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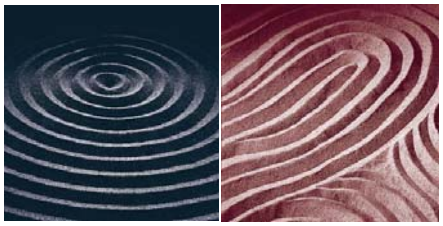

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Advance Costs in Public Interest Litigation -- The Relationship Between Democracy and Individual Rights in a Society of Limitless Need and Limited Resources

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ADVANCE COSTS IN PUBLIC INTEREST LITIGATION
"THE RELATIONSHIP BETWEEN DEMOCRACY AND INDIVIDUAL RIGHTS IN A SOCIETY OF LIMITLESS NEED AND LIMITED RESOURCES."

Dwight M.D. Stewart[1]

Background:

In the summer of 2003 I found myself in the role of lead trial counsel in a case which has come to be referred to as "Little Sisters' No. 2." Acting as an agent to the Department of Justice I was appointed counsel to the Commissioner of Customs and Revenue and Minister of National Revenue in response to the appeal of a decision by the Commissioner to classify as obscene, two comic books that had been imported by Little Sisters Book and Art Emporium. I was not anyone's first choice as counsel. My selection was by default. As so often happens in one's legal career I was the lawyer that remained on the file after senior counsel with significant experience and expertise in the matter was unable to proceed due to a scheduling conflict.

I continue in the role of counsel in this matter to this day.[2] As such I will be cautious not to comment directly on the case, other than to attempt to summarize certain of the judicial decisions on the Appellant's application for an order that the Commissioner pay its legal costs in advance of the trial ("the Application for Advance Costs) as this case made its way through the British Columbia Supreme Court, British Columbia Court of Appeal, and finally the January 19, 2007 decision of the Supreme Court of Canada.

The purpose of this paper is to provide some background and summary of the present state of the law in Canada on applications for advance costs in public interest litigation, as well as a few comments about advance costs based on the experience of counsel.

Introduction:

In any democratic society, its members cannot resolve disputes by force or threats, or otherwise "take the law into their own hands." Instead they are required to abide by the law. However such laws are enforceable only where its members are represented in the creation of the law, and have an ability to challenge those laws they disagree with. Pursuant to the *Canadian Charter of Rights and Freedoms,* every citizen has a right to vote for members of the legislature who enact provincial and federal legislation or to serve as a member.[3] The *Charter* also guarantees the right to challenge those laws by protecting the freedom to expression, including freedom of the press and other media communications, freedom of peaceful assembly, and freedom of

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2 Formal conclusion of the underlying action awaits a final application before the trial Judge.

3 Section 3 of the *Canadian Charter of Rights and Freedoms (*"the *Charter").*

association.[4] Further, the *Charter* guarantees individual rights to life liberty and security of the person.[5] Both sections 1 and 7 of the *Charter* contemplate access to justice to determine the limits of these guaranteed rights;

> s.1 The Canadian Charter of Rights and Freedoms guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law *as can be demonstrably justified in a free and democratic society*.
>
> s.7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof *except in accordance with the principles of fundamental justice*.

With a relationship between submitting to the law, and the ability to challenge the law, access to justice is one of the cornerstones of any democratic society. Indeed, it is often the rights associated with the ability to challenge the law; freedom of the press, freedom of expression, and freedom of association that require access to the courts to uphold them.

However, gaining access to justice is not always immediately available to every individual. Our legal system is not always conducive to individual participation. In most circumstances, access to justice, requires access to a lawyer:

> The procedure here is founded on the adversary system...it is based on the premise that the truth will emerge from the contest between the two adversaries where each presents its case before an impartial tribunal. Each side will do its best to establish its own case and to destroy the opponent's case. Out of this conflict, truth and justice will surface. Where, however, in fairness and in the circumstances of the case, one of the parties is incapable of self-representation, confidence in the system is threatened. The adversaries must be equal or relatively equal before the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence.[6]

Of course access to a lawyer usually requires the means to retain one. Very often those most in need of legal representation are those who are least able to afford the costs of a lawyer.

> People are driven to the law and to court by the most critical, serious, and often dangerous situations imaginable. Children may be hurt, perhaps permanently, criminal records established, sometimes in cases of innocence, people are losing their shelter and very ability to feed themselves and their dependents. The severity of these cases makes it essential that they not go into court uninformed or without representation. The trauma of having to go to court over personal issues cannot be overstated. This is compounded when a person is forced to go through it without professional representation. They need lawyers, trained in the law and its technicalities, to represent their interests and ensure that their rights are upheld.[7]

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4 Section 2 of the *Charter*.

5 Section 7 of the *Charter*.

6 *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)* (1997), 187 N.B.R. (2d) 81 (N.B.C.A.) (Bastarache, J., dissenting).

7 British Columbia Coalition for Access to Justice, *The Legal Aid Stories* (Fall 1998) [hereinafter B.C Coalition for Access to Justice]. at page 1

In Canada provincially funded legal aid programs attempt to provide for basic representation in circumstances that demand legal representation for those whose socio-economic status would otherwise bar entry. Primarily legal aid is reserved for criminal cases (although often restricted only to those case that carry a real possibility of incarceration), family matters, including child custody, access, and support, as well as government apprehensions of children at risk, and certain immigration matters[8].

A. RIGHTS TO FUNDING IN CRIMINAL CASES:

The relationship between fairness and public funding for counsel largely developed in the context of criminal law. Prior to the enactment of *Charter*, the courts addressed the issue of the right to counsel in the context of an accused's right to a full answer and defence as one aspect of the right to a fair trial. The presence of defence counsel, and more particularly state-funded counsel, was generally not found to be an essential component of that right at common law.[9] The analysis of when the right to a full answer and defence amounted to a right to counsel was determined on a case-by-case basis.[10]

Since the advent of the *Charter* in 1982, cases on the right to state-funded counsel have attempted to maintain a similar balance between: the constitutional rights of the accused to a fair trial and the reality of legal aid plan budgets, including their financial eligibility requirements and their limits as to which offences may be covered by legal aid.

Courts have confirmed that although the *Charter* only explicitly recognizes a right to counsel in section 10(b)[11], it is an implicit component of the right to a fair trial protected by both sections 7 and 11(d). However, this does not mean that there is always a right to state-funded counsel:

> The right to retain counsel, constitutionally secured by section 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, Legal Aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal aid assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases

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8 The right to counsel in this context is also based on the specific right to counsel granted in provisions of An Act respecting immigration to Canada, 1976-77, c. 52, s.1 [hereinafter Immigration Act], the *fundamental rights to security of the person and the right to a fair hearing under the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. However, these do not, generally speaking, create a right to state-funded counsel.*

9 *R.* v. *Barette* (1976), 29 C.C.C. (2d) 189 (S.C.C.).

10 *Re Ewing* (1974), 18 C.C.C. (2d) 356 at 365-66 (B.C.C.A.), Seaton J.A.

11 In a strong decision, the Supreme Court of Canada held in *R.* v. *Brydges*, [1990] 1 S.C.R. 190. that section 10(b) of the *Charter* compels the government to establish a duty counsel system to provide advice to people upon arrest or detention.

> not falling within provincial legal aid plans, sections 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot provide a lawyer, and representation of the accused is essential to a fair trial.[12]

A number of cases have now established that in matters of sufficient seriousness and complexity, the accused cannot receive a fair trial without counsel. However, it is clear that the Supreme Court of Canada has refused to order the Provinces to implement legal aid systems prescribed or designed by the courts.[13]

In what has become known as a *Rowbotham* application, accused persons who have been refused legal aid coverage are entitled to apply to the court for a remedy. In the *Rowbotham* decision, the Ontario Court of Appeal indicated that the Court could essentially override a legal aid plan decision to deny funding, make its own determination whether an accused is without sufficient funds to retain counsel necessary to conduct a fair trial, and then provide a remedy to the accused. The Court stated:

> In our view, a trial judge confronted with an exceptional case where Legal Aid has been refused, and who is of the opinion that representation of the accused by counsel is essential to a fair trial, may, upon being satisfied that the accused lacks the means to employ counsel, stay the proceedings against the accused until the necessary funding of counsel is provided. As stated above, the finding of Legal Aid officials that an accused has the means to employ counsel is entitled to the greatest respect. Nevertheless, there may be rare circumstances in which Legal Aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused, because of the length and complexity of the proceedings or for other reasons, cannot retain counsel to the extent necessary to ensure a fair trial. In those circumstances, even before the advent of the Charter, the trial judge had the power to stay proceedings until counsel for the accused was provided. Such a stay is clearly an appropriate remedy under section 24(1) of the Charter. Where the trial judge exercises this power, either Legal Aid or the Crown will be required to fund counsel if the trial is to proceed.[14]

The limits of provincial funding for access to Justice are highlighted by reviewing a recent report of the Debates of the British Columbia Legislative Assembly. On May 16, 2006, the Attorney General was asked about funding for legal aid and Rowbotham applications in the province and provided the following figures:

> **Hon. W. Oppal:** The figure I have for 2004-2005 is $32,668,386. That has been broken down as follows: criminal legal aid expenditures at over $27 million; Rowbotham for other than megatrials, $58,000; and the Rowbotham megatrials of Pickton, Air India and Enron make up the balance, which is around $5.445 million.[15]

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12 *R.* v. *Rowbotham* (1988), 41 C.C.C. (3d) 11 at 65-66 (Ont.C.A.).

13 *R.* v. *Prosper* (1994), 92 C.C.C. (3d) 353.

14 *R.* v. *Rowbotham*, *supra*, note 10 at 69.

15 2006 Legislative Session: Second Session, 38th Parliament, *Hansard*, (Official Report of Debates of the Legislative Assembly) TUESDAY, MAY 16, 2006 Morning Sitting Volume 12, Number 3PROCEEDINGS IN THE DOUGLAS FIR ROOM), p. 4890.

