont. C.A.), appeal allowed [2003] 3 S.C.R. 160, 44 C.B.R. (4th) 249, 232 D.L.R. (4th) 193 (S.C.C.).

See also *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 at para. 9, 2001 CarswellOnt

officer, the receiver must discharge its duties properly and is afforded protection on any motion for advice and directions.[37] The receiver is not subject to the control of the security holder who applied to the court for the appointment[38] nor is the receiver subject to the control of the debtor which did not appoint the receiver. The receiver should act promptly in fulfilling its duties so as not to prejudice the rights of creditors. Once appointed by the court, the receiver should not take the position of the security holder who initiated the appointment[39] but should act impartially and even-handedly to all interested parties.[40] Nor should the receiver retain counsel for the security holder where there are subordinated claims or where the receiver might be placed in a conflict of interest situation. In a court appointment, the receiver ought to have independent counsel in order to avoid any bias, conflict, or prejudice.[41]

1325 (Ont. S.C.J. [Commercial List]), appeal dismissed (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.), leave to appeal refused (2003), 2003 CarswellOnt 730 (S.C.C.).

See also *Canadian Western Bank v. 702348 Alberta Ltd.* (2009), 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 55 C.B.R. (5th) 298 at para. 40 (Alta. Q.B.), appeal dismissed (2010), 26 Alta. L.R. (5th) 4, [2010] 8 W.W.R. 402, 66 C.B.R. (5th) 14 (Alta. C.A.).

37 *Parsons v. Sovereign Bank of Can.* (1912), [1913] A.C. 160, 9 D.L.R. 476, 1912 CarswellOnt 770 (Ont. P.C.). See below under "3. Powers and Duties, Court Appointment".

38 *Royal Trust Co. v. Montex Apparel Indust. Ltd.*, [1972] 3 O.R. 132 at p. 136, 17 C.B.R. (N.S.) 45, 27 D.L.R. (3d) 551 (Ont. (C.A.); applied in *Royal Bank of Canada v. Vista Homes Ltd. et al.* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590 (B.C. S.C.).

39 *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 78 Sask. R. 87, 62 D.L.R. (4th) 243, 76 C.B.R. (N.S.) 241 (Sask. C.A.), dismissing an appeal from (1989), 73 Sask. R. 140, 73 C.B.R. (N.S.) 73, 1989 CarswellSask 33 (Sask. Q.B.) where, as a result of the receiver's delay, the rights of contractors were prejudiced in the enforcement of their claims against a trust fund.

40 *Re Ravelston Corp. [plea agreement motion]* (2007), 29 C.B.R. (5th) 1 at para. 67, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]), appeal dismissed (2007), 85 O.R. (3d) 175, 29 C.B.R. (5th) 45, 2007 ONCA 135 (CanLII) (Ont. C.A.). Similar to a trustee in bankruptcy, the receiver as an officer of the court should keep an even hand in dealing with all parties: see *Re Reed* (1980), 28 O.R. (2d) 790, 34 C.B.R. (N.S.) 83, 111 D.L.R. (3d) 506 (Ont. C.A.).

See also *Bank of Montreal v. Grafikom Ltd. Partnership* (2009), 59 C.B.R. (5th) 90, 2009 CarswellOnt 6162 (Ont. S.C.J.) where the court stated that the rule in *Ex Parte James, Re Condon* (1873-74), L.R. 9 Ch. App. 609 (Ch.), applies equally to a court-appointed receiver as it does to a trustee in bankruptcy. The rule in *Ex Parte James* is a rule of general application where the bankrupt estate is unfairly enriched through a mistake of law such that the court will direct the trustee to repay the party.

See also *Nash v. C.I.B.C. Trust Corp.*, [1996] O.J. No. 1833 at para. 6, 1996 CarswellOnt 2185 (Ont. Gen. Div.).

