Clerk's stamp:

COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON

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")

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

WRITTEN BRIEF OF THE TRUSTEES
VOLUME 2 OF 2

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8
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Solicitors for Sawridge First Nation

PART V – LIST OF AUTHORITIES

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.

[page379]

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.

[page408]

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.

[page414]

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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Solicitors for the respondents: Mandell Pinder, Vancouver.

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cp/e/qw/qllls

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)

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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.

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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".

[page52]

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.

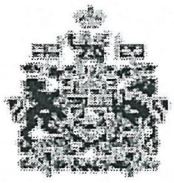
61 Bennett J. held that the public importance of the constitutional issues underlying the appellant's claim and the broad impact of Customs' procedures sufficed to satisfy the public importance criterion. As mentioned above, she failed to address the special circumstances criterion. Yet, the Four Books 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*



SUPREME COURT OF CANADA

CITATION: R. *v.* Caron, 2011 SCC 5, [2011] 1 S.C.R. 78

DATE: 20110204
DOCKET: 33092

BETWEEN:

Her Majesty The Queen in Right of the Province of Alberta
Appellant
and
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

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

REASONS FOR JUDGMENT: (paras. 1 to 49)	Binnie J. (McLachlin C.J. and LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)
CONCURRING REASONS: (paras. 50 to 55)	Abella J.

R. *v.* Caron, 2011 SCC 5, [2011] 1 S.C.R. 78

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*

Indexed as: R. *v.* Caron

2011 SCC 5

File No.: 33092.

2010: April 13; 2011: February 4.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

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.

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.

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 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 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 interpreted 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 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.

Cases Cited

By Binnie J.

Applied: *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; **referred to:** *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *R. v. Rain* (1998), 223 A.R. 359; *R. v. Mercure*, [1988] 1 S.C.R. 234; *R. v. Paquette*, [1990] 2 S.C.R. 1103; *R. v. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307; *R. v. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321, leave to appeal granted in part, 2010 ABCA 343, [2010] A.J. No. 1304 (QL); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, and [1992] 1 S.C.R. 212; *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *Lefebvre v. Alberta* (1993), 135 A.R. 338, leave to appeal refused, [1993] 3 S.C.R. vii; *R. v.*

Rémillard, 2009 MBCA 112, 249 C.C.C. (3d) 44; *R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *R. v. Caron*, 2006 ABPC 278, 416 A.R. 63.

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*, 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. (4th) 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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APPEAL from a judgment of the Alberta Court of Appeal (Hunt, Ritter and Rowbotham JJ.A.), 2009 ABCA 34, 1 Alta. L.R. (5th) 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. (6th) 319, [2009] A.J. No. 70 (QL), 2009 CarswellAlta 94, affirming a judgment of Ouellette J., 2007 ABQB 632, 84 Alta. L.R. (4th) 146, 424 A.R. 377, [2008] 3 W.W.R. 628, [2007] A.J. No. 1162 (QL), 2007 CarswellAlta 1413. Appeal dismissed.

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 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

> 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 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 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, 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 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 ought to have pursued a more aggressive fundraising 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 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 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.

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

THE
LAW OF COSTS

SECOND EDITION

VOLUME I

MARK M. ORKIN, Q.C., B.A., J.D., LL.M., Ph.D., L.S.M.

OF THE ONTARIO BAR

CANADA LAW BOOK®

DECEMBER 2011

§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.).

Case Name:

Keewatin v. Ontario (Minister of Natural Resources)

Between
Willie Keewatin, Andrew Keewatin Jr., and Joseph William Fobister on their own behalf and on behalf of all other members of Grassy Narrows First Nation, Plantiffs, and Minister of Natural Resources and Abitibi-Consolidated Inc., Defendants

[2006] O.J. No. 3418

32 C.P.C. (6th) 258

152 A.C.W.S. (3d) 23

2006 CarswellOnt 6463

Court File No. 05-CV281875 PD

Ontario Superior Court of Justice

N.J. Spies J.

Heard: March 29 - 31, 2006.
Judgment: May 23, 2006.

(248 paras.)

Aboriginal law -- Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights -- Motion by plaintiff Indians for leave to continue action as class action allowed on consent -- Motion for order that defendant Minister pay the plaintiffs their costs in advance on partial indemnity scale allowed in part -- Representative order granted on consent -- Minister ordered to pay costs of determining issue of interpretation of "taking up" provision of Treaty 3 to determine whether Ontario had authority to take up lands for forestry -- Prima facie meritorious argument that only federal government had power to take up lands covered by Treaty for purpose of lumbering.

Aboriginal law -- Treaties -- Motions by plaintiff Indians for leave to continue action as class action allowed on consent -- Motion for order that defendant Minister pay plaintiffs their costs in ad-

vance on partial indemnity scale allowed in part -- Minister ordered to pay costs of determining issue of interpretation of "taking up" provision of Treaty 3 to determine whether Ontario had authority to take up lands for forestry ---- Prima facie meritorious argument that only federal government had power to take up lands covered by Treaty for purpose of lumbering.

Civil procedure -- Parties -- Class or representative actions --Certification -- Motion by plaintiff Indians for leave to continue action as class action allowed on consent -- Plaintiffs, members of Grassy First Nation, sought to set aside validity of logging permits granted by Minister to defendant Abitibi-Consolidated.

Civil procedure -- Costs -- Special orders -- Motion by plaintiff Indians for order that defendant Minister pay the plaintiffs their costs of action in advance on partial indemnity scale allowed in part -- Minister to pay costs to determine interpretation of "taking up" provision in Treaty 3 -- Prima facie meritorious argument that only federal government had power to take up lands covered by Treaty for purpose of lumbering -- Issues raised transcended individual interests of litigants, were of public importance, and had not been resolved in previous cases -- Public interest not served if plaintiffs required, as a result of lack of funds, to abandon action.

Motions by plaintiffs for leave to continue action as class action and for order that defendant Minister pay the plaintiffs their costs of action in advance on partial indemnity scale -- Defendants largely agreed to representative order, but sought order that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against plaintiffs -- Plaintiffs were members of Grassy First Nation and sought to set aside validity of logging permits granted by Minister to defendant Abitibi-Consolidated -- Plaintiffs argued logging activities invalidly infringed their harvesting and hunting rights under Treaty 3 which gave Indians the right to hunt and fish, save and expect for tracts that might be taken up for mining or lumbering by Dominion of Canada -- Parties disagreed as to whether "taking up" provision should be interpreted to restrict right to take up land to federal government only -- Plaintiffs argued Ontario had no right to unilaterally authorize logging on lands in dispute and that reference to Dominion of Canada in Treaty referred to federal government -- Some of Grassy Narrows members were wealthy, but most were impoverished -- HELD: Motion for representative order allowed -- Grassy Narrows not made jointly and severally liable for any costs ordered against plaintiffs -- No allegation that named plaintiffs were men of straw -- No reason to order non-party to be jointly and severally liable for costs -- Motion for advanced cost allowed in part -- Order limited to cost of determining issue of interpretation of the "taking up" provision of Treaty 3 so that it could be decided whether or not Ontario had authority to take up lands for forestry -- Grassy Narrows members with financial means should not be expected to fund litigation -- Grassy Narrows was impoverished community -- Plaintiffs had no other sources of funding litigation -- Issue of whether or not Ontario had authority to "take up" lands pursuant to Treaty 3 was important issue with significant consequences for parties -- -- Based on the plain wording of Treaty, plaintiffs had a strong argument that reference to "Her Government of Her Dominion of Canada" at time Treaty was signed referred to federal government -- Prima facie meritorious argument that based on language of Treaty that only the federal government had power to take up lands covered by the treaty for purpose of lumbering -- Issues raised transcended individual interests of litigants, were of public importance, and had not been resolved in previous cases -- Treaty interpretation issue was issue of great public importance -- Public interest not served if plaintiffs required, as a result of lack of funds, to abandon action.

Statutes, Regulations and Rules Cited:

Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, 54-55 Victoria, c. 5

Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, 54 Victoria, c. 3

Canada (Ontario Boundary) Act, 1989, 52 and 53 Vict., Chap. 28

Constitution Act, 1867, s. 91(24), s. 92.5, s. 109

Constitution Act, 1982, s. 35, s. 35(1)

Constitution Act, 1930, 20-21 George V, c. 26 (U.K.)

Crown Forest Sustainability Act, 1994, S.O. 1994 c. 25, s. 6, s. 8(2)

Indian Act, R.S.C. 1985, c. 1-5, s. 39, s. 88

Ontario Boundaries Extension Act, S.C. 1912, 2 Geo. V. c. 40, s. 2(a), s. 2(c)

Ontario Rules of Civil Procedure, Rule 12.08, Rule 37.15

Saskatchewan Act, S.C. 1905, c. 42

Counsel:

Robert J.M. Janes and Dominique Nouvet for the Plaintiffs

D. Thomas H. Bell, Michael Stephenson and Peter Lemmond, for the Defendant Minister of Natural Resources

Christopher H. Matthews and Colleen E. Butler for the Defendant Abitibi-Consolidated Inc.

REASONS FOR DECISION

INTRODUCTION

1 N.J. SPIES J.:-- The plaintiffs are Anishnaabe (also referred to as Ojibway) and members of the Grassy Narrows First Nation ("Grassy Narrows") and of the Grassy Narrows Trappers' Council. Each is the holder of a registered trap line located near the Grassy Narrows' reserve, in northwestern Ontario, just north of Kenora, near the English River.

2 In this proceeding, the plaintiffs seek to set aside the validity of the permits and licences issued by the defendant, Minister of Natural Resources (MNR), to the defendant, Abitibi-Consolidated Inc., which allows certain regulated logging activities within the trap line areas held by the Grassy Narrows trappers in the Whiskey Jack Forest. The position of the plaintiffs is that these activities invalidly infringe upon the harvesting rights that members of Grassy Narrows enjoy under Treaty 3, and in particular their right to trap and hunt on lands surrendered to the Crown under Treaty 3.

people represented by the applicants were employed and earning reasonable incomes or had other sources of income.

53 Clearly in this case the court considered the financial means of individual members of the represented class. The evidence filed on behalf of the respondents that a significant number of members of the class had means to contribute at least a modest amount to the cost of the litigation certainly appears to have conflicted with the very general evidence of the applicants.

54 The case is distinguishable from the case before me in that the evidence before me of impecuniosity of the Grassy Narrows community is quit detailed and unchallenged. This is not a case where I could reasonably conclude that a significant proportion of the members of Grassy Narrows could contribute a modest amount to fund the litigation. On the evidence only a handful could.

55 defendants also rely on Re Charkaoui[13] where the Federal Court denied the cost award because the litigant, who qualified for Quebec legal aid, wanted to hire more expensive counsel instead. Noel J. found this unacceptable, particularly given his view that there were well-qualified counsel who likely could have taken Mr. Charkaoui's case at the legal aid rates. That issue does not arise here because Legal Aid is not available to the Plaintiffs.

The Issues

56 The MNR concedes that the Band Council of the Grassy Narrows First Nation does not appear to have the necessary funds to prosecute this case, at least without jeopardizing other pressing priorities. The position of the MNR is that the plaintiffs have not met the onus on them to establish that they do not have other means to raise money for the costs of this litigation.

57 The defendants argue that notwithstanding the economic problems faced by the people of Grassy Narrows, that the plaintiffs have failed to make serious efforts to raise funds and support for this case. It is submitted by the defendants that if, as the plaintiffs claim, this is a case of such importance to the members of Grassy Narrows and other Treaty 3 First Nations, that advance costs funding is appropriate, surely they should seek funding from those individuals and groups. They submit that if those individuals and groups, the potential beneficiaries of the case, do not consider the case of sufficient merit and importance to support it with any of their funds, the court should not conclude that it must be funded by the MNR. Most telling, it is submitted, is the refusal of the plaintiff, Mr. Fobister to contribute anything to the costs of this proceeding.

58 The specific issues raised by the defendants are as follows:

(a) The plaintiffs and the Chief and Council of Grassy Narrows have made no effort to try to raise money to support this litigation from other members of their community, including accessing the income from the Grassy Narrows trust fund.
(b) The plaintiffs have made no effort to secure the support of other Treaty 3 signatory communities or their members, including the three Treaty 3 signatory communities that also have harvesting areas in the Keewatin Lands as defined below: the Lac Seul, Wabauskang and Wabaseemoong First Nations.
(c) The plaintiffs have not sought the support of any regional, provincial or national aboriginal organizations, outside of limited inquiries to Grand Council Treaty.

(d) The plaintiffs have failed to investigate whether other legal counsel could and would be willing to prosecute the case at lower cost than the Cook Roberts firm, which is located in Victoria, British Columbia.

The Facts

The financial resources of the Grassy Narrows community

59 The defendants did not contest the evidence relied upon by counsel for the plaintiffs concerning the general economic conditions of the Grassy Narrows community, which includes the following:

(a) Grassy Narrows receives virtually all of its funding from the Canadian and provincial governments. That funding is earmarked for specific programs, such as health, education, social assistance, and capital infrastructure projects.

(b) Grassy Narrows has operated at a deficit in several of the previous fiscal years, including 2004-2005. It has substantial outstanding liabilities including a $1.6 million long term debt owing to CMHC.

(c) The unemployment rate in the Grassy Narrows community currently sits at about 80%, and most people rely on social assistance as their main source of income. Most of the local jobs are with the Band itself Community members often need to seek emergency loans from the Band for matters such as travel for hospitalization, funerals, and hydro bills.

(d) Grassy Narrows lacks adequate housing for their members. Many are living in over-crowded homes or off reserve, waiting for new housing. Grassy Narrows cannot afford to build more than a couple of new houses per year. Furthermore, much of the existing housing is substandard, and the Band lacks the funding to carry out all of the necessary repairs. In 2004, six homes on the reserve were condemned by Health Canada, but Grassy Narrows members generally continued to live in condemned houses as they have nowhere else to live.

(e) Grassy Narrows does not have an adequate water supply. The current water treatment plant does not meet provincial standards. In two sections of the reserve, residents must drink bottled water as the tap water is not safe. Grassy Narrows cannot afford to build a new water treatment plant until it receives a special grant from Indian and Northern Affairs (INAC).

(f) 60% of the population on the reserve is under the age of 20.

(g) Grassy Narrows does not have adequate recreational facilities for its youth. A skating arena is under construction, but work on that has been stalled for several years now for lack of the $400,000 needed to complete it. Aside from this, the only communal gathering place for youths on the reserve is a gymnasium. Given that Grassy Narrows is almost an hour's drive from Kenora, this lack of facilities to promote healthy activities for youths is a serious problem, and many youths resort to drugs and alcohol for entertainment. However, the problem is not one that the community can afford to address at this time.

60 Apart from government funding, Grassy Narrows has access to two trust funds. The first is from Casino. Like other Ontario Indian bands, Grassy Narrows receives revenues from Casino Rama, which are distributed through the First Nations Limited Partnership Agreement, and, in the case of Grassy Narrows, placed in a trust. In recent years, the total revenues generated by the Trust have averaged about $350,000. The defendants have not disputed the fact that the Rama money is not available for this litigation given the terms of the limited partnership agreement, which limits the capital and/or operating expenditures of Casino Rama monies to specified purposes, namely: community development, health, education, economic development, and cultural development.

61 There is also a Grassy Narrows trust fund, which results from a settlement with Ontario Hydro and Canada for the flooding of Grassy Narrows' original reserve. Under the terms of that trust agreement, only the interest can be spent which is in the range of $500-$600,000 per year. The members of Grassy Narrows vote on how those interest payments are to be spent and most of the time they vote in favour of individual payouts which usually range in the amount of $150-$200 to each member per year.

The financial resources of certain members of Grassy Narrows

62 One of the plaintiffs, Joseph Fobister, is a successful businessman with personal assets exceeding $425,000, excluding the value of his general store. Approximately $370,000 of Fobister's assets are in his RRSP. The balance is in assets such as boats and trucks. He has 5 children and no pension.

63 Mr. Fobister has stated he will not use any of his personal income or assets to finance the prosecution of this action, and that it would not be reasonable to expect other financially successful Band members to contribute anything either.

64 There is no evidence that any of the other members of Grassy Narrows have significant assets save that two other members of Grassy Narrows have had some financial success.

Other sources of funding

65 The Sierra Legal Defence Fund assisted with and helped fund the judicial review application and paid some of the plaintiffs' legal fees and provided some direct legal support. Sierra has advised however that it lacks the resources to become involved in a trial.

66 The plaintiffs only pursued funding from Legal Aid for this action when prompted by a Rule 39.03 examination on this issue initiated by the MNR. As a result Grassy Narrows members made a group/test case application to Legal Aid Ontario. However, they have been denied funding on the basis that the case is too expensive. Although the defendants complain that the application was brought late, there is no suggestion that Legal Aid might fund this action.

67 The plaintiffs applied for funding to the federal government's Indian and Northern Affairs Canada "Test Case Funding" and were denied on the basis that the funding is restricted to cases on appeal.

68 Representatives of Grassy Narrows approached the Grand Council of Treaty 3 on a couple of occasions to seek funding for this litigation. They were advised that although the Council had a fund available for discretionary spending, accessing this required the agreement of all Chiefs, and it would not be possible to secure agreement for the Grassy Narrows' litigation. No further effort was made to secure the support of the Grand Council Treaty 3 or its chiefs.

69 The plaintiffs have not attempted to make use of the Treaty and Aboriginal Rights Research group operated by Grand Council Treaty 3. Mr. Janes acknowledged that they do have a research arm, which he would try to access.

70 Further affidavit evidence filed on behalf of the plaintiffs was admitted on consent, which disclosed a number of other attempts to contact various groups for funding, all without success.

The costs of this litigation

71 The costs of litigating this case for the plaintiffs are estimated at just over $2.8 million. This figure is based on a detailed budget for an estimated 12-week trial on all issues and it provides for use of experts (scientific, historical, archival, and anthropological).

72 Most of the work by counsel for Grassy Narrows has gone unpaid, and most of what has been collected has been paid not by Grassy Narrows, but Sierra Legal Defence Fund.

73 Grassy Narrows paid Cook Roberts LLP a bill of $18,391.54 in December 2005. Grassy Narrows obtained this money by making a special request to INAC for the Band's Ottawa trust fund monies.

Analysis

Funding from individual members of Grassy Narrows

74 The first issue is whether or not I should consider this motion on the basis that Mr. Fobister and a couple of other members of Grassy Narrows with financial means should be expected to contribute to the cost of this litigation.

75 Given the evidence of the financial circumstances of the Grassy Narrows community, as the Alberta Court of Appeal found in the Deans v. Thachuk, I am able to infer that canvassing the members of the community would be futile as they are impoverished and could not reasonably be expected to make any financial contribution to this action. The only evidence of a Band member with any significant assets concerns Mr. Fobister. Given that most of the other members of Grassy Narrows are on social assistance, Mr. Fobister is in a relatively unique position in his community, financially speaking.

76 I do not accept the arguments advanced by the defendants that Mr. Fobister and the couple of other members of Grassy Narrows who do have some financial means ought to be expected to contribute to or fund this litigation.

77 The rights that are being pursued by the plaintiffs in this action are communal rights that belong to all of the members of Grassy Narrows. Mr. Fobister represents those communal interests, not his personal interests. As such Mr. Fobister does not have an individual or direct pecuniary interest in this litigation, He could not for example, exclude the other members of the Grassy Narrows community from benefiting from this action.[14] It is not reasonable to expect Mr. Fobister to sacrifice his retirement fund for this litigation. These are the only retirement savings of a man in his late 40s.

78 Furthermore, I agree with the submission by Mr. Janes that given most of the members of Grassy Narrows could not contribute to the cost of this action, that it is not appropriate to consider whether a few individual members should do so. Where, as in this case, there are only a very small number of individuals who could reasonably be expected to make any kind of financial contribution, and where the evidence establishes that the remaining members of the representative group could not reasonably be expected to make any financial contribution whatsoever, in my opinion it is

not appropriate for the court to expect that the few members who might be able to make a contribution exhaust all of their assets for the benefit of the entire group before a finding will be made that the first requirement of the Okanagan test has been met.

79 I also agree with the submission by the plaintiffs that there is a danger in placing too much emphasis on the income or assets of a few members of the Band, in that it puts the interests of the collective at the mercy of a few individuals. The situation might be different if a large proportion or a substantial number of Band members could collectively, and without hardship, make a significant contribution or bear the burden of the litigation. In that case, it might be reasonable to expect some contribution by individual members. However, it would be quite different to make the litigation conditional on one Band member contributing all or a significant part of his retirement savings.

Funding from the Grassy Narrows trust funds

80 The Band membership collectively has access to approximately $5-600,000 per year in trust fund income that could be devoted to this case. Although no budget was prepared on this basis, it seems likely that if the litigation were phased, that sum would cover the first phase dealing with the interpretation of the treaty.

81 This issue then is should I find that the impecuniosity requirement in the Okanagan test has not been met because this fund is available? If the test was solely that of unqualified "impecuniosity", I would have to accept the submission of the defendants and effectively compel the members of Grassy Narrows to decide whether or not this case is important enough to warrant the use of these funds.

82 Lebel J. however did not limit this part of the test to a consideration solely of financial means. He stated 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" (at para. 36). In Okanagan the evidence filed, like the evidence here, was that the Bands were all in extremely difficult financial situations. The Bands had no way to raise the money needed for the action and even if they did there were many more pressing need which would have to take priority over funding the litigation (at paras. 4-5).

83 I am satisfied on the evidence before me that Grassy Narrows is an impoverished community. The settlement funds in question generate in the range of $150-$200 per person per year which is a very modest sum, but given that most members of Grassy Narrows are unemployed and on social assistance they are obviously dependent on that finding to meet basic needs. For the most part, the members of Grassy Narrows have such immediate pressing social problems it would not be reasonable to expect them to divert any of the income that they receive from the settlement to fund this litigation Even if individual members could reasonably be expected to leave this income in the trust, which I do not accept, like the Bands of Okanagan, the Council of Grassy Narrows would clearly have more pressing needs that would take priority over funding this litigation.

84 I recognize that the payment of the order for advanced costs will come from the public purse. The British Court of Appeal said in Little Sisters[15] that while the gay and lesbian communities had other priorities for their funds than the lawsuit in question, "so does the public purse." It is therefore not enough for an applicant to argue that they have other priorities for funds at hand and should be relieved of an obligation to utilize those funds. In this case however, one could hardly question the priorities of the Council given that the Grassy Narrows community lacks adequate infrastructure. If I were to accept the submissions of the defendants on this point I would be compel-

ling the members of Grassy Narrows to choose between attempting to provide for the basic necessities of life, such as adequate housing and securing a safe water supply, that most citizens of Ontario take for granted, and pursuing this litigation. In the circumstances, the reasonable choice would not be to divert those funds to this litigation. Accordingly I reject the submission that I consider the availability of these settlement funds in considering this requirement of the test.

Funding from other sources

85 The MNR argues that at the very least the plaintiffs have an obligation to inquire to seek support from the other three Treaty 3 First Nations with harvesting areas in the Keewatin Lands. They argue that their failure to do so is fatal, as they have not established that the other First Nations could not and would not provide financial support.

86 In the Federal Court decision of Re Charkaoui the court stated that if there is no possibility of recourse to other means or of access to other financial sources, it is important for the applicant to say so, as the burden of proof in such a motion is on the applicant (at para. 24).

87 There is no evidence before me as to whether or not the other three First Nations with harvesting areas within the Keewatin Lands could or would assist with funding this litigation. The plaintiffs did not ask them for support, even though those First Nations are potential beneficiaries of the litigation and of the treaty negotiations. I was advised that counsel for the MNR suggested for the first time, during the cross-examinations, that the plaintiffs seek funding from other First Nations in the area.

88 The defendants argue that the onus is on the plaintiffs to establish that the other First Nations are unable to fund this litigation. The plaintiffs argue that Okanagan does not require them to prove that there is absolutely no one else who can bear the costs of the litigation. Mr. Janes' position is that going to an Indian band is not an obvious source of funding and that there is no evidence that these other First Nations have any funds that could be used on this litigation.

89 Although the onus of satisfying me that the plaintiffs meet the test in Okanagan is on the plaintiffs, I accept the submission of Mr. Janes that the plaintiffs only have to act reasonably in following up with possible sources of funding and that without more, other First Nation communities in Ontario would not be an obvious source of funding.

90 If the MNR intended to seriously suggest that these other First Nations should be canvassed, notwithstanding that the onus is on the plaintiffs, in my opinion counsel ought to have alerted Mr. Janes to this in sufficient time that he could pursue the matter, as was done with the issue of Legal Aid or alternatively, put forward some evidence that these other First Nations have some financial resources that could be used to fund the litigation. Had he done so and the plaintiffs had decided not to pursue the matter, this argument might have had some force. As it is, I have no evidence that these other First Nations are unable or unwilling to assist and I am not prepared to find that they were an obvious source. That presumes that they are not faced with the same type of financial problems that the members of Grassy Narrows face as only then could this be considered a reasonable suggestion.

91 Mr. Janes argues that making aboriginal group coalitions a prerequisite to an advance cost award is problematic in that different First Nations may have different social, political and economic goals. For example, counsel for the MNR admitted that one of the other First Nations is logging to a significant extent. It may be that that First Nation would not support the position of Grassy

Narrows on this issue. That however could be dealt with on a motion like this because if there was evidence that other bands were not in favour of the litigation, as the court did in Deans, it could then be "inferred" that a request for funds to support the litigation would be futile. The Okanagan test does not require that everyone who stands to benefit from the litigation be in support of the action.

92 However, what the argument of the defendants does not consider is that if other First Nations agree to contribute to the cost of the litigation they would in no doubt demand some say in how the litigation proceeds. That would require a high level of cooperation and could lead to internal disputes. I do not read the first requirement in Okanagan as going so far as to, in circumstances like these, seek to join in other First Nation bands to this litigation.

93 As Mr. Janes submitted, the Okanagan case illustrates the reality that different groups may make different decisions oil how to advocate and advance their rights. In that case there were originally three sets of proceedings: two claims involving Okanagan First Nations (the Okanagan Indian Band and the Westbank First Nation) and a claim involving a number of Secwepemc First Nations. Westbank, settled with the Crown quite quickly by entering into a forestry agreement with the Crown. The Okanagan band did not; it proceeded with the litigation and ultimately obtained an advance costs order[16].

94 The defendants also suggest that the plaintiffs should pursue the Grand Council of Treaty 3, but on the evidence two requests were made and denied. No reasons were given. There is no evidence to suggest that further attempts would result in funding. As for the research group I accept Mr. Janes' advice that he will try to access this research program for this case. I expect this to be done immediately so their position can be taken into account in the budget.

95 Finally, as for the suggestion that there are other unspecified aboriginal organizations that the plaintiffs should contact, I accept the submission of Mr. Janes that the plaintiffs do no have to provide negative evidence on funding availability for all aboriginal groups and organizations to which they have any connection, when the defendants have provided no evidence that funding might reasonably be available from any specific group.

96 For these reasons therefore, I am satisfied that the plaintiffs do not have any other sources of funds that could reasonably be diverted or obtained to fund this action.

Cost of counsel

97 Although not pursued in oral argument, counsel for the MNR suggests in its factum that Grassy Narrows will increase the costs of the litigation by virtue of its decision to retain Cook Roberts LLP, which is located in Victoria. The Crown does not suggest that the plaintiffs' budget for this trial is misguided. For example, there is no allegation that the length of trial is overestimated or that the experts identified are inappropriate.

98 As counsel for the plaintiffs submits, Okanagan and the cases that have applied it consider the complexity of the proposed litigation. It may be possible to prosecute a simple case with the assistance of counsel acting on a pro-bono basis, at significantly reduced rates, or even possibly without counsel. However, a complex case will require the assistance of counsel, who will likely need specialized knowledge and who will likely require payment at normal or close to normal rates.

99 In this case, the defendants moved to convert the application for judicial review to a trial on a number of bases, including the complexity of the issues raised and the fact that they could not be resolved justly on a summary basis. They successfully argued that the case would require the de-

tailed examination of historical, anthropological and scientific evidence, and the making of difficult legal arguments, and this was one of the reasons that Justice Then converted this matter to an action.[17] In fact many courts have noted the inherent complexity of aboriginal rights litigation which often involves complex factual records and difficult legal questions.

100 Mr. Janes has extensive experience in aboriginal law. This is a specialized area and in my view, a lawyer with special expertise in this area is required to properly advance the plaintiffs' claim. Furthermore, presumably someone like Mr. Janes, who has this kind of expertise, will be able to prepare the case more efficiently. In my view the plaintiffs' choice of Mr. Janes as counsel is reasonable give the nature of this action.

101 The budgeted rates set out in Mr. Janes' budget are approximately in line with the partial indemnity hourly rates established by the old Costs Grid by the Subcommittee of the Rules Committee. The hourly rate will be argued at a later date but it is not suggested by the defendants at this stage that the rates are too high.

102 The only issue remaining then, is the fact that Mr. Janes is from British Columbia. There is no suggestion that the plaintiffs could not retain experience Ontario counsel, but they have chosen Mr. Janes to represent them.

103 As Mr. Janes points out, Ontario counsel would need to fly to Winnipeg to reach Grassy Narrows, which is where extensive work needs to be carried out, and their travel costs would likely not be much less than lawyers coming from Victoria. Furthermore, extra disbursement costs will be small relative to the costs of this action.

104 These issues are really more appropriately dealt with when terms of the order are argued. If at that stage I am persuaded that it is inappropriate for British Columbia counsel to represent the plaintiffs or that the rates proposed are too high, that can be dealt with when the terms of the order for advanced costs are established. It would not be appropriate reject the application for advance costs on this basis.

Scope of the action

105 As already stated, I have come to the conclusion that only a determination of the treaty interpretation/division of powers issue meets the Okanagan test. If the case proceeds with a trial on this issue alone, then only a portion of the costs estimated by Mr. Janes will be incurred. There was no specific evidence before me as to what the estimate for those costs would be and in fairness to counsel, that issue was to be dealt with in the next stage, but I have considered the fact that the threshold treaty interpretation/division of powers portion of the plaintiffs' case would be much less costly to litigate than the action as a whole in considering whether or not the plaintiffs meet the first requirement of Okanagan.

106 Counsel for the MNR referred me to the decision of the British Columbia Court of Appeal in Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)[18] and the criticism by the appeal court of the trial judge who concluded that the applicants met the first requirement of the Okanagan test regardless of the scope of the litigation, given her failure to consider whether a ruling on the narrow issue could be pursued by the applicant.

107 The trial of the treaty interpretation/division of powers issue would be expensive and the funding required would still be significant. Based on the evidence before me I can certainly conclude that a trial limited to the treaty interpretation/division of powers issue would still be a trial

involving the expected complexity of aboriginal rights litigation with a complex factual record including expert evidence and novel legal questions. It is to be noted that on the motion before me the plaintiffs, presumably because of a lack of funds, led no expert evidence. Obviously they would wish to retain experts to respond to the experts called by the defendants. Even with the reduced cost of a trial dealing only with the treaty interpretation/division of powers issue, the cost of that proceeding would not be within a range I could reasonably expect the Grassy Narrows community to find from the Grassy Narrows trust funds. Furthermore, for the reasons already given, I would not require financial contributions from Mr. Fobister or the other couple of band members with some financial resources.

Conclusion on the "impecuniosity" part of the Okanagan test

108 For these reasons, I conclude that the plaintiffs meet the "impecuniosity" part of the Okanagan test.

109 I should add that even if I had concluded that certain members of the Grassy Narrows community such as Mr. Fobister, could reasonably be expected to financially contribute to this litigation or that some portion of the income from the Grassy Narrows trust funds should be applied to the litigation in the future, I would not have dismissed the motion on this basis. By way of example only, in a case where the court determines that the plaintiffs and the members of the representative group can or should be expected to contribute 25% of the costs of the litigation, but could not afford to proceed with the litigation if an advance cost order was not made to cover 75% of the costs, if the other requirements of Okanagan were met, in my view the appropriate decision would be to award reduced advance costs. The plaintiffs in those circumstances would still meet the test of impecuniosity because without the order the action could not proceed.

110 As Mr. Janes points out, the plaintiffs do not seek a costs order covering 100% of their litigation costs, nor are advance cost orders generally meant to achieve this. In Okanagan, the British Columbia Supreme Court made an advance costs order of 50% of special costs (the British Columbia equivalent of substantial indemnity costs).

Is the claim to be adjudicated *prima facie* meritorious?

The Law

111 In Okanagan, the second requirement of the test is stated as follows:

> 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 (at para. 40).

112 In an earlier passage, Justice Lebel describes this condition as follows: "The claimant must establish a **prima facie case of sufficient merit to warrant pursuit ...** 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 (at paras. 36 and 37, emphasis added).

113 The consideration of whether or not the case is of sufficient merit to warrant pursuit is consistent with comments of Lebel J. characterizing the findings of the trial judge in that case, and in particular the view of the trial judge that "although the claim [of the Band] was not so clearly valid

Case Name:

Dish Network L.L.C. v. Rex

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
And 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
And 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

[2011] B.C.J. No. 1557

2011 BCSC 1105

Dockets: S094747, S084517 and S085635

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

P.W. Walker J.

Heard: January 11-13, 2011.
Judgment: August 15, 2011.

(328 paras.)

Civil litigation -- Civil procedure -- Costs -- Particular orders -- Special orders -- Application by the defendant Rex for an order for advance costs allowed -- Rex sold Canadian residents subscriptions to foreign encrypted satellite television signals -- He was seeking to strike certain provisions of the Radiocommunication Act which he claimed contravened section 2(b) of the Charter -- Rex was impecunious and lacked the funds necessary to pursue his Charter challenge -- Furthermore, Rex demonstrated a prima facie case of merit as there was a restriction of freedom of expression -- The issues raised by the Charter challenge were of public interest and would affect a broad segment of the Canadian population.

Constitutional law -- Constitutional proceedings -- Practice and procedure -- Costs -- Considerations -- Application by the defendant Rex for an order for advance costs allowed -- Rex sold Canadian residents subscriptions to foreign encrypted satellite television signals -- He was seeking to strike certain provisions of the Radiocommunication Act which he claimed contravened section 2(b) of the Charter -- Rex was impecunious and lacked the funds necessary to pursue his Charter challenge -- Furthermore, Rex demonstrated a prima facie case of merit as there was a restriction of freedom of expression -- The issues raised by the Charter challenge were of public interest and would affect a broad segment of the Canadian population.

Application by the defendant Rex for an order for advance costs. Rex ran a grey market satellite business, selling to Canadian residents subscriptions to encrypted satellite television signals provided by two companies in the United States. Those two companies, along with Bell ExpressVu, commenced separate proceedings against Rex, seeking injunctive relief and statutory and common law damages. Rex was seeking to fund a challenge pursuant to the Charter in which he was seeking to strike down certain provisions of the Radiocommunication Act. He took the position that the provisions contravened section 2(b) of the Charter by prohibiting Canadian residents from accessing expression from foreign broadcasters transmitting satellite television programming through encrypted signals. Rex submitted that he lacked the financial resources necessary to pursue a Charter challenge and that without the order sought an injustice would result as he would be unable to litigate a meritorious constitutional question of importance to a great number of Canadian residents. The respondents took the position that there was no merit to Rex's claim that the Charter had been breached and that Rex had failed to establish that he lacked the financial means to fund the litigation. The respondents further submitted that the claim was not of sufficient public importance to warrant an exceptional award of advance costs.