The resulting exchange between Minister Oppal, a former Court of Appeal Judge, and the opposition member, Leonard Krog, a former lawyer from Nanaimo, B.C. is compelling:

> **L. Krog:** I appreciate that that's a perfectly legitimate answer on the part of the Attorney General in these circumstances. But I wonder if the Attorney General can put himself on the streets of British Columbia and say to some person who can't get assistance to do a welfare appeal and is living on the lowest rung of our society that somehow the government, in its wisdom and in the pursuit of justice and in pursuit of a democratic society and all those great and glorious principles we're supposed to live by, that we can afford to manage significant criminal cases that cost millions, but we can't kick up a few million dollars to help people make an appeal to see if they can draw $515 a month to survive on.
>
> **Hon. W. Oppal:** The answer, I suppose, is that without the benefit of unlimited budgets, we have to assess and set some priorities. As the member well knows, the general philosophy or thrust is to look at the downside or the exposure of any particular person. For instance, where there is a possibility that someone may be incarcerated, that person receives legal aid and a lawyer of his or her choice, within reason. So all those things are being done, but it's impossible, having regard to financial considerations, to fund every cause and every person's lawsuit or every person's appeal. This is exactly what I said at the outset. We have to, in many cases, look for alternative ways of achieving access, short of assigning lawyers for every prospective litigant.[16]

It is of note that while the Attorney General was defending the decisions he had made as to allocation of limited resources for legal aid and other monies to effect access to justice, on the same morning, in the legislative assembly, the Premier, and Leader of the Opposition were debating first, global warming and the economic consequences of the Kyoto protocol, as well as funding for 5000 long-term care beds, as well as additional mental health beds, long-term assisted living beds, palliative care beds, and government investments in new medical schools at three universities to address the chronic shortage of doctors.[17]

Equality of Arms

The dilemma of inadequately funded defence counsel is addressed in Europe by the principle of "Equality of Arms." The European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution. The European Commission of Human Rights expanded on this concept in *Jespers v. Belgium*, where it noted that:

> In any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary or, if it entrusts the investigation to the Public Prosecutor's Department, instructs the latter to gather evidence in favor of the

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16 *Supra.*

17 *Supra*, p. 4875.

> accused as well as evidence against him. It is also, and above all, to establish that same equality that the 'rights of the defence'...have been instituted.[18]

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side. [19] The European Commission of Human rights has found the equality of arms an inherent element of a fair trial.[20]

This proposition that the equality of arms principle was intended to elevate the Defence to the level of the Prosecution, as much as possible, in its ability to prepare and present its case, is evident in the case law arising out of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR") and the International Covenant on Civil and Political Rights 1966 ("the ICCPR"), both of which incorporate the principle of equality of arms in the concept of a fair trial.[21]

In practice, where violations of this principle have been found, it is because the Defence was somehow unfairly disabled from preparing or presenting its case. For example, in *Bönisch v. Austria*[22], the European Court of Human Rights found that there was a violation when it determined that an expert involved in a proceeding was in effect a witness for the Prosecution rather than an expert and that because the accused had not been given the same opportunity to call such an "expert", the principle of equality of arms had been violated.

It is interesting to a common-law jurisdiction defence lawyer to see how the initially attractive idea of "equality of arms" might create unintended consequences. At the International Criminal Tribunal for the former Yugoslavia, the prosecutors in the case of *the Prosecutor v. Dusko Tadic* sought production of witness statements obtained by defence investigators. The Prosecutor submitted that where there was an equality of arms by virtue of a well-funded defence team, it was entitled to production of defence evidence. While the prosecutor's argument was rejected, the fact that the argument was ever made is a caution to Canadian defence counsel to be "careful what you wish for." [23]

Despite the European concept of Equality of Arms, this concept has been rejected in Canada. Although there is constant encouragement from our courts for increased government funding for legal aid, the Supreme Court of Canada has rejected notions like an equality of arms.[24]

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18 No. 8493, Report of the Eur. Comm'n H.R., 27 D.R. [1981] 61 at 87.

19 Decision of Judge Vorah, November 27, 1996 in the matter of *the Prosecutor v. Dusko Tadic* – Case No. IT-94-1 Tbis – R117.

20 *Pataki v. Austria* No. 596/59*; Dunshirn v. Austria* No. 789/60, Reports of the Eur. Comm'n H.R., vol. 6, 1963 Y.B. Eur. Conv. on H.R. 714 at 731-732.

21 *See* Van Dijk and Van Hoof, *supra* at 319-320; *Delacourt v. Belgium*, 11 Eur. Ct. H.R. (ser. A) [1970] 1 at 15; Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (1993) at 244.

22 92 Eur. Ct. H.R. (ser. A) [1985] at 15

23 ICTY Decision in the matter of *the Prosecutor v. Dusko Tadic* – Case No. IT-94-1 Tbis – R117.

24 Although not specifically addressing funding in criminal cases, in the Supreme Court of Canada decision in *Little Sister's No. 2, (Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* 2006 SCC 2) – discussed in greater detail below -- Justices Bastarache and LeBel commented that;

B RIGHTS TO FUNDING IN CIVIL PROCEEDINGS:

While *Rowbotham* type applications have been made by civil litigants seeking funding from the provincial or federal governments for private litigation, on the whole these applications are successful only where there is a constitutional right at stake similar to those in a criminal trial.

The leading decision in this area is *New Brunswick (Minister of Health and Community Services) v. G.(J)*, where, given the exceptional circumstances of the case, the Court extended the section 7 Charter right to state-funded counsel to civil proceedings. In this case, the appellant's children were taken into custody by the New Brunswick Minister of Health and Community Services (the "Ministry). The appellant was indigent and living on social assistance and had been denied legal aid under the provincial program because custody applications were not covered. The Minister made an application to extend the original custody order. The appellant was unable to retain a lawyer to represent her at the custody hearing and brought a motion for an order to compel the Minister to provide her with sufficient funds to cover reasonable fees and disbursements of counsel. The Court found that, in the particular circumstances of this case, the New Brunswick government was under a constitutional obligation to provide the appellant with state-funded counsel.

In making its decision, the Court in G.(J.) stated:

> I have concluded that the Government of New Brunswick was under a constitutional obligation to provide the appellant with state-funded counsel in the particular circumstances of this case. When government action triggers a hearing in which the interests protected by s. 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s. 24(1) of the Charter through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.[25]

The *G.(J.)* case demonstrates that there are levels of procedural safeguards, even within civil proceedings. Where constitutionally protected rights are at risk as a result of government action, different levels of procedural safeguards, such as state-funded legal counsel, may be required. The Court in *G.(J.)* found that the Minister's application to extend the original custody order threatened to restrict the appellant's right to security of the person guaranteed by section 7 of the Charter. Given this fact, state-funded legal counsel was necessary to ensure that the hearing was fair.

C. THE COURT'S DISCRETION TO AWARD COSTS:

With limited access to government funding for legal representation outside of the narrow category approved for legal aid, parties without sufficient means to retain counsel have appealed to the judicial discretion to award costs as a basis for relief.

"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…",, 2006 SCC 2, at 30.

[25] [I9991 3 S.C.R. 46 paragraph 2.

SUMMARY OF THE LAW ON COSTS:

A consideration of the law in this paper is assisted by a review of the case law on three topics:

1. Traditional costs principles;

2. Constitutional rights to funding in civil proceedings; and

3. Orders for advance or interim costs.

TRADITIONAL COSTS PRINCIPLES:

Indemnifying the Successful Party

In the modem Canadian legal system, the equitable and discretionary power to order costs of a proceeding is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

In most cases, costs are awarded to the successful party after judgment. The standard characteristics of costs awards are summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee, Inc.*[26], as follows:

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

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

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

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

These listed characteristics of a costs award reflect its traditional purpose; to indemnify the successful party for its expenses. Costs awards are described in *Ryan v. McGregor*, 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"[27].

Costs as an Instrument of Policy

The power to order costs is discretionary. The principles set out above govern that discretion in most cases. However, special circumstances may justify a different approach. In this regard, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, in *The Law of Costs*, has remarked that:

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[26] (1985), 51 O.R. (2d) 23, at p. 32.

[27] (1925), 58 O.L.R. 213 (App. Div.), at p. 216.

> 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.[28]

In Skidmore v. Blackmore, the British Columbia Court of Appeal stated that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court permitted a self-represented lay litigant (although formerly a member of the bar) to tax legal fees[29].

Following *Skidmore,* in the use of costs to encourage or deter certain types of conduct is *Fellowes, McNeil v. Kansa General International Insurance Co.,* Macdonald J. held that beyond the principle of indemnity costs must serve many functions. In that case a law firm had represented itself, but was awarded costs as if it retained outside counsel[30]. Justice Macdonald further held that the discretion to award costs must be exercised having regard to the following principles[31]:

(i) The principle of indemnity is a paramount consideration.

(ii) To encourage settlement of all actions from the outset.

(iii) To deter frivolous actions and defences.

(iv) To discourage unnecessary steps in litigation.

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.

Public Interest Litigation and Access to Justice

In litigation over matters of public importance, access to justice, has become another consideration in the award of costs. Courts have referred to the importance of this objective on numerous occasions."

In Canadian Newspapers Co. v. Attorney-General of Canada, Osler J. opined that; "it is desirable that a *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden,"[32] 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."[33]

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28 (2nd Ed. (loose-leaf)), at p. 2-24.2.

29 (1995), 2 B.C.L.R. (3d) 201 at paragraph 28.

30 (1997), 37 O.R. (3d) 464 (Gen. Div.) at p. 475.

31 *Supra* at page 467 paragraph (e).

32 (1986), 32 D.L.R. (4th) 292 (H.C.J.) at pp. 305-6.

33 *Supra* at p. 306.

In Re Lavigne v. Ontario Public Service Employees Union (No. 2), White J. held that; "it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means." He awarded costs to the successful Charter applicant in spite of the fact that his representation had been paid for by a third-party.[34]

In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 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 trial judge directed the intervening Attorney General to pay the applicants' costs.[35]

This costs order was upheld on appeal by the Ontario Court of Appeal, and subsequently by the Supreme Court of Canada. La Forest J. stated that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases." He went on to state that;

> Nevertheless, this case appears to have raised special and peculiar problems, and the District Court's exercise of discretion was supported by the Court of Appeal. I am loath to interfere with the exercise of their discretion in this case.[36]

In considering this decision it is important to note that although the trial judge ordered costs against the respondent Attorney General for Ontario, he found that the fact that the appellants were individuals of modest means (even if supported by their church) and that the Attorney General for Ontario had practically unlimited resources was not relevant to the allocation of costs, for otherwise the result would be a flood of marginal applications against the Crown. To this end, the trial judge referred to the remarks of Osler J in *Canadian Newspapers Co. v. Attorney-General of Canada*, cited above.