41 *Royal Bank v. Vista Homes Ltd. et al.* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590 (B.C. S.C.); *Bank of Montreal v. Big White Ski Dev. Ltd.* (1988), 25 B.C.L.R. (2d) 86, 1988 CarswellBC 130 (B.C. S.C.); *NEC Corporation v. Steintron Int'l Electronics Ltd.* (1986), 14 C.P.C. (2d) 305, 1986 CarswellOnt 489 (Ont. H.C.); *Royal Bank v. Lee* (1992), 9 C.P.C. (3d) 199 at p. 203, 3 Alta. L.R. (3d) 187, 1992 CarswellAlta 83 (Alta. C.A.); *Canadian Commercial Bank v. Pilum Investments Ltd.* (1987), 62 C.B.R. (N.S.) 319 (headnote only), 1987 CarswellOnt 154 (Ont. H.C.); *Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.* (2002), 166 Man. R. (2d) 163, 36 C.B.R. (4th) 19, [2002] 11 W.W.R. 630 (Man. C.A.). However, in a court-appointed receivership by way of equitable execution, counsel for the creditor ought to be able to continue to act for the receiver since the receivership is creditor-driven and the creditor is unlikely to change counsel at this stage to pursue other actions. If a conflict arises, the court-appointed receiver can then retain independent counsel.

See also *Northland Fuels Ltd. v. Campbell Air Ltd.* (2000), 144 Man. R. (2d) 169, 16 C.B.R. (4th) 250, 2000 CarswellMan 123 (Man. Master).

initiated the appointment if there is a deficiency.[127] The indemnity extends to all assets in the receivership and not simply the assets which the receiver has taken into possession. Moreover, the receiver is entitled to assert the rights to an indemnity over the assets even though the receivership has been terminated and control of the assets has returned to the legal owner.[128]

With respect to trust assets, the court-appointed receiver, like a trustee in bankruptcy, is generally not entitled to remuneration from the trust assets. However, if the order appointing the receiver is set aside, the receiver may still be able to recoup fees and expenses from the assets including trust assets if the receiver acted in good faith and pursuant to the order.[129] There are a number of exceptions where the court may provide that the receiver's remuneration extend to trust assets.[130] First, if the

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127 *Batten v. Wedgewood Coal & Iron Co.* (1885), L.R. 28 Ch. D. 317 (Ch. Div.); *Re London United Breweries, Ltd.; Smith v. London United Breweries Ltd.*, [1907] 2 Ch. 511 (Eng. Ch. Div.); *Re Glyncorrwg Colliery Co.; Ry. Debenture & Gen. Trust Co. v. The Company*, [1926] Ch. 951 (Ch. Div.), where the receiver's remuneration had priority over the plaintiff's costs in the action.

128 *Mellor v. Mellor*, [1992] 4 All E.R. 10, [1992] 1 W.L.R. 517 (Eng. Ch. Div.).

129 *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 67 O.A.C. 49, 106 D.L.R. (4th) 132, 1993 CarswellOnt 1844 (Ont. C.A.). In absence of evidence, the court awarded one half of the receiver's fees against the trust beneficiaries and the other half against the Registrar. This seems to be a harsh conclusion as the trust beneficiaries should not be saddled with costs for a wrongful appointment. But see *Ernst & Young Inc. v. Ontario* (1995), 25 O.R. (3d) 623, 44 C.P.C. (3d) 204, 1995 CanLII 7125 (Ont. Gen. Div.) where on appeal the court set aside a receivership in a matrimonial action which was invoked by the trial judge [*Wunsche v. Wunsche* (1994), 18 O.R. (3d) 161, 114 D.L.R. (4th) 314, 70 O.A.C. 380 (Ont. C.A.)] and made no order as to fees. The receiver then sued the government for its fees, and the court at this hearing dismissed a motion to strike out the claim on the basis that there was no cause of action against the Crown.

And see *Chartrand v. De la Ronde* (1996), 113 Man. R. (2d) 12, 41 C.B.R. (3d) 193, 131 W.A.C. 12 (Man. C.A.) [the setting aside of the receivership], *Chartrand v. De la Ronde* (1997), 115 Man. R. (2d) 73, [1997] 3 W.W.R. 305, 44 C.B.R. (3d) 301 (Man. C.A.) [costs] where the court imposed the costs of the receivership on the debtor even though the court appointed a receiver on its own initiative which was subsequently set aside.