HELD: Application allowed. Rex was impecunious and had already paid approximately $326,700 in legal fees to fund his defence. He sold all of his RRSPs, engaged in fundraising efforts and tried unsuccessfully to find lawyers who would take his case on a pro bono basis. Rex therefore lacked the funds necessary to pursue his Charter challenge, which would not be able to proceed in any meaningful matter without an order for advance costs. Furthermore, Rex demonstrated a prima facie case of merit as the combined effect of the relevant Order in Council and section 9 of the Radiocommunication Act prevented Canadian residents from accessing programs related to their cultural

heritage available only from foreign broadcasters. As such, one effect of section 9 of the Radiocommunication Act was to restrict freedom of expression. The issues raised by the Charter challenge were of public interest as they related to the nature and scope of the right to freedom of expression in Canada. The issues would also affect a broad segment of the Canadian population. It was therefore appropriate to order an award of advance costs to pursue a narrower challenge, namely the combined effect of the Order in Council and the Radiocommunication Act. The quantum of advance costs would be determined on a step-by-step basis, with preliminary funding in the amount of $35,000 to be provided to Rex.

Statutes, Regulations and Rules Cited:

Broadcasting Act, S.C. 1991, c. 11, s. 2(3), s. 3, s. 26(c)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2(b), s. 15

Constitutional Question Act, RSBC 1996, CHAPTER 68, s. 8(2)

Copyright Act, R.S.C. 1985, c. C-42,

Criminal Code, R.S.C. 1985, c. C-46, s. 326, s. 327

Limited Partnership Act, R.S.O. 1990, c. L-16,

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 2, s. 9, s. 9(1)(c), s. 9(1)(d), s. 10(1)(b), s. 10(2.1), s. 10(2.5), s. 18(1)

Supreme Court Civil Rules, Rule 9-7, Rule 14-1(9)

Counsel:

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.

Reasons for Judgment

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> 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 con-

> sidered 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*, [1988] O.J. No. 271; *R. v. Rain*, [1998] A.J. No. 1059. 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*, [1992] 1 S.C.R. 212. 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 for judgment in view of the submission by counsel for Mr. Rex that special circumstances exist in this case.

V. FACTS

A. Encrypted Broadcasting Signals

75 The nature of the encrypted broadcasting signals at issue in this case was the subject of comment by the Supreme Court of Canada in *Bell ExpressVu.* There, Mr. Rex was a party to protracted litigation that was brought in British Columbia. Bell sought to enjoin Mr. Rex and his business from engaging in essentially the same grey market activities that are in issue in this case.

76 Mr. Rex raised a *Charter* issue in his defence for the first time when the case was argued before the Supreme Court of Canada. Submissions were made to the effect that s. 9(1)(c) of the *Radiocommunication Act* offended *Charter* values. The Court dismissed Mr. Rex's case. In doing so, the Court stressed its holding from prior cases that to the extent that a "*Charter* values" interpretive principle exists it is restricted to "circumstances of genuine ambiguity" (which the Court found was not the case on Mr. Rex's appeal): *Bell ExpressVu* at para. 62.

77 Although the Court found against Mr. Rex, it left the door open for a *Charter* challenge to be brought when a proper evidentiary record was established:

> [60] Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication* Act. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

...

> [67] It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(*c*) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(*c*), and, if they are, whether they are justified under s. 1.

78 The lower courts held that s. 9(1)(c) applied only to the black market, i.e., to theft of signals from "lawful distributors" in Canada, and had no application to Canadians who paid for subscriptions to signals emanating from distributors outside of the country: [1999] B.C.J. No. 3092 (S.C.), aff'd 2000 BCCA 493. The Court of Appeal determined that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin.

79 The Supreme Court of Canada determined otherwise. It held, at para. 16, that Parliament chose to regulate signals transmitted by "parties who are authorized by Canadian law to do so." The Court explained, at para. 33, that the "forbidden activity is decoding", so that "the prohibition is ... directed towards the reception side of the broadcasting equation". [Emphasis in original]

80 Decoding permits an encrypted satellite signal to be received and viewed on a television set.

81 The method of broadcasting at issue in *Bell ExpressVu* is commonly referred to as "direct to home" ("DTH") broadcasting. DTH broadcasting relies on satellite technology to transmit television programming signals. The nature of DTH broadcasting was described in detail in *Bell ExpressVu* by Iacobucci J. at para. 4:

> DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying "slots" assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth's surface, covering an area referred to as a "footprint". The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

82 DTH broadcasting is regulated by international convention. DTH encryption makes regulation by the *Radiocommunication Act* possible. Otherwise, it would be impossible to prevent Canadian residents from accessing the programming (just as "free to air" signals, picked up by ordinary television antennas, cannot be regulated).

83 The broadcasting at issue in the present case is also DTH broadcasting.

84 Dish and DIRECTV are DTH satellite-based subscription program providers. They are licensed by the United States Federal Communications Commission to broadcast their services in the United States and its territories, including Puerto Rico and the U.S. Virgin Islands. They broadcast

to Mexico and Central and South America (together, "Latin America") through related companies. They are not licensed to broadcast in Canada. Dish and DIRECTV do not offer their services for sale in Canada. Dish and DIRECTV hold copyrights and licenses from content providers to sell some (though not the majority) of their broadcast signals in Canada.

85 Dish and DIRECTV purchase distribution rights for most of their DTH programming from program providers such as network affiliates, pay and specialty broadcasters, cable networks, motion picture distributors, sports leagues, event promoters, and other program rights holders.

86 Bell is the larger of two Canadian DTH satellite-based subscription television programming providers licensed by the CRTC under the *Broadcasting Act*. Shaw Direct is the other. Counsel advised that Bell and Shaw Direct are the only two lawful distributors of DTH programming to Canadian residents.

87 Bell holds copyrights and licenses to sell its signals in Canada. It sells some, but not all of the programming offered by Dish and DIRECTV.

88 Because of the Order in Council, neither Dish, DIRECTV, or any other foreign broadcaster is able to obtain a license to distribute DTH programming in Canada.

B. Access to American DTH Programming by Canadian Residents

89 In order to access DTH programming, customers must purchase or lease receiving equipment to decode the signals. Once the signal is decoded, customers can watch the programming. The receiving equipment consists of a satellite receiver and a satellite dish. DTH broadcasters generally use different hardware designed to access their signals.

90 Many DTH broadcasters use a "smart card" decoding system. The card resembles a credit card, and contains a computer chip. It is attached to the receiving equipment. The smart card is programmed to control decoding so that customers may only view signals they have paid for.

91 The programming content of DTH programming consists of news, information, cultural, sports, and entertainment programs.

92 Canadian residents purchased receiving equipment from Mr. Rex who lawfully imported that equipment from the United States. Mr. Rex purchased the receiving equipment directly from vendors in the United States.

93 Mr. Rex's customers are Canadian residents. A large number of them are ethnic and elderly and wish to maintain links with their culture and heritage. Many of those customers bought DTH programming in their native language that is not otherwise available for viewing from existing licensed providers of encrypted broadcasting signals in Canada.

94 Dish offers multiple television channels in the following languages and cultures: Arabic, Armenian, Bangla, Brazilian, Cantonese, Filipino, French, German, Greek, Gujarati, Hindi, Israeli/Hebrew, Italian, Japanese, Kannada, Korean, Malayalam, Mandarin, Polish, Portuguese, Punjabi, Russian, Taiwanese, Tamil, Telugu, Ukrainian, Urdu, Vietnamese, and Spanish.

95 Mr. Rex also deposed that DIRECTV offers multiple channels in the following languages and cultures: Brazilian, Cantonese, Filipino, Greek, Korean, Mandarin, Russian, Spanish, South Asian, and Vietnamese. Mr. Rex highlights the breadth of foreign language and cultural content offered by DIRECTV by pointing to its international programming literature, which lists 47 Spanish channels that are available to its subscribers.

96 There is no evidence before me concerning the regulatory regime in the United States and Latin America.

97 Mr. Rex's evidence, which was not challenged by the respondent broadcasters ("Broadcasters"), is that Bell and Shaw Direct offer much less foreign language programming than Dish and DIRECTV.

98 Mr. Rex's customers paid a premium to watch programming from Dish and DIRECTV through subscriptions. To do so, they had to provide a false address in the United States. Unlike the black market, where signals are pirated, these Canadian customers paid Dish and DIRECTV to access their DTH program signals on a monthly or annual basis.

99 Mr. Rex's position is that Dish and DIRECTV knew or had the means to know that Canadian residents were purchasing their DTH programming. Mr. Rex's evidence is that Dish and DIRECTV charged their subscription fees to Canadian customers' credit cards monthly or annually.

100 Although Dish and DIRECTV took issue with that evidence, the affidavit evidence of Gavin Phillips, an investigator licensed by the Ministry of Community Safety and Correctional Services of Ontario, reveals that Mr. Phillips used his Canadian credit card to pay Dish for its DTH programming. Mr. Phillips' firm, King-Reed & Associates, was retained by Dish to investigate the operations of Mr. Rex and his businesses. His affidavit was filed in opposition to Mr. Rex's application for advance costs. Mr. Phillips used a fictitious name and address to purchase DTH programming and equipment from Dish through Can-Am Satellites. Mr. Phillips used a Canadian credit card, issued in that fictitious name, to pay Can-Am for the services it provided. His credit card invoice shows that the DTH subscription fee charged by Dish was billed to his credit card by Dish.

101 Mr. Rex's customers also obtained from him a device known as an "auto-redialer", which allowed them to contact a U.S. program provider without being detected as calling from a telephone number in Canada. Mr. Rex charged his customers an annual agency fee of $85 as well as a $10 call fee when customers sought to change their program channels.

102 Mr. Rex's evidence, which was not challenged by the Broadcasters, is that his customers have not used Can-Am's services to save money. At paras. 18, 19, and 22 of his affidavit sworn on August 30, 2010 ("August affidavit"), Mr. Rex deposed:

> 18. Generally, the cost of subscribing to American DTH broadcasting through Can-Am was more expensive than the cost of Canadian DTH broadcasters. I have regularly spoken to customers who advised me and I verily believed that used our services not to save money but rather to access news, sports and cultural programming in their own language.
> 19. Many of Can-Am's customers including Fernando Franco told me, and I verily believe, that they used our services in order to keep in touch with their country of origin and to maintain their heritage. I am aware that Fernando Franco filed an affidavit in this action. Although my counsel had been working with him in the preparation of an affidavit, it was not finalized and he filed his affidavit without my direction. Nevertheless, it accurately describes the point I make above and I rely on it in this application.
>
> ...

22. I also had customers, who advised me and I verily believed that they used our services because they wished to access programming related to their religious beliefs that is not otherwise available in Canada. For example, one of my customers, Jeanette Reid, advised me that she used our services so that she could access programming from her church, which is broadcast on a channel that is available through American DTH broadcasters, but not offered by the Canadian DTH broadcasters. I believed her statement to be true.

103 Mr. Franco was 82 years old when he swore his affidavit on June 21, 2010 in support of Mr. Rex's efforts to pursue his *Charter* challenge. The Broadcasters did not challenge Mr. Franco's evidence, which is that:

(a) he emigrated to Canada from Portugal on May 7, 1928;
(b) an interim injunction that I granted in August 2009 "greatly restricts" the amount of Portuguese television programming that he and others like him are able to receive;
(c) the population of Canadians of Portuguese descent is approximately 1.2% of the Canadian population (over 350,000 people);
(d) the Portuguese community in Canada has a large number of social, cultural, sports, and religious organizations (he is personally involved in some);
(e) approximately 15 years ago, he learned that Portuguese television programming was available in Metro Toronto and Montreal, but not Vancouver (Bell did not offer it in British Columbia);
(f) he became a client of Mr. Rex in 1996 in order to subscribe to television programs from Portugal and Brazil offered by Dish;
(g) Dish's programs included information about many religious, sports, and cultural events that are not reported in Canada;
(h) when the August 2009 injunction was issued, he lost that ability to view programming;
(i) he telephoned Shaw Direct and learned that it was not possible to view through their broadcasting the Portuguese channels offered by Dish;
(j) he has felt cut off from news, culture, and sports in Portugal;

and

(k) without access to a reasonable variety of Portuguese programming, he feels that his culture, language, and ethnic background are not respected and accommodated in Canadian society.

104 Mr. Franco attached to his affidavit a petition supporting Mr. Rex's *Charter* challenge, which is signed by approximately 400 members of the Portuguese community in Vancouver following a campaign run by the Portuguese Club of Vancouver and the Portuguese Canadian Seniors Foundation.

105 DTH programming offered by licensed Canadian broadcasters is primarily in English and in French.

ALBERTA LAW REPORTS

SECOND SERIES

Reports of Selected Cases from the Courts of Alberta and Appeals

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CROTHERS v. SIMPSON SEARS LTD; ATTORNEY GENERAL OF ALBERTA (Intervener)

[Indexed as: **Crothers v. Simpson Sears Ltd.**]

Court of Appeal,
Irving, Cote and Bracco JJ.A.

Judgment – May 10, 1988.

Costs – Security for costs – Jurisdiction and discretion – Non-resident plaintiff ordered to post security for costs pursuant to R. 593(1)(*a*) – Rule not violating ss. 6 and 15 of Charter and justifiable under s. 1 of Charter in any event – Court discussing reasons behind cost rules.

Civil liberties and human rights – Equality rights – Equality before the law – Non-resident plaintiff ordered to post security for costs pursuant to R. 593(1)(*a*) – Rule not violating ss. 6 and 15 of Charter and justifiable under s. 1 of Charter in any event – Court discussing reasons behind cost rules.

Civil liberties and human rights – Mobility rights – Non-resident plaintiff ordered to post security for costs pursuant to R. 593(1)(*a*) – Rule not violating ss. 6 and 15 of Charter and justifiable under s. 1 of Charter in any event – Court discussing reasons behind cost rules.

Constitutional law – Constitution Act, 1982 – Charter of Rights and Freedoms – Validity of legislation – Alberta R. 593(1)(*a*), security for costs from non-residents – Rule not violating ss. 6 and 15 of Charter and justifiable under s. 1 in any event.

Civil liberties and human rights – Enforcement under Charter of Rights and Freedoms – Scope and interpretation of Charter – Limitations on guaranteed rights and freedoms – Public purposes of legislation justifiable under s. 1 of Charter including objectives and interests of citizens – Fair system of justice to settle private disputes being prime public objective of civilized society – Rule respecting posting of security for costs of litigation justifiable under s. 1 of Charter.

The plaintiff, an Ontario resident, sued the defendant in Alberta. The plaintiff was ordered to post $1,300 security for costs and he appealed, claiming that

R. 593(1)(*a*), requiring non-residents to post security for costs, violated ss. 6 and 15 of the Charter.

Held – Appeal dismissed.

There is a long tradition of ordering security for costs to protect defendants from plaintiffs who want to gamble and collect if they win, but not pay if they lose. A successful defendant will have trouble collecting costs from a non-resident, and there are numerous difficulties in suing on an Alberta judgment for costs in some other provinces. Furthermore, reciprocal enforcement Acts do not give an Alberta party any substantive rights and are of little relevance to security for costs.

Also, a non-resident will not lose his suit simply because he cannot post security, as each case is judged on its own merits, following a ten-step sorting process. The rule for security is just and discretionary. In addition, there are exceptions and qualifications such that an order for security for costs might not issue against a non-resident, and many Alberta residents must also give security under the rules and various statutes.

Rule 593(1)(*a*) does not violate s. 15(1) of the Charter, as it does not involve any discrimination or inequality. Using any possible definition, however wide or lax, the maximum extent of forbidden discrimination must involve a less favourable legal position because of some insufficient criterion.

The fact that a plaintiff is a non-resident is both relevant and sufficient to justify security for costs. The large number of exceptions and qualifications to security for costs against non-residents and the large number of grounds for security against residents show that their legal positions are not clearly different.

The argument that R. 593(1)(*a*) violates s. 6(2) of the Charter must also be rejected, as the issue here did not concern where the plaintiff would live or work. Finally, the rule can be justified under s. 1, as the end sought is important and proper and the means used are rational, proportional and individually tailored to do as little harm as possible in each case.

It cannot be said that s. 1 can only be used for public purposes and that the protection of one litigant from another does not suffice. If the Charter could only be used to advance public or government objectives, and not those of its citizens, then the Charter would have the opposite effect to that for which it was enacted. A free and democratic society's objectives do not ignore civil lawsuits, and a fair system of justice to settle private disputes is a prime public objective of civilized societies.

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Andrews v. Law Soc. of B.C., [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600, 23 C.R.R. 273 (C.A.) [leave to appeal to S.C.C. granted [1987] 1 W.W.R. lxviii, 7 B.C.L.R. (2d) xli, 23 C.R.R. 273n] – referred to.

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RR. 430-435
R. 469
R. 492
R. 493
R. 524
R. 577.2
R. 578(4)
R. 593(1)
R. 594
R. 595
R. 596
R. 597
Supreme Court Rules (English)
O. 4, r. 1
O. 14, r. 4
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O. 71, r. 4
para. 2003

Authorities considered

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32 C.J. "Injunctions", 310-19.

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Dicey and Morris, Conflict of Laws, 10th ed. (1980), vol. 2, pp. 1101, 1194, 1196, 1197.

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Orkin, Law of Costs, 2nd ed. (1987), paras. 502, 503.1, 503.3, 511.1.
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Spry, Equitable Remedies, 3rd ed. (1984), pp. 467-68.
Williams, Practice of the Supreme Court of Victoria, 2nd ed. (1973), vol. 2, p. 2462, para. 65.6.14.
Williston and Rolls, Law of Civil Procedure (1970), vol. 1, pp. 577-78.

Canadian Encyclopedic Digest (West. 3rd) Classification

Costs
XVII. 1. a.
XVII. 3. b.
Human Rights
VIII. 7.
VIII. 9.
VIII. 14.

Canadian Abridgment (2d) Classification

Constitutional Law
XXIV. 1. a.
XXIV. 1. d.
XXIV. 1. f. i.
Practice (Revised)
XXI. 4. d. i. A.

APPEAL from order of Berger J. (sub nom. *Singh v. Dura*), 52 Alta. L.R. (2d) 62, [1987] 4 W.W.R. 549, 19 C.P.C. (2d) 282, 38 D.L.R. (4th) 15, 80 A.R. 347, requiring plaintiff to post security for costs.

P.G. Lister, for plaintiff.
R.J. Normey, for intervener, Attorney General of Alberta.
No one contra.

(Edmonton Appeal No., 8703-0456-AC)

May 10, 1988. The judgment of the court was delivered by

COTE J.A.:—

I. *Introduction*

The plaintiff resides in Ontario and sues the defendant for a leg twisted in a fall. The Court of Queen's Bench of Alberta on motion by the defendant ordered the plaintiff to post $1,300 security for costs. (The order appealed from is reported as *Singh v. Dura*, 52 Alta. L.R. (2d) 62, [1987] 4 W.W.R. 549, 19 C.P.C. (2d) 282, 38 D.L.R. (4th) 15, 80 A.R. 347.)

Whether R. 593(1)(*a*) requiring non-residents to post security for

costs survives the Charter of Rights and Freedoms is the only issue. The plaintiff questions only whether that subrule may validly require security for costs from poor residents of other provinces and territories of Canada. He concedes that the order for security appealed from is otherwise proper. The defendant Simpson Sears did not take part in the appeal, but the Attorney General of Alberta intervened and presented full argument.

This judgment will show that costs are very hard to collect from a non-resident (Pt. II), and that a poor but meritorious plaintiff will not lose his suit for failure to post cash (Pt. III), and that resident plaintiffs have to post security too (Pt. V). It will conclude by discussing the Charter (in Pts. VI to VIII).

The discussion must start with how security for costs works and interlocking topics such as enforcement of judgments in other provinces, for two reasons. The first is to avoid sterile abstract theorizing. Constitutional challenges to costs rules need factual underpinnings: *Re Danson and A.G. Ont.* (1987), 60 O.R. (2d) 676, 19 C.P.C. (2d) 249, 41 D.L.R. (4th) 129, 22 O.A.C. 38 (C.A.). The second is because the plaintiff criticizes features of the security for costs procedure which in my opinion do not exist.

II. *A successful defendant will have more trouble collecting costs from a non-resident*

A. The defendant's position

The plaintiff would concentrate on his own position as plaintiff. But almost everything else in civil procedure balances the interests of both parties, plaintiff and defendant. This cannot be accomplished, and grave injustice will result, if we look at the interests of only one party when ruling on security for costs. The issue here is not government vs. citizen, but citizen vs. citizen.

Often a defendant is not wealthy and the taxable court costs which he will be awarded if he wins the lawsuit against him are only a small fraction of the legal bill that he will incur, not to mention the other expense and inconvenience he will sustain through being sued.

B. Execution of judgment if plaintiff lives here

If a resident plaintiff loses his suit, within two hours of *pronouncement* of a judgment for costs in his favour the successful defendant can levy execution, filing writs against land and chattels, and garnishing bank accounts or wages. Within a few more days he

can examine the plaintiff under oath as to his assets. Indeed, the defendant may even be able to have the sheriff effect seizure within a few days. None of that requires leave, or consent, or any waiting period. The chance of the plaintiff's being able to hide or transfer his assets away is small. (Defendants sometimes see the inevitable coming and hide their assets, but few plaintiffs go to trial expecting to lose.)

Now contrast that with a case where the defendant sues a non-resident plaintiff on his judgment for costs, or where he applies to register his judgment in the plaintiff's home province. Any legal régime to enforce judgments in other provinces involves inherent difficulties. Logistics dominate.

C. Suit on costs judgment in plaintiff's province

It is impossible to sue on an Alberta judgment for costs in Manitoba: *Koven v. Toole* (1954), 13 W.W.R. 444 (Man. C.A.); *Paslowski v. Paslowski* (1957), 65 Man. R. 206, 22 W.W.R. 584, 11 D.L.R. (2d) 180 (Q.B.). I doubt that this is the law of Alberta: see *Cavanagh v. Lisogar* (1956), 19 W.W.R. 230 (Alta. Dist. Ct.); Gordon (1954), 32 Can. Bar Rev. 1146 [case comment: *Koven v. Toole*]; *Deutsche Nemectron GmbH v. Dolker* (1984), 51 B.C.L.R. 162, 41 C.P.C. 269 (S.C.). But the *Koven* doctrine is a complete barrier in Manitoba and maybe one or more other provinces.

If it is possible to sue on a judgment for costs, what steps and time are involved? The successful defendant who sues the former plaintiff in the other province may be forced to put up security for costs: Daniell's Chancery Practice, 8th ed., vol. 1, p. 68; *Crozat v. Brogden*, [1894] 2 Q.B. 30; cf. *Lockett v. Solloway Mills & Co.* (1932), 41 O.W.N. 24. So security for costs in the initial suit involves less discrimination and more poetic justice than appears at first blush. The new defendant (former unsuccessful plaintiff) may well defend the new suit, thus delaying judgment for some months, even if the judgment creditor moved for summary judgment.

How to sue elsewhere on an Alberta judgment is still relevant, for Alberta's reciprocal enforcement of judgments arrangements do not cover all the provinces of Canada. The question is one of different courts, not different countries. It is so even in a unitary state with different courts such as the United Kingdom, or pre-Confederation Canada: *McDonald v. Dicaire* (1859), 1 Ch. Cham. 34 (Ont.). Before the Judicature Acts, English courts ordered security against those resident in Ireland or Scotland: Daniell, vol. 1. A fortiori in Canada.

D. Reciprocal enforcement legislation

Some cases say that reciprocal enforcement Acts should influence security for costs: see *Frank v. Commr. of N.W.T.*, [1985] N.W.T.R. 149 (S.C.) (apparently misreading annotations to the Alberta rules); cases cited in *McCormack v. Newman* (1983), 35 C.P.C. 298 at 301-302 (Ont. Master). However, I do not consider such legislation at all important, because it still places or leaves barriers described below.

Reciprocal registration of a costs judgment is also impossible in Manitoba: *Koven v. Toole*, supra. Another province may also follow that questionable decision. Once again, the winning Alberta defendant may have to give security for costs to the losing Ontario plaintiff: (English) Supreme Court Practice 71/4/1; *Kohn v. Rinson*, infra; Castel [Canadian Conflict of Laws, 1st ed., vol. 1] (1975), p. 551. (It is otherwise in British Columbia: id. at pp. 551-52.)

The reciprocal enforcement Acts of several provinces expressly allow the losing judgment debtor to retry the whole lawsuit on the merits. The losing plaintiff can there argue again that the Alberta judge was wrong, and make the winner prove his case all over: Castel, pp. 471-78 (1975); p. 269, note 191 (2nd ed. (1986)). And some mistaken cases elsewhere produce the same result: id. at pp. 269-70 note 192 (2nd ed.), and pp. 489 ff., 523, 549 (1st ed.). That is not the law in Alberta or in most provinces, but it poses a great delay, expense, and risk in some provinces.

It is instructive to look at the Reciprocal Enforcement of Judgments Act of Ontario (R.S.O. 1980, c. 432), which is where this plaintiff lives. If a successful defendant in Alberta tries to use it, he will spend some days selecting an Ontario lawyer and learning the right forms. Ontario's Act requires an *entered* formal Alberta judgment, which can take weeks. Then he must get papers certified in Alberta and send them to Ontario for filing there. (On the formalities of proof, cf. Castel, pp. 518 ff. (1975).) The Ontario statute (s. 3(*e*)) freezes all action during the Alberta appeal period plus the term of any appeal. The creditor must (by s. 5) find and personally serve the judgment debtor (former plaintiff) in Ontario; no address for service suffices. During a further month the debtor (former plaintiff) may apply to the Ontario court to cancel the registration (s. 6). Even purely spurious objections which ultimately fail will occupy further weeks at least; if there are examinations on affidavits and so forth, it will take months. This process involves adjudication and disputes, even a trial; it is far from automatic: *Kohn v. Rinson & Stafford (Brod.) Ltd.*, [1948] 1 K.B. 327, [1947] 2 All E.R. 839. So the winning Al-

berta defendant cannot enforce his judgment in Ontario for months, maybe many months.

One must distinguish reported English cases. Canadian reciprocal enforcement Acts are very different from the automatic incontestible registration of judgments between England, Scotland and Ireland: *Jorgenson v. Reid*, [1932] 3 W.W.R. 250 at 253-54 (Sask. C.A.); *Kohn v. Rinson*, supra; *Factory Tire & Rubber Co. v. Timac Tire Sales Ltd.* (1979), 9 Alta. L.R. (2d) 193 at 195, 17 A.R. 49 (T.D.); Dicey and Morris, Conflict of Laws, 10th ed. (1980), vol. 2, pp. 1101, 1196. Cases relying on reciprocal enforcement arrangements for security for costs questions thus misread the English cases: Banfai (1980), 2 Adv. Q. 334 ["The Effect of Reciprocal Enforcement of Judgments Legislation on Obtaining Security for Costs"].

After all this delay, the execution debtor's assets may be hard to find. During these months a losing plaintiff could presumably hide his assets or make it very difficult to attach them. Furthermore, the judgment creditor (former defendant) must work across thousands of miles trying to instruct lawyers in a province he did not choose with no connection to the original lawsuit. The solicitor-and-client legal bills for this new process will normally exceed the original unpaid party-and-party costs judgment. So it may be completely uneconomical to register that judgment in Ontario.

Reciprocal Enforcement Acts do not give the Alberta party any substantive rights, and are of little relevance to security for costs: *Fraser v. Wainwright Dome Oil Co.*, [1927] 1 W.W.R. 523, [1927] 2 D.L.R. 314 (Alta. T.D.); *Factory Tire v. Timac*, supra; *Jorgenson v. Reid*, supra; *Aeronave S.P.A. v. Westland Charters Ltd.*, [1971] 1 W.L.R. 1445 at 1449, [1971] 3 All E.R. 531 (C.A.). See also Orkin, Law of Costs, 2nd ed. (1987), para. 503.3. Therefore I do not agree with the suggestion in *Kask v. Shimizu*, 44 Alta. L.R. (2d) 293, [1986] 4 W.W.R 154 at 170, 28 D.L.R. (4th) 64, 69 A.R. 343 (Q.B.), that the defendant's concern over recovering his costs is no more pressing and substantial when the plaintiff lives elsewhere than when he lives here.

III. *A deserving non-resident will not lose by inability to post cash*

A. Preliminary

Now I will turn to the plaintiff's position. The plaintiff alleges (citing *Kask v. Shimizu* at p. 156) that ordinarily a non-resident must give security without further debate. I disagree. The plaintiff also suggests that a poor non-resident will lose his suit just because he can-

not post security. Nor do I accept that suggestion. Security or dismissal is unlikely to hinge on non-residence, because the courts and parties weed out most demands by a defendant for security for costs or dismissal for want of it. Each such case must survive the 10-step sorting process outlined in points B to K below.

B. Chosen forum

Every non-resident plaintiff chooses Alberta as his forum. Canadian courts are now slow to strike out suits for choice of the wrong forum, so the forum is rarely imposed. The defendant, Simpson Sears Ltd., could be sued in any province where they carry on business or are registered. In theory a plaintiff should sometimes sue where he can serve the defendant because service out of the jurisdiction will not found a judgment which can be enforced elsewhere. In fact, however, very few defendants have the courage or the lack of assets to ignore a suit against them in another province. So the plaintiff usually freely chooses the forum.

C. Plaintiff can afford to sue

It is almost impossible for a non-resident to sue without a lawyer. That is because of the practicalities of life, not because of any law or rules. A lawyer, court reporters and experts all cost far more than security for costs would, so what is the practical impact of security? Security for costs never exceeds (and may be less than) estimated party-and-party costs, which are rarely more than a fraction of solicitor-and-client costs on one side: cf. (English) Supreme Court Practice 23/1-3/22. So the security, but a drop in the total bucket of litigation expenses, is highly unlikely to be the prohibitive expense. Indeed here someone told the judge that this plaintiff's

> . . . trial was adjourned due to the inability of the plaintiff to bear the cost of an expert witness attending at trial [p. 552 W.W.R.].

It is ironic that the plaintiff retains a lawyer to fight anew before the Court of Appeal this involved constitutional issue of legislative validity, all to avoid posting security worth $1,300, and whose amount is admitted to be proper in this case.

D. Arguable defence

The defendant now cannot get security unless he swears positively and shows that he has a defence to whole suit: R. 594. The plaintiff can cross-examine the defendant on that affidavit. A host of authorities hold that the court then may go into the merits and conclude that the claim sounds well founded, or that the defence is weak

or unlikely to succeed completely: see, for example, *Mackley v. Univ. of Alta. Gov.*, [1933] 2 W.W.R. 330 at 342, 345, [1933] 3 D.L.R. 726 (Alta. C.A.); *Mangold v. 330002 Ont.* (1986), 57 O.R. (2d) 716 at 719, 721 (H.C.); 37 Halsbury's Laws (4th ed.), 230-31, para. 304 *Mortimer v. Inuvialuit Reg. Corp.*, [1987] N.W.T.R. 228 at 231 (S.C.); *Simaan Gen. Contr. Co. v. Pilkington Glass Ltd.*, [1987] 1 W.L.R. 516 at 520, [1987] 1 All E.R. 345; Orkin, paras. 502, 503.1(2)(d); cf. *Gusky v. Rosedale Clay Prod.*, [1917] 2 W.W.R. 441 at 442, 34 D.L.R. 727 (Alta. C.A.) (appeal). Contrary cases probably rely on outdated decisions before R. 594: *Mackley* case, supra, at pp. 332, 346; cf. Dicey and Morris, 11th ed. (1987), p. 195. In deciding whether to order security, the court looks at the nature of the defence: *Booth Const. Ltd. v. Estabrook Const. Ltd.* (1987), 55 Alta. L.R. (2d) 157 at 165, 83 A.R. 333 (Q.B.). The Alberta Business Corporations Act (S.A. 1981, c. B-15, ss. 184(11), 193, 223(3), 235(3)) also exempts certain classes of plaintiff from having to furnish security for costs.

E. No assets in Alberta

Rule 595 and many decided cases deny security if the plaintiff has sufficient exigible assets in Alberta, or if he brings any to, or creates any in, Alberta. See Seton's Forms of Judgments and Orders, 5th ed. (1891), vol. 1, p. 28; Chitty's Archbold, 14th ed. (1885), vol. 1, p. 397.

F. General "discretion" of the court

Courts should not automatically order security for costs. The history of the rule is carefully reviewed in *Launer v. Sommerfeld* (1964), 48 W.W.R. 224, 45 D.L.R. (2d) 293 (B.C.S.C.). Since the 1700's the courts have given or withheld security because of the justice of the individual case, and the modern rule was worded to reverse a decision casting doubt on that principle: ibid. The word "may" in R. 593(1) is permissive not mandatory: Alberta Interpretation Act, ss. 25(1)(*e*), 25(2)(*c*); (English) Supreme Court Practice, para. 2003; *A.G. v. Emerson* (1889), 24 Q.B.D. 56 at 58 (C.A.); *Sir Lindsay Parkinson & Co. v. Triplan Ltd.*, [1973] 1 Q.B. 609, [1973] 2 W.L.R. 632, [1973] 2 All E.R. 273 at 285 (C.A.). Many authorities hold that security is "discretionary", i.e., that the court looks at the justice of the individual circumstances. See, for example, *Mackley v. Univ. of Alta.*, supra, at pp. 332, 341; *Vollenga v. Berry* (1962), 39 W.W.R. 319 at 320 (Alta. C.A.); *Aukema v. Bernier Kitchen Cabinets Inc.*, 53 Alta. L.R. (2d) 78, [1987] 5 W.W.R. 122, 19 C.P.C. (2d) 295, 38 D.L.R. (4th) 146, 80 A.R. 354 (Q.B.); Williston and Rolls, Law of Civil Procedure, (1970), vol. 1, p. 577; 37 Halsbury's Laws (4th ed.), 230-31, para. 304; *Aeronave v. Westland*, supra; 2 Holmested and Gale,

R. 373, paras. 3, 4; Orkin, at para. 502; (English) Supreme Court Practice, 23/1-3/2A, 3.

The plaintiff does not quarrel with this view, and indeed asks this court to reaffirm it; he says he would be content with a rule of justice and "discretion".

G. A poor plaintiff

Of course it is not enough for the plaintiff to allege vaguely that he is poor; he must give evidence of it: *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 (B.C.C.A.); *Smith Bus Lines Ltd. v. Bank of Montreal* (1987), 61 O.R. (2d) 688, 20 C.P.C. (2d) 38 (H.C.). This plaintiff made very little attempt in his affidavit to prove poverty (despite what he seems to have told the chambers judge about the cost of experts), and his counsel does not wish to argue that point.

If a plaintiff shows that he cannot get any assets, and his action sounds well founded, a security for costs order is highly unlikely. Many authorities say this, among them *Vollenga v. Berry*, supra; *Proniuk v. Petryk*, [1933] 1 W.W.R. 648, affirmed [1933] 3 W.W.R. 223 (Alta. C.A.); Williston and Rolls, op. cit., at pp. 577-78; *Holly Homes Ltd. v. Euchner*, [1986] N.W.T.R. 289 at 292-93, 13 C.P.C. (2d) 84 (S.C.); *Mangold v. 330002 Ont.*, supra, at pp. 719-20; *Leathem v. Indelco Fin. Corp.*, 31 Alta. L.R. (2d) 178, [1984] 4 W.W.R. 359, 52 A.R. 388 (C.A.); cf. *Gusky v. Rosedale*, supra, at p. 442. While two of the judges in the *Mackley* case, supra, questioned that proposition (at pp. 342, 343), they were a minority of the court (and only half of the majority); and their statements on the point were plainly obiter, for the court there refused to order security. Therefore, I do not agree with the suggestion (in *Kask v. Shimizu*, supra, at p. 164) that in Alberta it is unlikely that the court would ever refuse to order security from a non-resident.

The plaintiff's partial poverty is also a ground for greatly reducing the amount of the security: *Melbourne v. McQuesten*, [1942] O.R. 102, [1942] 2 D.L.R. 483 (C.A.); *Sonntag v. Krause* (1975), 11 O.R. (2d) 500 (H.C.); dicta in *Eddie 'N' Me Productions Co. N.V. v. Toronto Star Newspapers Ltd.* (1981), 34 O.R. (2d) 433, 24 C.P.C. 261 (Master).