In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, (a case that will be referred to in much greater detail below) the Court of Appeal held that there is no "constitutional right" to provincially funded legal fees and the Courts do not have jurisdiction to order the same.[37] The plaintiffs challenged the constitutionality and applicability of the Forest Practices Code of British Columbia, R.S.B.C. 1996, c. 159 and made a land claim. The plaintiffs made an application for a "funding order" to ensure "access to justice" The Court dismissed the plaintiffs' application for finding, stating:

> Of course there are legal aid programs in every province of Canada which soften the effect of this reality to some extent. In some circumstances as well -e.g., where a person is charged with a serious criminal offence and his liberty is at risk -there is statutory recourse such as that provided by s. 684 of the Criminal Code. But I am not aware of any authority for the proposition that the principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit -even one that may be sui generis. If the meaning of access to justice is to be extended that far, it is in my view for government to do.

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34 (1987), 60 O.R. (2d) 486 (H.C.J.) at page 526.

35 [1995] 1 S.C.R. 315.

36 *Supra* at paragraph 122.

37 (2001) 95 B.C.L.R. (3d) 273 (C.A.) at paragraphs. 24, 28-30, 33-34 and 36.

> For similar reasons, I agree with the Chambers judge that s. 35 of the Constitution Act does not place an affirmative obligation on the provincial Crown or the courts to provide for the funding of the legal fees of an aboriginal band in attempting to prove an asserted right and the infringement thereof, even in defence to a proceeding brought by government. Undoubtedly, the fiduciary duty of the Crown must be considered in connection with the application of general statutes and obligations to aboriginal peoples, but as the Chambers judge noted, there is nothing in the specific circumstances of this case that would give rise to a "fiduciary expectation" of funding. (This is not to say that the existence of the Crown's broad fiduciary duty should not be considered in the exercise of the Chambers judge's discretion in making an order as to costs, as I will discuss below.)[38]

While the Court of Appeal in Okanagan Indian Band, dismissed the argument of a constitutional right to funding it did order the payment of interim costs which is set out in detail later in this paper.

In *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, the plaintiffs, made an application for an order that "the legal fees, expenses and disbursements for the conduct of this litigation" be paid for by the provincial and federal governments.[39] Prior to bringing their application, the plaintiffs made a request for funding to both governments, which was denied. The plaintiffs' application for funding was brought on the basis that the governments' denial of the plaintiffs' request for funding constitutes a breach of section 15 of the Charter. The Court summarized the plaintiffs' argument as follows:

> The plaintiffs advance a different s. 15 argument on this application. The foundation for the plaintiffs' 15 argument is the denial of funding by Canada and British Columbia. The essence of the argument is that there is a gross disparity in the resources of the plaintiffs and the two Crown defendants. In the submissions of counsel, the disparity arises because the plaintiffs are aboriginal and poor. The disparity will manifest itself in the plaintiffs not enjoying equal benefits of the law and the legal process as would the defendants or as would a wealthy non-aboriginal person suing the Crown. Counsel points out that funds have obviously been allocated to Canada and British Columbia for the conduct of this litigation and it is the refusal of both Canada and British Columbia to allocate some of these funds to the plaintiffs that constitutes a breach of s. 15 and requires the court to make a funding order…[40]

The Court dismissed the plaintiffs' application on the basis that no section 15 Charter breach was established. The Court stated:

> For the plaintiffs to succeed on this s. 15 issue they must demonstrate that the defendants' refusals to fund causes them to be treated differently and in a stereotypical manner reflecting an assumption or presumption of personal or group characteristics. Does the refusal to fund have the effect of demeaning the plaintiffs' human dignity?: *Lovelace v. Ontario*, [2000] 1 S.C.R. 950. I conclude the plaintiffs fail on this third step of the analysis set out in Law, supra. No public "program" or "fund" was identified from which the plaintiffs assert a right to funds. They say it is obvious there are funds allocated for these proceedings. A failure to allocate a portion of these funds to them is a breach of s.

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38 *Supra* at paragraphs 28, 29.

39 [2001] B.C.J. No. 2484 (S.C.) at paragraph 1.

40 *Supra*, Para. 14.

> 15. The court is not called upon to consider a law and to inquire whether that law imposes differential treatment. Rather, in the submission of the plaintiffs, it is the decisions of both defendants to deny funding that has resulted in the obvious differential treatment.
>
> I conclude that the decisions not to fund were not based on any assumed or presumed characteristics of the plaintiffs as individuals or as a group and the decisions did not have the effect of demeaning their human dignity.
>
> To accede to the plaintiffs' request would mean that once a decision was made to defend this action by the Crown, a burden was cast on the defendants to meet the legal fees and disbursements of the plaintiffs in the situation posed by the facts of this case, namely, an inability to meet these expenses by a group of persons who are both aboriginal and poor. It would mean that in every case in which a group of people who were both aboriginal and poor commenced proceedings against the Crown, the Crown would be required to fund such proceedings in their entirety. Such a conclusion appears to fly in the face of the proposition that courts should not interpret the Charter in a manner which imposes a positive constitutional obligation on government: *Prosper v. The Queen*, [I9941 3 S.C.R. 236.
>
> I conclude the plaintiffs do not have a constitutional right to publicly funded legal fees and disbursements and the courts do not have jurisdiction to so order: *Okanagan Indian Band, supra.*[41]

In *Xeni Gwet'in First Nations v. British Columbia*[42], the plaintiffs, made an application to the British Columbia Supreme Court for an order that the defendants, the provincial and federal governments, "henceforth pay the plaintiffs' legal fees and disbursements" or, alternatively, that the defendants pay the plaintiffs interim costs in any event of the cause for the conduct of the litigation. The Supreme Court dismissed the plaintiffs' application for funding but allowed the plaintiffs' application for costs. The defendants appealed from the order for payment of the plaintiffs' costs and disbursements and the plaintiffs cross-appealed on the order dismissing their application for payment of legal fees. The British Columbia Court of Appeal dismissed the defendants' appeal and upheld the Supreme Court's order requiring payment of the plaintiffs' costs and disbursements. The defendants were granted leave to appeal, and the matter was dealt with within the Supreme Court of Canada decision indexed as *British Columbia (Minster of Forests) v. Okanagan Indian Band* which is discussed in detail below.

In *Lawrence v. British Columbia (Attorney General)*, the plaintiff made an application for a declaration that she was entitled to receive legal funding from the Attorney General. The plaintiff had commenced two actions; the first seeking a declaration that title to property in a home be transferred back to her name and the second, a suit against the notary and person in whose name the house now stood. The British Columbia Supreme Court dismissed the plaintiffs' application, which decision was upheld by the British Columbia Court of Appeal.[43]

The plaintiff in *DeFehr v. DeFehr*, also sought an order for legal funding. The British Columbia Supreme Court dismissed the plaintiffs' application. On appeal to the British Columbia Court of

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41 *Supra* Paras. 20 – 24.

42 (2002) 3 B.C.L.R. (4th) 231 (C.A.).

43 [2003] B.C.J. No. 1483 (C.A.)

Appeal, the Court upheld the lower Court's decision. The Court of Appeal considered the application of *G.(J.)* and stated:

> Thus, following *G.(J.)*, the appellant in this case has two hurdles to establish a constitutional right to counsel. First, he must establish, which he cannot, that this case involves state action that interfered with his relationship with his children. This case is a private dispute between two parents as to which of them will have custody and the terms of access. The *G.(J.)* case is not authority for the proposition that one parent has a constitutional right to parent in relation to the other... Allegations that the actions of the judiciary violated his constitutional rights do not provide a basis for claiming a right to state funding of counsel.
>
> Furthermore, this Court made it clear in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2001] B.C.J. No. 2279 (C.A.), that there is no "constitutional right to provincially-funded legal fees and the courts do not have jurisdiction to order same" (at para. 36).
>
> Second, even if the appellant could show that his constitutional rights were violated in any way, the evidence before this panel does not establish that, taking into account the seriousness of the interests at stake concerning the appellant's relationship with his children, the complexity of the proceedings and the capacity of the appellant, his right to a fair hearing on his appeal would not be met if counsel were not appointed to represent him.[44]

In *A.B. v Canada (Minister of Citizenship and Immigration)*, the appellant argued that section 7 of the *Charter* imposed an obligation on the federal government to provide him with state-funded counsel for the preparation of an immigration inquiry that may lead to his removal from Canada. The appellant's application was dismissed by the lower Court and his appeal was dismissed by the Federal Court of Appeal. The Federal Court reasoned that any constitutional duty to provide legal funding was a provincial responsibility and, since the federal government contributed to legal aid through Canada Health and Social Transfer payments to the provinces, it would be unwarranted to impose on the federal government an additional constitutional obligation to provide legal funding.[45]

The Saskatchewan Court of Queen's Bench in *Sanderson v. Sasknative Rentals Ltd.*, dismissed an application for an order directing the Attorney General of Saskatchewan to provide the plaintiffs with counsel funded by the Department of Justice. The plaintiffs' claim was for relief under the Residential Tenancies Act, R.S.S. 1978, c. R-22. The Court considered whether there is a constitutional right to funded counsel to pursue private litigation. The Court concluded there was not, stating:

> In Mireau, Hrabinsky J. held that the right to funded counsel to pursue private litigation is not entrenched in the Charter. He also concluded that the policy adopted by the Saskatchewan Department of Justice that funding will not be provided to individuals to pursue private litigation regardless of the merits of the case is a law within the meaning of the word law in s. 15 of the Charter…
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> …

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[44] [2002] B.C.J. No. 418 (C.A.) paras 9-11.

[45] (2001) 269 N.R. 381 (Fed C.A.) paras 10-13.

> There is a vast difference between criminal and civil proceedings and the most significant are the consequences to the accused. The person charged in a criminal prosecution faces imprisonment or other penal consequences. Therefore a civil proceeding is simply not comparable…
>
> …
>
> I find that the right to funded counsel to pursue or defend an appeal pursuant to s. 49 of the Act is not entrenched in the Charter.[46]

It must be noted that Sanderson was decided before the Supreme Court of Canada released its decision in *G.(J.)*.