130 *Ontario Securities Commission v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385, 14 C.B.R. (3d) 6, 93 D.L.R. (4th) 321 (Ont. C.A.), dismissing an appeal from (1991), 9 C.B.R. (3d) 278, 1991 CarswellOnt 226 (Ont. Gen. Div.) where, under subsections 17(2) and (4) of the *Securities Act*, the O.S.C. invoked a receivership to protect investors. That section provided that a receiver may take control over trust assets. However, the court restricted this principle to the facts of the case and did not want to extend the claim against trust assets in other cases without review. See also the *Matrix* case: *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 67 O.A.C. 49, 106 D.L.R. (4th) 132, 1993 CarswellOnt 1844 (Ont. C.A.).

And see *Re Eron Mortgage Corp.* (1998), 2 C.B.R. (4th) 184, 53 B.C.L.R. (3d) 24, 1998 CarswellBC 102 (B.C. S.C.) where the court concluded that it had the jurisdiction, although it was premature at this stage, to create a charge against the trust assets for the remuneration and expenses of a committee of investors if the work done is beneficial to the trust property or is necessary for the management and preservation of the trust assets. In the proper case, where there are many creditors and sufficient assets to carry the costs, it makes sense to fund a committee of creditors who can assist the receiver and court in the administration of the estate. The committee provides a useful check on the receiver and alleviates the role of the court in second-guessing the administration.

In *Re Taylor Ventures Ltd.* (2007), 73 B.C.L.R. (4th) 330, [2007] 12 W.W.R. 166, 32 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]), the court appointed a steering committee to represent the interests of investors in a receivership situation. As the work of the steering committee benefited the management and preservation of the assets, the court ordered a reference to determine a fair and reasonable allowance to each member of the committee to be paid out of the trust assets.

A guarantor may defend a security holder's action for recovery of the deficiency balance pursuant to the terms of his or her guarantee on the basis that the receiver's remuneration is excessive.[156]

(c) Quantum of Remuneration

There is no statutory guideline controlling the quantum of fees in a receivership as there is with a licensed trustee under the *Bankruptcy and Insolvency Act*.[157] Even with an interim receivership under the *Bankruptcy and Insolvency Act*, there are no guidelines to govern the manner in which the interim receiver's services are to be remunerated. Unlike a bankruptcy where there are inspectors who can approve the conduct and activities of the trustee as well as challenge its fees and disbursements, there are no inspectors in a receivership to guide the receiver. The receiver often acts alone and does not consult the creditors in taking a proposed course of action. The receiver may, however, consult the larger secured creditors before embarking on a course of action.

As stated in *Re Confectionately Yours Inc.*, one of the leading cases on remuneration, the standard of review of a court-appointed receiver is whether the amounts claimed for remuneration and disbursements in carrying out the receivership are fair and reasonable.[158] The receiver should attempt to keep a close control on its fees and its disbursements to assure the court, and all other interested parties, that the costs are fair and reasonable and proportionate to the type of receivership and amount recovered. The court-appointed receiver is generally entitled to recover its actual costs and only in extraordinary circumstances will the court reduce its costs.[159]

As a result, the court assesses or taxes on the general principles of taxation.[160] Such principles include "the work done by the trustee [interim receiver]; the responsibility imposed on the trustee [interim receiver]; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained."[161] In assessing a receiver's fees, the court is required to put a

156 See *Belyea et al. v. Fed. Bus. Dev. Bank* (1983), 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244, 116 A.P.R. 248 (N.B. C.A.).

157 See subsection 39(2), under which the trustee can claim a minimum sum of seven and one-half percent as remuneration out of the proceeds of realization after the claims of the secured creditors have been satisfied.

158 *Re EnerNorth Industries Inc.* (2007), 38 C.B.R. (5th) 291, 2007 CarswellOnt 7322 (Ont. S.C.J. [Commercial List]) referring to *Re Confectionately Yours Inc.* (2002), 164 O.A.C. 84, 36 C.B.R. (4th) 200 at p. 214, 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal refused (2003), 181 O.A.C. 197 (note), 41 C.B.R. (4th) 28, 312 N.R. 195 (note) (S.C.C.).