H. Forms of acceptable security

The court may accept anything reasonable as security, for the form and amount of security are in the "discretion" of the court: Daniell, vol. 1, p. 71; vol. 2, p. 1621. The security might be a bond

or payment into court: id., vol. 2, pp. 1621-23; Chitty's Archbold, vol. 1, p. 402; see (English) Supreme Court Practice, 23/1-3/20 and 23/1-3/21. Alberta R. 597 and Seton, 5th ed. (1891), vol. 1, p. 26, expressly contemplate a bond. A bond was allowed in *Booth v. Estabrook Const.*, supra, pp. 167-68. So suggestions that a non-resident plaintiff must pay cash into court are unfounded. If a plaintiff does not escape security because of poverty, then he can offer some kind of security. He might offer a mortgage on his home or farm in Ontario; if any of his friends or relatives will act as sureties, then he can offer their bond.

I. How much time is allowed

How much time the plaintiff gets to post the security is also in the "discretion" of the court: Daniell, vol. 1, p. 71; vol. 2, p. 1621. Allowing him to pay it by instalments is apparently common in Ontario: *Mangold v. 330002 Ont.*, supra, at pp. 721-22. It was ordered in stages in *Booth Const. v. Estabrook*, supra. See Orkin, at para. 511.1. So the plaintiff can probably get enough time to post security and not lose his lawsuit.

J. The plaintiff need not lose his suit

The court may choose not to dismiss or even stay the action if the plaintiff does not provide the security ordered: Rule 596; *Wray v. Can. Nor. Ry.* (1909), 2 Sask. L.R. 321, 12 W.L.R. 14; cf. Daniell, vol. 1, p. 72; vol. 2, at pp. 1623-24; Chitty's Archbold, vol. 1, p. 402; cf. the cases cited in point K below.

K. Reviving the suit

The court can later extend time to give security, even reviving a suit dismissed for failure to give security: *Murray v. Delta Copper Co.*, [1923] 2 W.W.R. 275, [1923] 3 D.L.R. 118 (Alta. C.A.); *Columbia Pictures of Can. Ltd. v. Gurevitch*, [1935] 2 W.W.R. 581 at 582-83, 585-86 (Sask. C.A.). The reference in R. 596 to "special application" reinforces that: *Murray* case at pp. 287-88; *Columbia* case at pp. 582, 585-86. So it is unnecessary to cite more general cases.

L. Specially tailored approach

A defendant would thus have to surmount at least ten successive hurdles (points B-K above) to have the plaintiff's suit dismissed. (Co-plaintiffs or multiple residences might add more hurdles.) The very poverty founding the plaintiff's constitutional argument is a good ground for relaxing or dispensing entirely with security, let alone a stay or dismissal of the suit.

IV. *A non-resident plaintiff who can put up security is not harmed*

A plaintiff who is ordered to post security and can do so will suffer very little harm, especially as the security can take almost any form: see Pt. III. J above. There is no injustice in requiring him to furnish security. Nor did the plaintiff suggest any. Not many non-resident plaintiffs are destitute: see Pt. III. C above.

V. *Residents give security for costs*

The plaintiff suggests that residents of Alberta rarely need post security for costs. I disagree; here is a list of Alberta residents who must also give security:

a. Companies which may not be able to pay costs: Alberta Business Corporations Act, s. 245.1.

b. Plaintiffs with repeated claims: R. 593(1)(*c*), (*d*).

c. Plaintiffs with nominal or representative claims: R. 593(1)(*e*), (*f*), (*h*). An insolvent plaintiff suing for his creditors must (as a nominal plaintiff) give security though resident here: (English) Supreme Court Practice, 23/1-3/8; Daniell's Chancery Practice, vol. 2, p. 1620; Chitty's Archbold, 14th ed. (1885), vol. 1, p. 399; Harrison's Common Law Procedure Act, p. 632n.

d. Infants: By R. 58, they must sue by next friend, and his function is to answer for costs. He cannot retire without giving replacement security: Daniell's Chancery Practice, 8th ed., vol. 1, p. 106. On security by a resident plaintiff if infant or irresponsible, cf. Harrison's Common Law Procedure Act, p. 630n; and see id. at p. 632n on (Imp.) 30 & 31 Vict., c. 142, s. 10, and cases under it.

e. Adult plaintiffs of unsound mind must similarly sue by next friend: R. 60.

f. Some plaintiffs: R. 524.

g. Plaintiffs with frivolous or vexatious claims: R. 593(1)(*g*).

h. Parties getting things on terms. For example, defendants opening up default judgments; or plaintiffs avoiding summary judgment: R. 159(4). On payment into court of the amount in issue or other security as a condition of leave to defend, see (English) Supreme Court Practice, 14/3-4/13, 13A.

i. Parties seeking a jury trial: Jury Act, s. 17 (S.A. 1982, c. J-2.1).

j. Parties seeking a special venue of a defamation trial away from the resident of the parties: Defamation Act, s. 14 (R.S.A. 1980, c. D-6).

k. Plaintiffs misstating or omitting their address: Holmested and Gale, R. 373, para. 21; (English) Supreme Court Practice, 23/1-3/9; Williams, Practice of the Supreme Court of Victoria, 2nd ed. (1973), vol. 2, p. 2462 (para. 65.6.14).

l. Spouses in matrimonial cases: Alberta R. 577.2, 578(4); (English) Supreme Court Practice, 23/1-3/15; *White v. White* (1968), 2 D.L.R. (3d) 564 (B.C.C.A.); dicta in *Kerr v. Kerr* (1980), 22 B.C.L.R. 394, 114 D.L.R. (3d) 159 at 161 (S.C.). Cf. the Domestic Relations Act, R.S.A. 1980, c. D-37, s. 56(4).

m. Caveators: Land Titles Act, R.S.A. 1980, c. L-5, s. 140 (even before they sue).

n. Creditors instructing seizure under distress warrant: Seizures Act, s. 22(2) (R.S.A. 1980, c. S-11). Or those instructing seizure of a growing crop: s. 13(1), (2). Or those instructing seizure of goods possessed by a third person who claims them: s. 38(1)(*b*). Or those instructing sale of perishable goods seized under writ of attachment: RR. 492 and 493.

o. Those seeking replevin: RR. 430-435.

p. Those seeking possession of property held by one claiming a lien: R. 469; Innkeepers Act, s. 4(1) (R.S.A. 1980, c. I-4).

q. Those claiming an injunction before trial (especially a debtor trying to restrain a creditor); *Prairie Hospitality Consultants Ltd. v. Renard Int. Hospitality Consultants Ltd.* (1980), 118 D.L.R. (3d) 121 at 125, 55 C.P.R. (2d) 78 (B.C.S.C.); *Nelson Burns & Co. v. Gratham Indust. Ltd.* (1981), 34 O.R. (2d) 558 at 564, 24 C.P.C. 42, 59 C.P.R. (2d) 113 (H.C.); Spry, Equitable Remedies, 3rd ed. (1984), pp. 467-68; Kerr on Injunctions, 6th ed. (1927), p. 28; cf. 32 C.J. 310-19.

r. Those suing or instructing seizure against an estate administered by the Public Trustee: Public Trustee Act, s. 18(2) (R.S.A. 1980, c. P-36).

s. Consumer organizations bringing actions against suppliers for unfair practices: Unfair Trade Practices Act, s. 15(4) (R.S.A. 1980, c. U-3).

t. Those appealing from Provincial Court or various specialized tribunals: a host of Alberta statutes so provide.

u. Certain witnesses, and plaintiffs in election, flooding, surrogate and trust company matters.

v. Residual category. Alberta courts have a general power in a just case to order security for costs by residents of Alberta even where no specific rule authorizes it: *Bailey Cobalt Mines v. Benson* (1918), 43 O.L.R. 321, 43 D.L.R. 692 at 694 (C.A.); *Lavaris v. MacMillan Bloedel Ltd.* (1977), 3 B.C.L.R. 308 at 309, 317, 318, 81 D.L.R. (3d) 197 (S.C.); *Gundy v. Gundy* (1982), 28 R.F.L. (2d) 51 (Sask. Q.B.); *Shiell v. Coach House Hotel Ltd.* (1982), 37 B.C.L.R. 254, 27 C.P.C. 78, 136 D.L.R. (3d) 470 at 475, 478-79 (C.A.).

Therefore I do not agree with the suggestion by the plaintiff and by *Kask v. Shimizu*, supra (at p. 170), that residents of Alberta have to give security for costs only if their action is found to be frivolous and vexatious.

VI. *Equality rights*

Section 15(1) of the Charter of Rights and Freedoms reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Attorney General argues first that any alleged discrimination here is not similar to these enumerated grounds. Indeed, security for costs from a non-resident involves no discrimination on the basis of nationality: Dicey and Morris, Conflict of Laws, 10th ed., pp. 1194, 1197. In view of the other conclusions here, I need not pursue that argument.

The authorities differ on what is the proper test for inequality or discrimination under s. 15 of the Charter of Rights and Freedoms. For example, *Andrews v. Law Soc. of B.C.*, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305, 27 D.L.R. (4th) 600, 23 C.R.R. 273 (C.A.), and *McKinney v. Guelph Univ.* (1987), 9 C.H.R.R. D/4573, 24 O.A.C. 241 (C.A.), seem to conflict. The plaintiff in oral argument asked this court not to rely on the subtleties of rival definitions of "discrimination", as they would all produce the same result in this case. I agree. It would suffice here, for the sake of argument only, to use the plaintiff's suggested definition:

> . . . discrimination is a distinction based on a personal characteristic that is automatically applied, but is irrelevant to the activity being regulated.

All the authorities cited to us agree that different legislative treatment of different people or classes is almost inevitable and does not itself contravene s. 15. Using any possible definition, however wide or

lax, the maximum extent of forbidden discrimination must involve a less favourable legal position because of some insufficient criterion.

Here the criterion, non-residence of a plaintiff, is both relevant and sufficient to justify security for costs (Pt. II above). The large number of exceptions and qualifications to security for costs against non-residents (Pt. III) and the large number of grounds for security against residents (Pt. V) show that their legal positions are not clearly different. "Equality before the law" does not demand the most carefully tailored, finely crafted legislation. The test is just a general examination of whether the statute is in pursuit of a valid (provincial) legislative objective. Local administrative problems may allow different (federal) laws in different parts of Canada: *Cornell v. R.*, S.C.C., No. 19347, 24th March 1988 (not yet reported).

This security for costs procedure in some ways just regulates the onus of proof. The interaction of RR. 593 and 595 means that where the plaintiff resides outside of Alberta, the onus merely shifts to him to show that he has assets within the jurisdiction which would be exigible, or to show that it would otherwise be unjust to order him to pay security for costs. The courts presume that those things are true of an Alberta resident. *R. v. Hamilton; R. v. Asselin; R. v. McCullagh* (1986), 57 O.R. (2d) 412, 54 C.R. (3d) 193, 44 M.V.R. 72, 30 C.C.C. (3d) 257, 25 C.R.R. 94, 17 O.A.C. 241 (C.A.), found discrimination in federal criminal law which differed rigidly between provinces, but the court's remedy there was not to strike down the law. It was special individual consideration for those affected. That is what we already have in the (provincial) law on security for costs.

The plaintiff argues that R. 593(1)(*a*) is bad because *in practice* it is sometimes applied unevenly or even mechanically. No evidence was led to show that, the legal authorities cited rebut the argument, and should security ever be improperly ordered an appeal from a master in chambers is quick and inexpensive. A discretion which can be exercised in favour of plaintiffs offers them no ground to complain: cf. *R. v. Lyons*, S.C.C., 15th October 1987, at pp. 36-37 [now reported [1987] 2 S.C.R. 309, 61 C.R. (3d) 1, 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 82 N.S.R. (2d) 271, 207 A.P.R. 271, 80 N.R. 161]. The court will not assume bad administration of an impugned law which provides for individual exceptions: *R. v. Jones*, [1986] 2 S.C.R. 284, 47 Alta. L.R. (2d) 97, [1986] 6 W.W.R. 577 at 602-603, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 25 C.R.R. 63, 73 A.R. 133, 69 N.R. 241.

Security for costs is designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if

he loses. Indeed, such a plaintiff acts more unfairly than that, for by his groundless suit he inflicts serious expenses on the defendant.

> The objective of the rule is to ensure equality between litigants. Where a plaintiff does not reside in the province and does not possess assets within the province sufficient to satisfy costs, that party is not at risk on an equal footing with a resident party. In order to re-establish a measure of equality between such parties the court may order that such security for costs be paid into court. Rule 58 does not violate s. 15(1) of the Charter.

The quotation is from *Isabelle v. Campbellton Regional Hosp.* (1987), 38 D.L.R. (4th) 638, 80 N.B.R. (2d) 181, 202 A.P.R. 181 (Q.B.), at pp. 182-83. Other cases agree that security for costs by non-residents does not violate the Charter: e.g., *Aukema v. Bernier Kitchen Cabinets*, supra; *Nissho Corp. v. Bank of B.C.; Nichiban Co. v. Bank of B.C.* (1987), 39 D.L.R. (4th) 453 (Alta. Q.B.); *Benoit v. Gestion Tex-Di*, [1987] R.J.Q. 1401 (Que. S.C.).

In *Mangold v. 330002 Ont.*, supra, the court refused to strike down the rule and merely suggested individual relief under the Charter to any plaintiff who could prove injustice in his particular case. For reasons given above, that should never occur.

The corollary of plaintiff's arguments based on *Kask v. Shimizu*, supra (pp. 162 ff.), is that the Charter lets every plaintiff sue anyone without paying any money to anyone (e.g., court reporters, lawyers). But it is questionable that the Charter invalidates statutes of general application just because the wealthy find it easier to satisfy them than do the poor: *Gerald Shapiro Hldg. Ltd. v. Nathan Tessis & Associates Inc.* (1986), 13 C.P.C. (2d) 288 at 295, 27 C.R.R. 161 (Ont. Master); *Benoit v. Gestion Tex-Di*, supra, at p. 1405. Indeed, the argument of the plaintiff would logically bar any costs award against a plaintiff who fails. Yet a plaintiff may fail or pay costs without fault: e.g., a witness may not come, or may misunderstand questions, or the plaintiff may miss a short limitation period without fault. The defendant may pay money into court at an early stage and plaintiff recover less, so the defendant will recover heavy costs. Abolishing security for costs would largely postpone the evil day rather than eliminate it.

VII. *Mobility rights*

The plaintiff argues that security for costs from non-residents also violates s. 6(2) of the Charter, which reads as follows:

> 6 . . .
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

But this suit is unconnected with employment. Rule 593 does not govern where one may live or work; it is about when one should make assets available to sue: *Shapiro v. Tessis* case, supra, at pp. 296-97. Someone who works in Alberta would be resident in Alberta, maybe even for some time after he leaves that work. It is very difficult to conceive how someone could pursue the "gaining of a livelihood" in Alberta with neither residence nor assets in Alberta. Cf. Holmested and Gale, R. 373, para. 22. Therefore, I cannot accept that argument.

VIII. *Section 1 of the Charter*

Even if my conclusions above are wrong and R. 593(1)(*a*) prima facie violates s. 15 of the Charter, it is saved by s. 1 of the Charter. To show that, one need only repeat the comments in the earlier parts of this judgment. Cf. *Shapiro v. Tessis*, supra, at pp. 300-301. Clearly the end sought is important and proper. The means used are rational, proportional, and individually tailored to do as little harm as possible in each case.

The plaintiff suggests that something in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1 at 28-30, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, holds that the purposes protected by s. 1 of the Charter must be public purposes, so that protecting one litigant from another would not suffice. I cannot find any such statement in that judgment. As the *Oakes* case had to do with proving intent to traffic in narcotics in a criminal prosecution, one could hardly expect a discussion there of the rights and interests of one civil litigant against another. Again I emphasize that R. 593 regulates affairs between two citizens. Security for costs is held for defendants, not for the government. If the Charter could only be used to advance public or government objectives but never the objectives and interests of citizens, then the Charter would have the opposite effect to that for which it was enacted.

Indeed, I repudiate the suggestion that a free and democratic society's objectives ignore civil lawsuits. Every citizen of a free and democratic society expects, and must get, justice in his dealings with his fellow citizens. A fair system of justice to settle private disputes among subjects has been a prime *public* objective of civilized societies whose traditions Canada follows. The Emperor Justinian's Institutes recite that

> The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and that the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes.

Book I, Title I, commences

> Justice is the set and constant purpose which gives to every man his due.

The vast majority of his Institutes and of his Digest concern private civil law. In like manner, even Napoleon Bonaparte took great pride in his part in the 1804 enactment of the French Code Civil, which regulates private civil law. Queen Victoria formally opened the Royal Courts of Justice, housing the civil (non-criminal) courts. Handing the key to the Lord Chancellor, she said:

> I have all confidence that the independence and learning of the Judges, supported by the integrity and ability of the other members of the profession of the Law, will prove in the future, as they have in time past, a chief security for the rights of my Crown and the liberties of my people.

Many other jurisdictions, all free and democratic, have a similar rule on security for costs. Other Canadian rules are listed in *Benoit v. Tex-Di*, supra, the English rules are found in their Supreme Court Practice, and the Attorney General has shown us some similar Australian rules. We have a long tradition of security for costs which has been constantly applied for centuries: *Shapiro v. Tessis*, at p. 301; the passages cited above in the Harrison, Daniell, and Chitty textbooks; *Launer v. Sommerfeld*, supra.

IX. *The result*

I would therefore dismiss this appeal. As the defendant did not appear, I would not award any costs of this appeal to it. If the intervener Attorney General wishes, he may speak to costs. If he does not do so within 21 days, then he or the defendant may simply enter a formal judgment dismissing this appeal without costs.

Appeal dismissed.

Case Name:

R. v. Kirton

Between
Regina v. Kirton

[2007] M.J. No. 299

2007 MBCA 38

[2007] 7 W.W.R. 676

214 Man.R. (2d) 59

219 C.C.C. (3d) 485

46 C.R. (6th) 338

155 C.R.R. (2d) 351

73 W.C.B. (2d) 659

2007 CarswellMan 116

Court File No. AR06-30-06518

Manitoba Court of Appeal

R.J. Scott C.J.M., Huband and B.M. Hamilton JJ.A.

Heard: January 16, 2007.
Judgment: April 5, 2007.

(23 paras.)

Sentencing -- Offences against person and reputation -- Assaults -- Assault -- Particular sanctions -- Probation -- Conditions -- Appeal from a condition in a probation order that the appellant not associate or communicate either directly or indirectly with any person known to him to be a member or associate of a gang, including the Hells Angels motorcycle club -- Appeal allowed -- The probation condition was unreasonable because it was vague and uncertain -- One could not define

a "gang" or what it meant to be an "associate" of one.

Appeal from sentence. Kirton pled guilty to assault and breach of probation. He was sentenced to seven months in jail, to be followed by two years' supervised probation. At issue on appeal was the validity of one term in the probation order, namely, a requirement that he not associate or communicate either directly or indirectly with any person known to him to be a member or associate of a gang, including the Hells Angels motorcycle club. Kirton argued that this condition was vague, unenforceable, and interfered with his constitutional right to freedom of association.

HELD: Appeal allowed, and condition removed. The probation condition was unreasonable because it was vague and uncertain. One could not define a "gang" or what it meant to be an "associate" of one. Further, the sentencing judge erred when she found that Kirton was wearing his "gang colours" at the time of the offence, and she also erred when she found that the Hells Angels was a criminal organization based on the Lindsay case. The issue of whether an organization qualified as a "criminal organization" needed to be addressed each time on an evidentiary basis. Accordingly, she erred when she imposed the condition.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(d)

Criminal Code, s. 718.2(a)(iv), s. 732.1(3), s. 731.1(3)(h)

Counsel:

S.L. Chapman, for accused, appellant.

G.A. Lawlor, for the Crown, respondent.

The judgment of the Court was delivered by

1 R.J. SCOTT C.J.M.:-- The accused pled guilty to common assault and breach of probation. He was sentenced to seven months in jail, to be followed by two years' supervised probation. The only question before this court is the validity of one term in the accused's probation order, namely, a requirement that he "not ... associate or communicate either directly or indirectly with any person known to him to be a member or associate of a gang including the Hells Angels motorcycle club." The accused argues that this condition is vague, unenforceable, and interferes with his constitutional fight to freedom of association. See s. 2(d) of the Canadian Charter of Rights and Freedoms (the Charter).

Background

2 It is not necessary to go into the facts in detail. The assault on a stranger (and consequent breach of probation) to which the accused pled guilty occurred in a hotel bar. In her lengthy oral reasons, the sentencing judge concluded that the accused's attack upon the victim was unprovoked. She also found that:

> The accused is a full member of the Hells Angels motorcycle gang and he was wearing clothing indicating his membership in the gang at the time of the events in question.

And:

> ... the accused is a member of the Hells Angels, a group of thugs that have been found to be a criminal organization; ...

3 In considering sentence, she concluded:

> ... the accused's membership in and very public support of a criminal organization significantly increases the likelihood that he will re-offend in the future. ... the accused's membership in the Hells Angels motorcycle club and the fact that he was wearing club clothing at the time of this offence are aggravating facts in relation to the offence itself.

4 Relying on the decision of R. v. Lindsay, [2005] O.J. No. 2870 (QL), 66 W.C.B. (2d) 454 (S.C.J.), she found that the Hells Angels Motorcycle Club (the Hells Angels) is a criminal organization. She recognized that "it is not a criminal offence to be a member of a criminal organization," therefore, "the accused is not being sentenced for that reason."

5 The impugned condition was necessary, she held, "for the protection of the public and to assist the accused in his rehabilitation."

6 The Crown conceded in its factum and during the course of the argument that the sentencing judge erred when she found that the accused had been wearing his "gang colours" at the time of the offence. The Crown also conceded in its factum that "the probation condition requiring [the accused] not to associate with 'any person known to him to be a member or associate of a gang' is vague, and probably unenforceable."

7 But, the Crown submitted, an amendment deleting the reference to "gangs" and "or an associate" would suffice to render the condition enforceable. The condition would then read: "Not to associate or communicate, either directly or indirectly, with any person who is a member of the Hells Angels motorcycle club."

8 While there was no evidence as earlier noted that the accused was wearing the "colours" of the

Hells Angels, the Crown in its submissions at trial referred on several occasions to the fact that the accused was involved with that organization. There was no discussion and no evidence before the sentencing judge to establish that the Hells Angels was a criminal organization as defined in s. 467.1(1) of the Criminal Code (the Code).

9 Nonetheless, as we have seen, the sentencing judge found that the Hells Angels was a criminal organization relying on the decision of Fuerst J. in Lindsay. But in Lindsay, the trial judge heard extensive expert evidence before making such a finding. While the sentencing judge expressly acknowledged that the accused was not charged with a criminal organization offence, she found, based on Lindsay, that the accused's membership in the Hells Angels significantly increased the likelihood that he would re-offend.

Decision

10 The court's authority to impose optional conditions in a probation order is found in s. 732.1(3) of the Code. The section provides that the court may prescribe a number of additional conditions in a probation order, the last of which (s. 732.1(3)(h)) enables the court to mandate that an accused:

...

> ... comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.

11 It is now accepted that the purpose of probation is to rehabilitate the offender. Probation conditions may not be imposed as a form of punishment. See R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, 140 C.C.C. (3d) 449, and R. v. Shoker, 2006 SCC 44, [2006] 2 S.C.R. 399, 212 C.C.C. (3d) 417. In Shoker, Charron J., writing for the majority, considered the scope of the "residual power" under s. 732.1(3)(h). She noted that (at para. 13):

> ... before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offence but need not be. ...

12 In determining whether a condition under s. 732.1(3)(h) is reasonable, this court has held in R. v. Traverse (B.R.), 2006 MBCA 7, 205 C.C.C. (3d) 33, that (at para. 36):

> The accused must have knowledge both of the conditions of the order and of the consequences of his conduct in wilful breach of those conditions. If a condition is vague, a probationer cannot determine when his conduct is at risk of breaching that condition. A vague condition is an inherently unreasonable condition.

13 Clayton C. Ruby et al., Sentencing, 6th ed. (Markham: Butterworths, 2004), summarizing the applicable law, stated that, "Common sense alone indicates that a probation order, like any other court order, must be reasonably certain to be valid or enforceable" (at para. 10.52).

14 Section 2(d) of the Charter guarantees that everyone has the fundamental freedom of association. The Supreme Court in Dunmore v. Ontario (Attorney General), 2001 SCC 94, [2001] 3 S.C.R. 1016, determined that, if it is sought to establish that a breach of this "fundamental freedom" has taken place (at para. 13):

> ... appellants must demonstrate, first, that [their] activities fall within the range of activities protected by s. 2(d) of the Charter, and second, that the impugned legislation has, either in purpose or effect, interfered with these activities [citations omitted]. ...

15 But freedom of association only protects the exercise of association rights in connection with lawful objectives. See Yuen v. Canada (Minister of Citizenship and Immigration) (2000), 195 D.L.R. (4th) 625 (F.C.A.). Contrary to popular belief, mere membership in a gang or criminal organization is not a criminal offence in Canada.

16 The relationship between the Charter and probation conditions is described in Ruby's text as follows (at para. 10.63):

> Section 732.1(3)(h) does not violate the Charter because it specifies that the probation conditions for securing the good conduct of an offender are to be "reasonable." Accordingly, a challenge to any particular probation order must be made to its terms and not to those of the section. ... A condition "must not be discriminatory or infringe unduly upon basic rights."

17 In my opinion, not only was the sentencing judge in error in finding that the accused was wearing his "gang colours" at the time of the incident in question, she also erred in interpreting the conclusion in Lindsay (which is under appeal) to constitute for all purposes a binding decision that the Hells Angels is a criminal organization. Other courts have expressly held that Lindsay should not automatically be applied in every case; rather, the issue of whether an organization qualifies as a "criminal organization" needs to be addressed each time on an evidentiary basis. See, for example, R. v. Ciarniello, 2006 BCSC 1671 at para. 67, 152 A.C.W.S. (3d) 826, where the court stated: "The Crown could not simply rely on Justice Fuerst's ruling."

18 Several authorities from Ontario appear to have accepted Lindsay as binding, at least in that province. See R. v. Boudreault, [2005] O.J. No. 3842 (QL) (S.C.J.), and R. v. Vickerson, [2006] O.J. No. 352 (QL), 68 W.C.B. (2d) 461 (S.C.J.). However, a careful reading of Lindsay leads me to the same conclusion as in Ciarniello, namely, that the findings in Lindsay are very much based on the evidence before the court in that case, and cannot be automatically applied as if it was an "in rem judgment" (at para. 67), that is to say, a finding affecting the world at large. Needless to say, a

court cannot take judicial notice of the fact that the Hells Angels is a criminal organization, tempting as that might be.

19 Section 718.2(a)(iv) deems the fact that "an offence was committed for the benefit of, at the direction of or in association with a criminal organization" to be an aggravating circumstance. The sentencing judge concluded that the accused's membership in the Hells Angels was a "Significant aggravating factor." But this court's decision in R. v. Marsden (D.G.), 2004 MBCA 121, 187 Man. R. (2d) 298, 188 C.C.C. (3d) 42, is authority for the proposition that to be an aggravating factor the offence in question must be either gang sanctioned or related to membership in a gang (at paras. 13-14). There was no such evidence here. It was not open for the sentencing judge to consider membership in a criminal organization as an aggravating factor.

20 While sentencing judges are given a wide latitude for the exercise of discretion by the omnibus wording of s. 732.1(3)(h) of the Code, the conditions imposed pursuant thereto must be "reasonable." In my opinion, the probation condition imposed in this case is unreasonable because it is vague and uncertain. How, for example, does one define a "gang," or what it means to be an "associate" of one? As noted earlier in Traverse, at para. 36, vague conditions are invalid because they are "inherently unreasonable."

21 On the same point, Steel J.A. in Traverse noted (at paras. 34-35): "Individuals should not be subjected to criminal sanction if they do not have fair notice of the prohibited conduct."

22 It is hard to escape the conclusion that the sentencing judge was led astray by her preoccupation with the accused's involvement with the Hells Angels. She started with her erroneous finding that the accused was wearing "gang colours" at the time of the offence. She then erred (in the absence of any supporting evidence) when she decided that the Hells Angels was a criminal organization. She further erred in concluding that such membership was an aggravating factor with respect to the sentence to be imposed for the offences in question, in the absence of any evidence to support that conclusion (as required by s. 718.2(a)(iv)). And, most significantly of all, the condition that she imposed is so vague and uncertain as to be unenforceable and is therefore "unreasonable" (s. 732.1(3)(h)).

23 The appeal is accordingly allowed and the provision in question in the probation order is deleted.

Appeal allowed; order accordingly.

cp/s/qlhjk/qljjn/qlbrl/qlcct

Case Name:

R. v. Levkovic

Between
Her Majesty the Queen, Appellant, and
Ivana Levkovic, Respondent

[2010] O.J. No. 5252

2010 ONCA 830

223 C.R.R. (2d) 261

271 O.A.C. 177

103 O.R. (3d) 1

264 C.C.C. (3d) 423

81 C.R. (6th) 376

2010 CarswellOnt 9252

Docket: C49523

Ontario Court of Appeal
Toronto, Ontario

D.H. Doherty, R.P. Armstrong and D. Watt JJ.A.

Heard: March 8, 2010.
Judgment: December 7, 2010.

(125 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Appeal by Crown from accused's acquittal on charge of concealing dead body of child under s. 243 of Criminal Code allowed, acquittal set aside and new trial ordered -- Trial judge concluded that Levkovic's s. 7 Charter interest, which was implicated by prospect of imprisonment

on conviction, was breached because of vagueness of phrase, "child died before ... birth", in s. 243 -- Offending phrase "before ... birth" was neither unconstitutionally vague nor otherwise constitutionally infirm -- Trial judge erred in his determination of unconstitutionality, and he applied overly demanding standard of vagueness -- Criminal Code, s. 243.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Life, liberty and security of person -- Appeal by Crown from accused's acquittal on charge of concealing dead body of child under s. 243 of Criminal Code allowed, acquittal set aside and new trial ordered -- Trial judge concluded that Levkovic's s. 7 Charter interest, which was implicated by prospect of imprisonment on conviction, was breached because of vagueness of phrase, "child died before ... birth", in s. 243 -- Offending phrase "before ... birth" was neither unconstitutionally vague nor otherwise constitutionally infirm -- Trial judge erred in his determination of unconstitutionality, and he applied overly demanding standard of vagueness -- Criminal Code, s. 243.

Statutory interpretation -- Statutes -- Role of court -- Language ambiguous -- Appeal by Crown from accused's acquittal on charge of concealing dead body of child under s. 243 of Criminal Code allowed, acquittal set aside and new trial ordered -- Trial judge concluded that Levkovic's s. 7 Charter interest, which was implicated by prospect of imprisonment on conviction, was breached because of vagueness of phrase, "child died before ... birth", in s. 243 -- Offending phrase "before ... birth" was neither unconstitutionally vague nor otherwise constitutionally infirm -- Trial judge erred in his determination of unconstitutionality, and he applied overly demanding standard of vagueness -- Criminal Code, s. 243.

Appeal by the Crown from Levkovic's acquittal on a charge under s. 243 of the Criminal Code of concealing the dead body of a child. Levkovic was charged after an apartment superintendant discovered the remains of a human fetus on the balcony of a recently vacated apartment. The pathologist could not determine the cause of death, or whether the child had died before, during or after birth. Levkovic told the police that the child was hers. She claimed that she had fallen while alone in the apartment. The baby was born there. She put the baby in the bag, which she left on the balcony. After arraignment and plea, Levkovic challenged the constitutionality of s. 243 of the Code. The section read, "Everyone who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." The essential elements of the offence included an actus reus, the disposal of a dead body of a child, and a mens rea, which included the specific or ulterior intent to conceal the fact that the mother had been delivered of the child. The actus reus required the prosecutor to prove beyond a reasonable doubt that what the accused did amounted to a disposal, that a dead body was disposed of, and that the dead body was that of a child. Inclusion of the clause, "whether the child died before, during or after birth", seemed to render immaterial the time during the birth process at which the child died. The Crown prosecutor undertook not to pursue any suggestion that the deceased child had been born alive. The constitutional challenge proceeded under ss. 7 and 15 of

the Charter. Among the deficiencies identified in s. 243 were overbreadth and vagueness. Levkovic sought a declaration of invalidity to the extent of the breach and dismissal of the indictment because it failed to allege an offence known to law. The trial judge rejected the challenge under s. 15, as well as the claim of overbreadth under s. 7. However, he concluded that Levkovic's s. 7 interest, which was implicated by the prospect of imprisonment on conviction, was breached because of the vagueness of the phrase, "child died before ... birth", in the section. In the result, he severed the word "before" from the section, leaving it to read in its material part "whether the child died during or after birth". The Crown prosecutor acknowledged that he could not establish either the cause or the time of death, thus he offered no evidence in support of the allegation contained in the indictment. The trial judge then acquitted Levkovic.

HELD: Appeal allowed, acquittal set aside and new trial ordered. The offending phrase "before ... birth" was neither unconstitutionally vague nor otherwise constitutionally infirm. The trial judge erred in his determination of unconstitutionality, and he applied an overly demanding standard of vagueness. A law was unconstitutionally vague if it failed to give fair notice about the conduct prohibited by the law, or to impose real limitations on the discretion of those charged with enforcement. However, a law did not offend vagueness principles just because it was open to more than one interpretation. Vagueness was constitutionally terminal only if the law could not, even with judicial interpretation, provide meaningful standards of conduct. For the purposes of establishing liability for an offence under s. 243 in cases involving death before birth or those in which the time of death in relation to birth was unclear, a fetus became a child when the fetus had reached a stage in its development when, but for some external event or other circumstances, it would likely have been born alive. To determine whether the disposal was of the "dead body of a child", the trier of fact's decision was to be informed by expert medical evidence about the course of the pregnancy, fetal age and viability, and the cause of death. The trial judge concluded that part of s. 243 was void for vagueness because he could not determine a coherent, unambiguous meaning for the term "child" in the context of a death that occurred before the child's birth. Neither the Charter nor the vagueness doctrine required that the statute provide absolute certainty in its application by the language it used. The portion of s. 243 upon which the trial judge focused could not be uprooted from its context and subjected to microscopic scrutiny.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 15

Criminal Code, R.S.C. 1985, c. C-46, s. 222(1), s. 223(1), s. 223(2), s. 233, s. 237, s. 242, s. 243

Appeal From:

On appeal from the acquittal entered by Justice S. Casey Hill of the Superior Court of Justice, sitting without a jury, on September 18, 2008.

Counsel:

Brian McNeely and Gillian Roberts, for the appellant.

Delmar Doucette and Jessica Orkin, for the respondent.

The judgment of the Court was delivered by

1 **D. WATT J.A.**:-- Since July 1, 1893, concealing the dead body of a child has been an indictable offence in Canada. The definition of the offence has always declared it to be immaterial whether the child died before, during or after birth.

2 On September 18, 2008, a judge of the Superior Court of Justice decided that the words "died before ... birth" in s. 243 of the *Criminal Code* are unconstitutionally vague. In the result, he severed the preposition "before" from the section, leaving it to read in its material part "whether the child died during or after birth".

3 The prosecutor acknowledged that he could not establish either the cause or the time of death, thus he offered no evidence in support of the allegation contained in the indictment. The trial judge acquitted Ms. Levkovic.

4 This appeal requires us to determine whether the trial judge was correct in his conclusion that the "before birth" reference was unconstitutionally vague.

5 For reasons that I will develop, I am satisfied that the offending phrase "before ... birth" is neither unconstitutionally vague nor otherwise constitutionally infirm. I would allow the appeal, set aside the acquittal and order a new trial.

THE BACKGROUND

6 The circumstances[1] underlying the prosecution and its procedural history can be stated in brief terms.

The Discovery of the Body

7 On April 5, 2006, an apartment building superintendent in Mississauga was cleaning a recently-vacated apartment unit. He noticed an abandoned bag on the balcony. At first, he thought that the bag contained wet rags that he could simply toss down the garbage chute.