D. ORDERS FOR ADVANCE OR INTERIM COSTS:

Introduction:

As set out above, a constitutional right to funding of public interest litigation has not been recognized by the courts. However, it is on the basis of the court's discretion to order interim costs or advance costs, that funding has been provided in such circumstances. This requires a consideration of the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise.

Summary of the law of interim costs:

While the cases referred to above address costs in public interest litigation, they all deal with an award of costs after judgment. Understanding the evolution of the use of interim costs in public interest litigation requires a review of the historic use of interim costs.

An early case involving this remedy was the English case, *Jones v. Coxeter*, where 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 "entirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause."[47]

An extensive discussion of this power in Canada is found in *Organ v. Barnett*, Macdonald J. concluded that "the court does have a general jurisdiction to award interim costs in a proceeding."[48] 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."[49]

Despite these general comments Macdonald J. recognized that, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases.

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[46] (1999) 176 Sask. R. 212 (Q.B.), paras. 17 & 19-20

[47] 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742) at p. 642).

[48] (1992), 11 O.R. (3d) 210 (Gen. Div.) at p. 215.

[49] *Supra* at p. 215.

In *McDonald v. McDonald*, Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position. 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".[50]

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.

In *Turner v. Telecommunication Workers Pension Plan* an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs.[51]

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. These conditions are as follows:

(i) 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.

(ii) The claimant must establish a prima facie case of sufficient merit to warrant pursuit; and,

(iii) 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 this regard the Supreme Court of Canada in *Okanagan Lake Indian Band* (which is discussed in greater detail below) specifically dismissed the conclusion of the New Brunswick Court of Queen's Bench in New Brunswick (Minister of Health and Community Services) v. G. (J) 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. As a result, the power to order costs contrary to the cause is within the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

Special Circumstances: Causal Connection

The one factor that is common to the narrow class of cases where this extraordinary exercise of powers has been appropriate is the existence of a causal link between the relief sought and the party's financial inability to fund the litigation seeking that relief. The typical cases where interim costs are awarded make this clear:

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[50] (1998), 163 D.L.R. (4th) 527 (Alta. C.A.) at paras. 18 and 20.

[51] (2001), 197 D.L.R. (4th) 533, at para 18.

(i) In matrimonial litigation, the spouse seeking a division of the family assets, cannot afford counsel because she has no access to those assets.

(ii) In trust litigation, the beneficiary seeking the removal or supervision of the trustee, cannot afford counsel because the trustee controls the estate.

(iii) In an oppression remedy, the shareholder cannot afford counsel, because it is the director's of the corporation who control its assets.

As will be seen in the discussion of *Okanagan Lake Indian Band* which follows, the same is true in that case as well. The Band sought the right to log. The purpose for the logging was to build social housing. The Province refused the Band permission to log. As a result, the Band was forced to exhaust its resources to buy lumber to build the homes. If it was permitted to log it would have had money to challenge the Province. Because of the Province's interference with its rights to log, it had no money to enforce that right.

Summary of the decision in Okanagan Indian Band:

Facts:

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code*. 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, 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 Bands filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations.

The chiefs deposed that their communities face grave social problems, including;

(i) The band counsel is on the verge of bankruptcy.

(ii) Significant debts are incurred in order to finance day to day operations.

(iii) Band elders are living in deplorable housing conditions, with 130 families on a wait list for housing.

(iv) Band members are living in poverty, and the social conditions are far below the national average.

(v) The Band is unable to afford economic development programs for the unemployed, despite the fact that the unemployment rate is at 42%, with attendant costs of social assistance.

(vi) The province continues to authorize extraction of resources on Band territory while it waits for reconciliation title.

The chiefs of the Spallumcheen and Neskonlith Bands deposed that they were close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits were so high.

The Bands were unable to raise the estimated costs of $800,000, and even if they could, there were many more pressing needs which would have to take priority over funding litigation. Commenting on these pressing needs the court stated: “One of the most urgent needs is new housing --the very purpose for which, they say, they want to harvest timber from the land to which they claim title.”

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 concluded that, although the Bands did not have a constitutional right to legal fees funded by the provincial Crown, the court did have a discretionary 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.

Decision of the B.C. Court of Appeal in Okanagan Indian Band:

At the outset, Newbury J.A. noted

(i) That the Bands' claims would be the first to try aboriginal claims to title and other rights in respect of logging in British; and

(ii) That the Bands faced "dire financial circumstances”.

On the question of a constitutional right to funding, Newbury J.A. 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 found that if the meaning of “access to justice" was to be extended beyond the duty of the government to make courts of law and judges available to all persons, that; "it is in my view for government to do so.”

She also agreed with the trial judge that s. 35 of the Constitution Act did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. She found that:

> Undoubtedly, the fiduciary duty of the Crown must be considered in connection with the application of general statutes and obligations to aboriginal peoples, but as the Chambers judge noted, there is nothing in the specific circumstances of this case that would give rise to a "fiduciary expectation" of funding. (This is not to say that the exercise of the Crown's broad

> fiduciary duty should not be considered in the exercise of the Chambers judge's discretion in making an order as to costs, as I will discuss below.)

Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favor 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.

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; as follows

> In my view, the circumstances of this case "special" or "exceptional". The "test case" nature of these proceedings has already been noted, and the public importance in this Province of the issues to be tried is obvious. It is clearly in the public interest that the applicability of the Forest Practices Code to lands and activities claimed as aboriginal be determined, and be determined on all the available evidence. The proceedings were initiated and are being pursued by the Minister against the Bands, and there is no doubt that counsel who have experience in aboriginal law are required to put forth the Bands' position. These facts remove this case from the realm of ordinary litigation where costs do generally follow the event, and financial hardship is not a proper ground for ordering otherwise: see *Brown v. Blacktop Cabs Ltd.* (1997) 43 B.C.L.R. (3d) 76 (B.C.C.A.), at para. 16.

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 [l0] of the *Reasons for Judgment*;

(b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;

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

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

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

Decision of the Supreme Court of Canada in Okanagan Indian Band

Comments on Interim Costs in Public Interest Litigation:

Justice Lebel, writing the decision for the majority (McLachlin C.J. and Gonthier, Binnie, Arbour and Deschamps JJ. (Iacobucci, Major and Bastarache JJ. dissenting) focused on 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, Lebel found that, the more usual purposes of costs awards are often superseded by other policy objectives, noted as:

(i) That ordinary citizens have access to the courts to determine their constitutional rights and other issues of broad social significance.

(ii) That the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues.

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

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

With these considerations in mind, Justice Lebel identified the criteria that must be present to justify an award of interim costs in this kind of case as follows:

(iii) 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.

(iv) 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.

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

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.

Finally the court commented that courts must also be mindful that an award of interim costs must not impose an unfair burden on them, as follows:

> 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.

Summary of the test in *British Columbia (Minister of Forests) v. Okanagan Indian Band*:

A. Pre-conditions:

There are three pre-conditions to an award of advance costs:

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

(ii) 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.

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

B. Residual exercise of discretion:

Once these necessary conditions or 'pre-conditions' are considered, the determination remains in the discretion of the court. In its exercise of this discretion the court must consider the following principles:

(iv) That the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

(v) That access to justice is balanced against the need to encourage the reasonable and efficient conduct of litigation.

(vi) That the interests of justice would be best served by making the order.

Little Sister's Book and Art Emporium

Little Sister's Book and Art Emporium is a small corporation that operates a store catering to the gay, lesbian, bisexual and transgendered (GBLT) community in Vancouver, British Columbia. In 1990 Little Sister's commenced an action against the Prohibited Importations Unit, a section of Canada Customs which, pursuant to the *Customs Act* is responsible for determining whether expressive materials being imported into Canada are prohibited on the basis that they are "obscene."[52]. Section 163(8) of the *Canadian Criminal Code* deems as obscene, "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects namely, crime, horror, cruelty and violence"

In 1990 Little Sister's sought a declaration against Canada Customs based on two constitutional breaches. The first was that the process of prohibiting imported expressive materials infringed freedom of thought, belief opinion and expression as guaranteed in s.2(b) of the *Canadian Charter of Rights and Freedoms*, and is not a reasonable limit prescribed by law in a free in democratic society. The second was that the statutory review provision had been construed and applied to seized and detained material in a manner that discriminated on the basis of sexual orientation of the authors and readers, contrary to their right to equality guaranteed pursuant to s.15 of the *Charter*.

A 1991 trial was adjourned by consent to await the 1992 decision of the Supreme Court of Canada in *Butler*. In *Butler* the Supreme Court of Canada found that the prohibition on obscene material as defined by s.169(8) of the *Criminal Code* infringes freedom of expression but constitutes a reasonable limit prescribed by law within the meaning of section 1 of the *Charter*. The court also laid down a new comprehensive interpretation of "obscenity" involving a two state test. The first involves a determination of whether the particular material involved the undue exploitation of sex. For the purposes of this definition, the court referred to three categories of pornography; (1) explicit sex with violence; (2) explicit sex without violence but

[52] Although never an aspect of the Little Sister's case, the Prohibited Importations Unit is also responsible for determining whether imported expressive material is prohibited on the basis that it is "hate propaganda," defined by s. 320 of the *Criminal Code* to mean "any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319. Section 319 relates to the incitement of hatred towards an identifiable group, which is defined by s.318 to mean" any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation."

which subjects people to treatment that is degrading or dehumanizing,; and (3) explicit sex without violence that is neither degrading nor dehumanizing. In applying the definition to the three categories, the courts must determine what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Even if the work contains sexually explicit material that, by itself, would constitute the undue exploitation of sex, the portrayal of sex must then be viewed in context to determine whether that is the dominant them of the work as a whole (the "internal necessities test"). In other words, is undue exploitation of sex the main object o the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose. Since artistic expression lies at the heart of freedom of expression values, any doubt in this regard must be resolved in favor of freedom of expression.[53]

The trial in Little Sister's eventually proceeded in the fall of 1994 and lasted two months. The decision was given in 1996, and Mr. Justice Smith found that the impugned legislation did not infringe s.15(1) of *the Charter,* however he did find that the evidence revealed that a disturbing amount of homosexual art and literature that was arguably not obscene had been prohibited. Mr. Justice Smith found various systemic deficiencies in Custom's administration of the legislation. In addition he commented on the following facts;