159 *Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd.* (2010), 73 C.B.R. (5th) 10, 2010 ONSC 6535 (CanLII), 2010 CarswellOnt 9811 (Ont. S.C.J.) where the court reduced the receiver's costs by approximately 28 percent of the amount claimed.

160 *Re Hoskinson*, 22 C.B.R. (N.S.) 127, 1976 CarswellOnt 53, [1976] O.J. No. 1616 (Ont. S.C.).

161 *Re West Toronto Stereo Centre Ltd.* (1975), 19 C.B.R. (N.S.) 306, 1975 CarswellOnt 73 (Ont. S.C.).

2004 CarswellMan 473, 2004 MBCA 180, 245 D.L.R. (4th) 751, C.E.B. & P.G.R. 8130, 190 Man. R. (2d) 225, 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316

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2004 CarswellMan 473, 2004 MBCA 180, 245 D.L.R. (4th) 751, C.E.B. & P.G.R. 8130, 190 Man. R. (2d) 225, 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316

Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba

RICHTER & ASSOCIÉS/PARTNERS INC. in its capacity as Trustee in Bankruptcy of Dominion Bridge Inc. (Applicant / Appellant) and ALL CURRENT AND FORMER PLAN MEMBERS OF THE RETIREMENT INCOME PLAN OF DOMINION BRIDGE INC. - MANITOBA (the "Manitoba Plan"), together with all other persons who may have an interest in the Manitoba Plan (Respondents / Respondents) and SUN LIFE ASSURANCE COMPANY OF CANADA, THE PUBLIC TRUSTEE OF MANITOBA and THE MANITOBA PENSION COMMISSION (Respondents)

Manitoba Court of Appeal [In Chambers]

Scott C.J.M., Huband, Steel JJ.A.

Heard: October 26, 2004
Judgment: November 15, 2004
Docket: AI 04-30-05889

Proceedings: reversing *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba* (2004), 40 C.C.P.B. 249, (sub nom. *Dominion Bridge Inc. (Bankrupt), Re)* 182 Man. R. (2d) 182, 2004 MBQB 74, 2004 CarswellMan 129 (Man. Q.B.)

Counsel: A.F. Foran, J.J. Burnell for Applicant / Appellant

E.B. Eva, C.P. McNicol for Respondents / Respondents

A.J. Ladyka for Manitoba Pension Commission

Subject: Corporate and Commercial; Civil Practice and Procedure

Pensions --- Practice in pension actions — Costs

Trustee in bankruptcy applied to Pension Commission for payment of surplus funds in plan on winding up — Commission declined to make determination without legal opinion as to entitlement — Trustee applied to court for declaration — Court appointed person to represent current and past members of plan on application — Representative brought motion for payment of interim costs — Motion was granted — Motions judge found that there was sufficient merit to representative's position at least to investigate claim and that trust cases were in special class justifying ex-

2004 CarswellMan 473, 2004 MBCA 180, 245 D.L.R. (4th) 751, C.E.B. & P.G.R. 8130, 190 Man. R. (2d) 225, 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316

ercise of court's discretion to make order — Motions judge also found that representative's costs were likely to be paid from fund even if trustee succeeded and that proceedings were brought for guidance on construction of trust instruments — Motions judge found that standard of impecuniosity was of less importance in circumstances and that court should not risk losing members' perspective because of inability to participate — Trustee appealed — Appeal allowed — Motions judge erred when he found that there was sufficient merit as while there was issue that needed to be resolved fact that plan members did not have all information necessary was not indicator of strong enough merit to get over threshold — Motions judge's finding of impecuniosity was made without sufficient evidence of identity of plan members and their financial ability to contribute or any other details — Facts before motions court judge did not justify order that he made.