8 The superintendent felt something inside the bag. He opened it and looked. Wrapped in towels

was the lifeless body of a "baby". The superintendent called the police.

The Post-mortem Findings

9 Advanced decomposition of the body precluded optimal pathological assessment. The body was that of a female child at or near a full-term gestation. The pathologist could not determine the cause of death, or whether the child had died before, during or after birth.

The Acknowledgement of the Respondent

10 On April 9, 2006, after extensive media coverage of the superintendent's discovery, the respondent went to a local police station. There, in a highly emotional state, she acknowledged that the child was hers. In a later police interview, the respondent said that she had fallen while alone in the apartment. The baby was born there. She put the baby in the bag and left the bag on the balcony.

The Procedure Followed

11 The respondent was arraigned and pleaded not guilty to a count that alleged that she:

> ... within a two hundred and forty eight day period, last, past and ending on or about the 5th day of April, 2006 at the City of Mississauga in the Central West Region, unlawfully did dispose of the dead body of a child with intent to conceal the fact that she had been delivered of it by concealing it on the property of 285 North Service Road, Mississauga, contrary to section 243 of the Criminal Code of Canada.

12 Immediately after arraignment and plea, the constitutional challenge to s. 243 of the *Criminal Code* began. The prosecutor adduced no evidence. Defence counsel made no admissions. The respondent had waived the preliminary inquiry. There, the prosecutor undertook not to pursue any suggestion that the deceased child had been born alive.

13 The constitutional challenge proceeded under ss. 7 and 15 of the *Charter*. Among the deficiencies identified in s. 243 were overbreadth and vagueness. The respondent sought a declaration of invalidity to the extent of the breach and dismissal of the indictment because it failed to allege an offence known to law.

THE RULING OF THE TRIAL JUDGE

14 The trial judge gave lengthy reasons. He rejected the challenge under s. 15, as well as the claim of overbreadth under s. 7. But he concluded that the respondent's s. 7 interest, which was implicated by the prospect of imprisonment on conviction, was breached because of the vagueness of the phrase, "child died before ... birth", in the section. In the result, the trial judge severed the word "before" from s. 243.

THE GROUNDS OF APPEAL

15 The Attorney General contends that the trial judge erred in concluding that the reference "child died before ... birth" was unconstitutionally vague and in granting the remedy of severance for the infringement. The Attorney General seeks a determination of constitutionality and an order for a new trial.

ANALYSIS

16 At the outset of the hearing of this appeal, the parties skirmished about the extent of the appellant's reliance on reports of several prosecutions at the Old Bailey in London for infant homicide and concealment of birth. The appellant also complained about the adequacy of the factual record in the Superior Court and about the judge's decision to let the challenge proceed in the absence of any evidence, agreed statement of facts or applicable admissions. The issues are related and require determination before the constitutional integrity of s. 243 may be approached.

The Preliminary Issue: The Adequacy of the Factual Record

17 After the parties had finished their submissions before the trial judge, but before he had rendered his decision on the constitutional issue, researchers in England released online reports of nearly 200,000 cases tried at the Old Bailey, the Central Criminal Court in London, between 1674 and 1913. Among the reported cases were many involving prosecutions for infant homicide and for concealment of birth.

18 Among the several Books of Authorities the appellant has filed for use on this appeal are two volumes of "Old Bailey cases". These materials, which were not provided to the trial judge, are relied upon to demonstrate the "actual workings of the English Criminal Law".

The Positions of the Parties

19 The appellant says that the reports of the Old Bailey cases reveal several features about the origins and application of the concealment offence. These features are of service in demonstrating errors in the analysis and ultimate conclusion of the trial judge.

20 The appellant points out that the Old Bailey cases negate any link between the concealment offence and the former crime of abortion, thus rebut any suggestion that the abortion cases can inform the content of the concealment offence or that the concealment offence was enacted to buttress the crime of abortion. Further, the authorities demonstrate that the concealment offence was *not* enacted to punish women for having sex outside the bonds of marriage.

21 According to the appellant, these authorities reveal that juries were eager to acquit young women of both child homicide and concealment of birth on virtually any pretext. Accidental death and lack of proven "disposal", "concealment" or birth were frequently successful defences.

22 Further, the authorities make it clear that investigations of and prosecutions for the concealment crime invariably include case-specific medical evidence and at or near full term children. In the event of conviction, the sentences imposed tend to be either non-custodial or short-term imprisonment dominated by rehabilitative sentencing principles.

23 In the result, the appellant says, these authorities indicate the very limited role the phrase "child died before ... birth" has had in the operation of the provision, thereby the error in its use to found a determination of unconstitutionality.

24 The respondent takes no issue with reliance upon the Old Bailey cases as persuasive legal precedent, but resists the more expansive use that the appellant seeks to make of them.

25 At the outset, the respondent points out that the authorities upon which the appellant relies are edited reports. They rehearse the arguments advanced and record the conclusion of the court, usually a trial judge, but contain minimal reference to the evidence adduced at trial. They cannot form the basis for judicial notice, nor can they be utilized as adjudicative, social or legislative facts in the determination of the constitutional issue.

26 To the appellant's more general complaint that the trial judge was wrong to proceed with the constitutional challenge in the complete absence of evidence, the respondent reminds us that the prosecutor at trial was content to proceed on this basis. It follows, the respondent submits, that the appellant, absent an application to adduce fresh evidence, must take the record as it exists and ought not to be permitted to expand it indirectly by attempting to make evidentiary use of the Old Bailey cases.

The Governing Principles

27 The preliminary issues raised in this case invite recall of the principles governing the extent of factual foundation required to determine the constitutionality of legislation and those that define the limits of judicial notice.

The Need For An Adequate Factual Foundation

28 It is difficult to understate the importance of a factual basis in constitutional challenges: *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 38; *R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 954. Two kinds of facts are involved:

* legislative facts
* adjudicative facts

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086, at p. 1099.

29 Adjudicative facts concern the immediate parties to the prosecution. They respond to the query "Who did what to whom, where, when, how and with what intent or motive?": *Danson* at p.

1099. Adjudicative facts are specific to the case being prosecuted, thus must be established by evidence that is relevant, material and admissible: *Danson* at p. 1099; *Mills* at para. 38.

30 Legislative facts help to establish the purpose and background of legislation, including the social, economic and cultural context in which the legislation was enacted. Of necessity, these facts are of a more general nature. The admissibility requirements for legislative facts are less rigorous than those that govern adjudicative facts: *Danson* at p. 1099; *Mills* at para. 38.

31 Social facts are cousins of legislative facts. Each is relevant to the reasoning process and may involve policy considerations: *R. v. Spence*, [2005] 3 S.C.R. 458, at para. 58. Evidence of social facts is social science research engaged to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case: *Spence* at para. 57.

32 In this case, the respondent brought her constitutional challenge immediately after arraignment and plea. The hearing followed over three days. The trial judge reserved his decision on the challenge. No evidence was adduced in support of the allegations contained in the indictment. Four and one-half months later, the trial judge released his reasons in response to the constitutional challenge. The prosecutor gave a brief summary of the nature of his case, offered no evidence in support of it, and invited the trial judge to acquit the respondent. The trial judge did so.

33 It is well-settled that, as a general rule, a trial judge is entitled to reserve judgment on any application made at the outset of trial proceedings until the end of the case. In other words, the judge may decline to rule on the application until all the evidence has been heard: *DeSousa* at p. 954. The decision whether to rule on the application at the outset, or to await the introduction and conclusion of the evidence, rests within the discretion of the trial judge: *DeSousa* at p. 954.

34 The exercise of this discretion is informed by two policy considerations: the policy that discourages adjudication of constitutional challenges without a factual foundation and the policy that enjoins fragmentation of criminal proceedings by interlocutory proceedings that take on a life of their own: *DeSousa* at p. 954. Both of these policies favour disposition of the application at the end of the evidence in the case: *DeSousa* at p. 954. A trial judge should not depart from these policies in the absence of a strong reason for doing so: *DeSousa* at p. 954.

35 Sometimes it will be more economical to decide constitutional questions before proceeding to trial on the evidence relied upon in support of the allegations. Within this exception to the general rule may be an apparently meritorious *Charter* challenge of the law under which an accused is charged that does *not* depend on facts to be elicited during the trial: *DeSousa* at p. 955; *Mills* at para. 37.

The Scope and Role of Judicial Notice

36 It is the reality in many *Charter* challenges that the social or legislative facts are likely to prove dispositive: *Spence* at para. 64. While the limits of judicial notice outside the realm of

adjudicative facts are inevitably somewhat elastic, the application of the doctrine, which dispenses with the need for formal proof of facts that are clearly uncontroversial or beyond reasonable dispute, is not unprincipled: *Spence* at para. 63; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, at para. 226.

37 It is also worth reminder that simply labelling an issue as one involving a "social fact" or a "legislative fact" does not afford a court *carte blanche* to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Neither may counsel bootleg "evidence in the guise of authorities": *Spence* at para. 58; *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, at para. 3.

The Principles Applied

38 The appellant advanced a tepid submission that the trial judge erred in embarking on the constitutional challenge to s. 243 without a satisfactory evidentiary foundation for the claim.

39 I would not give effect to this submission for several reasons.

40 First, the authorities that insist upon an adequate factual foundation to ground a constitutional challenge recognize equally that the general rule is not inflexible or intolerant of exception in individual cases: *DeSousa* at p. 954; *Mills* at para. 38. To some extent, the nature of the challenge advanced, the interest at stake and the likelihood or improbability that the evidence to be adduced at trial would assist the resolution of the issue are of importance in determining whether the immediate challenge will be permitted or determined: *DeSousa* at p. 955; *Mills* at para. 41.

41 Second, counsel at trial agreed on the procedure followed. To be more specific, the prosecutor did not ask the trial judge to reserve his decision on the constitutional challenge until the conclusion of the evidence adduced at trial. Nor did counsel for the respondent at trial suggest that evidence should have been heard or an Agreed Statement of Facts be filed to provide a factual foundation or context for the challenge.

42 Third, the challenge here was directed principally at the language of the offence-creating provisions. The liberty interest implicated was the prospect of imprisonment on conviction. The flaw alleged was that the prohibition was overbroad and void for vagueness, *not* as it applied to the respondent, but in its general operation.

43 Finally, as it turned out, when the prosecutor summarized his evidence after the trial judge's ruling, what could have been established may not have advanced the inquiry into constitutionality significantly at all events.

The Old Bailey Authorities and Judicial Notice

44 The Old Bailey authorities were not put before the trial judge although they became available

while the trial judge had his decision under reserve. As legal precedents, the decisions are of persuasive value, their influence significantly attenuated by their brevity and minimal factual content.

45 To the extent the appellant seeks to rely on these precedents to advance a claim that judicial notice should be taken of certain social or legislative facts, the submission is misplaced.

46 Although we apply the requirements of judicial notice less stringently to the admission of legislative facts than to adjudicative facts, we must nevertheless proceed cautiously to take judicial notice, even as "legislative facts", of things that are reasonably open to dispute, particularly when they relate to matters that could be dispositive of the challenge: *Danson* at p. 1099; *R. v. Find*, [2001] 1 S.C.R. 863, at paras. 48-49; *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at para. 28.

47 A court may equip itself to take judicial notice of some material fact that is capable of immediate and accurate demonstration by resort to readily available sources of indisputable accuracy: *Find* at para. 48; *Spence* at para. 53. I have been unable to find any precedent, however, to support a claim that "readily accessible sources of indisputable accuracy" include incomplete or edited reports of prior judicial proceedings.

48 To permit prior judicial precedent to ground a claim of judicial notice of an adjudicative or legislative fact in a later prosecution would permit a party, in effect, to sidestep the traditional rules governing the introduction and testing of evidence, to dilute the standard required for judicial notice of facts and to substitute precedent for proof. This use of authority harkens back to the protest of Mahoney J.A. in *Canada (Canadian Human Rights Commission) v. Taylor*, [1987] 3 F.C. 593 (C.A.), at p. 608 against "bootlegging evidence in the guise of authorities": *Public School Boards' Association of Alberta* at para. 3.

49 The Old Bailey cases are of persuasive value as legal precedents. They may assist in elucidating the essential elements of the concealment of childbirth offence and in attributing meaning to certain terms used in the statute, but not defined there. Further, they may shed some light on the purpose underlying the creation of the offence. But they have no evidentiary value.

50 The preliminary issues set to one side, it is time to turn to the merits of the appeal.

The First Ground: Is s. 243 Void for Vagueness?

51 The principal complaint of the appellant is that the trial judge erred in holding that the language "child died before ... birth" was void for vagueness and in remedying the constitutional deficiency by striking the word "before" from s. 243.

The Reasons of the Trial Judge

52 The trial judge described the *actus reus* of the offence of s. 243 as disposal of the remains of a

child after birth or delivery. He concluded that the terms "birth" and "delivered", as used in the section, did *not* include compelled child-birth at any stage of gestation by an induced abortion. Concealment of pregnancy was not part of the *actus reus*.

53 The trial judge then examined the *mens rea* of the offence - the intent to conceal the fact of a birth. He concluded that the *mens rea* did not include the intent to conceal pregnancy.

54 According to the trial judge, the legislative purpose underlying the enactment of the predecessor of s. 243 included the protection of a vulnerable segment of society, unborn children, and effective investigation of suspicious infant death.

55 For the trial judge, the critical issue was whether the term "child", as it applied to the period before birth, provided an intelligible standard in that it gave fair notice to ordinary persons of the scope of risk of criminal liability and it avoided the potential for arbitrary enforcement.

56 The trial judge bemoaned the absence of expert evidence about fetal viability, medical consensus about the meaning of live birth and of the ability of forensic pathologists to determine the cause of infant deaths. These were not subjects about which the trial judge considered that he could take judicial notice.

57 The trial judge considered the "chance of life" standard proposed by the prosecutor. He noted that the degree of probability involved in the standard was unclear and could be determined in any of several ways. The absence of any coherent, unambiguous meaning for "child before birth" rendered the provision void for vagueness according to the trial judge.

58 The conclusion of the trial judge seems rooted in three paragraphs of his lengthy reasons:

> [212] Although flexibility of interpretation and application of statutory terminology is not necessarily synonymous with vagueness, and recognizing the critical role of the judiciary in interpreting legislators' intent, I am unable to determine from the record in this case, the respondent's submissions, or review of the history of s. 243 and its predecessor enactments, a coherent, unambiguous meaning of "child" in the context of death before birth. In these circumstances, in my view, it is for Parliament, not the courts, to decide the appropriate definitional interpretation.
>
> [213] Albeit in a different context, the words of Wilson J. in *Morgentaler*, at 563, are apposite here - this is a matter best left to "the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines". A legislature could of course prohibit the disposition of product of *any* still or life-birth with the concealment intent, or define "the standard for prohibited conduct in terms of gestational age" (*Fitzpatrick*, at 571)

> using a conclusive or rebuttable presumption respecting the fetus' capacity for live-birth. Or, as in s. 223(1), a definitional attempt of 'chance of life' could be crafted narrowing the ambiguity attaching to the interpretation of the commencement point for post-natal life.
>
> [214] In the result, the applicant has established that the impugned words are unconstitutionally vague and therefore inconsistent with the principles of fundamental justice already reviewed.

The Positions of the Parties

59 The appellant says that the trial judge applied the wrong test for vagueness. He substituted a more onerous standard than the law requires. The threshold for finding a statutory provision void for vagueness is very high. The only provisions that warrant a finding of unconstitutionality on this ground are those that are truly unintelligible. Section 243 is not so lacking in precision that it fails to provide sufficient guidance for legal debate.

60 It is the appellant's position that to provide fair notice of an area of risk does *not* require absolute precision in the language used. What is essential is that the statute provide reasonable notice to persons that their conduct approaches an area of risk. But the trial judge demanded more. He seems to have concluded that the offence-creating provision was unconstitutionally vague because *he* could not determine a coherent, unambiguous meaning for "child" in the context of a death that occurred before the child was born.

61 The appellant contends that the terms of s. 243 also permit fair enforcement of the prohibition. The language used consists principally of readily definable terms that identify an area of risk. They include a fault element. That medical experts may be required to assist in determining whether a prosecution should be undertaken is not an indicium of vagueness.

62 The appellant further faults the trial judge for failing to take into account the *mens rea* component of the offence in determining whether the allegation of unconstitutional vagueness should prevail. Its inclusion clarifies the reach and limits the effect of the prohibition, ensuring that inadvertent breaches are not criminal nor is conduct undertaken in good faith within the prohibition's sweep.

63 The appellant argues that the trial judge erred in his approach to an application of the "chance of life" standard of *R. v. Berriman* (1854), 6 Cox C.C. 388. The trial judge should have received expert evidence on the viability issue and not relied on decisions in dated abortion cases to conclude that viability was a medical not a legal concept. He failed to analyze *Berriman* on its own merits and as a legal test. In the result, the trial judge's conclusion that the physical maturity test of *Berriman* was unworkably vague reflects error.

64 To determine whether the phrase "child died before ... birth" is unconstitutionally vague requires consideration of several factors including the purpose of the provision, the governing legal principles, the operation of the law in practice, the surrounding statutory provisions and the policies underlying the vagueness doctrine. This analysis compels the conclusion that s. 243 is not unconstitutionally vague.

65 The respondent says that the trial judge got it right.

66 In this case, the respondent argues, her liberty and security interests were implicated in two different ways. Not only may a conviction result in a sentence of imprisonment, but her personal autonomy, as a female, to make fundamental life choices, including whether to disclose the natural end of her pregnancy, implicated her liberty interest under s. 7. The dual nature of her s. 7 interests affected is a contextual factor affecting the vagueness analysis and one that demands greater, rather than lesser precision in the language of the prohibition.

67 The respondent submits that the appellant's reliance on *mens rea* as a factor negating what is otherwise a hopelessly vague statute is misplaced. The offending language is a component of the *actus reus*. Vagueness in the *actus reus* of necessity spills over to *mens rea* because of the requirement that an accused's conduct be intentional, wilfully blind or reckless with respect to the elements of the *actus reus*.

68 The respondent takes issue with the appellant's complaint about the failure of the trial judge to receive any evidence on the challenge. The prosecutor at trial, together with the appellant's trial counsel, agreed to proceed in the absence of the evidence. The trial judge had the authority to require the parties to adduce evidence, but no one asked him to do so. He can scarcely be faulted for proceeding with the challenge in accordance with the positions of the parties.

69 The respondent says that the trial judge treated *Berriman* as a legal test. He examined whether s. 243, as interpreted through *Berriman*, provided a basis for coherent judicial interpretation and identified a solid core of meaning. He found the results of the analysis inherently ambiguous, thus impermissibly vague.

70 The respondent also takes issue with the appellant's reliance on police, prosecutorial and judicial discretion as factors in the vagueness analysis. It is no answer to a claim of vagueness that charges may not be laid, prosecuted or result in convictions. None of these factors respond to the impermissible vagueness of the statutory language.

The Governing Principles

71 The submissions of the parties and the lengthy reasons of the trial judge ranged over a great many issues, medical, legal and philosophical. For my part, I prefer to concentrate my discussion of the governing principles on the terms of the offence created by s. 243 of the *Criminal Code*, the s. 7 *Charter* interests of liberty and security of the person, and the related, yet discrete doctrines of

vagueness and overbreadth and their influence on the constitutionality of s. 243. Along the way, I will examine the decision in *Berriman*.

The Offence of Child Concealment

72 Child concealment has a venerable lineage as a crime in Canada. As it approaches its 120th anniversary of residence in the *Criminal Code*, child concealment has changed little: a few words moved around, but nothing of importance for our purposes. Its current place is s. 243 of the *Criminal Code*. Its current terms are these:

> 243. Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

73 The essential elements of this offence include an *actus reus*, the disposal of a dead body of a child, and a *mens rea* that extends beyond the intentional commission of the *actus reus* to include the specific or ulterior intent to conceal the fact that the mother has been delivered of the child.

74 The *actus reus* or external circumstances of the offence require the prosecutor to prove beyond a reasonable doubt

> i. that what the accused did amounted to a *disposal*;
> ii. that the subject-matter of which the accused disposed was a *dead* body; and
> iii. that the dead body was that of a *child*.

Inclusion of the clause, "whether the child died before, during or after birth", would seem to render immaterial the time during the birth process at which the child died.

75 The core elements of the *actus reus* - disposal, dead body and child - are not defined in the section, nor elsewhere in the *Criminal Code*. The term "newly-born child", which is of significance for the offence of infanticide defined in s. 233, means a person under the age of one year. Section 223(1) defines when a child becomes a human being, thus when killing a child may form the basis for a prosecution of murder or manslaughter. Section 223(2) declares it to be homicide when a person causes injury to a child before or during its birth as a result of which a child dies after becoming a human being.

76 The fault element or *mens rea* in the crime of child concealment consists of the intentional disposal of the dead body of a child. Proof of knowledge of the character of the object disposed of is also essential to the prosecutor's case. But there is more: the prosecutor must also prove that in disposing of the dead body of a child, the accused intended to conceal the fact that the child's mother had been delivered of the child.

77 Section 243 is *not* enacted in gender-specific terms. Unlike ss. 233 and 237 (infanticide) and 242 (neglect to obtain assistance in childbirth), the principal in the offence of s. 243 is *not* restricted to a "female person".

The *Berriman* Standard

78 To provide meaning for the term "child" as it is used in "the child died before ... birth" in s. 243 the prosecutor invoked the standard articulated by Erle J. in his charge to the jury in *Berriman*.

79 In *Berriman* rumours were afloat in Ms. Berriman's neighbourhood that she had given birth to a child. What fuelled the suspicion, apparently, was Ms. Berriman's gradual enlargement, followed by a sudden recovery of "her usual form". A police officer paid a visit to Ms. Berriman, confronted her about her recent delivery and suggested that she had either murdered or concealed the birth of her child. Berriman's response formed a substantial part of the prosecutor's case against her, along with evidence about recovery of some calcined bones of a child of seven to nine months gestation.

80 Erle J. left the case to the jury, instructing them in these terms:

> This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a women to proclaim her own want to chastity, and if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probably is that the child would not be born alive.

Berriman at p. 390.

81 In *Berriman*'s case, as under s. 243, the offence can be committed even if the child was not born alive. To determine whether a child not born alive comes within the prohibition, *Berriman* postulates a "chance of life" standard. Without a chance of life, a foetus would not be a "child". Erle J. rejected any specific limit at which a chance of life begins, but considered it a safe assumption that "under seven months the great probably [*sic*] is that the child would not be born alive".

Liberty and Security of the Person

82 Among other things, s. 7 guarantees to everyone the right to liberty and to security of the person. To be constitutionally sound, any infringement of either right must be in accordance with the principles of fundamental justice.

83 The term "liberty" includes freedom from physical restraint. Thus, any law that imposes a penalty of imprisonment, whether mandatory or discretionary, deprives a person of liberty. It follows that such a law must conform to the principles of fundamental justice to be constitutionally valid: *Reference re: Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 515, 529; *Reference re: Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, at pp. 1140, 1215 (*Prostitution Reference*); *R. v. Swain*, [1991] 1 S.C.R. 933; and *Malmo-Levine* at para. 84.

84 But, "liberty" is not restricted to freedom from physical restraint. The term also applies when a law prevents an individual from making "fundamental personal choices": *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307, at paras. 49 and 54.

85 The phrase "security of the person" in s. 7 includes control over a person's body, extending beyond health and safety: *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76, at para. 3; *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30; *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519; *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46, at paras. 61 and 116. See also, *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791; and *Blencoe* at para. 98.

Vague Laws

86 Vague laws violate the principles of fundamental justice. If a vague law causes or amounts to a deprivation of a person's life, liberty or the security of his or her person, the law offends s. 7 of the *Charter*.

87 Vague laws offend two fundamental values of our legal system. They do not provide *fair notice* of what is prohibited, thus making compliance with the law difficult. Further, they do not provide *clear standards* for those entrusted with their enforcement to enforce them. As a result, vague laws contribute or lead to arbitrary enforcement.

88 Several principles emerge from the authorities that have considered complaints of constitutional infringement based on vagueness.

89 First, merely because a statute is broad and far reaching in its facial scope does not mean that it is unconstitutionally vague. What is crucial is whether a court examining the provision can give sensible meaning to its terms: *Prostitution Reference* at p. 1160.

90 Second, an offence need not be codified in statutory form to survive a vagueness challenge, although statutes may tend to provide greater precision than the ever-evolving common law: *United Nurses of Alberta v. Alberta*, [1992] 1 S.C.R. 901, at p. 933.

91 Third, inclusion in a statute of a term that has been the subject of debate and conflicting views as used in predecessor statutes does not render the provision void for vagueness, at least where the legislature has sufficiently delineated the area of risk and the terms of the debate: *Canada v. Nova*

Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 657.

92 Legislation that is very broad and general may withstand scrutiny for vagueness provided its scope is reasonably delineated so that legal debate can occur about the application of the provision to the peculiar circumstances of an individual case: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 70; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paras. 68-69.

93 Despite its frequent engagement by litigants who mount constitutional challenges, vagueness has been rarely applied by courts to strike down federal or provincial legislation. The governing principles have been narrowly defined, essentially rejecting vagueness where judicial interpretation of the provision is possible: *R. v. Lindsay* (2009), 245 C.C.C. (3d) 301 (Ont. C.A.), at para. 22; *Canadian Pacific* at para. 79. The threshold for the application of the vagueness doctrine is relatively high: *Lindsay* at para. 22; *Winko* at para. 68.

94 By their very nature, laws must cover myriad sets of circumstances. This acknowledgement of the self-evident or intuitive grasp of the obvious, makes it impossible to draft laws that precisely foresee each case that might arise. The situation is further complicated by the ambiguity and imprecision inherent in almost any word in either of our official languages: *Winko* at para. 68; *R. v. Devries* (2009), 95 O.R. (3d) 721 (C.A.), at paras. 35-36.

95 To imbue the rule against vagueness with some content, it is perhaps best to return to the core values the rule protects: fair notice to citizens and corresponding limitations on law enforcement discretion. A law is unconstitutionally vague if it fails

i. to give *fair notice* about the conduct prohibited by the law; or
ii. to impose *real limitations* on the discretion of those charged with enforcement.

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, at paras. 80-99.

96 What seems clear from the authorities is that the constitutional standard of precision that the vagueness doctrine demands cannot be very exacting. We cannot require a law to ascend to a standard of precision to which neither its subject-matter nor the language in which it is expressed lend themselves: *Nova Scotia Pharmaceutical Society* at pp. 606, 642; *Ruffo v. Conseil de la Magistrature*, [1995] 4 S.C.R. 267, at paras. 111-12. We do not and cannot require absolute certainty or laboratory precision: *Prostitution Reference* at pp. 1122 and 1156. Just because the law may be open to more than one interpretation does not offend vagueness principles: vagueness is only constitutionally terminal if the law cannot, even with judicial interpretation, provide meaningful standards of conduct: *Prostitution Reference* at pp. 1157-1161; *Nova Scotia Pharmaceutical Society* at pp. 606 and 626-27.

97 It is not enough to engage the vagueness doctrine that a provision is subject to interpretation,

or that there are cases that will land close to the line: *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 (C.A.), at para. 38.

Overbreadth

98 Overbreadth is a discrete ground upon which a law may be constitutionally unsound. It is related to vagueness because both overbreadth and vagueness emanate from a common source - a lack of legislative precision in the means used to accomplish the legislative objective: *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 792; *Lindsay* at para. 16.

99 Overbreadth refers to a law that restricts liberty more than is necessary to accomplish its purpose. Overbreadth is established only where the adverse effect of the legislation on individuals subject to it is grossly disproportionate to the state interest that the legislation seeks to protect or achieve: *Lindsay* at para. 21; *Heywood* at p. 792. The "grossly disproportionate" standard accords substantial elbow room to the legislature's assessment of the risk to public safety and the need for the law under siege: *Lindsay* at para. 21; *Malmo-Levine* at para. 143; *Cochrane* at para. 31.

The Relevance of Prosecutorial and Judicial Discretion

100 A claim of unconstitutionality, whether advanced as vagueness, overbreadth or otherwise, is not answered by reliance on prosecutorial or judicial discretion to confine its application: *R. v. Nguyen*; *R. v. Hess*, [1990] 2 S.C.R. 906, at p. 924; *Lavallee Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] 3 S.C.R. 209, at para. 45; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-104.

The Principles Applied

101 On the basis of a constitutional challenge advanced immediately after arraignment and plea, unsupported by any evidence, admissions or agreed statement of fact, the trial judge found a portion of a statutory provision almost 120 years old was unconstitutionally vague. The remedy he chose was to strike out a single word, "before", from the provision. In my view, the trial judge erred in his determination of unconstitutionality. He applied an overly demanding standard of vagueness and failed to properly apply the decision in *Berriman* in reaching his conclusion.

The Statutory Framework

102 Section 243 is the second of two indictable offences grouped under the heading, *Neglect in Childbirth and Concealing Dead Body*. The concealment offence has been part of our *Criminal Code* since our first *Criminal Code* came into force on July 1, 1893.

103 The concealment offence is one of several offences and related provisions that govern conduct that occurs prior to, contemporaneous with and subsequent to childbirth and involves the death of a child or disposal of the child's dead body.

104 As a general rule, homicide requires the death of a human being: *Criminal Code*, s. 222(1). But under s. 223(2) of the *Criminal Code*, a person commits homicide if they cause injury to a child before or during birth as a result of which the child dies after becoming a human being.

105 A foetus is not a "human being" or "person" for the purposes of the law of homicide: *R. v. Sullivan*, [1991] 1 S.C.R. 489, at p. 502. A child becomes a human being, thus their death may be the subject of a prosecution for unlawful homicide, when the child has completely proceeded, in a living state, from the body of its mother. It is of no moment whether the child has breathed, has an independent circulation or has been severed from the navel string: *Criminal Code*, s. 223(1).

106 A mother who fails to obtain assistance in childbirth commits an offence under s. 242 of the *Criminal Code*.

107 As a matter of law, proof of a crime of unlawful homicide is not foreclosed because the body of the deceased cannot be found, but a dead body is an indispensable aid to completion of the prosecutor's proof. A dead body assists in proving the fact and cause of death, in turn, whether the death was natural or caused by a human agency. In some cases, the body may assist in establishing the identity of the killer.

108 The purpose of s. 243 is to facilitate state investigation of infant death. By enacting a criminal prohibition against concealment of the dead body of a child, s. 243 preserves crucial evidence.

109 Concealment of the dead body impedes, in some cases prevents, timely forensic examination of the body. In turn, timely forensic examination of the dead body helps to determine when and how death occurred. A determination of when and how death occurred often assists in establishing whether the death attracts criminal liability.

110 Concealment of the dead body of a child rends the nexus or link between child and mother. The ineluctable effect of such a severance is the elimination of a valuable source of information about the circumstances in which death occurred, thereby whether criminal liability will attach and to whom.

The Meaning of "Child"

111 In many cases, post-mortem examination of the remains will yield an opinion about cause of death and the relationship between death and the birth process. In other cases, like this, the state of the remains will not permit an informed medical opinion about either subject.

112 The *Criminal Code* declares when a child becomes a human being. When a child has completely proceeded, in a living state, from the body of its mother, the child becomes a human being for the purposes of the *Criminal Code*. It is of no consequence for *Criminal Code* purposes whether the child has breathed, has an independent circulation, or remains attached to the navel

string. This transition into a human being is of signal importance for the law of homicide. But for the first year of life, at least so far as the *Criminal Code* is concerned, the new "human being" remains a child, a "newly-born child".

113 The *Criminal Code* offers no assistance about the meaning of "child" otherwise than in the transition from child to human being. In other words, the *Criminal Code* does not help us about when a foetus becomes a child for the purpose of determining whether certain conduct involving the child will attract criminal liability.

114 The test that *Berriman* proposes, a chance of life standard, marks the outer boundary of when a foetus becomes a child for the purpose of the concealment offence at common law. Under *Berriman*, for a foetus to become a child, the foetus must have reached a period when, but for some accidental circumstances, such as disease, it might have been born alive. The standard is one of viability. Under *Berriman* a foetus becomes a child when it reaches a stage in its development from which it might grow into a human being, given proper care.

115 For the purposes of establishing liability for an offence under s. 243 in cases involving death before birth or those in which the time of death in relation to birth is unclear, a foetus becomes a child when it (the foetus) has reached a stage in its development when, but for some external event or other circumstances, it would likely have been born alive.

116 To determine whether the disposal was of the "dead body of a child", the trier of fact must consider all the circumstances. In the usual course, the trier of fact's decision will be informed by expert medical evidence about the course of the pregnancy, fetal age and viability, and the cause of death. In some instances, there may also be evidence about the conduct of the child's mother and others during the course of the pregnancy and at times contemporaneous with the death of the child. The examples given are intended as illustrative not as exhaustive of the evidence that might be adduced.

The Vagueness Standard

117 The trial judge concluded that part of s. 243 was void for vagueness because he could not determine a coherent unambiguous meaning for the term "child" in the context of a death that occurred before the child's birth.

118 Neither the *Charter* nor the vagueness doctrine require that the statute provide absolute certainty in its application by the language it uses. Legal rules only provide a framework, a behavioural guide. They do so by approximation, by delineating a risk zone. We can expect no more of them. Certainty is achieved only where the law is actualized by a competent authority: *Nova Scotia Pharmaceutical Society* at p. 638.

119 Language is not a scientific instrument, an exact tool. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of

conduct in advance, else it be shunted to the sidelines, a constitutional casualty. An enactment must enunciate some boundaries, which create an area of risk: *Nova Scotia Pharmaceutical Society* at p. 639.

120 Section 243, guided by the principles described in *Berriman* in the present context, lays down an area of risk that gives fair notice to persons of the boundaries of criminal liability and limits the discretion of police in enforcing the legislation. We must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objects, by requiring a law to ascend to a level of precision to which its subject-matter fails to lend itself: *Nova Scotia Pharmaceutical Society* at p. 642.

121 The portion of s. 243 upon which the trial judge focused here cannot be uprooted from its context and subjected to microscopic scrutiny. This offence requires proof of *knowledge* of the character of the subject-matter disposed of, the dead body of a child, together with a *purpose*, or ulterior intention, of concealment of the birth. It is one of several offences, fatal offences against the person, that enjoin conduct that causes or contributes to the death of another. A provision that renders investigation of death less difficult forms an integral part of this statutory scheme.

122 It is also worth reminder that a crime consists of an *actus reus* and a *mens rea*. Each may have several components. To determine whether the definition of a crime is impermissibly vague requires a consideration of the enactment as a whole, including its *mens rea*. It is the provision as a whole that must define an area of risk, provide fair notice and curtail law enforcement discretion, not each individual noun, adjective, adverb, verb or preposition. And that, in my view, s. 243 does.

Overbreadth

123 The trial judge rejected the respondent's claim that inclusion of the words "child died before ... birth" rendered s. 243 constitutionally infirm on the basis of overbreadth. Although the submission was not pressed in argument before us, I agree with the conclusion reached by the trial judge. The inclusion of the impugned words does not overshoot the purpose of the prohibition by including within it conduct beyond what is necessary to achieve the purpose for which the section was enacted.

CONCLUSION

124 In the result, I am satisfied that the trial judge erred in striking out the word "before" in s. 243 on the ground of vagueness when it was used in the clause "the child died before ... birth". Section 243 is not void for vagueness in this or in any other respect.

125 For these reasons, I would allow the appeal, declare s. 243 constitutionally valid and order a new trial.

D. WATT J.A.

D.H. DOHERTY J.A.:-- I agree.
R.P. ARMSTRONG J.A.:-- I agree.

cp/e/ln/qllxr/qlana/qlhcs/qlced/qljyw/qlced/qlana

1 These circumstances are taken from the prosecutor's remarks after the ruling on constitutionality. No evidence was adduced at trial.

