Court File No.: 33092

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
APPELLANT
(APPELLANT)

AND:

GILLES CARON
RESPONDENT
(RESPONDENT)

FACTUM OF THE INTERVENER
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PART I – FACTS

1. The David Asper Centre for Constitutional Rights ("Asper Centre") accepts the facts as set out in the factums of the Appellant and Respondent and takes no position where they may disagree. The Asper Centre relies on the following facts in support of its position on the issues.

2. The costs which are the subject of this appeal relate to the Respondent's response to expert evidence tendered by the Appellant in the proceeding in relation to the constitutional issues. The Court of Appeal noted that the Crown itself had "appear[ed] to have spared little expense in its conduct of the litigation" and that on the other hand the Respondent "proved that he was of very limited means."[1] Justice Oullette of the Court of Queen's Bench of Alberta had the benefit of hindsight in his order of October 19, 2007, in respect of the public interest significance of the case given that all of the evidence in relation to the constitutional issues had been tendered at that point in time. Given this evidence, he found that "the scope of the constitutional question, the historical and expert evidence and the consequences of the decision not only on the accused, but also on the francophone community and the linguistic functioning of Alberta institutions, constitute[d] exceptional circumstances."[2]

PART II – INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

3. The Asper Centre's position in respect of the issues stated by the Appellant is that all of the stated questions relate directly or indirectly to the accessibility of meaningful remedies in the vindication of fundamental rights such as those enshrined in the *Charter of Rights and Freedoms*. Neither the courts below nor this Honourable Court have established a freestanding "right" to costs; rather, costs awards form part of the structure of our justice system that facilitates the vindication of rights and access to justice.

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[1] Reasons for Judgment of the Honourable Mr. Justice Keith Ritter (Court of Appeal for Alberta), March 19, 2008, Appellant's Record Vol. I at para. 57.
[2] Reasons for Judgment of the Honourable Mr. Justice V.O. Oullette (Court of Queen's Bench of Alberta), October 19, 2007, Appellant's Record, Vol. I, at para. 43.

Pragmatic considerations, such as the role that legal costs play in the accessibility of our courts to diverse and vulnerable minorities, are integral to the rule of law. These pragmatic considerations are inconsistent with a categorical approach based on arbitrary distinctions, such as a rule that interim costs are not available in regulatory matters. Moreover, such distinctions undermine the goal of a fair and accessible justice system.

PART III – ARGUMENT

A. Access to Justice and the Vindication of Rights

4. It is in the public interest that meritorious *Charter* claims be encouraged by the availability of full and effective means to bring such claims forward, including awards for interim costs in the circumstances established by this Honourable Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band.*[3] As the majority of this Court noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* "Canada has evolved into a country that is noted and admired for its adherence to the rule of law as a major feature of its democracy. But the rule of law can be shallow without proper mechanisms for its enforcement."[4]

5. This Honourable Court has stated that "the right to access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens."[5] As noted by Tollefson,[6] the *Okanagan* case took this further by recognizing the value of access to justice and the judicial responsibility to promote this ideal. The Ontario Court of Appeal accepted access to justice as one of the criteria Courts should use in making costs determinations in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*[7] where it ordered costs to a party whose counsel had acted on a *pro bono* basis. Indeed, as noted by Chief Justice McLachlin in public remarks,

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[3] [2003] 3 S.C.R. 371 (*"Okanagan").*
[4] [2003] 3 S.C.R. 3 at para. 31.
[5] *B.C.G.E.U. v. British Columbia (A.G.),*[1988] 2 S.C.R. 214 at para. 26.
[6] Chris Tollefson, "Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond" (2006) 19 Can. J. Admin. L. & Prac. 39 at 59.
[7] (2006) 82 O.R. (3d) 757 (C.A.) ("*Cavalieri*").

> The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system.
> […]
> The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford them. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment.[8]

6. There may indeed be cases in which the award of costs is necessary, indeed the only just remedy available, to eliminate a significant financial obstacle to access to justice. Contrary to the Appellant's interpretation of the Court of Appeal's judgment herein,[9] recognizing this value and giving it meaning through the discretionary award of costs in public interest litigation, is not tantamount to establishing a right to costs.