> Homosexuals form a small minority group in society, probably less than 10% according to evidence here, and there are only four bookstores in Canada dealing extensively in their literature. Imported shipments destined for those bookstores are methodically identified and scrutinized by customs officers. Moreover, estimates by customs officers of the proportionality of all materials they detained and examined, … that were produced for homosexual audiences ranged from 20% to 75%, a proportion far in excess of the relative size of the group.[54]

Little Sister's appealed the trial decision that legislative infringement of freedom of expression was justified. In 1998, the British Columbia Court of Appeal dismissed Little Sister's appeal and found that the infringement was reasonably and demonstrably justified. As to an infringement of equality rights, Mr. Justice MacFarlane found;

> The Customs legislation is not discriminatory on its face. If applied properly, it is not discriminatory in its effect but would catch only obscene material, whether heterosexual or homosexual.[55]

Little Sister's finally appealed to the Supreme Court of Canada, and a decision was rendered in December, 2000[56]. The appeal was allowed in one regard only – that the burden of proving obscenity rests on the Crown, and that the *Customs Act* must not be construed or applied so as to place on an importer the onus to establish that goods are not obscene. Otherwise, the previous decisions that the legislative intrusion on expression rights is demonstrably justified, and that the application of the legislation to gay and lesbian material did not infringe s.15(1) of the *Canadian Charter of Rights and Freedoms* were upheld. Commenting on the evidence from trial Mr. Justice Binnie, writing for the majority commented on censorship and discrimination as follows:

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53 *R . v. Butler,* [1992] 1 S.C.R. 452

54 *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* 1996 18 B.C.L.R. (3d) 242, p.312.

55 *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* 1998 54 B.C.L.R. (3d) 306, p.333

56 *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* 2000 SCC 69, [2000] S.C.R. 1120, p. 1205, 1206. (*Little Sister's No. 1*)

As to the nature and importance of the interest affected, the trial judge himself concluded that access to homosexual erotica was central to gay and lesbian culture at para. 128:

> Because sexual practices are so integral to homosexual culture, any law proscribing representations of sexual practices will necessarily affect homosexuals to a greater extent than it will other groups in society, to whom representations of sexual practices are much less significant and for whom such representations play a relatively marginal role in art and literature.

There was ample evidence to support the trial judge's conclusion that the adverse treatment meted out by Canada Customs to the appellants and through them to Vancouver's gay and lesbian community violated the appellants' legitimate sense of self-worth and human dignity. The Customs treatment was high-handed and dismissive of the appellants' right to receive lawful expressive material which they had every right to import. When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts.

While here it is the interests of the gay and lesbian community that were targeted, other vulnerable groups may similarly be at risk from overzealous censorship. Little Sisters was targeted because it was considered "different". On a more general level, it seems to me fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department. The appellants' constitutional right to receive perfectly <u>lawful</u> gay and lesbian erotica should not be diminished by the fact their suppliers are, for the most part, located in the United States. Their freedom of expression does not stop at the border.

That having been said, there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity, as already discussed, operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the Customs legislation.[57]

Little Sister's No. 2

On July 5, 2001 Canada Customs detained a shipment of books destined for Little Sister's. 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: referred to as the "Meatmen Comics"[58]. Customs again determined that these two titles were obscene. Arguing that they were incorrectly classified, on February 14, 2002, the

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[57] *Supra* at 1188 paras 122 to 125.

[58] *Meatmen*, vol. 18, *Special S&M Comics Edition* and *Meatmen*, vol. 24, *Special SM Comics Edition*

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.).[59]

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, referred to as the Townsend Books[60]. 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.[61] The parties agreed that the two appeals would be heard together.

In its appeals, Little Sister's 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".

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".

In Little Sister's No. 1 an injunction whose terms were generally the same as those requested in Little Sister's No. 2. In Little Sister's No. 1 Binnie J. felt that a remedy of this nature was not warranted. He wrote the following,[62]:

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

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59 *Little Sister's Book and Are Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, p. 17 para 11. *("Little Sister's No. 2" SCC*)

60 *Of Men, Ropes & Remembrance — The Stories from Bound & Gagged Magazine* and *Of Slaves & Ropes & Lovers*.

61 *Little Sister's No. 2, supra,* p. 17 para 11.

62 *Little Sister's No. 1, supra* at para. 157

Justice Binnie 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."[63]

The remedies sought in Little Sister's No. 2 were suggested by the appellant to be the "further action" that Mr. Justice Binnie anticipated. Arguing that it was denied the appropriate remedy nearly six years ago, Little Sister's sought to have Customs bear the financial burden of its fresh complaint on new facts.[64]

In February 2003 the Trial Judge approved Little Sister's constitutional question and broadly defined the scope of the litigation. The case was expanded beyond an appeal of the decision to prohibit the specific books in question, and became a complete systemic review of the administration of the legislation.[65] The result was a trial scheduled for 12 weeks in the fall of 2004, and projected legal costs for the bookstore of well over a million dollars.

On January 22, 2004, about a month after the Supreme Court of Canada released its decision in *Okanagan*, Little Sister's applied for advance costs, claiming, in the words of the trial judge that it had "run out of money to pursue the litigation."[66]

On the application for advance costs in the British Columbia Supreme Court, Bennett J. ruled in favor of the appellant on two of three aspects of its case. She identified three "discrete, yet linked, arguments" being advanced by the appellant. 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").[67] 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*[68]

British Columbia Court of Appeal[69]

Writing for a unanimous court, Thackray J.A. allowed Customs' appeal of the decision to award advance costs at trial.

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

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63 *Little Sister's No. 1, supra* at para. 158.

64 *Little Sister's No. 2* at para 9.

65 *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) ("Little Sister's No. 2")*, British Columbia Supreme Court (2003), 105 C.R.R. (2d) 119, 2003 BCSC 148)

66 *Little Sister's No. 2* British Columbia Supreme Court (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, para 6.

67 *Supra.* at para 15.

68 *Supra* at paras 75 – 87.

69 *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) ("Little Sister's No. 2")* British Columbia Court of Appeal (2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94

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[70]. 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.[71] The Court of Appeal was also reticent to extend this Court's decision in *Okanagan* to a for-profit corporation.[72]

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. It did not involve broad issues that would affect all book importers. [73]

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.[74] 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.[75] What is more, Thackray J.A. was hesitant about spending public funds on litigation that could result in a significant award for the applicant.[76]

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."[77]

***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* [2007] 1 S.C.R. 38, 2007 SCC 2**

The appeal by Little Sisters to the Supreme Court of Canada was denied.

Justices Bastarache and LeBel (concurred in by Deschamps, Abella and Rothstein) used the opportunity to reflect on the Supreme Court's earlier decision in *Okanagan Indian Band.* Commenting on that decision they stated that "An exceptional convergence of factors occurred in Okanagan."[78] The Court specifically commented on the fact that there was a connection between the relief sought, the dire financial circumstances of the bands, and the inability to fund the litigation, stating:

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70 *Supra*, paras. 29 and 45.

71 *Supra*, paras. 36-39 and 44.

72 *Supra*, para. 41.

73 *Supra*, para. 49.

74 *Supra*, para. 60.

75 *Supra*, para. 63.

76 *Supra*, para. 62.

77 *Supra*, paras. 72 and 74.

78 *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* ("*Little Sister's No. 2* ") [2007] 1 S.C.R. 38, 2007 SCC 2, para 33.

> 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.[79]

With respect to the public interest served in the resolution of the claim, while the court found that there was prima facie merit to the position of the bands, the issue that was of public importance regardless of the outcome was the determination of a mechanism for advancing such claims that had never been resolved by the courts. In essence the court found that "win or lose" the public will benefit by judicial consideration of the mechanism for determination of this issue. Justices Bastarache and LeBel clarified the intent in *Okanagan* stating that:

> 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.[80] [Emphasis added]

Justice Bastarache and LeBel also emphasized the cautions in *Okanagan* that advance costs awards were to remain exceptional, commenting as follows:

> It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.[81] [Emphasis added].

Finally Justices Bastarache and LeBel cautioned that the granting of an advance costs order did not give "free reign" to a litigant to spend the opposing party's money without scrutiny, and engage in every available proceeding, or lodge every conceivable argument;

> 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. [82]

Justices Bastarache and LeBel went on to comment that it becomes the courts duty to establish controls over the manner and scope of the litigation, citing the need to set limits on chargeable, rates, hours of legal work, and setting caps on specific aspects of the case as well as global caps on work. Dismissing any concept of "equality of arms" the Court limited advance costs only to that which was necessary to minimize unfairness:

> In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.[83]

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79 Para 33, *supra.*

80 Para 33, *supra.*

81 Para 39, *supra.*

82 Para 42, *supra.*

83 Para 43 *Supra.*

To go beyond this limited scope of costs was thought by Justices Bastarache and LeBel to amount to an "imprudent and inappropriate judicial overreach."[84]

Having taken the opportunity to illuminate and clarify the intent of *Okanagan*, the Court went on to apply these concepts to the facts of Little Sister's No. 2. Essentially, the Supreme Court adopted the reasoning of the BC Court of Appeal that the size and scope of the litigation was unnecessary. It found that the Appellant could have proceeded first with the Four Books Appeal – the costs of which the Appellant had originally believed to be within its means.

As to public importance – there could be no doubt that the Supreme Court felt that freedom of expression was a critical Charter value. The constitutionality of the obscenity provisions had already been recently considered by the Supreme Court of Canada in *R. v. Butler, Little Sister's No. 1, and R. v. Sharpe*. The requirement that the obscenity provisions be administered in a non-discriminatory manner was clearly established in *Little Sister's No.1*.