Cases considered by *Scott C.J.M.*:

British Columbia (Minister of Forests) v. Okanagan Indian Band (2003), 2003 SCC 71, 2003 CarswellBC 3040, 2003 CarswellBC 3041, 114 C.R.R. (2d) 108, 43 C.P.C. (5th) 1, [2003] 3 S.C.R. 371, 313 N.R. 84, [2004] 2 W.W.R. 252, 21 B.C.L.R. (4th) 209, 233 D.L.R. (4th) 577, [2004] 1 C.N.L.R. 7, 189 B.C.A.C. 161, 309 W.A.C. 161 (S.C.C.) — followed

Buckton, Re (1907), [1907] 2 Ch. 406 (Eng. Ch. Div.) — referred to

C.A.S.A.W., Local 1 v. Alcan Smelters & Chemicals Ltd. (2001), 2001 BCCA 303, 2001 CarswellBC 887, 89 B.C.L.R. (3d) 29, 198 D.L.R. (4th) 504, (sub nom. *Canadian Assn. of Smelter & Allied Workers, Local 1 v. Alcan Smelters & Chemicals Ltd.)* 152 B.C.A.C. 117, (sub nom. *Canadian Assn. of Smelter & Allied Workers, Local 1 v. Alcan Smelters & Chemicals Ltd.)* 250 W.A.C. 117, 27 C.C.P.B. 209 (B.C. C.A.) — referred to

Deans v. Thachuk (2004), 8 E.T.R. (3d) 75, 41 C.C.P.B. 27, 2004 CarswellAlta 514, 2004 ABQB 265 (Alta. Q.B.) — followed

Little Sisters Book & Art Emporium v. British Columbia (Commissioner of Customs & Revenue) (2004), 2004 BCSC 823, 2004 CarswellBC 1370 (B.C. S.C.) — referred to

McDonald v. Horn (1994), [1995] 1 All E.R. 961 (Eng. C.A.) — referred to

Schmidt v. Air Products of Canada Ltd. (1994), 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173, 1994 CarswellAlta 138, 1994 CarswellAlta 746, [1995] O.P.L.R. 283 (S.C.C.) — considered

Taylor v. Alberta Teachers' Assn. (2002), 2002 ABQB 554, 2002 CarswellAlta 1689 (Alta. Q.B.) — referred to

APPEAL from judgment reported at *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. - Manitoba* (2004), 40 C.C.P.B. 249, (sub nom. *Dominion Bridge Inc. (Bankrupt), Re)* 182 Man. R. (2d) 182, 2004 MBQB 74, 2004 CarswellMan 129 (Man. Q.B.).

***Scott C.J.M.*:**

1 The sole issue on this appeal is whether the motions court judge was correct in awarding payment of interim (prospective) legal costs in favour of current and former members of a retirement income pension plan (the Manitoba plan or "the plan") who oppose payment of the surplus in the plan to the appellant. In September 1998, Dominion

2004 CarswellMan 473, 2004 MBCA 180, 245 D.L.R. (4th) 751, C.E.B. & P.G.R. 8130, 190 Man. R. (2d) 225, 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316

Bridge Inc. (Dominion Bridge) was assigned into bankruptcy and the appellant was appointed as trustee. Dominion Bridge sponsored and administered the Manitoba plan for its salaried employees.

2 The Manitoba Pension Commission (the Commission) ordered that the plan be wound up. A subsequent valuation determined there was an actuarial surplus of $755,320 in the Manitoba plan as of September 1998, which had increased to $1,624,538 as of December 31, 2001.

3 In July 2002, the trustee made application to the Commission for payment to him for the benefit of the creditors of Dominion Bridge. In doing so, he relied on the provisions of the plan in existence at the time of the bankruptcy, which provide for payment of any surplus if the Manitoba plan is discontinued to the company, "after the approval of the Manitoba Pension Commission" and subject to any other applicable conditions.