Case Name:

R. v. Noel

Between
Her Majesty the Queen, Appellant, and
Patrice Jean Noel, Respondent

[2010] N.B.J. No. 126

[2010] A.N.-B. no 126

2010 NBCA 28

255 C.C.C. (3d) 27

358 N.B.R. (2d) 108

No. 25-09-CA

New Brunswick Court of Appeal

J.E. Drapeau C.J.N.B., W.S. Turnbull and B.V. Green JJ.A.

Heard: January 19, 2010.
Judgment: April 22, 2010.

(53 paras.)

Criminal law -- Procedure -- Trial judge's duties -- Assessing credibility of witnesses -- Appeal by Crown from acquittal of accused dismissed -- During traffic stop, police testified that he detected odour of raw marijuana and arrested accused for possession -- Incidental search resulted in seizure of large quantity of marijuana from vacuum-sealed bags in trunk -- Trial judge rejected officer's testimony regarding odour and excluded evidence based on breach of accused's rights -- Although trial judge erred by considering extraneous information in rejecting officer's evidence, such information was not operative in the reasoning for rejection, and thus had no material bearing on acquittal of accused -- Criminal Code of Canada, ss. 495, 676(1)(a).

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific

remedies -- Exclusion of evidence -- Appeal by Crown from acquittal of accused dismissed -- During traffic stop, police testified that he detected odour of raw marijuana and arrested accused for possession -- Incidental search resulted in seizure of large quantity of marijuana from vacuum-sealed bags in trunk -- Trial judge rejected officer's testimony regarding odour and excluded evidence based on breach of accused's rights -- Although trial judge erred by considering extraneous information in rejecting officer's evidence, such information was not operative in the reasoning for rejection, and thus had no material bearing on acquittal of accused -- Criminal Code of Canada, ss. 495, 676(1)(a).

Appeal by the Crown from the acquittal of the accused, Noel, of possession of marijuana for the purpose of trafficking. Police stopped the accused for speeding and sought to verify his registration. The officer testified that upon his return to the vehicle, he detected an odour of raw marijuana. The accused was arrested for possession of marijuana. Police conducted a warrantless search incidental to the accused's arrest. A large quantity of marijuana was seized from vacuum-sealed bags from a duffel bag in the trunk of the vehicle. The accused was charged with possession for the purpose of trafficking. At trial, the accused sought exclusion of the marijuana on the basis that the officer lacked reasonable grounds to believe that the accused was in possession of marijuana. The Crown submitted that the odour of marijuana provided grounds for the lawful arrest of the accused, and thus justified the search of the vehicle incidental to the arrest. The officer was cross-examined regarding previous arrests he had made where no odour of large quantities of marijuana was detectable from the vehicle's interior. The trial judge assessed those other arrests and ultimately expressed reservations as to whether the officer detected an odour of raw marijuana in the accused's vehicle. The judge found that the arrest of the accused and the follow-up search was conducted on nothing more than a hunch. The judge found that the search breached the accused's rights and excluded the evidence on the basis that its admission would bring the administration of justice into disrepute. The Crown appealed on the grounds that the trial judge was unduly influenced by the reported facts in the other cases involving the same arresting officer. The Crown submitted that the judge erred in law by assessing the reliability of the officer's testimony based on facts that were not part of the evidentiary record.

HELD: Appeal dismissed. The trial judge's reasons for decision regarding the lawfulness of the arrest featured forays beyond the evidentiary record contrary to the rule against use of extraneous information. Only the factual underpinnings established by admissible evidence could be considered in determining whether the officer had detected an odour of raw marijuana. However, the error of law attributed to the trial judge did not constitute a reversible error, as the extraneous information was not operative in the reasoning that led the judge to reject the officer's key testimony regarding the odour of raw marijuana. The foundational circumstances for the rejection were rooted in the evidential record. Thus, the erroneous use of extraneous information had no material bearing on the acquittal of the accused.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 8, s. 24(2)

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 4(1), s. 4(4)(b), s. 5(1), s. 5(2), s. 11(2)

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 487(1), s. 487.1, s. 495, s. 495(1), s. 495(2), s. 495(3), s. 676, s. 676(1)(a)

Interpretation Act, R.S.C. 1985, c. I-1, s. 34(1)(a)

Appeal From:

On appeal from a decision of the Provincial Court: February 10, 2009.

Court Summary:

History of Case:

Decision under appeal: Unreported

Preliminary or incidental proceedings: N/A.

Counsel:

For the appellant: David Schermbrucker.

For the respondent: James J. Matheson.

THE COURT: The error of law attributed to the trial judge does not constitute reversible error in the particular circumstances of the present case. The appeal is, therefore, dismissed. Reasons for judgment by: J.E. Drapeau C.J.N.B. Concurred in by: J.W. Turnbull and B.V. Green JJ.A.

J.E. DRAPEAU C.J.N.B.:--

I. Introduction

1 On June 20, 2006, the respondent, Patrice Jean Noel, was pulled over by an RCMP officer for the purpose of verifying the registration certificate of the vehicle he was operating. Within minutes, this routine highway traffic stop morphed into a full-fledged investigation under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 and a warrantless search incidental to Mr. Noel's arrest for possession of marihuana culminated in the seizure of a large quantity of that controlled

substance from the trunk of his vehicle. In due course, Mr. Noel stood trial in the Provincial Court on a charge under s. 5(2) of the *CDSA* (possession, for the purpose of trafficking, of more than 3 kilograms of marihuana).

2 As might be expected, the outcome in the court below hinged on the admissibility of the marihuana seized from Mr. Noel's vehicle. At a *voir dire* on that issue, the defence urged exclusion, arguing the predicate arrest was unlawful because the officer lacked the requisite reasonable grounds to believe Mr. Noel was in possession of marihuana. The Crown countered with the officer's sworn testimony that the arrest followed on the heels of his detection of an odor of raw marihuana from the interior of Mr. Noel's vehicle. In the Crown's submission, that circumstance, viewed in context, sufficed to provide the reasonable grounds required to clothe the arrest with the mantle of lawfulness and it followed that the incidental search was "reasonable" for constitutional purposes.

3 In ruling for the defence, the trial judge expressed reservations about the "reliability" of the arresting officer's testimony that he detected an odor of raw marihuana. After stating she had "difficulty" with that sworn assertion, the trial judge concluded Mr. Noel's arrest was "groundless" and that the follow-up search had been undertaken on a mere "hunch". Since Mr. Noel's arrest was unlawful, the trial judge found the incidental search was also unlawful. That finding led her to hold the search was "unreasonable" within the meaning of s. 8 of the *Canadian Charter of Rights and Freedoms*.

4 The evidence revealed by the search having been obtained in a manner that infringed Mr. Noel's s. 8 rights, the trial judge turned to the question of whether its admission would bring the administration of justice into disrepute. She concluded it would and excluded the contested evidence pursuant to s. 24(2) of the *Charter*. There being no admissible evidence to substantiate the charge, the trial judge acquitted Mr. Noel.

5 The Attorney General appeals on one ground, which is both specific and narrow. He submits that "in making her findings of fact and determining the main issue, the trial judge was heavily influenced by the reported facts as set out in other trial judges' reasons for judgment in other cases involving the same [arresting] officer". Correlatively, the Attorney General contends "those reported facts were not part of the evidentiary record in [Mr. Noel's] trial and should have had no part to play in the trial judge's deliberations". The Attorney General submits that "by relying on extraneous evidence in this way, the trial judge erred in law in deciding the case based on important evidence that was not properly before the Court". The "other cases" referenced by the Attorney General are: *R. v. Oldford and Tucker* (unreported, December 20, 2007, N.B.P.C.); *R. v. Truk Khuu* (unreported, December 5, 2007, N.B.P.C.); and *R. v. Ambrose (K.)* (2008), 332 N.B.R. (2d) 68, [2008] N.B.J. No. 241 (QL), 2008 NBPC 32.

6 From Mr. Noel's perspective, the Achilles' heel of the Attorney General's appeal lies in its premise. In his submission, the facts that undergird the trial judge's rejection of the officer's key

testimony regarding the grounds for arrest were established during the *voir dire*, primarily through the arresting officer's testimony on cross-examination and re-direct.

7 For the reasons that follow, I would dismiss the appeal. In brief compass, my reasons for so doing are: while it is true the trial judge's reasons for decision feature forays outside the evidential record and appear, on the surface, oblivious of the rule against the use of extraneous information, her rejection of the officer's key testimony -- the smell of raw marihuana from the vehicle's interior -- is not umbilically tied to any such information.

II. Context

8 In the Respondent's Submission, Mr. Noel accepts as substantially correct the statement of facts found in the Appellant's Submission. That being so, I draw liberally from the latter document in providing the account that follows.

9 Two R.C.M.P. officers testified for the Crown on the *voir dire*, Constable Stéphane Raymond, the arresting and searching officer, and Constable Joseph Jacques Pierre Cloutier, who provided backup at the scene.

A. *The testimony of Constable Raymond*

10 Cst. Raymond joined the RCMP two decades ago, more precisely in 1990. At that time, he received basic training relative to the enforcement of Canadian drug laws. From 1991 to 1994, Cst. Raymond was assigned to the Montreal Drug Section where he received additional related training and experience. Subsequently, he spent several years in smaller communities in Quebec and New Brunswick where he was further exposed to controlled drugs and substances, including marihuana. While a member of the Moncton Roving Traffic Unit for the two years previous to Mr. Noel's arrest, he was involved in some 80 vehicular searches and seizures of controlled drugs and substances, including marihuana. Though Cst. Raymond was not called to offer expert opinion evidence, the Crown relied on his extensive experience and training to buttress his conclusion that what he smelled coming from Mr. Noel's vehicle was indeed raw marihuana and, more generally, to inform the reasonableness -- subjective and objective -- of his grounds to arrest Mr. Noel.

11 In the late afternoon of June 20, 2006, while parked in a U-Turn area on the Trans-Canada Highway near Salisbury, New Brunswick, and accompanied by Jasper, a specially trained drug-sniffing dog, Cst. Raymond observed an eastbound vehicle traveling in the passing lane at a speed slightly in excess of the posted limit. He decided to intercept the vehicle and warn its driver "about his speeding". While in the process of taking chase, Cst. Raymond initiated a license plate query through his vehicle's computer. The response ("no record found"), which was transmitted in short order, prompted an immediate activation of his vehicle's emergency lights. The target vehicle's driver obeyed the stop order in unremarkable fashion.

12 Cst. Raymond exited his vehicle and approached on the target vehicle's passenger side. Mr.

Noel was its driver and sole occupant. Cst. Raymond advised him through the open front passenger window that he had been pulled over for the purpose of checking his vehicle's registration certificate, there being no record for its license plate. After explaining his vehicle was a rental vehicle, Mr. Noel handed over the rental agreement. Cst. Raymond then asked Mr. Noel for his driver's license, which he produced.

13 Significantly, Cst. Raymond did not detect any suspicious odor at this time although he appears to have been in data-gathering mode, making a mental note of two cell phones and some food wrappers in the vehicle, but no luggage. If only for debate-defining purposes, I should immediately point out that the relevance, if any, of the last-mentioned observations remains unclear and, just as importantly, the Crown did not rely upon them to make the case that there were reasonable grounds to arrest Mr. Noel.

14 After collecting the documents mentioned above, Cst. Raymond returned to his patrol vehicle. Upon reviewing the rental agreement, he realized the subject vehicle's return was nine days overdue, a circumstance that caused him to seek clarification from the car rental agency. Following unsuccessful attempts at contacting the agency with his cellular phone, Cst. Raymond asked Cst. Cloutier, who had just arrived at the scene, to try with his own portable phone. Cst. Raymond then walked back to Mr. Noel's vehicle to advise him that efforts were ongoing to contact the rental company and that the investigative process would take a little longer.

15 Once at the window through which he had previously interfaced with Mr. Noel, Cst. Raymond would have been "hit by an odor of raw marihuana". Not surprisingly, the credibility of that statement would take center stage during Cst. Raymond's cross-examination once he confirmed that, but for that odor, Mr. Noel would have been released. At any rate, Cst. Raymond did not immediately confront Mr. Noel with the matter of the odor he testified to having detected. Instead, he retrieved from Mr. Noel a phone number to call for rental details and returned to his colleague's police vehicle.

16 Cst. Raymond asked Cst. Cloutier to dial the number in question. He did so and was advised by a representative of the rental agency that everything was in order and that "it was okay to let [Mr. Noel] go". Cst. Raymond demurred, stating Mr. Noel would be arrested because of the odor of raw marihuana he had detected.

17 Immediately following Mr. Noel's arrest for "possession of marihuana" and his removal from the rental vehicle, Cst. Raymond undertook a search of the passenger compartment. While he did not find any marihuana in that location, the smell of raw marihuana "was getting stronger" during the search of the back seat area. As a result, Cst. Raymond proceeded to the rear of the vehicle where, after opening the trunk, he found a closed duffel bag, a search of which revealed numerous vacuum-sealed plastic bags of what looked like marihuana. I note parenthetically that it was later determined there were 56 such bags, each weighing slightly more than half a pound, for a total of 30.8 pounds (14 kilograms).

18 Shortly after the marihuana's discovery, Cst. Raymond decided ("for training purposes") to put Jasper through a drug sniffing exercise. According to the officer, the dog's reaction pointed to the presence of "narcotics" in the trunk.

19 Finally, and while still at the roadside, Mr. Noel was released from custody after promising to appear in court to be dealt with according to law.

20 On cross-examination, Cst. Raymond explained he first approached Mr. Noel's vehicle from the passenger side for personal safety reasons and so that he would have an unobstructed view of the interior, the point being that he was then in contraband investigation mode. He stated his second approach took place just a few minutes later and that "he was hit with a smell of raw marihuana" while standing at "the same place" as during his first exchange with Mr. Noel. Cst. Raymond also confirmed he did not enlist Cst. Cloutier's assistance in corroborating his detection of an odor of raw marihuana, the sole basis for Mr. Noel's arrest. Additionally, Cst. Raymond acknowledged he did not deploy Jasper with a view to providing, prior to the arrest and search, support for his detection of an odor of marihuana.

21 Most importantly for our present purposes, Cst. Raymond was also queried on cross-examination and re-direct regarding the circumstances of his arrest of the accused in *Khuu* and *Ambrose* and his search of their vehicles, all of which took place within a few months of Mr. Noel's arrest. In particular, Cst. Raymond explained that, although "somewhere near [...] 40 pounds of marihuana" were seized in each of the *Ambrose* and *Khuu* cases, he had not smelled "the marihuana in the vehicle". He sought to explain his claimed ability to do so in the case at bar by speculating that the prevailing conditions, such as the number of layers of packaging and wind direction, may have been different. As will be seen, I delve more fully into Cst. Raymond's testimony under "Analysis and Decision".

B. *The testimony of Constable Cloutier*

22 On June 20, 2006, at approximately 4:45 p.m., Cst. Cloutier was traveling east on the Trans-Canada highway when he noticed Cst. Raymond's police vehicle parked on the roadside behind a grey Chevrolet Impala. He brought his police vehicle to a stop aft of Cst. Raymond's.

23 At Cst. Raymond's request, he contacted the rental company identified in the rental agreement provided by Mr. Noel and was advised the latter remained authorized to operate the vehicle. Cst. Cloutier then exited his police vehicle and informed Cst. Raymond of that state of affairs. Cst. Raymond responded: "It doesn't matter, I smell the odor of marihuana, I'm going to arrest him."

24 After the arrest, Cst. Cloutier placed Mr. Noel in his police vehicle where he was informed again of the reason for his arrest, namely possession of marihuana, and advised of his rights under the *Charter* in both official languages.

25 On cross-examination, Cst. Cloutier acknowledged he had not attended at or near Mr. Noel's

vehicle to corroborate his colleague's claimed detection of an odor of marihuana.

C. *The salient parts of the trial judge's reasons for decision*

26 After noting "the parties" had referred her to three other cases involving searches and seizures by Cst. Raymond, namely *R. v. Oldford and Tucker*; *R. v. Ambrose*; and *R. v. Truk Khuu*, the trial judge detailed the facts of each. She did so, at least insofar as the *Ambrose* and *Khuu* were concerned, because, in her view, their "factual underpinnings [...] are relevant to the present case with regards to the reliability of the olfactory findings made by Officer Raymond and the circumstances under which these observations were made [...]".

27 The trial judge recounted the facts of *Oldford and Tucker* in these terms:

> Officer Raymond and another officer were conducting patrol on the Trans Canada Highway in March of 2006 when they encountered another vehicle traveling in the opposite direction. The vehicle was doing 115 kilometres an hour in a 110 zone. What really caught the officer's attention was the sudden drop in speed to 105 km per hour. The officers decided to turn around and follow the vehicle. As they caught up to it, they noted it had Newfoundland plates which, upon verification, appeared to have been expired since May 2005. They decided to stop the vehicle and, upon conversing with the occupants of the vehicle, they were told that it was recently purchased and they produced an application for vehicle registration dated February 2006 along with a "Dealer Temp" sticker clearly affixed to the rear license plate of the vehicle.
>
> The police officers wanted to verify that the vehicle identification number on the documents actually matched the one affixed to the vehicle to make sure this newly-purchased vehicle was not the product of a fraudulent VIN switch. To that purpose, Officer Raymond opened the driver's door to effect this verification so he could refer to the serial number located at the bottom of the door post. It is while doing this verification, with the door opened, and in a crouching position, that he was struck with an overwhelming smell of raw tobacco. Oldford and Tucker were arrested and a subsequent search of their vehicle revealed some 1200 bags of cigarettes hidden mainly inside different hockey equipment bags.

The trial judge ended her consideration of *Oldford and Tucker* by noting Cst. Raymond's warrantless search of the vehicle in that case was found to be authorized at law as a search incidental to a lawful arrest.

28 The trial judge followed with an adumbration of the facts in *Khuu*:

> In *R. v. Truc Khuu*, an unreported decision [...] dated December 5th, 2007,

> Officer Raymond, while on patrol on Highway 2, saw a vehicle in front of him which went over the fog line twice and while travelling at a speed of 98 kilometers per hour in an area where the speed limit is 110 kilometers per hour. Officer Raymond decided to pull this driver over to check the driver for fatigue or impaired driving. After he pulled the vehicle over, he requested the usual documents from Mr. Khuu who told Officer Raymond that the vehicle had been rented by his wife. He further explained that he had lost his driver's license during a recent move from Ottawa to Montreal. A computer search failed to reveal a valid driver's license in either Quebec or Ontario for Khuu. On checking the PIRS system, i.e. the Police Information Report System, it showed that Khuu was listed in a file implicating him with respect to marijuana and ecstasy. Officer Raymond then contacted Avis, from which the vehicle had been rented, and, after speaking to a person in authority and explaining that Khuu did not have a valid driver's license and that Khuu's name was not on the rental agreement, he was further informed that the rental agreement had expired. The Avis representative told Officer Raymond to keep the vehicle and tow it to the local Avis office in Moncton. Officer Raymond asked the Avis representative if he could search the vehicle as he believed the vehicle to be involved in illegal activity. Having been given this authorization, he searched the vehicle and in the trunk he found two well-taped boxes. He opened one and saw vacuum-sealed bags with marihuana in them.

The trial judge commented that, although the decision in *Khuu* did not clearly identify the quantity of marihuana seized, it had been "suggested during the cross-examination of Officer Raymond in the *voir dire* of the present case that the quantity was somewhere near 40 pounds".

29 Finally, the trial judge turned her mind to the facts of *Ambrose*, a case that, in her view, bore "remarkable similarity to the instant case":

> Officer Raymond stopped Mr. Ambrose, a young black man, because it appeared to him that when he observed the Ambrose vehicle driving past him on Highway 2, he appeared to be daydreaming. When he queried the license plate, it showed no registered owner found. Mr. Ambrose produced a rental agreement. However, Officer Raymond testified that he was suspicious that the accused was carrying contraband as he had observed an air freshener on the rear view mirror, an energy drink, two cell phones and a duffle bag inside the vehicle. Officer Raymond, hoping for an opportunity to confirm his suspicion, told Kinte that he was free to go but asked him if he would not mind answering a few questions. A conversation ensued during the course of which the questions became progressively more pointed until finally Officer Raymond asked Ambrose if he was carrying drugs and, by that time, Ambrose was showing overt signs of nervousness. Ambrose would have swallowed a couple of times, looked at the

> back of his vehicle and answered no. The reported decision [...] clearly states at paragraph 48 that there were 44 pounds of marijuana in the Ambrose vehicle.

The trial judge observed that, while the packaging of the contraband was not described in the reasons for judgment in *Ambrose*, Cst. Raymond had agreed on cross-examination with the suggestion that it was "similar to the case at bar [...], i.e. vacuum-sealed bags".

30 The foundational considerations for the trial judge's refusal to accept Cst. Raymond's sworn evidence that he detected an odor of raw marihuana from Mr. Noel's vehicle appear in the following excerpts from her reasons for decision:

> Officer Raymond stops a vehicle driven by a young black man ostensibly to enforce the *Motor Vehicle Act*. While initially it was, according to his evidence, to give him a warning for speeding, eventually it becomes an issue with regards to his license plate. Noel provides him with a contract agreement and a contact phone number for the rental company. During the course of this conversation, the evidence clearly establishes that nothing is noted concerning any suspicious odours. A second visit to the Noel vehicle made in exactly the same conditions as the first encounter this time produces an odour of raw marijuana. There is no intervening event, such as opening the vehicle's doors as in the *Oldford and Tucker* (*supra*) decision. No reliable explanation is provided either as to why the same set of circumstances can give such a different result.
>
> Secondly, there are indeed instances where Officer Raymond's olfactory abilities failed him, and this is certainly the case in the *Ambrose* and *Khuu* decisions. What is particularly troublesome is that it would appear from the cross-examination of Officer Raymond that the drugs were packaged in exactly the same fashion in these two arrests as they were in the present case.
>
> It is also open to speculation why the officer, faced with his own obviously contradictory observations, did not simply verify something as highly subjective as a smell. This did not require much of an effort as he had the specially-trained narcotics dog in his police cruiser. As well, his partner was also at the scene. The evidence clearly establishes that he did in fact use his search dog, but only after he had searched the vehicle.
>
> [...]
>
> In the present case, Officer Raymond refers to an odour of raw marijuana, [...]

> and this odour is only detected in his second interaction with the accused in circumstances that are highly problematic in terms of evidence reliability as I have discussed earlier. The only officer who smelled the marijuana is Officer Raymond. He had a colleague right at the scene and he had in his police vehicle a dog trained in narcotic detection.

31 As mentioned, the trial judge ultimately concluded Mr. Noel's arrest was "groundless" and that Cst. Raymond had undertaken it on a hunch. She came to that conclusion after considering "the circumstances elicited by the evidence" and recording her "considerable difficulty" with the officer's testimony. While it is true the trial judge did not state she disbelieved Cst. Raymond's testimony that he had smelled raw marihuana from within Mr. Noel's vehicle, no other rational explanation for her rejection of his testimony on point emerges from the record. After all, if she believed his evidence, the trial judge would arguably have had no choice but to find Mr. Noel's arrest was founded upon reasonable grounds to believe he was in possession of a significant quantity of marihuana. In that regard, I find appealing the views expressed by Jackson J.A. in *R. v. Janvier* (2007), 302 Sask.R. 190, [2007] S.J. No. 646 (QL), 2007 SKCA 147:

> With raw marihuana, in relation to a charge of possession, there is a direct relationship between the smell and the search for the source of the smell. It will be possible for the police officer, and the court, to verify whether the smell is linked to what is found. This is the point that distinguishes this Court's decision in *R. v. Sewell*, [2003] S.J. No. 391. The smell of raw marihuana is a sensory observation of the presence of raw marihuana, just as the sight of marihuana is. The smell of burned marihuana is a sensory observation of marihuana having recently been smoked. The latter, unlike the former, is not the offence that gives grounds for arrest without a warrant. [para. 44]

III. Statutory Provisions

32 The relevant statutory provisions are attached as Appendix A.

IV. Analysis and Decision

33 Appeals from acquittals are relatively rare in Canada. That is the case primarily because of the quality of the adjudicative work performed by trial judges. It may also be, on occasion, a function of the narrow right of appeal conferred upon the Crown by the *Criminal Code*. Thus, under s. 676(1)(*a*), the Attorney General may appeal to the court of appeal against a judgment or verdict of acquittal in proceedings by indictment only on a ground of appeal that involves "a question of law alone". Unlike the person convicted in such proceedings, the Attorney General may not seek leave to appeal on a ground that involves a question of fact or a question of mixed fact and law. That said, in *R. v. Biniaris*, [2000] 1 S.C.R. 381, [2000] S.C.J. No. 16 (QL), 2000 SCC 15, the Court explained that the word "alone" in s. 676(1)(*a*) does not operate to minimize the pool of questions of law

capable of triggering the provision's application:

> Various arguments have been advanced, based on the implications that should flow from the use of the expression "question of law alone" in s. 676(1)(a), which provides for appeals by the Crown to the court of appeal. These arguments are of little assistance or consequence in determining the scope of access to this Court under ss. 691 or 693. The use of that expression can be taken to mean either that the Crown has a right of appeal from an acquittal only on a question of law, or that there is such a thing as a "question of law alone", which is distinct from a "question of law". I think it means the former. It is used in contrast to the right of the accused to appeal both on questions of law, questions of fact, and questions of mixed fact and law (see s. 675(1)(a)(i) and (ii)), and it is of no assistance in further defining the scope of the expression "question of law" in ss. 691 and 693. [para. 30]

34 In his book *Criminal Procedure* (Toronto: Irwin Law, 2008), Professor Steven Coughlan suggests the following constitute errors that can open the door to appellate intervention at the Attorney General's behest:

> Some straightforward examples include the admissibility of evidence, the interpretation of a statute, and whether evidence is capable of being corroborative. A decision concerning the application of a legal standard, such as investigative necessity, is also a question of law. Whether a correct conclusion has been reached on a *Charter* question, such as whether there has been a section 10(b) violation or whether evidence should be excluded under section 24(2), is also a question of law. [p. 366, footnotes omitted]

The author goes on to add that "matters can still be classed as questions of law even if they involve the consideration of the evidence in some way". In *Criminal Pleadings & Practice in Canada*, 2nd ed., looseleaf (Aurora, Ont.: Canada Law Book, 1987) at para. 23:1010, the Honourable E.G. Ewaschuk provides a helpful inventory of matters that constitute pure questions of law. The list includes: (1) the admissibility of evidence; (2) evidential relevance; (3) "conjectural possibility (speculation)"; (4) what constitutes corroborative evidence; (5) what is proper rebuttal evidence; (6) the trial judge's failure to consider the evidence cumulatively, as opposed to separately; and (7) his or her failure to consider the evidence in its totality.

35 In the present case, the Attorney General contends the trial judge committed a reversible error of law when she determined the pivotal issue of testimonial "reliability" on the basis of information drawn from sources outside the evidential record at her disposal. Mr. Noel's assessment of the error attributed to the trial judge is, however, markedly different: he characterizes it as one impugning her finding of fact that the arrest was "groundless". On that view, it could be argued the Attorney General's appeal raises a question of fact, and not a question of law alone, which, as I have noted, is

the linchpin for this Court's jurisdiction by virtue of s. 676(1)(*a*).

36 With respect, I understand the Attorney General's complaint to be that the adjudicative process culminating in Mr. Noel's acquittal offended the prohibition against the use of extraneous or extrinsic information. That longstanding rule ordains that matters of fact are established by the introduction of evidence (see *Watt's Manual of Criminal Evidence* (Thomson Carswell: Toronto, 2009), at p. 111; *Lazard Brothers & Co. v. Midland Bank*, [1933] A.C. 289, at pp. 297-8, *per* Lord Wright; *Scarr v. Gower* (1956), 2 D.L.R. (2d) 402, 18 W.W.R. 184 (B.C.C.A.); and *R. v. Perkins* (2007), 228 O.A.C. 120, [2007] O.J. No. 3246 (QL), 2007 ONCA 585). As is well known, enabling legislation, admissions or judicial notice may expand the body of information which a trier of fact may draw upon in making findings of fact and credibility. However, no such legislation or admission is in play here and it is trite law that judicial notice cannot be taken of a fact simply because it was established in other judicial proceedings (see *R. v. Skelton*, [1968] 3 C.C.C. 35, [1967] B.C.J. No. 99 (S.C.) (QL); *R. v. J.S.* (1998), 38 W.C.B. (2d) 196, [1998] S.J. No. 247 (Prov. Ct.) (QL), at para. 44; and *R. v. Kirton* (2007), 214 Man.R. (2d) 59, [2007] M.J. No. 299 (QL), 2007 MBCA 38). In my respectful judgment, the issue raised by the present appeal is as much a question of law as the issues inventoried in paragraph 34 above. That being so, there is no impediment to this Court's assumption of jurisdiction. I now turn to the merits of the appeal.

37 The *Criminal Code* provides a potential avenue of relief for RCMP highway patrol officers who believe that an indictable offence has been committed and that it would be impracticable to appear personally before a Provincial Court judge to make application pursuant to s. 487 for a warrant to search a vehicle stopped at roadside. Section 487.1 is on point and provides that they may apply for a warrant by telephone or other means of telecommunication. That provision applies to indictable offences under the *CDSA* by virtue of s. 11(2) of that statute. Nothing in the record suggests that both processes under s. 487 and s. 487.1 were unavailable to Cst. Raymond. Had he obtained a search warrant, whether under s. 487 or s. 487.1 by means of his or Cst. Cloutier's cellular phone, the onus would have been on Mr. Noel to establish the search of his vehicle was "unreasonable" within the meaning of s. 8 of the *Charter*. As is well known, meeting that onus is relatively difficult having regard to the deference owed by the reviewing court to the issuing judge's decision. On that score, suffice it to repeat the summary of the applicable principles found in *R. v. Allain (S.)* (1998), 205 N.B.R. (2d) 201 (C.A.), [1998] N.B.J. No. 436 (QL):

> The fact that Informations are subject to judicial scrutiny before a search warrant can be validly issued and the fact that the issuing judge's ultimate decision involves an exercise of discretion explain, at least in part, why any subsequent review must be undertaken from the standpoint that the impugned search warrant and Information are presumed valid. See Fontana, *Law of Search and Seizure in Canada*, 4th ed. (Toronto: Butterworths, 1997) at 72. Since the Information is presumed valid, it follows that the burden rests on the challenger to satisfy the reviewing judge that it does not comply with the substantive requirements set by law.

Moreover, the reviewing court must not assess the substantive quality of the Information by confining itself to the evidence which is explicitly set out in it. The court must bear in mind the undoubted power of the issuing judge to draw reasonable inferences from such explicitly stated evidence. This power has been recognized by our Court on several occasions. See *R. v. MacDonald (F.D.)* (1992), 128 N.B.R. (2d) 447 (C.A.), and *Valley Equipment Ltd. v. R.* (1998), 198 N.B.R. (2d) 211 (C.A.). It has also been acknowledged by the Ontario Court of Appeal in the oft-quoted case of *R. v. Breton* (1994), 93 C.C.C. (3d) 171 (Ont. C.A.). In that case, the Court had no hesitation in deciding that the issuing judge had the power to draw the inference from the stated evidence that a particular individual had committed an offence, and that a narcotic was present at a particular location. It is settled law that the issuing judge is fully empowered to make all reasonable deductions which flow logically from the evidence stated in the Information, and this power must be factored into the review process.

Furthermore, the assessment by the reviewing court must take into account the totality of the Information, interpreting its constituent parts in context. See *R. v. Arason* (1992), 78 C.C.C. (3d) 1 (B.C.C.A.), at p. 25. It is therefore inappropriate to subject the Information to a microscopic analysis of its individual parts, each part being then viewed in isolation from its context.

Finally, an overly strict interpretation of the words used in the Information is not warranted by the jurisprudence, or by s. 8 of the *Charter*. This is particularly so where, as here, the evidence is uncontroverted that the deponent has acted in good faith throughout, and there is no evidence of fraud, reckless disregard for the truth, deliberate non-disclosure or intentional misstatement of the evidence. The reviewing court should be alive to the fact that, in most cases, the deponent is not trained in the niceties and subtleties of legal drafting. In this regard, I fully endorse the views expressed by Gibbs J.A. in *R. v. Melenchuk* (1993), 24 B.C.A.C. 97, at para. 15:

> [15] ... It would be impractical to expect of an officer swearing an information in these circumstances the precise prose of an Oxford grammarian, the detailed disclosures of a confessional and the legal knowledge of a Rhodes scholar.

> That being said, the reviewing court must remain vigilant and not allow its tolerance for drafting errors or deficiencies to extend to material omissions with respect to substantive requirements. It is indeed trite law that a warrant should only be issued where there is a credibly based probability that the items to be searched for are in the place specified in it. Where the Information does not expressly or by implication disclose the required reasonable grounds, the resulting warrant cannot be said to have been properly issued, and any search conducted under its authority can be challenged on the basis that it was not authorized by law. See *R. v. Caslake*, [1998] 1 S.C.R. 51, at p. 60. [paras. 10-14]

Needless to say, those principles may require tweaking to reflect the process contemplated by s. 487.1.

38 By proceeding without prior judicial authorization, Cst. Raymond shifted to the prosecution the burden of establishing the search's reasonableness (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, [1984] S.C.J. No. 36 (QL)). To discharge that burden, the Crown had to demonstrate Mr. Noel's arrest was authorized under s. 495 of the *Criminal Code*.

39 Section 495(1) states that a peace officer may arrest without warrant a person who has committed an indictable offence or who, on reasonable grounds, he or she believes has committed or is about to commit an indictable offence. It also authorizes a peace officer to arrest without a warrant a person whom he or she finds committing any criminal offence. Section 495(2) provides, *inter alia*, that those powers of arrest may not be exercised in respect of a hybrid offence (one for which the person may be prosecuted by indictment or for which he or she is punishable on summary conviction) or an offence punishable on summary conviction, in any case where the officer believes on reasonable grounds that the public interest may be satisfied without an arrest and the officer "has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law". Section 495(3) goes on to prescribe that, notwithstanding s. 495(2), a peace officer acting under s. 495(1) is deemed to be acting lawfully and in the execution of his duty for the purposes of proceedings under any federal statute, "unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements" of s. 495(2). In the case at bar, it was not alleged that Cst. Raymond had failed to comply with the requirements of s. 495(2) when he arrested Mr. Noel. Rather, it was the defence's contention that Cst. Raymond had acted without the reasonable grounds required by s. 495(1).

40 Recall that Mr. Noel was arrested for "possession of marihuana". For a long time possession of marihuana was a hybrid offence: no matter the quantity involved, the Crown had the option of proceeding by indictment or by summary conviction procedure. That is no longer the case as a result of relatively recent changes to the *CDSA*. Now, possession of marihuana is a summary conviction offence where 30 grams or less are involved and it is only a hybrid offence if that quantity is exceeded. Thus, it would appear that, where no more than 30 grams of marihuana are

involved, a police officer may only arrest without warrant for possession of marihuana if he or she "finds" the target committing the offence (see the discussion of this more exacting standard in *S.T.P. v. Canada (Director of Public Prosecutions Service)* (2009), 281 N.S.R. (2d) 1, [2009] N.S.J. No. 378 (QL), 2009 NSCA 86, MacDonald, C.J.N.S. for the Court). Reasonable grounds will suffice only if the arrest-provoking offence is an indictable offence covered by s. 495(1). As the Court noted in *R. v. Tontarelli (R.)* (2009), 348 N.B.R. (2d) 41, [2009] N.B.J. No. 294 (QL), 2009 NBCA 52, at para. 55, "unless and until the Crown elects to proceed summarily under s. 4(4)(b) [of the *CDSA*], possession of more than 30 g of cannabis (marihuana) is deemed to be an indictable offence" pursuant to s. 34(1)(*a*) of the *Interpretation Act*, R.S.C. 1985, c. I-1. Of course, transporting marihuana for the purpose of trafficking and possession of marihuana for that purpose are also indictable offences, the former under s. 5(1) of the *CDSA*, the latter by virtue of s. 5(2).