What the Court found was that *Little Sister's No. 2* would only be of public interest, if the Appellant was successful at trial in establishing that Customs acted unconstitutionally. However the Court recognized that the corollary was also true; Little Sister's No. 2 would not be of public importance if Customs were shown to be acting in accordance with its constitutional duties.[85] The Court cautioned against such prejudging of a case, but more importantly stated that where one outcome alone will demonstrate public interest – such a case is not "exceptional" and will not result in an award of special costs. Again, looking to the facts of *Okanagan*, it was in the public interest that the matter be heard regardless of the outcome:

> What must be proved is that the alleged Charter breach begs to be resolved in the public interest. In the context of Okanagan, this meant proving that there were issues that had to be resolved one way or the other. The exceptional circumstances in that public interest case were related not so much to obtaining a certain result as to ensuring that the state's and bands' rights and obligations were defined properly — and definitively — in a context where it seemed important that the court develop a proper method for adjudicating land claims. Thus, not every case that could, once decided, be seen as being of public importance should be viewed as a special case within the meaning of Okanagan. Recognizing a case as special cannot be justified solely by reference to one particular desired or apprehended outcome of the litigation. It must be based on the nature of the litigation itself.[86]

Ultimately, the Supreme Court of Canada decision on advance costs in *Little Sister's No. 2*, amplified and clarified the test it established in *Okanagan Indian Band.* While the decision assists in a determination of what are described as the three "pre-conditions" to an award of advance costs, it is of greatest utility in clarify the residual and limiting discretion of exceptional circumstances. In particular *Little Sister's No. 2* adds clarity to this discretion as follows:

1. The court in deciding if the matter is within a "narrow class" of cases, should consider whether there is a "causal connection" between the remedy sought and the inpecuniosity of the litigant – resulting in its inability to proceed with the litigation.

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[84] Para 44, *Supra.*

[85] Para 65, *Supra.*

[86] Para 64, *Supra.*

2. Advance costs orders must not purport to create equality among litigants, and that advance costs awards are meant to provide only a basic level of assistance necessary for the case to proceed. Specifically, an applicant for advance costs will surrender control to the Court in defining the size and scope of the litigation that may proceed with public funding.

3. Finally, an issue of public interest deserving of advance costs is one that must be resolved one way or the other. Public interest is not defined by a certain result, but is an issue never before considered by the court where the public will benefit merely by establishing the proper method for adjudicating such a claim.

CONCLUDING COMMENTS AND REFLECTIONS:

Prior to 2003 my only involvement in constitutional or charter litigation was as a criminal lawyer, most commonly making applications for the exclusion of evidence pursuant to section 24(2) of *the Charter*, on the basis that it was obtained in a manner that infringed the individual rights of the accused. This experience was almost entirely in the Provincial Courts of the "lower mainland" of British Columbia, which is comprised of Vancouver and its surrounding areas. And while my practice was not exclusive to these courts, I had during this time observed the serious under funding and potential collapse of the legal aid system, as well as the seemingly unbearable pressures brought to bear on over-worked and under-paid crown prosecutors. As a result, when I found myself at a conference of constitutional lawyers in Toronto, Ontario, in the spring of 2004, surrounded by a "who's-who" of academia and the constitutional bar, I felt a little disconnected.

I had always reminded myself in my practice that while I did not reside in an ivory tower, as a lawyer I certainly milled around at its base. But with "constitutional lawyers" and their requisite academic focus, they are at least climbing ivory steps. In making these comments about constitutional lawyers I do not intend to be critical. This is at it should be. Sometimes it is in striving for an ideal that light is cast on underlying "root" problems.

These reflections in the spring of 2004 on the differences between "public interest" as it was defined by constitutional lawyers in a hotel conference room on Bay Street in Toronto Ontario, and "public interest" demonstrated in the stories of many of my legal-aid clients in the first years of my practice, underlie my continuing fascination with any consideration of public funding. Those residents of the downtown east-side in Vancouver British Columbia, for whom the metal detectors at the summary conviction courts of 222 Main Street become another revolving door in a life of poverty, mental illness, addiction and abuse, may see access to justice as but one of the many barriers they face each day. How do these people (like many of the people behind the citations of cases referred to above) decide between access to justice, or access to safe and affordable housing, or access to better healthcare, or indeed their next meal. These impossible decisions define a society of limitless need and limited resources.

I am not suggesting that we just throw up our hands, or that the courts do not have an important role in defining, or indeed deciding some of these issues. In many cases public interest may be defined by circumstances where an inability to retain counsel is the barrier to a determination of the proper mechanism to decide access to many of these other most basic human needs – including basic human rights. In this regard, I am mindful of a quote, the source of which I

cannot now place; "A society's strengths and weaknesses are measured by the height of the barriers standing before its system of justice."

However, if there is to be increasing judicial involvement in ordering funding for cases of public interest the courts must anticipate that decisions made involving public funding will attract increasing oversight of the process by which those funds are spent. For this reason we must also be ever vigilant as counsel in defending judicial independence. In this regard I anticipate one aspect of decisions on advance costs in public interest litigation that may attract greater scrutiny; choice of counsel.

Insofar as orders for advance costs involve the expenditure of public funds, this should require much of the transparency and accountability of other forms of public procurement. In this regard public perception of the administration of justice is tantamount and safeguards should be considered to avoid any suggestions of judicial bias.

In many circumstances applications for advance costs, similar to a *Rowbotham* application, will only come after counsel chosen by the applicant has been involved in the litigation for some time. While it is very often the case that replacing existing counsel, with less experienced and less-expensive counsel may lead to inefficiencies and delays in the conduct of the case that may prove wasteful, this will not always be the case[87].

From time to time young criminal defence lawyers may be heard to complain about *Rowbotham* orders creating something of a monopoly within the senior members of the bar on high profile cases. The argument in court is that these senior members – while more expensive – are necessary given the seriousness and complexities of the litigation. However these same senior members of the bar will also tell young lawyers over drinks about the "good old days" of the assize system when they did a trial every week, and had conduct of numerous murder trials before they were ten years at the bar. In the meantime, more junior members of the bar, who would welcome an opportunity to gain experience and establish their reputation by assuming conduct of a high-profile case at a reduced rate, are not always given this opportunity.

In this regard I would encourage the courts to consider the potential for overlapping interests in advance costs awards. Not only should the underlying litigation be considered, but also the public interest in junior counsel gaining necessary court experience at a reduced rate. Further, the courts should ensure that litigants anticipate funding issues at the outset of litigation, and bare this in mind in their choice of counsel. Lawyers might also be cautious to avoid speaking to the issue of choice of counsel in an application for advance costs if they are to be the very counsel who will be the recipient of those public funds.

Finally, the courts should be cautious about the potential for a perception of judicial bias when decisions are made that one specific lawyer is necessary for the continued conduct of litigation. We should be vigilant to avoid the types of allegations of preference being given to former colleagues or personal and professional acquaintances that are too often made of politicians in decisions of public procurement.

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[87] *Cf. Little Sister's No. 2* British Columbia Supreme Court (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, paras 23 and 24.

Advance costs will be an important tool in improving access to justice on issues of public importance. Given its import, we should be vigilant to ensure its continued positive perception.

Acknowledgements

Portions of this paper are based on written submissions prepared in the fall of 2003 by my co-counsel and colleague, Karen L. Weslowski.

Ms. Weslowski researched and wrote most of the summary of law on traditional costs principles, costs as an instrument of policy, and the history of advance or interim costs awards. Ms. Weslowski is perhaps the best legal writer I have ever had the great fortune to work with.

Most of the remaining legal research reflected in this paper, as well as the case summaries that follow this paper are based on the work of law students who completed summer articling positions at Miller Thomson LLP in 2007 and 2008.

Chantelle Rajotte worked with me in the summer of 2007. Ms. Rajotte returned to Dalhousie University to complete her LL.B in 2008. Before she returns to Miller Thomson to complete her articles, Ms. Rajotte is presently a Clerk with the British Columbia Court of Appeal.

Kelsey Thompson worked with me in the summer of 2008. Ms. Thompson is currently at UBC where she will complete her LL.B in 2009. Ms. Thompson has obtained a clerkship with the British Columbia Court of Appeal, after which she will complete her articles at Miller Thomson.

This paper is based on a presentation given in the summer of 2007 at the 20th Anniversary Conference of the International Society for the Reform of Criminal Law held in Vancouver, BC from June 22 – June 26, 2007, "*Twenty Years of Criminal Justice Reform, Finding the Balance*."

The paper was then the basis of a presentation at the CLE BC, Continuing Legal Education Seminar, "*Pro Bono Practice 2008,"* in Vancouver, BC on Setpember 17, 2008.

The summaries of caselaw that follow were prepared for me solely for the purpose of speaking at these conferences and are attached in this form merely to assist the readers in further research.

SUMMARY OF CASES CONSIDERING APPLICATIONS FOR ADVANCE COSTS:

1. ***Kelly v Palazzo***, 2005 CarswellOnt 7268, 78 O.R. (3d) 539, [2005] O.J. No. 5364, 23 C.P.C. (6th) 83 (Ont. S.C.J. Dec 14, 2005).

   Interim costs order -- Plaintiff was allegedly subject of "racial profiling" by agents for Crown in Right of Canada -- Plaintiff brought action for damages for violation of plaintiff's rights as guaranteed by Canadian Charter of Rights and Freedoms -- In course of 21-day trial originally estimated to require five days, plaintiff brought motion for *Okanagan Indian Band* interim cost order -- Motion dismissed -- *Okanagan Indian Band* orders are extraordinary, rare remedies -- Burden lay upon plaintiff to establish severe impecuniosity, prima facie meritorious claim and significant public interest component to proceedings -- Evidence disclosed that, while plaintiff had limited income, plaintiff was able to travel to Jamaica annually and to lease motor vehicle -- Plaintiff was not so impecunious that furtherance of present litigation was impossible absent interim costs order -- "Prima facie meritorious claim" is low standard, requiring only that plaintiff prove reasonable, arguable issue -- Subsequent to hearing of motion, plaintiff's action was dismissed, which was evidence weighing against "prima facie meritorious claim" finding in present case -- Only remedy sought by plaintiff was damages, clear demonstration of personal nature of present proceedings -- Plaintiff did not establish significant public interest component to proceedings -- Having failed all elements of test, clearly plaintiff was not entitled to *Okanagan Indian Band* interim cost order.

2. ***Canada (Minister of Citizenship & Immigration) v Seifert***, 42 Imm. L.R. (3d) 1, 327 N.R. 374, 2004 CarswellNat 3643, 2004 CarswellNat 5294, 2004 CAF 343, 2004 FCA 343 (F.C.A. Oct 14, 2004).