4 The material before this court discloses that the plan was first established in July 1986, continuing an earlier retirement income plan of predecessor corporations. It would appear that the original plan was first registered in the province of Ontario in 1944 with numerous amendments thereafter. The plan was restated in 1973, providing for a right of amendment but was silent with respect to the application of surplus moneys upon the plan being discontinued. The 1986 plan also provided for rights of amendment to the plan, and included a provision that on termination any remaining assets over and above what was required to provide for the payment of benefits under the plan should be returned to Dominion Bridge.

5 The surplus in the plan is the last remaining asset in the estate of Dominion Bridge. The funds are in the custody of the plan administrator, to be paid in accordance with an order of the court.

6 In March 2003, the Commission advised the trustee that it was not prepared to pay the surplus moneys to the trustee in the absence of either a legal opinion substantiating the trustee's claim or a court ruling. Any review, the Commission noted:

> ... must incorporate all previous plan tests that have been superceded [*sic*] either by reason of conversion, merger, division, and so on. Further, the language in these documents must in every case clearly and consistently provide for payment to the employer. If the language is unclear, has ever been amended, or the documentation is silent in this regard, the Trustees may wish to obtain a legal opinion before proceeding.

7 The trustee chose to proceed by way of court application.

8 In February 2004, Paul Hunter was appointed by the court to represent the interests of the current and former members of the Manitoba plan.

9 Shortly thereafter an application was heard for payment of interim or prospective costs in favour of the Manitoba plan members. The application was successful. In his reasons for decision, the motions court judge referred extensively to the recent decision of the Supreme Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 (S.C.C.).

10 The issue directly before the court in *Okanagan* was (at para. 1):

> ... 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"). ...

11 The court identified the governing principles to be considered upon such an application as follows (at paras.

36-37):

> 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.
>
> 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. ....

12 The motions court judge concluded that all three conditions had been met. As to merit, he found that the requirement had been satisfied, "at least to the extent required to support an order in connection with investigation of and assessment of the relative merit of Richter's claim" (at para. 7). He was of the opinion that special circumstances existed because in litigation where proceedings are brought to obtain the assistance of the court as to construction of the trust instrument, or to deal with problems arising in the course of its administration, costs are "likely to be paid out of the trust fund" (at para. 8).

13 Finally, as to impecuniosity, he concluded that while "there is a paucity of information about the members' ability to pay for this litigation" (at para. 10), given the fact that the respondents (*ibid.*):

> ... simply want to address issues that have been placed before the court by Richter .... I hold that the threshold or standard of impecuniosity is of less importance than in other cases, especially since, as I have pointed out in para. 8, they are likely to recover their costs out of the fund irrespective of the result of the application. I find that Hunter has satisfied the third requirement of an order for interim costs.

14 In the result, the application was granted "to permit investigation and assessment of the members' position, with leave to apply for a further order prior to taking further steps in the action" (at para. 11).

Decision

15 In my opinion, the motions court judge erred in granting an order for interim costs, at least at this stage of the proceedings. Indeed, based on the record before the court, it is difficult to see how the Manitoba plan members meet any of the three conditions to be satisfied (see *Okanagan*) before such an order can be made.

16 As to the merits, the argument of the trustee is very simple — the terms of the plan in existence as of the date of bankruptcy specifically provide for the order requested. It is the plan members who assert, relying on the direction of the Commission, that the entire history of the pension regime must be meticulously scrutinized to determine the precise nature of the relationship between the plan members and the company, and the company's entitlement to amend the plan. It is common ground (see *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.)) that entitlement to a pension surplus will often depend on whether the fund is impressed with a trust. As the Supreme Court noted (at pp. 639-40):

> If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan. However, when a trust is created, the funds which form the *corpus* are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent

2004 CarswellMan 473, 2004 MBCA 180, 245 D.L.R. (4th) 751, C.E.B. & P.G.R. 8130, 190 Man. R. (2d) 225, 335 W.A.C. 225, 44 C.C.P.B. 86, [2005] 6 W.W.R. 316

that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

17 In this situation, the plan members argue that the failure of the trustee to disclose all of the documentation referred to in the March 2003 letter of the Commission itself indicates a *prima facie* case as mandated by the Supreme Court in *Okanagan.*

18 But this cannot be right. That there is an issue that needs to be resolved cannot be doubted, but the fact that the plan members do not have all the necessary information surely cannot, in and of itself be an indication of potential merit, "strong enough to get over the preliminary threshold of being worthy of pursuit" (*Okanagan*, at para. 37). This is all the more so where, as here, the information in question was not in the possession of the trustee but rather of the plan administrator. It had just been forwarded to counsel, we were advised, shortly before this appeal was heard.