41 Cst. Raymond testified he arrested Mr. Noel for "possession of marihuana". That statement raises the following questions: (1) In circumstances such as those revealed by the record, are reasonable grounds sufficient or does the arresting officer have to "find" the arrestee in possession of marihuana for the arrest to be lawful?; and (2) Does a police officer who detects an odor of raw marihuana emanating from a vehicle "find" the driver in possession of marihuana? The first issue was addressed tangentially in *R. v. Tontarelli* where the Court observed:

> In assessing lawfulness for s. 495 purposes, courts need to focus on substantive reality, rather than the precise words used by the police, often in stressful and trying circumstances. Despite the particular words employed by Cpl. Looker to inform Mr. Matheson of the reasons for his arrest ("possession"), the reality of the total situation for all concerned was this: Mr. Matheson was being arrested for trafficking (by transporting) and/or possession for the purposes of trafficking of the controlled drugs and/or substances in the trunk of the G6. Of course, that does not mean the justification offered contemporaneously with an arrest is invariably inconsequential. There are cases where the words actually employed by the arresting officer may prove troublesome for the prosecution (see *R. v. LeBlanc (K.R.)* (2007), 312 N.B.R. (2d) 321, [2007] N.B.J. No. 101 (QL), 2007 NBCA 24, at paras. 16-27, per Richard, J.A. for the Court). However, the case at hand is far removed from any problematic category. Indeed, it can reasonably be supposed no one was under the impression that a small quantity of cannabis (marihuana) had passed (in the large duffle bag) from the Jimmy to the G6. As well, Cpl. Looker, Mr. Matheson and, for that matter, his fellow traveling companions had to understand the G6 was pulled over (with the involvement of 3 marked units and another unmarked police vehicle, and 5 police officers) for more than "simple" possession of drugs. Bluntly put, no reasonable observer would believe that a for-personal-use-only quantity of illicit drugs was ferried in the large duffle bag that passed between the two vehicles with out-of-province plates in the circumstances painstakingly described above. [para. 59]

42 Notwithstanding the justification for the arrest verbalized by Cst. Raymond at roadside, it is plain Mr. Noel was arrested for an indictable offence under the *CDSA* that is caught by s. 495(1). Additionally, and perhaps more importantly, the case was argued both at trial and on appeal on the footing that Mr. Noel was arrested for such an offence. Thus, the issue at trial, as framed by the parties, was whether Cst. Raymond had the requisite reasonable grounds and the sole issue on appeal is whether extraneous information infiltrated and influenced the trial judge's decision-making process in relation to that issue. That being so, I am impelled to deal with the appeal as framed and conclude it is unnecessary to determine whether an officer meets the "finds committing" standard in circumstances where the sole ground for arresting the driver and only occupant of a rented vehicle is an odor of raw marihuana emanating from the vehicle's interior. In that regard, I note that in *S.T.P. v. Canada (Director of Public Prosecutions Service)* many factors beyond the smell of burnt marihuana "coalesced to justify the arrest" (para. 25) on the 'finds committing" standard.

43 For this Court to set aside an acquittal and order a new trial, the Crown must do much more than simply show a mistake of law by the trial judge: it must convince this court that the error had a material bearing on the acquittal. In *R. v. Graveline*, [2006] 1 S.C.R. 609, [2006] S.C.J. No. 16 (QL), 2006 SCC 16, Fish J., writing for the majority, summarized the applicable standard in these terms:

> In many jurisdictions, as Cory J. observed in *R. v. Evans*, [1993] 2 S.C.R. 629, at p. 645, the state has no right of appeal against the acquittal of an accused at trial. That is not so in Canada. Section 676(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that the Attorney General may appeal to the Court of Appeal "against a judgment or verdict of acquittal ... on any ground of appeal that involves a question of law alone".
>
> It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.
>
> This burden on the Crown, unchanged for more than half a century (see *Cullen v. The King*, [1949] S.C.R. 658), was explained this way by Sopinka J., for the majority, in *R. v. Morin*, [1988] 2 S.C.R. 345:

> I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do. [p. 374]

Speaking more recently for a unanimous court in *R. v. Sutton*, [2000] 2 S.C.R. 595, 2000 SCC 50, the Chief Justice stated:

> The parties agree that acquittals are not lightly overturned. The test as set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. *In R. v. Morin*, [1988] 2 S.C.R. 345, this Court emphasized that "the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty" (p. 374). [para. 2]

Generally, the errors alleged by the Crown in appealing against an acquittal go to the defence or defences upon which the accused relied at trial. For that reason, the impact of the errors on the verdict, if error is shown, will not be a mere matter of speculation. [paras. 13-17]

[Emphasis added.]

44 In *R. v. Pavlovszky (G.)* (2005), 281 N.B.R. (2d) 42, [2005] N.B.J. No. 24 (QL), 2005 NBCA 9, Justice Deschênes, writing for the Court, described the test in these terms:

> For reasons fully explored above, the trial judge made several errors of law and did not apply the correct legal test in excluding Mr. Pavlovszky's statements in the police cruiser. But not every error of law is fatal in the sense of requiring a new trial. As held by the Supreme Court of Canada in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, it is the duty of the Crown to satisfy the appeal court that the verdict would not necessarily have been the same if the error in law had not occurred at trial. Acquittals are not to be lightly overturned. The onus is a heavy one which the Crown must satisfy with a reasonable degree of certainty: *R. v. Morin*, [1988] 2 S.C.R. 345 at 374. [para. 29]

45 It is hornbook law that, as a general rule, findings of fact and credibility stand to be made on the basis of the evidence placed before the trier of fact, whether judge or jury. In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, [1997] S.C.J. No. 84 (QL) [*R.D.S.*] Major J. (dissenting on other grounds with Sopinka J. and Lamer, C.J.C.) commented on this fundamental aspect of principled decision-making:

> Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial. [para. 10]
>
> [...]
>
> In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable". The trial judge erred in law by failing to base her conclusions on evidence.
>
> Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.
>
> The trial judge concluded the impugned part of her reasons with the following: "[a]t any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit." What did she mean by basing her judgment, in part, upon her own comments? Did she mean based on her stereotyping of police officers? Or, did she mean based on her comments analysing the evidence of the parties? Based on the trial record what is clear is that the trial judge did not reach her conclusion on any facts presented at the trial. [paras. 19-21]
>
> [Emphasis added.]

46 In *R.D.S.*, there were four separate sets of reasons. Although they expressed divergent views over some key issues, the various opinions were unanimous in positing that, except in well-defined

exceptional circumstances, the credibility of witnesses stands to be assessed and determined on the basis of the evidential record placed before the decision-maker. See, as well, the authorities referenced in paragraph 36 of these reasons.

47 In the case at bar, the trial judge fell into error when she stated that the "factual underpinnings" of *Ambrose* and *Khuu*, which she identified by reference to the reasons for judgment in those cases, were relevant with regards "to the reliability of the olfactory findings made by Officer Raymond and the circumstances under which these observations were made as established by the evidence to the case at bar". Only the "factual underpinnings" established by admissible evidence could be considered in determining whether Cst. Raymond had indeed detected an odor of raw marihuana and, inarguably, some of the "factual underpinnings" referenced by the trial judge had not been so established. That said, consideration of extraneous information can only lead to the setting aside of an acquittal if the latter is shown to be the product of the former. Thus, reference to extraneous information will not constitute reversible error if it is offered as further support for a conclusion safely anchored to the evidential record; it will be otherwise if the information is "operative in [the judge's] reasoning" (see *R. v. Sappier; R. v. Gray,* [2006] 2 S.C.R. 686, [2006] S.C.J. No. 54 (QL), 2006 SCC 54).

48 The pivotal question is therefore clear: has the Attorney General discharged the burden of establishing that the trial judge's error was operative in the reasoning that prompted her to reject Cst. Raymond's sworn evidence that he detected an odor of raw marihuana? I would answer that question in the negative for the following reasons.

49 First, the trial judge states her view that the Crown's failure to establish Cst. Raymond had the requisite reasonable grounds is founded upon "a total assessment of the circumstances as elicited by the evidence" (emphasis added). In my judgment, one can safely assume on the basis of the quoted statement that only the "factual underpinnings" of *Ambrose* and *Khuu* that had been "elicited by the evidence" played an outcome-shaping role. Second, on a fair reading of the reasons provided by the trial judge for coming to that view, it appears the cumulative effect of the following circumstances was determinative: (1) "Nothing is noted concerning any suspicious odors" during the course of the first conversation between Cst. Raymond and Mr. Noel. However, inexplicably, "a second visit to the Noel vehicle made in exactly the same conditions as the first encounter this time produces an odor of raw marijuana"; (2) the marihuana seized from Mr. Noel's vehicle was packaged "in exactly the same fashion" as in *Ambrose* and *Khuu*, yet Cst. Raymond did not detect an odor of raw marihuana in those cases but claims to have done so here; (3) "faced with his own obviously contradictory observations", Cst. Raymond declined to enlist the assistance of either his colleague, Cst. Cloutier, or Jasper, the specially trained drug sniffing dog, in corroborating, in a timely fashion, the sole justification for Mr. Noel's arrest, the odor of raw marihuana; and (4) "The only officer who smelled the marijuana is Officer Raymond. He had a colleague right at the scene and he had in his police vehicle a dog trained in narcotic detection".

50 Each of these foundational circumstances is rooted in the evidential record. In particular, the

trial judge could infer that the second visit to Mr. Noel's vehicle was made "in exactly the same conditions" as the first. After all, Cst. Raymond testified the second visit to Mr. Noel's vehicle occurred within a few minutes of the first and that, in each instance, he stood in the very same spot next to the open front passenger window. Moreover, a careful review of the police officers' testimony, in particular Cst. Raymond's answers on cross-examination and re-direct, makes plain that the trial judge could reasonably conclude the following features are common to *Ambrose*, *Khuu* and the case at bar: (1) Cst. Raymond was the arresting and searching officer; (2) the arrests and searches of the vehicles took place on the roadside; (3) no judicial authorizations were sought for either the searches or the arrests; (4) the contraband was marihuana; (5) the quantities were comparable (in the 30-44 pound range); (6) the marihuana was being ferried in the closed trunk of a passenger-type vehicle; and (7) the marihuana was packaged in vacuum-sealed bags. The upshot of these observations is the following: although the trial judge committed an error of law in stating that the "factual underpinnings" in *Khuu* and *Ambrose* to which she referred were all relevant "with regards to the reliability of the olfactory findings" made by Cst. Raymond, that error was not operative in the reasoning that ultimately brought her to the conclusion that the Crown had failed to establish he had the requisite reasonable grounds to arrest Mr. Noel. That conclusion and the reasoning that underlies it are founded upon the evidential record, the "factual underpinnings" of *Ambrose* and *Khuu* that actually influenced the outcome having been established by the evidence elicited at trial.

V. Conclusion and Disposition

51 Following the respondent's arrest and a search of his vehicle incidental to that arrest, a significant quantity of marihuana was seized from the trunk. At trial, the respondent was acquitted on a charge of possession for the purpose of trafficking (s. 5(2) of the *Controlled Drugs and Substances Act*) when the trial judge concluded: (1) the arrest was groundless and, therefore, unlawful; (2) the warrantless search that followed was unreasonable and violated the respondent's rights under s. 8 of the *Charter*; and (3) the admission of the marihuana seized from the trunk would bring the administration of justice into disrepute. That finding led to the marihuana's exclusion from the record pursuant to s. 24(2) of the *Charter*. There being no evidence to substantiate the charge, the respondent's acquittal followed.

52 The present appeal raises only one substantive issue. It is whether the Attorney General has established that information extraneous to the record had a bearing on the acquittal. The Attorney General's specific and narrow complaint is that the trial judge brought into the mix unproven information distilled from other cases involving the arresting officer.

53 As mentioned in my introductory remarks, the trial judge's reasons for decision do indeed feature forays outside the evidential record and appear, on the surface, to be oblivious of the rule against the use of extraneous information. However, the Attorney General has not established that her rejection of the arresting officer's key testimony in support of the grounds for the respondent's arrest and, in turn, the legal justification for the incidental search of his vehicle, namely the smell of

raw marihuana from its interior, is based upon any such information. It follows that any error on the trial judge's part regarding the relevance of extraneous information did not have a material bearing on the acquittal and, for that reason, any such error does not constitute reversible error. In the result, I would dismiss the Attorney General's appeal against the respondent's acquittal.

J.E. DRAPEAU C.J.N.B.
We concur:
W.S. TURNBULL J.A.
B.V. GREEN J.A.

* * * * *

APPENDIX A

Sections 487(1), 487.1, 495 and 676 of the *Criminal Code* of Canada, RS.C. 1985, c. C-46, read as follows:

> 487.(1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place
>
> > (*a*) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
> >
> > (*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
> >
> > (*c*) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
> >
> > (*c.1*) any offence-related property,
>
> may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(*d*) to search the building, receptacle or place for any such thing and to seize it, and

(*e*) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

...

487.1(1) Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

(2) An information submitted by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing, shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the record or a transcription of it, certified by the justice as to time, date and contents.

(2.1) The justice who receives an information submitted by a means of telecommunication that produces a writing shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the information certified by the justice as to time and date of receipt.

(3) For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(3.1) A peace officer who uses a means of telecommunication referred to in subsection (2.1) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath.

(4) An information submitted by telephone or other means of telecommunication shall include

(*a*) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;

(*b*) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;

(*c*) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and

(*d*) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

(5) A justice referred to in subsection (1) who is satisfied that an information submitted by telephone or other means of telecommunication

(*a*) is in respect of an indictable offence and conforms to the requirements of subsection (4),

(*b*) discloses reasonable grounds for dispensing with an information presented personally and in writing, and

(*c*) discloses reasonable grounds, in accordance with subsection 256(1) or paragraph 487(1)(*a*), (*b*) or (*c*), as the case may be, for the issuance of a warrant in respect of an indictable offence,

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 256(1) or 487(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

(6) Where a justice issues a warrant by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

(*a*) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(*b*) the peace officer, on the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting on its face the name of the issuing justice and the time, date and place of issuance; and

(*c*) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(6.1) Where a justice issues a warrant by a means of telecommunication that produces a writing,

(*a*) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(*b*) the justice shall transmit the warrant by the means of telecommunication to the peace officer who submitted the information and the copy of the warrant received by the peace officer is deemed to be a facsimile within the meaning of paragraph (6)(*b*);

(*c*) the peace officer shall procure another facsimile of the warrant; and

(*d*) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(7) A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1),

shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

(9) A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

(*a*) a statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;

(*b*) a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and

(*c*) a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.

(10) The clerk of the court shall, as soon as practicable, cause the report, together with the information and the warrant to which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information or warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was

not authorized by a warrant issued by telephone or other means of telecommunication.

(12) A duplicate or a facsimile of an information or a warrant has the same probative force as the original for the purposes of subsection (11).

...

495.(1)A peace officer may arrest without warrant

(*a*) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

(*b*) a person whom he finds committing a criminal offence; or

(*c*) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

(2) A peace officer shall not arrest a person without warrant for

(*a*) an indictable offence mentioned in section 553,

(*b*) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(*c*) an offence punishable on summary conviction,

in any case where

(*d*) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,
(ii) secure or preserve evidence of or relating to the offence, or
(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(*e*) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(*a*) any proceedings under this or any other Act of Parliament; and

(*b*) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2).

676.(1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(*a*) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

(*b*) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;

(*c*) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or

(*d*) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

(1.1) The Attorney General or counsel instructed by the Attorney General may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a verdict of acquittal in a summary offence proceeding or a sentence passed with respect to a summary conviction as if the summary offence proceeding was a proceeding by indictment if

(*a*) there has not been an appeal with respect to the summary conviction;

(*b*) the summary conviction offence was tried with an indictable offence; and

(*c*) there is an appeal in respect of the indictable offence.

(2) For the purposes of this section, a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 730 of any other offence.

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 743.6.

[...]

Sections 4(1), 5(1), 5(2) and 11(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19:

4.(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

...

5.(1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

...

11.(2) For the purposes of subsection (1), an information may be submitted by telephone or other means of telecommunication in accordance with section 487.1 of the *Criminal Code*, with such modifications as the circumstances require.

[...]

cp/e/qlrxg/qljxr/qlcas/qlana/qlhcs

Hamish C. Stewart (Contributor)

Halsbury's Laws of Canada - Evidence

X. ESTABLISHING FACTS WITHOUT EVIDENCE

1. Judicial Notice and Related Doctrines

(2) The Formal Doctrine of Judicial Notice

HEV-205 Taking judicial notice.

HEV-205 Taking judicial notice. A court should judicially notice facts "that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy".[1]

Notorious facts. Adjudicative facts that have been judicially noticed on the basis of their notoriety include the following: the Nazi regime engaged in mass murder of Jews during the Second World War;[2] the health care system in the United States is not publicly funded;[3] a particular local road is a "driveway";[4] Slave Lake is in Alberta;[5] and a pint is less than five gallons.[6] The notoriety of the fact in question is relative to the community in which the court sits, so a fact appropriately noticed in one city or province may have to be proved with evidence in another city or province.[7]

Indisputable sources. Adjudicative facts that have been judicially noticed because, though not notorious, they were capable of being determined by reference to readily accessible sources of indisputable accuracy include the fact that the Roma people are also known as "gypsies".[8]

Facts not noticed. Adjudicative facts that courts have declined to take notice of include the following: the penis of a virile young man in good health would not lose its erection during intercourse;[9] the drug "ecstasy" has the chemical formula N-methyl-3,4-methylenedioxyamphetamine (N, alpha-dimethyl-1, 3-benzodioxole-5-ethanamine);[10] residents of Hamilton, Ontario, are likely to be biased against Muslim persons of Afghan origin;[11] and that mutual fund managers use certain methods for varying the allocation of assets within funds.[12]

Legislative facts. Legislative facts that Canadian court have noticed include the following: the public accounts of a province and what action the government of the day proposed in relation to those accounts;[13] and that marriage breakdown typically has a more severe impact on women than on men.[14] A court has declined to notice the following proposition of legislative fact: that the practice of routinely releasing videotaped statements to the media would discourage suspects from agreeing to have their statements videotaped.[15]

Judicial notice of law. Canadian evidence statutes usually provide that a court shall take judicial notice of domestic law, including Imperial statutes, the statutes of Canada, the statutes and regulations of the province in question, the statutes of other provinces, and Orders in Council.[16] The requirement to take judicial notice of domestic law extends to material that is incorporated by reference into a regulation.[17] These provisions typically do not extend to municipal by-laws, which at common law, are not subject to judicial notice and must be proved.[18]

If extra-provincial or other foreign law is not a proper subject-matter for judicial notice, it must be proved by expert evidence (see **HEV-147** above).

However, the Supreme Court of Canada, because of its position as final court of appeal from all provincial courts, may judicially notice the law of any province.[19]

Relationship between judicial notice and expert evidence. Generally speaking, the taking of judicial notice of a fact is incompatible with hearing expert evidence concerning that fact.[20] The conditions for taking judicial notice -- that the fact is notorious or capable of rapid and indisputable determination -- are inconsistent with the second of the four *Mohan* criteria -- that the expert evidence is necessary to assist the trier of fact as a group of laypersons (see **HEV-147** above).[21]

Relationship between judicial notice and a judge's personal knowledge. Although the trial judge, as a member of the community, may well happen to know any fact sufficiently notorious or indisputable to be judicially noticed, a judge cannot judicially notice a fact merely because he or she has personal knowledge of it,[22] even if that fact was previously proved in proceedings over which he or she presided. Facts judicially noticed, like other facts, usually have to be established in the proceedings in accordance with the law of evidence.[23]

Judicial notice on basis of precedent. Generally speaking, a fact proved in one proceeding cannot be judicially noticed in another proceeding but must be freshly proved, particularly where the fact in question is an adjudicative fact,[24] because findings of fact have no precedential effect. However, it has been suggested that proof of a legislative fact in one proceeding might enable a court to judicially notice that fact in another proceeding.[25] This suggestion may be explained by the fact that findings of legislative fact are usually connected with questions of law, which do have precedential value.

Effect of taking judicial notice. If a party requests the court to judicially notice a fact, or where a judge is inclined to judicially notice a fact, the basic principles of procedural fairness require the court to give the parties an opportunity to make submissions as to whether the fact in question is one that should be judicially noticed.[26] However, once the court has judicially noticed a fact, that fact can no longer be contested in the proceedings, and no evidence can be directed at proving or disproving it.[27] Further inferences to be drawn from the fact are for the trier of fact to determine and evidence may be directed at supporting or weakening those inferences.

Footnote(s)

1 *R. v. Find*, [2001] S.C.J. No. 34 at para. 48, [2001] 1 S.C.R. 863 (S.C.C.); see also *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] S.C.J. No. 61 at para. 56, [2004] 3 S.C.R. 381 (S.C.C.).

2 *R. v. Zundel (No. 2)*, [1990] O.J. No. 122 , 53 C.C.C. (3d) 161 (Ont. C.A.), revd on other grounds [1992] S.C.J. No. 70 , [1992] 2 S.C.R. 731 (S.C.C.).

3 *Morgan v. Oates*, [2007] N.J. No. 217 at para. 24, 268 Nfld. & P.E.I.R. (N.L.C.A.).

4 *R. v. Potts*, [1982] O.J. No. 3207 , 36 O.R. (2d) 195 (Ont. C.A.), leave to appeal refused [1982] S.C.C.A. No. 301 (S.C.C.).

5 *R. v. Dubrule*, [1978] A.J. No. 825 , 14 A.R. 554 (Alta. Dist. Ct.).

6 *Reid v. McWhinnie*, [1868] O.J. No. 39 , 27 U.C.R. 289 (U.C.Q.B.).

7 Compare *R. v. Bednarz*, [1961] O.J. No. 163 , 130 C.C.C. 398 (Ont. C.A.), where a fact was appropriate for notice by the trial court, sitting in Smooth Rock Falls, Ontario, but not for the Court of Appeal, sitting in Toronto, Ontario.

8 *R. v. Krymowski*, [2005] S.C.J. No. 8 , [2005] 1 S.C.R. 101 (S.C.C.).

9 *R. v. Perkins*, [2007] O.J. No. 3246 , 223 C.C.C. (3d) 289 (Ont. C.A.).

10 *United States of America v. Saad*, [2004] O.J. No. 1148 , 183 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal refused [2004] S.C.C.A. No. 232 (S.C.C.).

11 *Kayhan v. Greve*, [2008] O.J. No. 2699 , 295 D.L.R. (4th) 756 (Ont. Div. Ct.).

12 *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, [2007] O.J. No. 2603 at paras. 145-58, 283 D.L.R. (4th) 341 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 472 (S.C.C.).

13 *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] S.C.J. No. 61 at para. 56, [2004] 3 S.C.R. 381 (S.C.C.).

14 *Moge v. Moge*, [1992] S.C.J. No. 107 at paras. 90-92, [1992] 3 S.C.R. 813 (S.C.C.).

15 *R. v. Hogg*, [2006] M.J. No. 403 at paras. 30-46, 214 C.C.C. (3d) 70 (Man. C.A.).

16 (CAN) *Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 17, 18; (CAN) *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 16(1)

(AB) *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 32

(BC) *Evidence Act*, R.S.B.C. 1996, c. 124, ss. 24, 24.1; (BC) *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 16(3)

(MB) *Manitoba Evidence Act*, C.C.S.M. c. E150, ss. 29, 30

(NB) *Evidence Act*, R.S.N.B. 1973, c. E-11, s. 70

(NL) *Evidence Act*, R.S.N.L. 1990, c. E-16, s. 26; (NL) *Statutes and Subordinate Legislation Act*, R.S.N.L. 1990, c. S-27, s. 12(2)

(NS) *Evidence Act*, R.S.N.S. 1989, c. 154, s. 3; (NS) *Regulations Act*, R.S.N.S. 1989, c. 393, s. 9(2)

(ON) *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, ss. 13, 29, 74

(PE) *Evidence Act*, R.S.P.E.I. 1988, c. E-11, s. 21

(QC) *Civil Code of Québec*, S.Q. 1991, c. 64, art. 2807

(SK) *Evidence Act*, S.S. 2006, c. E-11.2, s. 40; (SK) *Regulations Act, 1995*, S.S. 1995, c. R-16.2, s. 10

(NT) *Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 38; (NT) *Statutory Instruments Act*, R.S.N.W.T. 1988, c. S-13, s. 13(1); (NT) *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, s. 7(2)

(NU) *Evidence Act*, R.S.N.W.T. 1988, c. E-8, s. 38; (NU) *Statutory Instruments Act*, R.S.N.W.T. 1988, c. S-13, s. 13(1); (NU) *Interpretation Act*, R.S.N.W.T. 1988, c. I-8, s. 7(2)

(YT) *Evidence Act*, R.S.Y. 2002, c. 78, s. 30; (YT) *Regulations Act*, R.S.Y. 2002, c. 195, s. 4(1).

17 *R. v. St. Lawrence Cement Inc.*, [2002] O.J. No. 3030 , 60 O.R. (3d) 712 (Ont. C.A.).

18 *R. v. Snelling*,]1952] O.W.N. 214 (Ont. C.A.); *Danylec v. Kowpac and Thiessen*, [1960] M.J. No. 37 , 25 D.L.R. (2d) 716 (Man. C.A.).

19 *Logan v. Lee*, [1907] S.C.J. No. 50 , 39 S.C.R. 311 (S.C.C.).

20 David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 4th ed. (Toronto: Irwin Law, 2005) at 428; *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, [2007] O.J. No. 2603 at paras. 145-58, 283 D.L.R. (4th) 341 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 472 (S.C.C.); *Fahlman (guardian ad litem of) v. Community Living British Columbia*, [2007] B.C.J. No. 23 at paras. 30-31, 234 B.C.A.C. 264 (B.C.C.A.).

21 *R. v. Mohan*, [1994] S.C.J. No. 36 at para. 17, [1994] 2 S.C.R. 9 (S.C.C.).

22 *R. (Giant's Causeway Tramway Co.) v. Antrim Justices*, [1895] 2 I.R. 603 (Q.B.).

23 *R. v. Potts*, [1982] O.J. No. 3207 at para. 21, 36 O.R. (2d) 195 (Ont. C.A.), leave to appeal refused [1982] S.C.C.A. No. 301 (S.C.C.).

24 *R. v. Kirton*, [2007] M.J. No. 299 , 219 C.C.C. (3d) 485 (Man. C.A.).

25 *R. v. Williams*, [1998] S.C.J. No. 49 at para. 54, [1998] 1 S.C.R. 1128 (S.C.C.) (widespread racial prejudice in a given community, once proved on evidence in one case, might be judicially noticed in another case, for the purpose of challenges for cause).

26 *Levesque v. Levesque; Birmingham v. Birmingham*, [1994] A.J. No. 452 at para. 37, 116 D.L.R. (4th) 314 (Alta. C.A.).

27 E.M. Morgan, "Judicial Notice" (1944) 57 Harv. L.R. 269; *R. v. Zundel*, [1987] O.J. No. 52 at para. 158, 31 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal refused [1987] S.C.C.A. No. 116 (S.C.C.). For the contrary view that taking judicial notice merely creates a rebuttable presumption that the fact noticed exists, see *Preston-Jones v. Preston-Jones*, [1951] A.C. 391 at 400 (H.L.).

Court of Queen's Bench of Alberta

Citation: Rozak (Estate), 2011 ABQB 239

Date: 20110407
Docket: 0503 17780
Registry: Edmonton

Between:

Brad Brogden, Administrator Ad Litem of the Estate of Brooklyn Alyssa Rozak

Plaintiff

- and -

Michael Demas, Carl Blashko, Darren Neilson, John Doe, Capital Health, operating a hospital known as The University of Alberta Hospital, Caritas Health Group, operating a hospital known as The Grey Nuns Hospital and the Governors of the University of Alberta

Defendants

Corrected judgment: A corrigendum was issued on April 11, 2011; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Mr. Justice R.A. Graesser

I. Introduction

[1] This is an application by Drs. Neilson, Ostolosky and Din (the "doctors") by way of an appeal from the decision of Master Wachowich dated June 1, 2010 dismissing their application to compel the Plaintiff to answer certain objected-to undertakings from his examination for discovery. Mr. Brogden cross-appeals Master Wachowich's decision with respect to the two objected-to undertakings he was required to answer.

[2] The application before Master Wachowich turned on relevance, solicitor - client privilege and solicitor's work product privilege.

II. Background

[3] The Plaintiff is the widower of the late Brooklyn Alissa Rozak and is the Administrator Ad Litem of her estate.

[4] Ms. Rozak had been admitted to the Grey Nuns Hospital in Edmonton on May 30, 2005 for psychiatric observation and treatment. She was discharged on June 3, 2005. Later that day, she was taken to the University of Alberta Hospital by her husband because of concerns for her mental well-being and safety.

[5] At the University Hospital, she was initially seen by Dr. Neilson, an emergency doctor. He concluded that she should have a psychiatric consultation, and she was then seen by a resident, Dr. Din, and the staff psychiatrist, Dr. Ostolsky.

[6] Following the psychiatric consultation, Ms. Rozak was discharged later that evening.

[7] On June 5, 2005, Ms. Rozak committed suicide.

[8] Mr. Brogden sought legal advice in August, 2005 and signed consents for the release of Ms. Rozak's medical records and information. Mr. Brodgen's counsel wrote the University Hospital on November 8, 2005 requesting patient files and records.

[9] The University Hospital records were provided to counsel under cover of a November 14, 2005 letter. The records clearly show that "Dr. Neilson" requested a medical consultation from "Dr. Ostolosky" on June 3, 2005.

[10] On the Outpatient Chart, there is a signature under "Doctor" but no printed name. Dr. Kevin Neilson has deposed that is his signature. Whether his signature is legible is in issue on the underlying application.

[11] On a similar form in the records, there are notes and above "Consultant's Signature" is a signature and the printed name "Omar Din". Whether either the signature or printed name is legible is in issue on the underlying application.

[12] A Statement of Claim was issued on June 1, 2007, naming Dr. Michael Demas, the University Hospital and the Grey Nuns Hospital. It was amended later that day to include Drs. Carl Blashko and Darren Neilson. The action has been since discontinued against Dr. Darren Neilson.

[13] The Statement of Claim was not immediately served. It was served on the University Hospital on April 24, 2008 and on Dr. Darren Neilson on May 6, 2008.

[14] Shortly after the University Hospital had been served, in-house counsel notified Mr. Brogden's counsel that the wrong Dr. Neilson had been sued. Dr. Darren Neilson was an emergency doctor at the Grey Nuns Hospital, and had no dealings at all with Ms. Rozak. Rather, his brother, Dr. Kevin Neilson, an emergency doctor at the University Hospital, was the emergency doctor who had seen Ms. Rozak on June 3, 2005.

[15] Following that correspondence, Mr. Brogden's counsel had the Amended Statement of Claim served on Dr. Kevin Neilson on July 2, 2008, along with a letter advising Dr. Kevin Neilson of Mr. Brogden's intention to amend the Statement of Claim to substitute him for his brother Darren as a defendant.

[16] On November 3, 2008, Dr. Ostolosky was served with the Amended Statement of Claim, along with a letter advising her of Mr. Brogden's intention to amend the Statement of Claim to add her as a defendant.

[17] An application was filed on November 14, 2008 on behalf of Mr. Brogden to amend the Amended Statement of Claim by substituting Dr. Kevin Neilson for Dr. Darren Neilson and adding Dr. Ostolosky.

[18] Mr. Brogden had Dr. Din served with the Amended Statement of Claim in mid-February, 2009 along with notice that he intended to add Dr. Din as a defendant.

[19] Drs. Kevin Neilson, Ostolosky and Din have objected to the amendments to the Amended Statement of Claim and have raised the *Limitations Act*, R.S.A. 2000, Ch. L-12.

[20] Mr. Brogden was cross-examined on his affidavit in support of his application for the amendments, and a number of undertakings were requested but refused.

[21] Following the refusals, counsel for the doctors applied to compel answers to the objected-to undertakings. Master Wachowich gave oral reasons for decision and ordered that Mr. Brogden provide answers to two of the undertakings. He declined to order answers to the rest.

[22] The doctors appeal the dismissal of some of the requested undertakings; Mr. Brogden cross-appeals with respect to the two he was required to answer. Over the course of preparing for this appeal, the parties have reduced the number of undertakings in dispute.

III. Standard of Review

[23] The parties are agreed that the issues in the appeal are questions of law, and thus attract a correctness standard of review.

IV. Undertakings in Dispute

[24] The following undertakings are the ones still in dispute:

Undertaking 6:	Advise if there was more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amended Statement of Claim.
Undertaking 8:	Make inquiries and determine what steps were taken on Brad Bogden's behalf to determine why Darren Neilson was named as defendant and what further determinations, if any, were made to confirm that he was properly named a defendant between June 4, 2005 and June 1, 2008.
Undertaking 9:	Make inquiries to determine what steps were taken on behalf of Brad Brogden between June 4, 2005 and June 1, 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.
Undertaking 10:	Make inquiries to determine whether or not there was anything preventing Brad Brogden's counsel from contacting the University of Alberta Hospital at any time between the time they were retained in August of 2005 until June 1, 2008 to ake inquiries with respect to the names of the physicians that were involved in caring for Ms. Rozak on June 3, 2005.
Undertaking 13:	Make inquiries of Brad Brogden's counsel as to what medical directories are available in their office and did have available in their office between August of 2005 and June 1, 2008.
Undertaking 16:	Make inquiries and determine when it was that Brad Bogden first advised counsel that he had a recollection of Ms. Rozak being seen by an intern or resident of the middle eastern descent.
Undertaking 22:	Make inquiries with Brad Bogden's counsel to determine if there was something preventing him from determining or recognizing that there was a resident involved in Ms. Rozak's care at any point after they received the records on November 16, 2005.

[25] The Master ordered answers to 13 and 16, and refused to order answers to 6, 8, 9, 10 and 22.

V. Issues

[26] This appeal only deals with the objected-to undertakings, and not the underlying application to amend the Amended Statement of Claim.

[27] The issues on this appeal relate to whether the undertakings may be directed on questioning on an affidavit, the relevance of the requested undertakings, and whether Mr. Brogden should be required to answer some or all of them having regard to solicitor and client privilege, as well as his solicitor's litigation and work product privilege.

[28] Rule 6.7 deals with questioning. It provides:

> A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on the application, and
>
> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

[29] Old Rule 314(2), which was in effect when the questioning took place, provided:

> The deponent may be required to attend in the same manner as a party being examined for discovery and the procedure on his examination is subject to the same Rules, so far as they are applicable, as the Rules that apply to the examination for discovery of party.

[30] Having regard to the foundational rules, I see no purpose or basis to change the scope of questioning on an affidavit in support of an application: questions relevant and material to the underlying application will be permitted and if refused, will be ordered to be answered:

> ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, [1981] 4 W.W.R. 760 (Alta Q.B.), at paras. 4 and 6
>
> ***155569 Can. Ltd. v. 248524 Alberta Ltd.***, (1989) 99 A.R. 100, (Q.B. Master) at paras. 11-13

Bland v. Canada (National Capital Comm.), (1989) CarswellNat. 170 (F.C.T.D.), at para. 16

Dow Chemicals Canada Inc. v. Shell Chemicals Canada Inc., (2008), 97 Alta L.R. (4th) 182 (Q.B. Master) at para. 5

[31] Repetitive and abusive questions have never been allowed; questioning must now be both relevant and material to the application having regard to the narrowing of the scope of questioning generally from "touching the matters in question" to "relevant and material".

[32] Nevertheless, to determine relevance and materiality, the issues on the underlying application must be reviewed.

VI. Undertakings on Questioning on Affidavits

[33] The threshold issue on this application is whether (or the extent to which) an affiant may be required to undertake to provide further evidence or documents. There is much authority to suggest that an affiant may not be required to inform him or herself following the questioning on questions that could not be answered - following up on answers "I don't know".