   Costs -- Citizen was naturalized after entering Canada after Second World War -- Minister attempted to revoke citizenship on basis that citizen made false statements concerning his national origin and activities during war -- Trial judge allowed Minister's application for issuance of committee for taking of evidence in Italy -- Citizen brought motion for order compelling Minister to pay all of his legal fees and disbursements in connection with taking of commission evidence -- Motion was granted -- Trial judge ordered payment of reasonable counsel fees and expenses insofar as they pertained to taking of evidence -- Trial judge found that taking evidence outside of Canada was extraordinary matter and that R. 271(3) of Federal Court Rules, 1998, SOR/98- 106 gave him broad discretion to make order as to costs -- Minister appealed -- Appeal allowed -- Trial judge erred by ordering counsel fees -- Rule 271(3) of Rules does not allow for counsel fees to be ordered -- "Costs of the examination" as stated in R. 271 of Rules covers extra expenses of taking evidence such as accommodation, travel and interpreters and stenographers -- Rules 271 and 272 of Rules are not rules pertaining to costs between parties and read in their entire context show that judges can only order directions on mechanical matters and not counsel fees -- Interim costs were not appropriate and there was no basis on which to award them.

3. ***Charkaoui, Re***, 43 Imm. L.R. (3d) 17, 256 F.T.R. 93, 2004 CarswellNat 1905, 2004 CarswellNat 2916, 2004 FC 900, 2004 CF 900 (F.C. Jun 23, 2004).

   Minister determined that applicant was inadmissible on grounds of national security -- Minister was in possession of pre-removal risk assessment that indicated that applicant

was in danger of being tortured or threatened with death or cruel and usual punishment if sent back to Morocco -- Minister did not release pre-removal risk assessment to applicant for more than seven months -- Applicant sought to challenge Minister's decision that he was risk to national security on basis of abuse of process based on Minister's failure to make timely disclosure of pre-removal risk assessment -- Applicant brought application for order that government pay his legal costs in advance -- Application dismissed -- Costs generally were determined at end of legal proceedings and followed cause -- Court's power to award costs in advance was discretionary -- Applicant could not afford to pay his own legal costs -- Applicant was eligible for legal aid -- Although applicant's own lawyers would not accept legal aid there was no evidence that applicant could not find lawyers who would -- This was not matter of first impressions that transcended interest of applicant alone -- Court had occasion in past to rule on similar questions.

4. ***R. v Fournier***, 2004 CarswellOnt 1077, 116 C.R.R. (2d) 253, [2004] O.J. No. 1136 (Ont. S.C.J. Mar 12, 2004).

Multiple accused were jointly charged with offences involving sale of alleged fraudulent native status cards -- Two accused filed Notice of Constitutional Question challenging inherent jurisdiction of court to prosecute them on basis of aboriginal heritage -- Accused had low income from old age security and pension -- Counsel for accused brought application for government funding, estimating that costs of arguing constitutional question would amount to $35,000 -- Decision on application was reserved pending review of information from Legal Aid Ontario ("LAO") -- LAO advised that if accused met financial criteria, it would likely recommend that half of budget or $17,500 be paid by LAO to fund constitutional question -- Application granted -- Crown ordered to pay accused's counsel $17,500 in addition to costs of application in sum of $2,500 -- Accused did not have financial means necessary to fund or otherwise pay remaining sum of $17,500 -- Stay of proceeding was not appropriate remedy given issues raised transcended individual interests of accused and were of public importance -- Constitutional questions were novel and complex and of sufficient merit that it would be contrary to interests of justice not to provide funding.

5. ***Hastings Park Conservancy v Vancouver (City)***, 2007 CarswellBC 209, 2007 BCCA 69, [2007] B.C.W.L.D. 1534, [2007] B.C.W.L.D. 1535, 35 C.P.C. (6th) 224 (B.C. [In Chambers] Feb 05, 2007).

Interim costs of appeal -- Park conservancy brought petition for judicial review of zoning by-law amendment which permitted installation and use of slot machines at park's racecourse -- Conservancy's petition was dismissed when amendment was found to be intra vires city's zoning powers and conservancy filed notice of appeal of review decision -- Conservancy alleged that reviewing judge erred in failing to address issue of park board's exclusive jurisdiction over licensing agreements for park and raised issues of procedural fairness -- City brought application seeking order requiring conservancy to post security for costs of appeal and staying appeal pending such payment -- Conservancy brought cross-application seeking order requiring city to pay conservancy's interim costs of appeal -- Application and cross-application dismissed -- Conservancy's impecuniosity was undisputed but it failed to establish requisite public importance of issues it raised and that case was so rare and exceptional as to warrant order of interim costs of appeal.

6. ***Mark Doe v*** Canada, 273 F.T.R. 60 (Eng.), 2005 CarswellNat 1026, 2005 FC 537 (F.C. Apr 20, 2005).

> Plaintiff alleged that Crown conspired with Vancouver police and city to entrap him in compromising situations through requests for help in surveillance operation -- Plaintiff alleged that activities caused him emotional harm and economic loss -- Plaintiff brought action against Crown seeking damages for tortious interference with contractual and economic relations among other claims -- Plaintiff brought unsuccessful motion and appeal for costs in advance -- Plaintiff amended statement of claim to add seven causes of action to initial claims -- Plaintiff brought another motion for costs in advance -- Motion dismissed -- Plaintiff was not impecunious to point of being unable to proceed with litigation -- Although plaintiff was living on very modest income, was far from being impoverished -- Plaintiff's claim was not prima facie meritorious -- Claim was largely improbable and farfetched and unworthy of consideration of costs in advance on basis of merit -- Claim was not of significant importance to public.

7. ***9022-8818 Québec Inc., Re***, 2005 QCCA 275

> This was an appeal of a refusal to grant interim costs in a bankruptcy case. The Trial Judge had refused to order costs, applying the criteria arising from two cases concerned with shareholder remedies under the *Canada Business Corporations Act.* The Court of Appeal felt that the *Okanagan* conditions could apply to an ordinary civil dispute if given a stricter application. The Court felt that the judge erred in using "the Wilson test" and that *Okanagan* was the appropriate test given what the Supreme Court of Canada said regarding its application to some ordinary civil matters:
>
> > 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 (Okanagan, at para.34).
>
> In light of the error of the Trial Judge, the Court of Appeal reviewed the order, keeping in mind the *Okanagan* criteria, and awarded interim costs.

8. ***Lenko v. The Manitoba Hydro-Electric Board***, 2007 MBQB 39

> The plaintiff sought an order that Hydro should be unable to turn off its service where people are unable to pay hydro costs during the winter months. The plaintiff brought a motion for interim costs on the basis that the issues he was raising were public interest issues. The Court held that the plaintiff did not meet the Okanagan criteria. The Court felt that the primary focus was his own dispute, which he had tried to turn into a public issue so as to entitle him to advance costs.

9. ***Fontaine v. Courchene & Sagkeeng***, 2007 MBQB 238 (CanLII)

> The Court held that a legal cause of action claiming defamation would seldom be described as a public interest claim. The Court held that the applicant failed to show: impecuniosity; that she had exhausted all alternatives and how her claim transcended her individual interests. The Court articulated that while a comparative advantage may exist,

such a comparative advantage is not new to the world of litigation and that some defendants will inevitably have deeper pockets.

10. ***Conway c. Québec (Ministre du Revenu)***, 2007 QCCQ 2343

The applicant was a cigarette vendor who applied for a tax rebate alleging his Indian status exempt him from payment of such tax. The defendant argued that the three criteria for interim costs, as laid out in *Okanagan* did not exist. Further, the defendant argued that *Okanagan* did not apply in Quebec because the decision is common law and the law of costs are governed by article 477 of the Quebec Civil Code. The defendant argued that since costs are codified their application cannot be broadened, relying on *Lac d'Amiante du Québec v. 2858-0702 Québec Inc.,* [2001] 2 S.C.R. 743, for the proposition that a Quebec court does not have the same power to create a positive rule in relation to civil procedure as a common law court. The applicant relied on two cases where the inapplicability argument was rejected and the Quebec court had awarded interim costs (*9022-8818 Quebec Inc. v. Magil Construction (Syndic de),* J.E. 2005-611 (C.A.); *Hétu v. Notre-Dame-de-Lourdes (municipalité de),* [2005] R.J.Q. 443 (C.A.)). The Court agreed with the applicant, that an award of interim costs was possible under the civil law in cases of sufficiently special circumstances. It would be questionable, in a case that raised a public issue of national importance, to not apply the *Okanagan* criteria if the case arose in Québec, when it could be invoked to the assistance of someone in any other province. However, on application of *Okanagan* the Court felt that the criteria were not met: he had not shown that he was impecunious and had exhausted all alternative funding; he was unable to demonstrate that his claim had sufficient merit; and finally he failed to demonstrate the value of the case to the public at large. The action dealt only with the tax on sales to non-Indians and therefore could not be compared to a case like that involving the Okanagan Indian Band. Furthermore, the question of taxation to Aboriginal people has been discussed by the courts and therefore cannot be considered a new question.

11. ***Barker v. Barker***, 2007 CanLII 13700 (ON S.C.)

Plaintiffs brought claims relating to the treatment they received between 1965 and 1983 as residents, and patients, at the Oak Ridge maximum security division of the Mental Health Centre at Penetanguishene during the administration of programs conducted by the defendants under the supervision of Her Majesty the Queen in the Right of Ontario. To discharge their discovery obligations, the defendants proposed to computerise and codify the documents to make them available to the plaintiffs, as there were many documents involved, most of which were old and fragile. The defendants requested the Court require the plaintiffs to pay one-third of the interim document production costs. While the criteria of *Okanagan* did not apply, the Court awarded the interim costs as the codifying would be of great benefit to all parties involved. The Court differentiated from *Okanagan* on the grounds that costs are not to be in any event of the cause

12. ***Waxman v. Waxman***, 2007 ONCA 326 (CanLII)

The issue in this case was whether the test for interim costs from *Okanagan Indian Band* should be used to determine whether frozen funds can be accessed to pay reasonable legal fees in a post judgement context. The Court rejected this suggestion as the criteria in *Okanagan* arise before the litigation has been determined. Furthermore, the test for interim costs in *Okanagan* is concerned specifically with public interest litigation. Since the present litigation was regarding a family business, this litigation did not fall within that category.