19 The finding of impecuniosity is even more tenuous. The facts disclose that there are approximately 53 persons in the plan; about half of them have been contacted, and 20 plan members have apparently contributed approximately $2,000 in total. Other than the bold statement by Mr. Hunter that 25 of the plan members whom he had contacted were not in a position to fund the proceedings, no other details have been provided. No cost estimate has been given to complete the review process authorized by the motions court judge. There is no specific evidence that the plan members are unable to find the necessary funds to obtain a legal opinion after examination of the relevant documents, without the order for costs that has been made in this instance.

20 Before this court, counsel for the plan members mounted a strenuous argument that the motions court judge was correct in his assessment. She conceded that, generally speaking, an order of prospective costs will be rare and exceptional, but argued that in proceedings brought concerning construction of a trust instrument (including a pension plan) or as a result of questions arising in the course of administration, it is well established that costs of all parties are paid out of the fund on a solicitor-and-client basis as they are considered to be incurred for the benefit of the estate. See *McDonald v. Horn* (1994), [1995] 1 All E.R. 961 (Eng. C.A.), at 970-71, and *Buckton, Re*, [1907] 2 Ch. 406 (Eng. Ch. Div.). Put another way, she asserts that different principles than the factors recently considered by the Supreme Court in *Okanagan* apply to an interim cost award on an application for payment of surplus moneys out of a pension plan, so long as it can be said that the proceedings are non-adversarial in nature. Relying on authorities such as *Taylor v. Alberta Teachers' Assn.*, [2002] A.J. No. 1571, 2002 ABQB 554 (Alta. Q.B.), *C.A.S.A.W., Local 1 v. Alcan Smelters & Chemicals Ltd.* (2001), 198 D.L.R. (4th) 504, 2001 BCCA 303 (B.C. C.A.), and *Little Sisters Book & Art Emporium v. British Columbia (Commissioner of Customs & Revenue)*, [2004] B.C.J. No. 1241, 2004 BCSC 823 (B.C. S.C.), she urged this court to find that the nature of these proceedings was non-adversarial.

21 Counsel for the trustee, not surprisingly, disagreed. He argued that the proceedings were demonstrably adversarial in nature since they involve in reality a contest between two competing groups over entitlement to the pension fund surplus. Strong reliance is placed on the decision of Moreau J. in *Deans v. Thachuk*, [2004] A.J. No. 470, 2004 ABQB 265 (Alta. Q.B.), in which when dealing with an application for payment of interim costs in an action alleging mismanagement of a pension fund, she meticulously applied the criteria from *Okanagan* in concluding, "there is insufficient evidence before me to justify the granting of this extraordinary relief at this time" (at para. 67).

22 I agree entirely with the rigorous approach taken in *Deans*.

23 Finally, as to special circumstances, I simply observe that it is not known at this early stage whether the original pension plan arrangements were of a trust or contractual nature or whether the numerous amendments to the plan over a period in excess of fifty years were validly enacted.

24 In my opinion, it cannot be doubted that the decision of the Supreme Court in *Okanagan* and the three prin-

ciples enunciated therein are intended to apply to all applications for interim or prospective costs, whatever the nature of the cause of action. Having said this, each case will in the end depend very much on its own unique circumstances. The facts before the motions court judge did not justify the order that he made.

25 This result does not foreclose the plan members from making an application for the same relief at a later date, once additional information is available to enable the court to properly conduct the review mandated by the Supreme Court in *Okanagan*, and exemplified by the approach taken in *Deans*. At such time the arguments with respect to whether this is an adversarial proceeding or not may well be of more import.

26 In the result, the appeal is allowed with costs.

Appeal allowed.

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