[34] ***Merck Frosst Canada Inc. v. Canada (Minister of Health)***, 1997 CarswellNat 2661 (F.C.T.D, holds that "absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself" (at para. 4).

[35] That is an often-quoted statement, and has been followed in ***Alberta Treasury Branches v. Leahy***, 1999 CarswellAlta 1027 (Q.B.), and ***Bruno v. Canada (Attorney General)***, 2003 CarswellNat 3375 (F.C.T.D. Prothonotary).

[36] However, there are also a number of cases in Alberta where affiants have been require to inform themselves, and provide answers following the questioning.

[37] The most detailed analysis of undertakings on questioning on affidavits is Master Prowse's decision in ***Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.***, 2008 ABQB 671 (Master). He concluded at para. 5:

> After a review of the relevant case law, I have come to the conclusion that the court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery. Undertakings should only be directed on a cross-examination where:

> (a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or
>
> (b) the undertakings relate to an important issue in the application, and the provision of such information:
>
> > (i) would not be overly onerous, and
> >
> > (ii) would likely significantly help the court in the determination of the application.

[38] I agree with his conclusions. The statement that an affiant cannot be required to inform him or herself is not the law in Alberta. An affiant being questioned is in a similar position to that of a witness being cross-examined at trial. Witnesses are expected to have taken reasonable steps to inform him or herself as to the subject matter on which they are expected to testify. They are expected to bring with them all records in their possession or control which are relevant to the issues in the lawsuit. They may be cross-examined not only on their evidence in chief, but on any other matter within their knowledge.

[39] One key difference is that witnesses at trial does not usually have the ability to inform themselves during cross-examination on questions they are unable to readily answer. That may work to their great disadvantage, as a witness who is unable to provide an answer to something reasonably expected to be in his or her knowledge may be seen as unprepared, unhelpful, unintelligent, or even untruthful.

[40] Because questioning on affidavits generally takes place some time before the underlying application is heard, an affiant does have the opportunity to shore up his or her testimony by providing a further affidavit. Where the affiant has knowledge or access to knowledge which may be helpful to the other side, there is no policy reason to have a **bar** against requiring the affiant to obtain the answer for a question that was properly put to the affiant on questioning.

[41] That being said, I am also in agreement with Master Prowse that the court should be slow to direct that an affiant be directed to inform him or herself after the questioning and provide further answers, and that generally witnesses being questioned on an affidavit are treated differently (i.e. with greater restraint as to undertakings) than witnesses being questioned under Part 5 of the New Rules of Court.

[42] To be clear, therefore, I agree with the Master that there is no general prohibition against asking affiants for undertakings on questioning on their affidavits, but that the propriety of any undertaking sought is governed by the tests set out above.

[43] This does not prevent an affiant or counsel on his or her behalf from agreeing to provide undertakings on a voluntary basis. As noted by the Master, it may be in the affiant's advantage to provide such information, as the information will be used on the underlying application. Giving undertakings, and complying with them, may avoid the underlying motion from failing for want of evidence.

[44] I also agree with the Master's conclusion that the courts should be slower in requiring affiants to inform themselves than is the case with witnesses being questioned in the disclosure process under Part 5 of the New Rules.

[45] Here, I am satisfied that, subject to privilege issues and relevance issues as to each inquiry requested, it is appropriate to require Mr. Brogden to inform himself as to steps taken on his behalf to identify the individuals who may have been involved in Ms. Rozak's treatment at the University Hospital.

[46] In relation to this application, Mr. Brogden can only assert that he has been reasonably diligent in identifying the appropriate defendants by informing himself from his counsel as to what was done by them on his behalf. The information sought relates to an important issue in the application - the commencement date for the limitation period - and requesting the information from counsel is not onerous and would likely be significant in determining the application.

[47] Thus both alternatives in the test in ***Dow Chemical*** are satisfied here.

VII. Relevance

[48] It should be noted that the Plaintiff does not argue that the naming of Dr. Darren Neilson was a misnomer. The Plaintiff intended to sue someone else, not Dr. Darren Neilson, so this is not a case of mis-spelling the person's name.

[49] The doctors are resisting the underlying application on the basis of the *Limitations Act*. There are two provisions in the *Limitations Act* which are brought into play: s. 3(1)(a) dealing with the basic two year limitation period from discovery of the cause of action, and sections 6(1) and 6(4)(1)(b) dealing with adding defendants to an existing lawsuit after the two year period has run.

[50] S. 3(1)(a) provides:

> Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

(i) that the injury for which the claimant seeks a remedial order had occurred,

(ii) that the injury was attributable to conduct of the defendant, and

(iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,

[51] S. 6(1) states:

> Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.

[52] S. 6(4)(b) states:

> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.

[53] Additionally, s. 6(5)(b) provides that:

> the defendant has the burden of proving that the requirement of subsection 3(b) or 4(b), if in issue, was not satisfied.

VIII. Onus and Arguments

[54] As this is an application to add defendants, to which s. 6(4)(b) applies, the doctors acknowledge that the onus is on them to demonstrate that their identities were discoverable by Mr. Brogden **before** the dates identified below, citing ***Resortport Development Corp. v. Alberta Racing Corp.***, 2004 CarswellAlta 1880 (Q.B.), at para. 3, aff'd 2005 ABCA 49.

[55] The test for discoverability is set out in ***De Shazo v. Nations Energy Co.***, 2005 ABCA 241:

> A cause of aciton arises for purposes of a limitation period when the material facts on which it (the cause of action) is based have been discovered or ought to have

> been discovered by the plaintiff by the exercise of reasonable diligence. (At para. 26)
>
> ...
>
> The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding. (At para. 28)

[56] In this case, there are different arguments with respect to each of the doctors:

Dr. Kevin Neilson

[57] The Plaintiff argues that Dr. Neilson was served within two years from the discovery of an arguable cause of action against him. The University Hospital records only show "Dr. Neilson"; materials relied on by the Plaintiff for the purpose of preparing and issuing the Amended Statement of Claim showed only Dr. Darren Neilson as an emergency doctor in Edmonton. The first the Plaintiff learned of Dr. Kevin Neilson was a June 20, 2008 email from counsel for the doctors, who advised that "He (Dr. Darren Neilson) tells us that Dr. Kevin Neilson, however, was on shift. Darren believes that Kevin should be the named Defendant."

[58] If June 20, 2008 is the appropriate date for the discoverability of Dr. Kevin Neilson's identity and involvement, the application to amend (November 14, 2008) was within the discoverability date.

[59] Alternatively, if Dr. Kevin Neilson is to be treated as a party to be added after the limitation period has expired, the test is whether he learned of a possible claim against him within the appropriate limitation period, plus the time for service of the Amended Statement of Claim under the Rules of Court.

[60] In the latter circumstance, the Amended Statement of Claim was issued on June 1, 2007. It had to be served (or renewed) before June 1, 2008. But using discoverability principles, the Plaintiff argues that the earliest commencement time would be November 16, 2005, the date the November 14, 2005 correspondence from the University Hospital enclosing Ms. Rozak's medical chart was received by Mr. Brogden's counsel. Thus, the Statement of Claim should have been issued and served on Dr. Kevin Neilson by November 16, 2008.

[61] As such, even if the limitation period has expired, since Dr. Kevin Neilson had knowledge of the possible action against him on July 2, 2008, the application to add him as a defendant to the existing action is not barred by the *Limitations Act*.

[62] Dr. Neilson argues that the limitation period began to run on June 4, 2005, the date of Ms. Rozak's death. Alternatively, he argues that Mr. Brogden has not established that he was

reasonably diligent in obtaining the University Hospital's chart and in determining that the Dr. Neilson referred to in it was Dr. Kevin Neilson and not Dr. Darren Neilson. He argues that his signature is clearly identifiable in the chart, and he is shown in the readily-available Alberta Health and Wellness Statement of Benefits Paid as having provided services to Ms. Rozak on June 3, 2005.

[63] The Statement of Benefits Paid was not ordered until October 20, 2008, and was received by Mr. Brogden's counsel on November 12, 2008.

[64] Dr. Neilson argues that the limitation period expired much before November 16, 2005 and that Mr. Brogden has not proven that he was reasonably diligent in obtaining records and determining the correct defendants to name in the Statement of Claim.

[65] Essentially, his argument is that the limitation period expired on June 3, 2007. For the purposes of s. 6(4)(b) of the *Limitations Act*, Dr. Kevin Neilson would have had to have known about the possible claim before June 3, 2008. Mr. Brogden has not proven that he was reasonably diligent in obtaining the necessary information; thus there should be no extension of the June 3, 2007 limitation period. Thus, when Dr. Kevin Neilson learned of the possible claim against him on July 2, 2008, it was too late under s. 6(4)(b).

[66] To succeed in adding Dr. Kevin Neilson, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in Ms. Rozak's treatment at the University Hospital before July 2, 2005 and that the limitation period under s. 3(1)(a) commenced then or later.

Dr. Ostolosky

[67] Mr. Brogden argues that the discoverability period for Dr. Ostolosky began to run on November 16, 2005 when the hospital records identifying her and her involvement were received by his counsel. Thus, so long as she had notice of the possible claim against her by November 16, 2008, the claim against her is not barred under the *Limitations Act*. Since she was served with the Amended Statement of Claim and was advised that Mr. Brogden intended to have her added as a defendant by letter of November 3, 2008, there is no limitations defence for her.

[68] Dr. Ostolosky responds in similar fashion to Dr. Neilson: Mr. Brogden has not discharged the onus on him of showing reasonable diligence in obtaining the medical records and the relevant date should not be extended beyond the basic limitation period of June 3, 2005. That would have required notice to her by June 3, 2008. Since she did not receive notice until November 3, 2008, the application to add her as a defendant under s. 6(4)(b) of the *Limitations Act* must fail.

[69] For Mr. Brogden to succeed in adding Dr. Ostolosky, Mr. Brogden will have to establish that it was not unreasonable for him to have taken no steps to identify the doctors involved in

Ms. Rozak's treatment at the University Hospital before he consulted counsel in August, 2005 (two or so months after Ms. Rozak's death) **and** that it was not unreasonable for his counsel to take until November 16, 2005 to obtain the University Hospital chart or otherwise identify the doctors involved in her treatment. Essentially, that the limitation period under s. 3(1)(a) did not begin to run until November 16, 2005 or later.

Dr. Din

[70] Mr. Brogden argues that Dr. Din's name and involvement could not reasonably be determined from the University Hospital chart, and his name does not appear on the Statement of Benefits Paid.

[71] Mr. Brogden met him on June 3, 2005 when Dr. Din interviewed Ms. Rozak and (as confirmed on his cross-examination on September 15, 2009 that he was aware of the involvement of a white male emergency doctor and an East Indian or Middle Eastern male psychiatrist.

[72] Mr. Brogden deposed in his affidavit sworn November 13, 2008 in support of his application to add Dr. Ostolosky as a defendant, that he did not then know the identity of the East Indian or Middle Eastern psychiatrist or resident. Attached to his affidavit was a request by his counsel to the University Hospital's counsel is a letter dated October 20, 2008 requesting the name of the "consultant's signature".

[73] He argues that the discoverability period with respect to Dr. Din had not expired by October 20, 2008. While no formal application has been made to add Dr. Din as a defendant, that is not necessary because under s. 6(4)(b), he can still be added as a defendant. He had notice of the possibility of this action against him in mid-February, 2009 which was well within the limitation period, let alone any added service period.

[74] Dr. Din's counsel argues that the limitation period against him expired on June 3, 2007. Mr. Brogden has not satisfied the onus on him of showing reasonable diligence in seeking out his identity and involvement. His involvement (but not necessarily his name) was known to Mr. Brogden on June 3, 2005 when they met. At the latest, discoverability for Dr. Din might run to November 16, 2005 when the hospital charts were provided to Mr. Brogden's counsel. The chart clearly identifies Dr. Din. Thus, the latest limitation period for Dr. Din would have expired on November 16, 2007. For s. 6(4)(b) of the *Limitations Act* to apply, he would have had to have had notice of the possible claim before November 16, 2007. Since he only had such notice in mid-February, 2009, the action is clearly barred against him and the application to add him under s. 6(4)(b) is doomed to fail.

[75] For Mr. Brogden to succeed in adding Dr. Din, it appears that he will have to establish that it was not unreasonable for his counsel to have not identified Dr. Din from the University Hospital records provided to them on November 16, 2005, and further that it was not

unreasonable for them to take no further steps to identify doctors involved in Ms. Rozak's treatment at the University Hospital until after mid-February, 2006 (despite Mr. Brogden's knowledge that an East Indian or Middle Eastern psychiatrist was involved). Essentially, that the limitation period under s. 3(1)(a) did not begin to run until mid-February, 2006 or later.

[76] Mr. Brogden also has arguments that could lead to similar result as are argued with respect to Dr. Kevin Neilson and Dr. Ostolsky: that sufficient information was not learned about Dr. Din's involvement until late 2008 or even 2009 such that the period under s. 6(4)(b) has not yet run. For the purpose of this application, those arguments do not need to be dealt with.

[77] Thus, the issues for Dr. Kevin Neilson are:

1. Whether the limitation period based on discoverability expired July 2, 2007 or later.
2. Has Dr. Neilson satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Kevin Neilson before July 2, 2005 (a month after Ms. Rozak's death and before he sought legal counsel in August, 2005)?

[78] For Dr. Ostolovsky:

1. Whether the limitation period based on discoverability expired November 12, 2007 or later.
2. Has Dr. Ostolovsy satisfied the onus on her that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Ostolovsky before November 12, 2005 (before Mr. Brogden's counsel received the University Hospital chart identifying Dr. Ostolovsky)?

[79] For Dr. Din:

1. Whether the limitation period based on discoverability expired before mid-February, 2008.
2. Has Dr. Din satisfied the onus on him that Mr. Brogden should, with reasonable diligence, have discovered that he had a possible cause of action against Dr. Din before mid-February, 2006 (three months after the University Hospital chart with his signature and printed name was received by Mr. Brogden's counsel)?

[80] It is reasonable to assume that Mr. Brogden left the identification of possible defendants to his counsel after August, 2005, so issues as to his diligence or reasonableness in trying to identify the correct defendants are really issues as to the diligence or reasonableness of his counsel. Thus the application and the evidence is destined to bump up against solicitor - client privilege and solicitor's work product privilege.

IX. Master's Decision

[81] The essence of the Master's ruling is found at pages 2 and 3 of his decision:

> Further comment from the BC Appellate Court in *Hodgkinson v. Simms*, 1988 Carswell BC 437:
>
> > If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.
>
> In my view, there might be an appropriate case to allow for that type of questioning, but it would have to be a rather severe case, and it would have to be a situation where justice cried out for that type of inquiry to be answered. In this case, it is clear from the hospital record that Kevin Neilson should have been named as a defendant as should have Dr. Ostolosky and as should the resident. So in this case there is no obligation for Mr. Brogden in the context of a cross-examination on affidavit to answer undertakings, especially where, as her, it would require Mr. Brogden to inform himself of making inquiries of his counsel in order to provide the answer. In my vies, the Court should lean towards protecting the file of counsel for the plaintiff, and, as I say, in an appropriate case, it might be that the Court would rule otherwise.
>
> Dealing now with the undertakings in question, I do not think it is necessary to go through them one by one. I have already indicated which way I am headed on this, so that undertaking number 6, 8, 9, and 10 do to have to be answered.
>
> Undertaking 13 is to make inquiries of Brogden's counsel as to what medical directories are available in his lawyer's office. That does not go into the lawyer's brief. That is a straightforward matter, and I direct that that be provided.
>
> Undertaking number 16 is to make inquiries and determine when it was that r. Brogden first advised counsel that he had a recollection of Ms. Rozak being seen by a male intern, a resident of Middle Eastern Descent. That is relevant material, and it shall be provided.
>
> Eighteen is, my view, going into plaintiff's counsel's file or worse yet, asking him to ask his lawyer to provide an answer to that question, and that will not be provided.
>
> Twenty-one, again it is asking Mr. Brogden to seek information from his counsel, and that will not be provided.

> I should say a number of these matters for them not to be provided does not mean that the information sought is not available in one form or another to be provided to the Court should this matter proceed to trial or to summary judgment.
>
> Twenty-two is make inquiries of Brogden's counsel to determine if there was something preventing him from determining or recognizing that there was a resident involved. I mean, again, that is asking the plaintiff to get information from the counsel. It is evident from the possible record that there was a resident involved, so the evidence is already there.

[82] He determined that undertaking requests 6, 8, 9, 10 and 22 need not be answered because they involved solicitor's work product privilege, and he was not satisfied that such privilege had been waived.

[83] With respect to undertaking requests 13 and 16, he directed that they be answered, on the basis of relevance.

X. Specific Undertakings Requests

[84] The onus of showing that Mr. Brogden failed to exercise reasonable diligence in discovering the identities of the doctors involved lies on the doctors. It is also clear that knowledge as to what Mr. Brodgen knew and when he knew it would not be known to the doctors, and the only way of finding out such information would be to obtain it from him, or from persons acting on his behalf.

[85] The issues of knowledge, diligence and timing are clearly relevant and material to the underlying application in a general way, and specifically with respect to those issues to those specific dates discussed above.

Undertaking 6

[86] Request 6 seeks any more information received or obtained to determine that Carl Blashko and Darren Neilson should be added as defendants prior to filing the Amedned Statement of Claim.

[87] Firstly, there is no issue regarding Dr. Blashko on the underlying application, so information regarding him is not relevant and need not be provided. As regards Dr. Darren Neilson, the relevant date for the purpose of the underlying application is July 2, 2005.

[88] It may be that the plaintiff was not diligent in seeking counsel. It may be that counsel was not diligent in identifying the doctors involved in Ms. Rozak's care at the University Hospital. But a statement of claim was issued within the time for the earliest possible limitation period to

expire. Dr. Darren Neilson was therefore sued in time, although it is clear that there was no cause of action against him.

[89] Therefore, the underlying application clearly involves s. 6(4)(b) of the *Limitations Act*, and the only relevant date for Dr. Kevin Neilson is July 2, 2005. Any lack of diligence after that date does not affect the outcome of the underlying application.

[90] The undertaking which might be required to be answered would be "what information was received or determined that Darren Neilson should be added as a defendant prior to July 2, 2005". Because counsel was not retained until August, 2005, the answer to that undertaking would be solely in Mr. Brogden's knowledge, and he should be required to answer it.

Undertaking 8

[91] Request 8 seeks information as to what steps were taken on Mr. Brogden's behalf to determine why Darren Neilson was named as a defendant.

[92] As the answer to that question relates to a period long after July 2, 2005, I do not see any relevance to it and it need not be answered.

Undertaking 9

[93] Request 9 seeks information as to what steps were taken on Mr. Brogden's behalf between June 4, 2005 and June 1 2008 to determine whether any other physician should be named as defendants in the lawsuit, particularly Dr. Ostolosky and Dr. Din.

[94] The relevant date for Dr. Ostolosky is November 12, 2005. The relevant date for Dr. Din is mid-February, 2006.

[95] If steps were taken on Mr. Brogden's behalf other than by or for his lawyers, that information should be provided as regards Dr. Ostolsky to November 12, 2005 and as to Dr. Din to February 15, 2006.

[96] With respect to steps taken on Mr. Brogden's behalf by his counsel, solicitor-client privilege and solicitor's work product privilege are raised.

[97] At the outset, I need not weigh into whether solicitor's work product privilege is or is not a subset of litigation privilege or a stand-alone privilege of lesser. Whether as a subset of litigation privilege or standing on its own, work product privilege has lesser standing than solicitor-client privilege. ***Blank v. Canada***, 2006 SCC 39, ***R. v. Card***, 2002 ABQB 537, ***Hudson Bay Mining & Smelting Co. v. Cummings***, 2006 MBCA 98, ***Moseley v. Spray Lakes Sawmills*** (1980) Ltd., (1996), 39 Alta. L.R. (3d) 141 (Q.B.), are to that effect.

[98] Privilege can be waived by giving evidence of a privileged communication, or where a party, by his testimony or pleading voluntarily raises a defence or asserts a claim which makes information provided by his solicitor relevant. Selective waiver is not permitted:

> ***Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.***, 1992 CanLII 6132; ***True Blue Cattle Co. v. Toronto-Dominion Bank***, 2004 ABQB 145, ***Petro Can Oil & Gas Corp. v. Resource Service Group Ltd.***, [1988] A.J. No 336 (Q.B.), aff'd (1988), 32 C.P.C. (2d) xlvi (Alta. C.A.); ***Alberta Wheat Pool v. Estrin***, [1986] A.J. No. 1165 (Q.B.) , aff'd (1987) 17 C.P.C. (2d) (xxxiv) (Alta. C.A.); ***Marion v. Wawanesa Mutual Insurance Company***, 2004 ABCA 213.

[99] Positions cannot be taken that are inconsistent with maintaining privilege; privilege on a particular issue or point cannot be waived selectively or unfairly.

[100] I hasten to add that preservation and protection of solicitor client privilege (and to a lesser extent litigation privilege and solicitor's work product privilege) is important, and privilege should not be interfered with other than in the few exceptional circumstances recognized by the courts:

> ***Pritchard v. Ontario Human Rights Commission***, 2004 SCC 31,
> ***Descoteaux c. Mierzwinski***, [1982] 1 S.C.R. 860,
> ***Smith v. Jones***, [1999] 1 S.C.R. 455, and
> ***R. v. Fosty***, [1991] 3 S.C.R. 263.

[101] Where the issue of diligence has been legitimately raised (as it has here because of the Plaintiff's application to add the doctors as defendants after the standard without-discoverability period of two years from the injury), the Plaintiff's diligence as well as his solicitor's diligence becomes relevant. As the only way the doctors have of testing such diligence is through cross-examination on Mr. Brogden's affidavit and seeking undertakings with respect to his counsel's actions (unless the doctors wanted to risk examining the Plaintiff's counsel under Rule 6.8 as their witness rather than through cross-examination), solicitor client privilege may well have to yield on issues relating to knowledge of doctors, and the diligence of the solicitors in informing that knowledge. It would be unfair to allow the plaintiff to essentially say "I didn't do anything, I left it all to my lawyers" and then refuse to say what the lawyers have told him they did, or even ask them about it.

[102] That is not to say that the resulting waiver or loss of privilege extends to anything beyond diligence in discovering the identity of the doctors involved. Mr. Brogden's affidavits do not go beyond diligence issues, and anything beyond that would be irrelevant to the underlying application let alone being an unwarranted incursion into privilege.

[103] In the context of the undertaking sought, as modified by me above, I do not see that it is improper to ask what steps the solicitors took from the time they were retained until the relevant

date specified above. Mr. Brogden has brought diligence into issue by applying to add the doctors as defendants, and discoverability is necessary to extend the limitation period for suing each of the doctors to or beyond the relevant dates.

Undertaking 10

[104] Request 10 seeks information as to whether there was anything preventing Mr. Brogden or anyone on his behalf from contacting the University Hospital to make inquiries as to the identities of the doctors who were involved in Ms. Rozak's care.

[105] I see this as a question of diligence - was there some reason why Mr.Brogden's counsel did not contact the University Hospital or its solicitors to determine specifically which doctors were involved, particularly after receipt on November 16, 2005 of the University Hospital chart in which Dr. Kevin Neilson's signature, Dr. Ostolosky's name and Dr. Din's signature and printed name are found (legibility issues aside).

[106] As regards Dr. Kevin Neilson, the question is irrelevant as the relevant date for him had passed before counsel was retained.

[107] As regards Dr. Ostolosky, the relevant date is November 12, 2005. In my view, the undertaking should be answered with respect to her to November 12, 2005. My view on privilege is the same as with requested undertaking 9.

[108] As regards Dr. Din, the relevant date is February 16, 2006, and the undertaking should be answered with respect to him to February 16, 2006.

[109] Any times after February 16, 2006 are simply not relevant to the application to amend.

Undertaking 13

[110] In request 13, the doctors seek information as to what materials were available to Mr. Brogden's counsel between August, 2005 and June 1, 2008 (when the Amended Statement of Claim was issued). Mr. Brogden objects to this as it is part of his solicitor's work product.

[111] Firstly, as with the other undertaking requests, times after February 16, 2006 are not relevant to the application to amend. So the time frame is in any event narrowed to August, 2005 to February 16, 2006. Diligence is in issue. It seems to me that it is relevant to know what resources the plaintiff (or his counsel) actually had readily available to them, or obtained for the purposes of determining the appropriate parties, during this relevant time frame. Certainly the doctors are free to argue what sources of information **might** have been available to the plaintiff or his counsel, but it is clearly relevant to know what information they actually had.

[112] Mr. Brogden's counsel has already advised that they had the 2005 Canadian Medical Directory in their offices and that they consulted it regarding Dr. Darren Neilson. There are issues relating to his identity, as well as whether Dr. Din's identity is ascertainable from the University Hospital Chart. I see no valid objection to Mr. Brogden being asked to enquire of his solicitors what resources they had in their offices to ascertain doctors' identities during this period.

[113] As to privilege, if any materials were obtained for the purpose of this litigation in this period, privilege has been waived by the plaintiff putting his due diligence in issue. If materials (such as directories) are simply part of counsel's library, I do not see that it could be claimed that they were obtained for the dominant purpose of this litigation. In that regard, I do not see the request as being any more objectionable than asking if counsel had the Western Weekly Reports or the Supreme Court Reports in their offices. They may be there for litigation purposes generally, but no one file specifically. It would be difficult to see how a "dominant purpose" test for privilege could be met.

[114] The requested undertaking should be answered, but limited to the period ending February 16, 2006.

Undertaking 16

[115] In request 16, the doctors want to know when Mr. Brogden told his counsel that Ms. Rozak had been treated by a male resident or intern of East Indian or Middle Eastern descent. This was objected to on the basis of the answer being a protected solicitor-client communication.

[116] Doubtless the question goes to the a well-protected area: communications between solicitor and client for the purpose of giving and receiving legal advice. However, in my view the privilege relating to the answer has been waived by the issue of due diligence in determining Dr. Din's involvement and identity being brought into issue by Mr. Brogden. If the answer relates to a period after February 16, 2006, the specific date or circumstances need not be disclosed as being irrelevant. But if such a disclosure was made before February 16, 2006, the doctors are entitled to know that.

[117] 22 The doctors want to know why Dr. Din's involvement and identity were not recognized by counsel following receipt of the University Hospital records on November 16, 2005. Ordinarily, what was done with the records, or how they were interpreted, would be the subject of work product privilege. In some cases, obtaining records would be included in that privilege. That would not apply here, however, as the records were obtained from one of the parties to the lawsuit.

[118] Again, because Mr. Brogden's diligence is in issue, any privilege relating to the records as to that issue has been waived. The doctors are entitled to know why Dr. Din's identity and

involvement were not recognized after November 16, 2005, and whether there were any impediments to following up on the records until at least February 16, 2006.

XI. Conclusion

[119] In the end, I find that the learned Master erred in law in declining to order that Mr. Brogden inform himself from counsel and advise as to undertaking requests 6, 9, 10 and 22. The answers to those requests fall within the exceptions to privilege - whether solicitor and client or litigation privilege or work product privilege. Number 8 need not be answered, but on the basis of relevance rather than privilege.

[120] I agree with the Master's conclusion on Number 13.

[121] While I agree with his decision on Number 16, he did not deal with privilege. The question was clearly relevant, but the response strikes directly at solicitor-client communications and would clearly be privileged but for waiver. As noted above, Mr. Brogden waived privilege over that communication by putting his diligence into issue.

[122] I also agree with the Master's comment that "the Court should lean towards protecting the file of counsel". Privilege is an essential part of our legal system, and must be protected, subject to waiver and the very limited exceptions described in the case law.

XII. Costs

[123] Despite the fact that I have directed that all but one of the requested undertakings be answered, I have in all cases limited the scope of the inquiries. The doctors sought information for periods much later than is relevant on the application to amend. I thus view the result as having mixed success for both sides: the plaintiff has to provide more information than he was prepared to, and the doctors will receive less information than they sought.

[124] As a result, costs of this application, and the application before the Master, should be in the cause.

Heard on the 23rd day of February, 2011.
Dated at the City of Edmonton, Alberta this 7th day of April, 2011.

R.A. Graesser
J.C.Q.B.A.

Appearances:

Philip Kirman
Weir Bowen LLP
for the Plaintiff

David Hawreluk and Alison Archer
Bennett Jones LLP
for the Applicants Kevin Neilson, Lara Ostolosky and Omar Din

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Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice R.A. Graesser

The citation has been corrected from "Brogden v. Demas" to "Rozak (Estate)" on the cover page.

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	EDMONTON
	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")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. G. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the "Beneficiaries and Potential Beneficiaries")

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Justice of the Court of Queen's Bench in Alberta

809772;August 31, 2011

Indexed as:

Barry v. Garden River Band of Ojibways

Between

Caroline Barry, Patricia Lariviere, Arlene Barry, Valerie Boissoneau, Rita Tice and Carolyn Musgrove each suing on behalf of herself and on behalf of all the women reinstated to and entitled to be reinstated to membership in the Garden River Ojibway Nation #14 [also known as the Garden River Band of Ojibways]; and, Natalie Barry, a minor, and Christian Barry, a minor, and Kari Barry, a minor, by their litigation guardian, Caroline Barry; Lee Ann Barry, a minor, and Charla Barry, a minor, by their Litigation guardian, Arlene Barry; Daniel Tice, a minor, and Deanna Tice, a minor, by their Litigation guardian, Rita Tice; Kelly Musgrove, a minor, Melanie Musgrove, a minor, and Stacey Musgrove, a minor, by their Litigation guardian, Carolyn Musgrove, each minor plaintiff suing on behalf of himself or herself and on behalf of all the other children and lawful wards of all the women reinstated to and entitled to be reinstated to membership in the said Band, plaintiffs (appellants), and

The Chief and Council of the Garden River Band of Ojibways [also known as the Garden River Ojibway Nation #14] including, before the election of 14 October 1988, Ron Boissoneau (Chief, Morley Pine, Ronald Thibault, Daniel L. Pine, Darrell Boissoneau, Willard Pine, Chris Belleau, Arnold Solomon and Terry J. Belleau, Councillors, and, after the said election, Dennis Jones (Chief, Morley Pine, Ronald Thibault, Willard Pine, Chris Belleau, Arnold Solomon, Terry J. Belleau, Muriel Lesage, Gordon Boissoneau and Ted Nolan, Councillors, defendants (respondents)

[1997] O.J. No. 2109

33 O.R. (3d) 782

147 D.L.R. (4th) 615

100 O.A.C. 201

[1997] 4 C.N.L.R. 28

71 A.C.W.S. (3d) 800

No. C14296

Ontario Court of Appeal
Toronto, Ontario

Finlayson, Charron and Rosenberg JJ.A.

Heard: April 17, 1997.
Judgment: May 27, 1997.

(31 pp.)

Counsel:

Michael F.W. Bennett for the appellants.
Robert MacRae for the respondents.

The following judgment was delivered by

1 THE COURT:-- The adult appellants are female members of the Garden River First Nation of Ojibways who were reinstated to Indian status and to membership in the Garden River Band of Ojibways ("Band") on or before December 17, 1987 as a result of amendments, introduced in Bill C-31, infra, to the Indian Act, R.S.C. 1970, c. I-6, as amended. The minor appellants are their children. The respondents are the Chief and Council of the Band at the material times.

2 The appellants appeal from the judgment of the Honourable Mr. Justice Noble of the Ontario Court of Justice (General Division), wherein the action of the appellants for an equal per capita distributive share of land claim settlement moneys was dismissed. When the moneys were distributed to the members of the Garden River Band, the adult appellants' shares were reduced by amounts of Band moneys that they had previously received when they were deemed to have left the Band and became "enfranchised" by reason of marriage to a man who was not a status Indian. The appellant children were denied shares on the ground that they were not members of the Band at the date of distribution.

The proceedings

3 This is an action for an accounting and payment to the appellants of their per capita distributive share in what they maintain is a trust fund received by the Garden River Band in settlement of an outstanding claim of the Band against the Government of Canada. The adult appellants claimed a distributive share for themselves and on behalf of all other women reinstated to membership in the Band. The minor appellants claimed a distributive share for themselves and on behalf of all other children of reinstated women who are or shall be known to the respondents. They also sought:

(a) A temporary injunction restraining the Chief and Council, from time to time, of the Band from distributing or disposing of any part of or of the whole of the balance of the funds from the Squirrel Island Settlement Trust monies remaining in its account until the trial of this action and, in the event there is an insufficient balance of such funds to satisfy the claims of the plaintiffs, then an order that the defendants account to the plaintiffs and trace the said funds.

(b) A declaration that the defendants' failure to distribute the plaintiffs' share of the said Band's Squirrel Island Settlement Trust monies is contrary to s. 15 of the Canadian Charter of Rights and Freedoms ("Charter").

(c) A claim for pre-judgment and post-judgment interest and costs on a solicitor client basis.

4 On the face of it, this would appear to be a straightforward case involving the per capita distribution of a finite sum of money. Unfortunately, at the Band Council stage, the distribution of these moneys was caught up in a larger and more contentious issue relating to the reinstatement of these adult appellants and their children to the Garden River Band as a result of the passage by the Parliament of Canada of certain amendments to the Indian Act, those amendments being commonly referred to as Bill C-31. We propose to deal with the factual aspects of the Settlement Agreement separate from our analysis of the effect, if any, of Bill C-31 on the contemplated distribution.

Facts

(1) The Squirrel Island Land Claim

5 The Band had an outstanding claim against the Government of Canada that related to the sale of land on Squirrel Island in the middle of the St. Mary's River. The Band contended that Squirrel Island was part of the Band Reservation set aside by the Robinson Huron Treaty of 1850. The moneys in issue are part of the Garden River Land Settlement Agreement ("Settlement Agreement") dated March 30, 1987, wherein the Crown, as represented by the Minister of Indian Affairs and Northern Development, agreed with the Chief and Council of the Band to pay in settlement of the claim the sum of $2,530,000.000 made up as follows:

(a) the offsetting of $154,600.00 as full payment for advances and loans provided by the Crown for researching, preparing and negotiating the agreement;

(b) $1,036,250.00 to be paid into an interest bearing trust account, to be held by the Band in trust exclusively for the repurchase of Squirrel Island;

(c) $1,339,150.00 to be paid into the Band's revenue account, an account set up under the provisions of the Indian Act.

6 Section 69.(1) of the Indian Act provides:

> The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke such order.

7 The Indian Bands Revenue Moneys Regulations, C.R.C. 1978, c. 953, as amended, names the Garden River Band of Indians as a Band. As we read the Regulation, this Band may, subject to the Regulations, control, manage and expend in whole or part its revenue moneys. The Regulations relate to the establishment of a bank account, the selection of signing officers, the appointment of auditors and the publication of an annual auditor's report.

8 At trial, a councillor of the Band testified that the Band Council considered it necessary to consult the Band members and obtain a consensus regarding disposition of the settlement funds in the Revenue Account. Accordingly, a questionnaire was circulated to individual members, asking whether it was agreed "to divide equally amongst the members of the Garden River Band the one million dollars from the trust account [sic]". The questionnaire further asked whether, if the member agreed with the distribution, the distributive share of an enfranchised person now reinstated pursuant to Bill C-31 should be reduced by the aggregate amount of Band moneys paid out to the person when he or she left the Band. The tabulated results of the questionnaire demonstrated that almost everyone who completed a questionnaire was in favour of the distribution. By a small majority, members were also in favour of making deductions from the shares of the enfranchised women in the amount that they had received upon leaving the Band. It is interesting to note that, at a later date, the Chief and Council agreed that no deductions would be made from any members who owed debts to the Band for other reasons, such as water use charges.