13. ***Stevens v. Attorney General of Canada***, 2007 FC 847

This case involved two workers from the Canadian Food Inspection Agency who brought an application as lay litigants to the Canadian Human Rights Commission regarding gender prejudice in duties and pay classification. On appeal the applicants were awarded costs. In addition to disbursements, the litigants attempted to claim costs for their time. In rejecting the applicant's position, the court added *obiter* commentary on *Okanagan* to aid the applicants in understanding some of the issues associated with compensation. The Court explained that *Okanagan* does not support the proposition that a court could award something for the time of a lay litigant on the basis that costs can be something additional to or other than an indemnity.

14. ***Frayne v. Holburn Business Systems Corporation***, 2007 CanLII 9611 (ON S.C.)

Ordered to pay costs because of strict statutory wording of section 185 of the Ontario Business Corporations Act, not because of *Okanagan Indian Band.*

15. ***R v. Caron***, 2007 ABQB 632

Mr. Caron was charged with the regulatory offence of failure to make a left turn in safety, the fine for which was $100. His defence consisted of a constitutional languages question. Mr. Caron asserted that because the ticket was issued using a uni-lingual English form, the process which brought him before the Court was flawed. The Crown requested an adjournment to prepare evidence and obtain expert witnesses. In light of the unexpected extension of the trial, Mr. Caron made a request of the Court Challenges Program for funding, however the program was abolished before the funding could be granted and subsequent requests for legal aid were denied. The trial judge ordered the Crown to pay the fees of Mr. Caron's lawyer and his experts' fees. The Court of Queen's Bench quashed the trial judge's order as the Provincial Court did not have the jurisdiction to grant the order. Mr. Caron proceeded to seek the order from the Court of Queen's Bench. Crown council requested that the Court adjourn the question of defence counsel's fees to after the completion of the trial. In considering this request, the Court considered the application of *Okanagan* and *Little Sisters* in a criminal or quasi-criminal matter. The Crown argued that an order, such as the one made in *Okanagan* is only available in civil matters as there are already rules in place regarding remuneration of defence counsel in criminal cases (*R v Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont.C.A.). Mr. Caron argued that the case raised public interest issues and therefore the appropriate remedy is to be found in an *Okanagan* order. While public interest questions are routinely raised in criminal law, this case was special in that it asked a constitutional question regarding the entire body of statute law in the province and would greatly impact language law. The Court held that in approving the guidelines established in *Rowbotham* the Supreme Court did not intend to exclude the possibility of any other recourse for remuneration in quasi-criminal matters. In that case the important consideration was the accused's liberty, whereas here the question was one of public interest. The key factor in determining an award of interim costs is not the initial character of the proceeding but rather whether the issue is one of public interest, and therefore this special quasi-criminal case was not excluded from the application of *Okanagan.*

The second issue the Court considered was whether the Court of Queen's Bench has the jurisdiction to order interim costs in a case being heard by another court. The Court held that it is within the inherent jurisdiction of the Superior Court to act when the lower court

does not have the power to ensure the proper administration of justice because the lower court does not have equivalent jurisdiction.

The third issue the Court considered was whether in light of the three pre-requisites set out in *Okanagan* and the guidelines from *Little Sisters*, the circumstances of the case were sufficiently special that it would be contrary to the interests of justice to deny the advance costs application. With respect to the three criteria: Mr. Caron was responsible in trying to make funding arrangements and the abolition of the Court Challenges Program was completely beyond his control; in light of the contrasting expert opinion evidence the action was of sufficient merit and was worthy of being heard; and finally the Court had no doubt that it was a question of public importance because if Mr. Caron succeeded French in Alberta would have a guaranteed constitutional status allowing citizens to obtain statutes and regulations in French. In considering whether the matter was sufficiently special to justify an order for interim costs, the Court compared the assertion of language rights under the Constitution to the assertion of treaty rights. In both cases, the rights in question have a direct impact on the descendants of founding peoples of Canada. The Court also felt that it would be extremely unlikely that this legal argument, based on historical evidence, would ever be raised again.

Interim costs were awarded.

16. ***R v. Caron***, 2008 ABCA 111

The Court declined the Crown's application to stay the interim funding award.

17. ***Versluce Estate v. Knol***, 2008 YKCA 3 (CanLII)

Cases dealing with real property between private parties do not transcend the interests of the parties and therefore there is nothing to support an extraordinary order.

18. ***Hagwilget Indian Band v. Canada***, 2008 FC 574

The Government conducted blasting of rocks in a canyon which resulted in the total destruction of an Aboriginal Fishery. The present action was started over 20 years ago. There was no question that the first of the *Okanagan* requirements was met as the Band was in serious debt and had unsuccessfully sought funding from a number of sources. There was no doubt that without help the Band would be unable to bring the action through to trial. As for the second and third criteria, while the case will be a difficult one to make, it is clear that the case has merit and the question at issue is one of great public interest and importance as it will be significant to Canada's relations with its Aboriginal Peoples. The questions asked were unique to this case and have not been resolved or are likely to be resolved in an easier way. In considering the question of "special circumstances" the Court noted that the fulfillment of the three conditions are necessary but not sufficient to support an award of interim costs. The Court took note of the extraordinary delays by the Crown both before and after the commencement of litigation through a series of broken promises, and found that although they were not forced into litigation like *Okanagan*, they certainly did not rush into it, and had no other realistic option. Further the Court also took note of other relevant factors such as the honour of the Crown, the fact that the claim dealt with the complete destruction of an Aboriginal right rather than a diminution of one, ensuring the trial proceeds is the only way to finally settle this grievance and that the plaintiffs had already committed significant amounts of money to this action.

Interim costs were awarded, however the Court felt that advance costs should only be prospective in nature and the plaintiffs should have to continue to contribute to the costs of the litigation.

19. ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, 2008 BCCA 107

This is an appeal of an order severing the trial of issues in the litigation under Rule 39(29). The order severed the aboriginal rights issue from the aboriginal title issue and directed that the trial of the aboriginal rights issues proceeds first. Depending on the outcome of the first issue, the Judge felt that the trial on the second issue may become unnecessary. The appellants appealed contending that severance could potentially deprive them of the ability to advance their central defence of aboriginal title. The appellants argue that the advance costs order was granted to fund the litigation of the title issue and that costs incurred to date in anticipation of litigating the aboriginal title issues will be wasted if a trial on those issues does not go forward. The Court of Appeal held that there was no significant distinction between the triable issues in the Supreme Court of Canada's reasons awarding interim costs. Much litigation has happened since the original interim costs order was made. Aboriginal logging for domestic purposes is no longer contested and the only issue remaining is the justifiable scope of provincial regulation of the exercise of that right. Furthermore, no longer is this case the first to try claims to aboriginal title. The Court of Appeal therefore found that the rare and exceptional circumstances that led to the interim cost order have been altered by the subsequent jurisprudence. While the interim cost order remains, it does not necessarily preclude avoidance of a trial of aboriginal title if the case can be decided on other grounds. The considerations motivating an order of advance costs cannot override this discretion.

In the dissenting opinion of the Court of Appeal decision, Mr. Justice Donald felt that the severance order would not result in a more effective or efficient resolution of the appellant's cause, as it reduces a claim for title and rights to a mere defence to a stop work order, sidelining the central issue. Furthermore, the severance order is a radical amendment to the advance cost order as it deprives the Band of the ability to bring their title claim under the advance cost order and instead require them to obtain a new interim cost award if they succeed in the rights case and still wish to pursue their title claim. The severance order significantly amends the costs order, defeats its public interest rationale, and exceeds the judge's jurisdiction. It is beyond the authority of the judge to alter the costs order affirmed by the SCC. The dissent went on to talk about the discretion to control costs, but held that it is to be achieved by procedural measures rather than substantive cuts to the heart of the litigation.

Cases Dealing With Costs After the Event/ Costs as an Instrument of Policy

- *Canadian Bar Association v. British Columbia,* 2007 BCSC 182- (Litigation which cannot survive a motion to strike under 19(24) should not be considered on an access to justice basis).
- *Driscoll v Morgan*, 2008 NLCA 16
- *John Doe v. Ontario,* 2007 CarswellOnt 7531
- *St. Paul (County) No.19 v St. Paul (County) No.19,* 2008 ABQB 284
- *Waterloo (City) v Ford,* 2008 Canlii 22152

- *Royal Bank v Welton*, 2008 CarswellOnt 2693
- *H. (P.) v. H. (P.)*, 2008 NBCA 17
- *Matton v Yarlasky*, 2007 CarswellOnt 8322
- *Brito (Guardian ad litem of) v Woolley*, 2007 BCCA 1
- *V.M and C.M. v. British Columbia (Director of Child Family and Community Service)*, 2007 BCCA 325
- *Neville v Wynne*, 2007 BCSC 1877
- *Khalil v. Canada*, 2007 FC 1184
- *Samuda v. Recipco and Fierro*, 2008 BCSC 192
- *W.A. v. St. Andrew's College*, 2008 CanLii 3234 (ON.S.C.)
- *Cochrane v. Ontario*, 2007 CanLii 29973 (ON.S.C)
- *Luciano v. The Queen*, 2007 TCC 230 (Canlii)

Cases in French

- *Hetu v. Notre-Dame-de-Lourdes (Municipalite de),* [2005] R.J.Q. 443 (C.A.)
- *Quebec (procureur generale) c. Marchand*, 2007 QCCQ 11711
- *Developpement Tanaka Inc. c. Commission Scholaire de Montreal*, 2007 QCCA 1122
- *Commissions des Transports du Quebec c. Villeneuve*, 2007 QCCA 1101
- *Drotie de la Famille 071796*, 2007 QCCA 1012
- *Drotie de la Famille 07952*, 2007 QCCs 1996
- *Caisse Populaire Desjardins de Audet c. Boucher*, 2007 QCCQ 6631
- *Lomaga c. Hema-Quebec*, 2007 QCCS 2303
- *Giampersa c. Fabrique de la Pariosse de Notre-Dame-du- Mont-Carmel*, 2007 QCCQ 1926
- *Tanisma c. Commissions des de la Personne et de Droits de la Jeunesse*, 2007 QCCS 467