9 Accordingly, on September 28, 1987, the Band Council passed a Band Council Resolution ("BCR") which stated:

> As we the Garden River Band operate under section 69 of the Indian Act, do hereby request that the sum of one million dollars from our Revenue Account be made available and payable to the Garden River Band. These monies are required for per capita distribution to the Garden River Band Members.
>
> 1. The Garden River Band will arrange for an audit report to be completed by June 30, 1988. Our auditor is Dunwoody and Company.
> 2. The Band will submit expenditure reports.
> 3. The Band will use the funds provided for distribution only.
> 4. The Band will maintain financial records in accordance with generally

accepted accounting principles and practices.

10 It would appear from the above that the sum of $1,000,000.00, being part of the $1,339,150.00 paid under the Settlement Agreement, is not strictly a trust fund because it was to be paid into the Revenue Account of the Band where it could be used for the purposes of the Band generally, subject only to the Regulations which set out accountability requirements. There was no requirement in the Settlement Agreement that the fund was to be distributed to the members of the Band and certainly there was no requirement that it be distributed by a certain date. At some later time, the Band decided on December 17 and 18, 1987 as the dates for the per capita distribution. There was no clear evidence presented at trial explaining why these dates were selected. Accordingly, while the funds were not the subject matter of a trust when they were delivered to the Band Council, when the Band Council resolved to make a per capita distribution, and to set aside $1,000,000.00 for that purpose, in our view a trust was created. The Band Council was then under a duty to ensure that the distribution was carried out in accordance with trust principles.

(2) Band Membership and the Bill C-31 issue

11 Prior to April 1985, pursuant to s. 5 of the Indian Act, the Department of Indian Affairs and Northern Development ("Department") was responsible for maintaining a list, known as the Indian Register, of all aboriginals with Indian status. The Department also maintained the lists of all the Indians who were members of the individual bands ("Band Lists") and did so on the basis of the names in the Indian Register. At that time, subject to s. 12(1)(b) of the Indian Act, an aboriginal woman with Indian status was no longer entitled to be included in the Indian Register if she married a man who was not a status Indian. As a consequence of losing her eligibility to be registered, she not only lost her status as an Indian under the Indian Act, she lost her eligibility to remain on the Band List of the Band in which she had previously enjoyed membership and with it her status as a member of the Band. As a further consequence, children of such a union were also deprived of the opportunity of achieving status as an Indian, both on the Register maintained by the Department and as a member in the Indian Band. This process leading to a lack of status was known as enfranchisement because when it was first enacted in 1869, the woman became eligible to vote in Canadian elections, a right she had not previously held as a status Indian under the Indian Act.

12 On the other hand, if a man with Indian status married a non-status woman, he did not lose his status but rather his wife gained his status. With the advent of the Constitution Act, 1982 and the Canadian Charter of Rights and Freedoms ("Charter"), this obvious inequality could no longer be tolerated. Parliament passed Bill C-31, An Act to Amend the Indian Act, R.S.C. 1985 (1st Supp.) c. 32, s. 4. It received Royal Assent on June 28, 1985 but was made effective retroactively to April 17, 1985. It removed the discriminatory provisions and permitted the re-registration of enfranchised Indian women and their children. It also permitted each band to assume control over its membership list. Thus, the Department continued to register aboriginals who had status or who were reinstated to status, but once a band gained control of its membership list, the Department relinquished responsibility for that list to the Band. Two separate lists, one maintained by the Department and

one maintained by the band, would come into existence.

13 In order to assume control of its membership list, a Band was required to create a code setting out the rules by which membership was to be determined, and submit it for approval to the Department before June 28, 1987. These provisions are found in s. 10 of Bill C-31, as follows:

> 10.(1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.
>
> (2) A band may, pursuant to the consent of a majority of the electors of the band,
>
> (a) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
> (b) provide for a mechanism for reviewing decisions on membership.
>
> (3) Where the council of a band makes a by-law under paragraph 81 (p. 4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.
>
> To bring this section into effect, it is necessary to invoke s. 81(1) (p. 4) of the Indian Act which states:
>
> 81.(1) The council of a band may make by-laws not inconsistent with this Act or with any regulations made by the Governor in Council or the Minister, for any or all of the following purposes, namely:
>
> (p. 4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

14 On June 19, 1987, the Garden River Band complied with the procedural requirements of s.10 and submitted its membership rules, called Citizenship Registry Regulations, to the Minister. They were accepted by the Minister by letter dated September 25, 1987 and the membership rules were effective retroactively to June 25, 1987. Part IX provided:

Non-Discrimination

> This Code shall be administered and all powers, duties and functions hereunder shall be exercised or performed without discrimination based on sex, affiliation to First Nations or Indian Bands, creeds or religion.

15 The Garden River Band membership rules created four categories of members: Original Members, Restored Members, Accepted Members and Members by Birth. "Original Members" were those who were entitled to be entered on the band list immediately prior to April 17, 1985 and also any child born after April 17, 1985, if the child's natural parents were both original members. The "Restored Members" category applied to those persons, including the adult appellants, who were entitled to rejoin the band pursuant to Bill C-31. The "Accepted Members" category encompassed all members who had applied for membership and whose applications had been accepted and confirmed. The children of reinstated women, including the appellant children, would belong in this category. The final category was created to provide greater certainty for children born after April 17, 1985 and whose natural parents are or were both members of the Garden River Band at the time of the child's birth. At the time that the Band was drafting the membership rules, the Department was having difficulty managing a large, unexpected backlog of applications for reinstatement to Indian status. The Department was also waiting for the bands to complete the process of assuming control over their membership. As a result, births after April 17, 1985 were not being registered by the Department, with the exception of those children born to parents who were both original members. This time was referred to as an abeyance period. There was concern that a child might be denied membership in the Band, and so this section provided for automatic membership for the child.

16 If a person had only one parent who was a member of the Band, that person was required to apply for membership, and thus would become an Accepted Member. The rules further provided for the application process. This is the route by which the appellant children could obtain Band membership. It should be noted that after the rules became effective on June 25, 1987, application for membership was necessary whether the parent-member was the father or the mother of the child. It should be further noted that the application process required the person to first obtain Indian status with the Department prior to applying for membership in the Band. Due to the Department backlog, this requirement created problems in some cases.

17 It was the testimony of the adult appellants that although they frequently and regularly inquired at Band Council meetings regarding the membership application process for their children, the Chief and Councillors did not provide satisfactory answers. The reinstated women were reassured that there was no deadline for applications. Minutes of the Band Council Meeting of February 8, 1988 indicate that application forms were still not available at that time, long after the date of distribution of the settlement moneys. At the time of the distribution, the appellant children were not members of the Band, although in most cases, they had achieved Indian status by directly applying to the Department.

(3) Enfranchisement payments

18 Bill C-31 also dealt with payments that had been made to enfranchised women or other aboriginal persons who became enfranchised or otherwise ceased to be a member of a band. On leaving, these persons were entitled to receive one per capita share of money held in the band's capital fund, one per capita share of money held in the revenue fund, and if they were in a treaty area, 20 years treaty annuity. Each of the adult appellants had received an aggregate sum of less than one thousand dollars at the time she lost status. A band was allowed a strictly limited right of recovery of these sums by s. 64.1(2) of the Indian Act. The provision permits recovery of money paid out on enfranchisement in excess of one thousand dollars. Section 64.1 of the Indian Act was never resorted to by the Garden River Band. Even if the Band had invoked s. 64.1, it would have had no application in this case, because individually each adult appellant received an enfranchisement payment that was less than $1,000.

(4) The distribution procedure

19 As noted above, on September 28, 1987, the Band passed a resolution to make a per capita distribution of $1,000,000.00 from the revenue account to all members of the Band. The minutes of a special meeting of the Band Council held on December 3, 1987, indicate that it was agreed to make the disbursements two weeks later on December 17 and 18, 1987. These minutes further note that it was decided to give each member the sum of $1,000.00 and that no deductions would be made from the shares of members with outstanding debts to the Band. There is no indication in the minutes of the reason for choosing this date for distribution.

20 One week before the dates set for distribution, on December 11, 1987, the Band Council held a "Working Meeting". Several issues related to the disbursement of the funds were discussed. Decisions were finalized regarding the distribution procedure. It is recorded in the minutes that the reinstated women who had applied for reinstatement before June 15, 1987 would qualify for a share, but that a reduction would be applied in the amount of money received at the time of enfranchisement, rounded off to the nearest $100.00.

21 Another issue raised was the question of entitlement of certain children to a share in the settlement funds. There was no provision in the Indian Act as amended by Bill C-31, or in the Band's own membership rules, which automatically bestowed membership to children born after April 17, 1985 to parents, only one of whom was a member of the Band. Due to the Department's abeyance period for registering births, these children were in an uncertain situation. The minutes note:

> STATUS CHILDREN - Children birn [sic] to one parent original band members born after April 17, 1985 and before June 15, 1987, should they get a share? Noted that all birth registrations were suspended for band membership during that time, except where two parents were band members. Noted that membership code came into effect June 15, 1987.

> Decision was made to make Status children Garden River Band members under both of the following categories:
>
> 1 - Born between April 17, 1985 and December 16, 1987.
>
> 2 - Born to one parent original Garden River Band member.
>
> All in agreement.

22 At trial, considerable time was spent in interpreting this decision. It was established by witnesses for both sides that it should be read conjunctively, such that a person was required to satisfy both conditions in order to achieve membership in the Band. Therefore, any child born after the effective date of Bill C-31, who had at least one parent who was a member in the Garden River Band, would be entitled to membership in the Band without having to fulfil the procedural requirements set out in the Band's recently enacted membership rules.

23 The decision was implemented by passing Band Council Resolution number 90, dated December 11, 1987, listing forty-nine individuals by name who met both of these requirements, and admitting them to Band membership. People on the list had either a mother or a father who was a member of the Garden River Band. This decision remedied the problem created by the delays in the membership process which existed because the Department had suspended the registration of births and because the Band had not yet instituted its application process. At trial, it was established that persons who obtained membership as a result of this resolution were allowed to collect full shares of the settlement money on December 17 and 18, 1987.

24 The December 11, 1987 decision did not address the concerns of the appellants regarding the position of their children, who were all born before April 17, 1985. These children were still required to complete the application process set out in the membership rules. Thus, the discrimination which Bill C-31 attempted to remedy was perpetuated. Children born before April 17, 1985 to a father with Indian status who had married a non-status woman could become members of the Band, since both parents were entitled to Indian status and Band membership according to the Indian Act prior to the Bill C-31 amendments. Children born before April 17, 1985 to unmarried mothers who were Band members could obtain membership, since their mothers never lost status or membership. Children born after April 17, 1985 to fathers or to mothers whose spouses were without status, gained membership as a result of the December 11, 1987 resolution. However, the children of the reinstated women continued to be denied membership. In effect, this denial was based on their mothers' lost status. A woman's loss of status due to marriage of a non-status man had been recognized and rejected as discriminatory action by Parliament. Thus, the denial of membership to the appellant children, while granting membership to other children in a similar

position, was a breach of the non-discriminatory clause in the Band's membership rules.

25 This issue of discrimination directed towards children of enfranchised woman was finally eliminated on February 13, 1989. A Band Council Resolution passed on that date reflects the following decision:

> THAT ALL Children of restored and original Band Members who have attained Indian Band status designated as First Generation be accepted by the Garden River Band with no exceptions or reservations to any individual.

26 The rapidity of the meetings and decision-making must be noted. The Settlement Agreement was made on March 30, 1987. The dates for distribution of the funds were accepted on December 3rd, of that year, the procedures were discussed one week later on December 11th, and the actual disbursements were made on December 17th and 18th. It is also noted that during the same time period, Band members continued to raise concerns regarding who would share and to what extent, as evidenced by the minutes of the meeting and the testimony at trial.

The trial judge's disposition

27 The trial judge determined this case based upon his analysis of what he regarded as the two issues before the court. The first issue was whether the first generation children of women formerly deprived of Indian status, and to whom Indian status has now been restored by Bill C-31, were entitled to membership in the Band as of the date for distribution of the $1,000,000 from the Settlement Agreement. The second issue was whether it was appropriate to deduct from Indian women re-admitted under Bill C-31 those amounts which had been advanced to them individually by the Government of Canada when their Indian status, and therefore Band membership, had been lost.

28 The trial judge found that on the date of distribution, the appellant children could not claim membership based on any of the enumerated classes found within the Band's membership rules. He stated that he was unable to find that "in its application of its Citizenship Regulations or in the distribution of the Squirrel Island Settlement Trust Money, that the band acting through its Council, did so contrary to law". He also found:

> There was nothing sinister or deliberate in the sense of lacking fairness or was there anything legally improper in the decision to make distribution on December 17 and 18, 1987 to those persons who were, at that time, recorded in the records of the Garden River Band of Ojibways as members in the Band.

Therefore, he held that the appellant children were not entitled to a share.

29 Regarding the second issue, he stated:

> In my opinion, what the Band Council did was fair and equitable and restored the financial interests of the restored C-31 Indian women to equal that of their Indian sisters who had not been deprived of their status and who had not received earlier distribution.

Having decided both issues in the negative, the trial judge dismissed the action.

Analysis

30 In our opinion, the essential error of the trial judge was in not recognizing that the Band in this case was attempting to deal with two unrelated matters at the same time. In the result, he dealt with the two issues in the manner in which they were presented to him and later to this court. They are:

(1) should the appellant children have received a full share as members of the Band?
(2) were the deductions from the adult appellants appropriate?

With respect, we are of the view that the trial judge erred in his conclusions on both issues.

31 The Band Council Resolution stated that $1,000,000.00 of the settlement moneys was required for per capita distribution to the Garden River Band members. Black's Law Dictionary (6th ed.) at p. 1136, provides the following definition of per capita:

> By the heads or polls; according to the number of individuals; share and share alike. This term, derived from the civil law, is much used in the law of descent and distribution, and denotes that method of dividing an intestate estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent, without reference to their stocks or the right of representation.

Webster's Ninth New Collegiate Dictionary, at p. 872 defines per capita as meaning "equally to each individual".

32 In order to comply with its own Resolution to make a per capita distribution to band members, the Band Council would have to give an equal share to all band members. In effect, it constituted itself a trustee for this purpose. The Band itself appears to have recognized this, given the language of its questionnaire relating to distribution. The trial judge also appears to have proceeded on the basis that from at least the date of the resolution to make a per capita distribution, the Band Council was dealing with trust moneys. As D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (1984) explains at p. 111, "whether a trust has been created is simply a matter of construction". In our view, the proper construction of the September 28, 1987 Band Council Resolution is that an express trust was created with the Garden River Band as both settlor and trustee of the $1,000,000.00, being the moneys necessary to make a per capita distribution, and the Garden River Band Members as beneficiaries.

33 One of the primary duties of a trustee is to treat all beneficiaries impartially: Benoit v. Tisdale (1925), 28 O.W.N. 477 (Weekly Court); Re McClintock (1976), 70 D.L.R. (3d) 175 at 180 (Ont. Div. Ct.). Waters, Law of Trusts in Canada, supra, describes this duty as follows at p. 787:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand. The settlor or testator may choose to give disproportionate interests to various beneficiaries, and he very often does so in practice, but that is his privilege. It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust. [emphasis added].

34 The duty to act impartially would require the trustee to treat equally all members of a class of beneficiaries. We think this basic principle is dispositive of the appeal as it relates to the adult appellants. Once the decision was made by the Band Council that there should be a per capita distribution of the sum in issue, then it is apparent that the Band Council had an obligation to treat all members of the Band equally. There could be no suggestion of set off with respect to so-called Band indebtedness unless all Band indebtedness was subject to the set off. The evidence at trial established that a decision was made to deduct sums only from the appellant women. Members of the Band who owed sums for such items as water use charges were able to collect full shares. The reinstated women were entitled to be treated equally to all other beneficiaries. Since all other beneficiaries received full shares, the Band should have advanced full shares to the adult appellants.

35 In any event, such a set off could not be employed to recover from formerly enfranchised women sums relating to re-instatement under Bill C-31. There was a special provision in Bill C-31 relating to that and it is reproduced in s. 64.1(2) of the Indian Act. This provision limits recovery to sums paid in excess of one thousand dollars. The appellant women had all received sums less than this amount. The trial judge erred in permitting this deduction from the per capita distributive share of each of the adult appellants.

36 The minor appellants, being the first generation children of formerly enfranchised women present a different problem, but it is a problem that disappears when one ignores the self-imposed time limit for the distribution. When the Band Council Resolution in question was passed, it is common ground that the identity of all the first generation children were known. The only live issue

for a time was whether a distinction would be drawn between children born after April 17, 1985 with only one parent who was a Band member and children born before April 17, 1985 with similar parentage. The latter group was comprised of the minor appellants whose applications for membership in the Band were being held in abeyance because of matters over which they had no control. Leaving apart the highly valid point that such a distinction could not be made between the two classes of children without violence to the self-imposed non-discrimination provisions of the Band's membership rules, the Band Council knew that these children would ultimately become members, as in fact they did, but well after the date for distribution. The cut off date, being highly arbitrary, could not have the effect of eliminating these children from participation in the per capita distribution. Alternatively, if the deadline was of some significance to the Band Council, it would have been a simple thing to have made the distribution to the members whose credentials were certain, after withholding for the time being an amount sufficient to cover the interests of those minor appellants whose applications had not yet been accepted.

37 However, on the evidence, the date for distribution was not chosen for any particular reason. Despite notice of concerns regarding individual entitlement to participate in the distribution of the moneys, the Chief and Council appeared determined to distribute the entire $1,000,000.00 at one time. In fairness to the Band Council, last minute attempts were made to remedy entitlement problems. The December 11th resolution addressed the question of entitlement for some individuals. At trial, witnesses testified that even on the date of distribution, children were brought to the Band Office, produced birth documentation, were accepted as members, and were given their shares. It is also noted that on October 13, 1988, many months after the self-imposed deadline, a Band Council Resolution similar to the December 11, 1987 resolution was passed. As a result, seven more children were entered onto the membership list and advanced shares in the settlement funds.

38 In setting the arbitrary deadline, the Band compromised its ability to fulfil its duties with respect to the distribution of funds. The Band placed itself in the position of having to disburse the funds before it could, as trustee, definitively ascertain the identity of all beneficiaries. This was not only a breach of the Band's duty to act impartially, but it was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and to identify and locate the members of that class.

39 It is basic to all trust concepts that for a trust to come into existence, it must have three essential characteristics. Before a trustee can begin the administration of a trust, he or she must be satisfied that the trust satisfies the following three requirements: a) certainty of intention; b) certainty of subject-matter; and, c) certainty of objects.

40 It is the third requirement which is relevant to the discussion of the entitlement of the minor appellants. The need for certainty of objects means that a fixed trust will fail unless it is possible to say whether any person is a member of the class and unless all the possible members of the class are known or ascertainable: Waters, Law of Trusts in Canada, supra at p. 80. In determining whether

the trust satisfies the requirement of certainty of objects, the trustee will effectively be determining what classes are entitled to benefit from the trust fund. This is because the question whether it is possible to say that any person is a member of the class and the question whether all possible members of the class are known or ascertainable assumes that the class has been determined. In the case under appeal, there is no issue that the object of the distribution was the membership of the Band; the question that arose was whether the Band could pick the date that it did to ascertain the membership of the Band.

41 We think that it could not. A trustee's first duty is to follow implicitly the terms of the trust instrument: Merrill Petroleums Ltd. v. Seaboard Oil Co. (1957), 22 W.W.R. 529 at 557, affirmed 25 W.W.R. 236 (Alta C.A.), noted in Waters, Law of Trusts in Canada, supra at 695. As a logical extension of this duty, we think that before a distribution is made, a trustee has a duty to make reasonable efforts to identify and locate the members of a class of beneficiaries. If a trust dictates that the trustee should distribute trust funds to a certain class of beneficiaries, the trustee can only comply with this requirement by first identifying and determining the members of the class.

42 The case of Atlantic Trust Co. v. McGrath (1969), 8 D.L.R. (3d) 225 (N.S.C.A.) stands for the proposition that an administrator of an estate has a duty to make reasonable inquiries as to the existence of beneficiaries of the estate. In that case, the administrator had the final accounts passed and the estate distributed after sending out the usual notices for persons having claims against the estate. After the distribution had been completed, the widow of a son of the deceased came forward claiming that she had been excluded from the distribution. At the time of the distribution, the administrator did not know about the deceased's son but he did have reasonable grounds for believing that such a son existed and was last thought to be in the north-eastern United States. Notwithstanding such reasonable grounds, he made no effort to locate the son. The trial judge held that the administrator had a duty to make inquiries as to the existence of the son (quoted at p. 228):

> ... I am of the opinion from all the evidence on the point that Howard McGrath [the administrator] had reasonable grounds for supposing there might well be a son of Harvey McGrath's [the deceased] residing somewhere in the eastern American States. He should have advertised at least in Massachusetts for the next of kin.

The Nova Scotia Court of Appeal agreed that a duty to make such inquiries existed (at p. 238):

> Here the evidence which I have mentioned and which was accepted by the trial Judge indicates a very definite warning that further inquiries and investigations should have been made.

See also: M.V. Ellis, Fiduciary Duties in Canada, (1993), at 4.6.

43 Accordingly, there was an affirmative and readily performable duty on the Band Council to ascertain and identify the membership of the Band. That duty came into existence on September 28,

1987 when the decision was made to make a per capita distribution. That Band Council Resolution did not fix a date for distribution or set special guidelines for those entitled to a distributive share: it referred only to "Garden River Band Members". Its only time limit on that date was that it would produce an audited report by June 30, 1988. During that period, the Band Council was made aware of the inability of some children who were clearly eligible for Band membership to complete their applications for membership within the time frame set by the Band Council.

44 The trial judge was in error in determining this issue in favour of the Band Council by holding that there was nothing sinister or deliberately unfair in the decision to fix the date for distribution for December 17th and 18th of 1987. That is not the test in scrutinizing the performance of a trustee. The issue of whether a trustee can set an arbitrary time limit for identifying and locating the members of the class is to be resolved by a standard of care analysis. In other words, would a trustee be reasonably fulfilling his or her duty to identify and locate the members of the beneficiary class if he or she operated on a self-imposed deadline?

45 In Learoyd v. Whiteley, (1887), 12 App. Cas. 727 (H.L.), Lord Watson set out the standard of care expected of a trustee in carrying out his or her duties. He stated at p. 733 that

> "the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own affairs.".

Waters defined the standard as follows at p. 750, supra:

> the trustee must show ordinary care, skill, and prudence, he must act as the prudent man of discretion and intelligence would act in his own affairs.

In Fales v. Can. Permanent Trust Co., [1977] 2 S.C.R. 302 at 318, Dickson J. stated that the trustee must show "vigilance, prudence and sagacity".

46 In our opinion, the Band Council did not show ordinary care, skill and prudence in carrying out its duties as trustee with respect to the minor appellants and the class they represent.

Disposition

47 We are of the opinion that this case can be decided on the basis of well recognized principles relating to the fiduciary obligations of any person who undertakes to make a per capita distribution of a fund of money entrusted to that persons' care. Accordingly, we find it unnecessary to address the appellants' submissions regarding s. 15 of the Charter of Rights and Freedoms.

48 For the reasons given, we are allowing the appeal and setting aside the judgment below. The appellants and all those they represent are entitled to a declaration that they are each entitled to the payment of an equal distributive share of the $1,000,000 fund from the Settlement Agreement

without deduction of any kind. They are also entitled to pre-judgment interest from the distribution date until the date of the trial judgment below and post-judgment interest thereafter until payment. In order to give effect to this declaration, the matter is remitted to the trial judge or a judge of concurrent jurisdiction for an accounting and judgment with respect to the individual appellants and members of the class they represent.

49 Since the appellants are beneficiaries of a trust who were obliged to sue their trustees, they should receive costs on a solicitor and client basis here and below.

FINLAYSON J.A.
CHARRON J.A.
ROSENBERG J.A.

qp/d/ln/mmr/mjb/qlhjk

Indexed as:

Huzar v. Canada

Between
Her Majesty the Queen, in right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, defendants (appellants), and
Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew Mcgillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (née McDonald), plaintiffs (respondents)

[2000] F.C.J. No. 873

[2000] A.C.F. no 873

258 N.R. 246

Docket A-326-98

Federal Court of Appeal
Toronto, Ontario

Décary, Sexton and Evans JJ.

Heard: June 13, 2000.
Oral judgment: June 13, 2000.

(6 paras.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action or defence -- Actions, commencement of -- Choice of method of commencement of proceedings.

Appeal by the defendants from a decision allowing the plaintiffs' motion to amend their statement of claim and dismissing the defendants' motion to strike the statement of claim as disclosing no

reasonable cause of action. It was conceded that without the proposed amending paragraphs, the statement of claim disclosed no reasonable cause of action.

HELD: Appeal allowed. The motions judge erred in law. The proposed amending paragraphs amounted to a claim for declaratory relief against the Band, which was a federal board, commission or other tribunal within the meaning of the Federal Court Act. Such relief could only be sought on an application for judicial review under that Act, and could not be included in a statement of claim. Accordingly, the statement of claim was struck as disclosing no reasonable cause of action.

Statutes, Regulations and Rules Cited:

Federal Court Act, ss. 2, 18(3), 18.1.

Counsel:

Philip P. Healey, for the defendants (appellants).
Peter V. Abrametz, for the plaintiffs (respondents).

The judgment of the Court was delivered orally by

1 **EVANS J.**:-- This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the Federal Court Act. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

4 It was conceded by counsel for the respondents that, without the proposed amending

paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

EVANS J.

cp/d/qlndn

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C., 1985, ch. F-7

Current to February 20, 2012

À jour au 20 février 2012

Last amended on September 21, 2009

Dernière modification le 21 septembre 2009

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

eral Court — Trial Division or the Exchequer Court of Canada; and

(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

tion de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Demandes contradictoires contre la Couronne

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(*a*) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Actions en réparation

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Incompétence de la Cour fédérale

Extraordinary remedies, federal tribunals

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Recours extraordinaires : offices fédéraux

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les

determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Intergovernmental disputes

19. If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

R.S., 1985, c. F-7, s. 19; 2002, c. 8, s. 28.

Industrial property, exclusive jurisdiction

20. (1) The Federal Court has exclusive original jurisdiction, between subject and subject as well as otherwise,

(*a*) in all cases of conflicting applications for any patent of invention, or for the registration of any copyright, trade-mark, industrial design or topography within the meaning of the *Integrated Circuit Topography Act*; and

(*b*) in all cases in which it is sought to impeach or annul any patent of invention or to have any entry in any register of copyrights, trade-marks, industrial designs or topographies referred to in paragraph (*a*) made, expunged, varied or rectified.

renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Différends entre gouvernements

19. Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 2002, ch. 8, art. 28.

Propriété industrielle : compétence exclusive

20. (1) La Cour fédérale a compétence exclusive, en première instance, dans les cas suivants opposant notamment des administrés :

a) conflit des demandes de brevet d'invention ou d'enregistrement d'un droit d'auteur, d'une marque de commerce, d'un dessin industriel ou d'une topographie au sens de la *Loi sur les topographies de circuits intégrés*;

b) tentative d'invalidation ou d'annulation d'un brevet d'invention, ou d'inscription, de radiation ou de modification dans un registre de droits d'auteur, de marques de commerce, de dessins industriels ou de topographies visées à l'alinéa *a*).

WATERS' LAW OF TRUSTS IN CANADA

Third Edition

By

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I. INTRODUCTION

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*,[1] in words adopted by Barker J. in *Renehan v. Malone*[2] and considered fundamental in common law Canada,[3] (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained.[4] Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

The principle of the three certainties has been fundamental at least since the days of Lord Eldon, and no one today could seek to challenge the principle; the problems that exist concern the issue of what constitutes certainty.

II. CERTAINTY OF INTENTION

There is no need for any technical words or expressions for the creation of a trust.[5] Equity is concerned with discovering the intention to create a trust; provided

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[1] (1840), 3 Beav. 148, 49 E.R. 58 (Eng. Ch.).

[2] (1897), 1 N.B. Eq. 506 (N.B. S.C. [In Equity]).

[3] Numerous Canadian cases have referred to the three certainties as essential to the existence of an express trust. A few relatively recent examples include *Goodman Estate v. Geffen* (1987), (sub nom. *Goodman v. Geffen*) 52 Alta. L.R. (2d) 210 (Alta. Q.B.), reversed (1989), 68 Alta. L.R. (2d) 289 (Alta. C.A.), additional reasons at (1990), 80 Alta. L.R. (2d) 289 (Alta. C.A.), reversed (1991), 80 Alta. L.R. (2d) 293 (S.C.C.), leave to appeal allowed (1989), 101 A.R. 160 (note) (S.C.C.); *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (B.C. C.A.); *Bank of Nova Scotia v. Société Générale (Canada)* (1988), 58 Alta. L.R. (2d) 193 (Alta. C.A.); *Faucher v. Tucker Estate* (1993), [1994] 2 W.W.R. 1 (Man. C.A.); *Howitt v. Howden Group Canada Ltd.* (1999), 170 D.L.R. (4th) 423, 26 E.T.R. (2d) 1 (Ont. C.A.); *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.); *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)* (1998), 227 A.R. 280, (sub nom. *Arkay Casino Ltd. v. Alberta (Attorney General)*) 64 Alta. L.R. (3d) 368, [1999] 4 W.W.R. 334 (Alta. Q.B.); *Re Chemainus Team Development Training Trust* (2004), 2004 CarswellBC 2853, [2004] B.C.J. No. 2519 (B.C. S.C.); *Parsons v. Cook* (2004), 238 Nfld. & P.E.I.R. 16, 7 E.T.R. (3d) 92 (N.L. T.D.); and *McMillan v. Hughes* (2004), 11 E.T.R. (3d) 290 (B.C. S.C.).

[4] The property interest which each beneficiary is to take must also be clearly defined. See *infra*, Part III C.

[5] See, e.g., *Royal Bank v. Eastern Trust Co.*, 32 C.B.R. 111, [1951] 3 D.L.R. 828 (P.E.I. T.D.) where

tainable; if it is changed in character by, for example, the sale of land and the purchase of shares, the trust property obviously retains its ascertainability.[110]

IV. CERTAINTY OF OBJECTS

"Objects" is a neutral word, and properly so, because trusts may be created in favour of persons, but also to a limited extent in favour of purposes which the settlor or testator would like to see carried out.

A. Persons

We saw earlier[111] that the courts in England have distinguished between a mere or non-discretionary trust, a power in the nature of a trust which includes the discretionary trust, and a mere power. Persons, human or incorporated, are the familiar objects of trusts, and the problem of certainty which they present is whether it is possible to say that the persons intended as objects are ascertainable.[112] Ascertainable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, second, that the totality of the membership of that class is known.[113] Ascertainment means

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[110] Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as the trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. See further, *infra*, chapter 26. If a statutory trust in favour of the Crown is imposed upon moneys withheld by the employer from the employee's wages as income tax due from the employee, but the statute also provides that the withheld moneys "shall be kept separate and apart" from the employer's own moneys, such separation is necessary before the trust can come into existence, and the withheld sums become traceable: *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182, 108 D.L.R. (3d) 257 (S.C.C.), especially at 265-267 [D.L.R.] (see also *Neal v. Toronto Dominion Bank* (1997), 25 O.T.C. 142 (Ont. Gen. Div. [Commercial List]). The position is different with deductions under the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 227(4), (4.1), the *Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23(3), (4), and the *Employment Insurance Act*, S.C. 1996, c. 23, s. 86(2), (2.1), because there withheld moneys are "deemed to be separate" from the employer's own fund, whether or not the employer actually separates them: *ibid.*

[111] *Supra*, chapter 3, Part VII C.

[112] Reference should be made to chapter 3, Part VII, *supra*, where distinction is drawn between the certainty required for a mere power, a power in the nature of a trust which includes a discretionary trust, and a mere or non-discretionary trust.

[113] Both these elements are required for certainty of beneficiaries of a non-discretionary trust. For example, in *Arkay Casino Management & Equipment (1985) Ltd. v. Alberta (Attorney General)*, *supra*, note 105, Brooker J. concluded that winners of a casino jackpot were a sufficiently certain class since it was "possible to determine if an individual is a member of the class by seeing if their poker hand meets the necessary criteria of being a flush or higher in order to win. It is also possible to determine the extent of the class since the class consists only of those people who meet the requirements at the time of winning the jackpot." One difficulty with the analysis in this case was that the funds in question were amounts left after payment of all winners to the point that the casino discontinued its operations. Thus, amounts remaining would have been for future jackpot winners

certainty, and it is certainty on both of those matters that must be established if the trustees have no discretion as to distribution among the class members, but hold the property for beneficiaries who have interests whose amount or quantum is set out in the instrument creating the trust.[114]

1. Reason for Certainty of Objects

Before pursuing these two elements of certainty further, however, something must be said of why certainty of objects is required. If a testator leaves property on trust for equal distribution "among my friends", it is self evident that before the

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had the casino continued to operate. Could the totality of this class have been known? In *Ernst & Young Inc. v. Central Guaranty Trust Co.* (2001), *supra*, note 89, Wilson J. made the following comment on the *Arkay Casino* case, "It seems to me to say, without a declaration to that effect in any trust instrument, that all the world is a member of the beneficiary class, as anyone could walk in to play the game. There being no description of the class, it cannot be said whether or not it is certain, and a class that includes everyone in the world surely is not certain." Also in *Canada Trust Co. v. Price Waterhouse Ltd.* (2001), 288 A.R. 387 (Alta. Q.B.), funds had been deposited with Canada Trust Co, pursuant to an agreement in which Canada Trust was referred to as "trustee". The funds were to provide security for the payment of the farmers who had sold grain to the purchaser on a deferred payment basis. Price Waterhouse had been appointed as a receiver of the purchaser and argued that there was no trust on the basis, among other reasons, that the class of beneficiaries was uncertain. Forsyth J. noted that it was possible to determine whether any given person was a member of the class of farmers who had sold grain to the purchaser on a deferred payment basis and that, indeed, a complete list of the class could be determined since Price Waterhouse itself had created a complete list.

Two things should be noted: (1) the difficulty of finding the members of the class is irrelevant, if the description is such that it is possible to say who is or is not in the class, and to list the persons who make up the class. "The whereabouts or continued existence of some of its members at the relevant time matters not": per Lord Upjohn in *Re Gulbenkian's Settlement* (1968), [1970] A.C. 508, [1968] 3 All E.R. 785 (U.K. H.L.) at 524 [A.C.]; (2) "The question of certainty must be determined as of the date of the document declaring the donor's intention": *ibid.*, i.e., the date of the deed, writing, or verbal declaration which is to take effect *inter vivos,* or the date of the testator's death when his will is the instrument of creation. However, it should be observed that certainty exists as at the moment of the instrument taking effect even though the instrument creates a successive interest in a class of persons, the actual membership of which can only be known when that interest vests in possession. E.g., *Kinsela v. Caldwell* (1975), 132 C.L.R. 458 (Australia H.C.): to the next-of-kin of the settlor, and in the shares the intestacy laws of New South Wales would then distribute the settled property, assuming that the settlor died on a given date twenty years after the taking effect of the settlement instrument. For an unusual case – an hotelier's catering staff during the time that he had been imposing a service charge upon customers – see *Shabinsky v. Horwitz* (1971), [1973] 1 O.R. 745, 32 D.L.R. (3d) 318 (Ont. H.C.).

[114] In *Ernst & Young Inc. v. Central Guaranty Trust Co.*, *supra*, note 89, the court noted that the trustees had no discretion as to who constituted the beneficiaries. At the outset there would have been no warranty-holder beneficiaries. The beneficiaries entitled to make claims under the trust would only be determined over time as the warranty holders made accepted warranty claims. The court felt that the test of certainty of beneficiaries, requiring both certainty of whether any person is a member of the class and certainty of the totality of the membership of the class, was thus not established. Is this perhaps too narrow an approach constraining the adaptation of the trust to a commercial context in which the trust might have served a useful function in protecting the value of the warranties to warranty holders against the risk of insolvency of the warranty provider?