7. While this Court in *British Columbia (Attorney General) v. Christie*,[10] found that there is no general constitutional right to access to justice aided by a lawyer within unwritten constitutional principles, it did acknowledge that there may be cases where access to legal services is essential for due process and a fair trial. In addition, this Court recognized that the role of lawyers is so important in ensuring access to justice and upholding the rule of law that in some situations the right to counsel has been given constitutional status.[11] Roach has noted, "Courts have generally ordered these interim costs as part of their inherent jurisdiction over their own process and not as a distinct Charter remedy."[12] He goes on to say that funding for cases can also be ordered as a

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[8] Right Honourable Beverly McLachlin, P.C., Address delivered to the Empire Club of Canada, Toronto, 8 March 2007; accessed online <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp> 23 March 2010.
[9] Appellant's Factum, paras. 30, 35, 37-41.
[10] [2007] 1 S.C.R. 873.
[11] *Ibid*. at para. 27; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.
[12] Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 2006) at para. 11.935.

s.24(1) remedy if the Charter applicant was able to establish that his or her Charter rights would be violated without such an order.[13]

8. Bastarache J.'s majority decision in *Dunmore v. Ontario (Attorney General)*,[14] acknowledged (albeit in respect of s.2 of the *Charter*), that there may at times be a positive obligation on government to act where vulnerable groups' ability to exercise their constitutional rights meaningfully is threatened by government inaction. Recourse to the courts is often a necessary measure of last resort for those who have little or inadequate access to governments and legislatures. Arguably, costs awards that facilitate the ability for such groups to bring forward *Charter* claims function in a similarly positive way to promote access to justice where through impecuniosity those claims cannot otherwise be pursued.

9. There is a multiplicity of ways in which litigants who lack financial means can bring their claims to court: legal aid, government funding programs (e.g. Court Challenges Program), damages awards, and costs awards, in addition to charitable support through third parties or *pro bono* legal counsel. Unfortunately, as we are becoming all too aware, there are significant gaps in the system preventing individuals from accessing the courts or placing too great a financial burden on them to do so. The system is neither comprehensive nor planned to address all such access issues. This Court's decision in *Okanagan* provided a faint hope for some litigants advancing a meritorious public interest claim that interim costs could be awarded where they were deemed necessary to bring the issues before the court.

10. The assessment of whether a request for interim costs is necessary depends on an assessment of the legal and economic context. In that analysis, the scope of legal aid statutes and the sufficiency of legal aid may be relevant considerations. Similarly, the cancellation of funding of the Court Challenges Program should be considered relevant, as interim costs will likely represent a last resort for matters where litigation funding was

[13] *Ibid*. at para. 11.937, citing *New Brunwick (Minister of health and Community Services) v. G. (J.), supra* note 11 at para. 55.
[14] [2001] 3 S.C.R. 1016.

reduced or discontinued due to that circumstance. The elimination of the Court Challenges Program has been described as a "hard blow for access to justice."[15] Bhaba noted that despite its limitations, "the Court Challenges Program represented a unique and important initiative to institutionalize access-to-justice."[16] According to Mathen, "Requiring the state to fund some litigation against itself, at times, may be necessary in order to uphold the fundamental values on which our legal system depends."[17] She goes on to say,

> If the government is unwilling to set aside funds for this purpose, and the courts continue to be wary of interim costs, private wealth and fundraising will quickly become the only game in town (supplemented somewhat by pro bono litigation). The losers will include not only the most downtrodden who cannot command attention at glittering charity events, but they will also include everyone whose need for the government to do no harm is buttressed by no more than state benevolence and the (occasional, weak) threat of political accountability.[18]

11. *Pro bono* programs under which lawyers donate their services to clients in need have been expanded in response to the rise of self-represented and unrepresented parties in Canadian courts, particularly in civil justice settings.[19] The courts' exercise of discretion with respect to costs should not become a disincentive for *pro bono* representation, in its design or its implications. Although the public service obligation of the legal profession is manifested in the provision of *pro bono* services, requiring counsel to carry the costs of litigation including disbursement costs rather than examining the appropriateness of advanced and other costs awards to facilitate such access to justice may discourage this activity by placing too large a burden on individuals particularly for significant public interest test cases at first instance.[20] As Justice Feldman for the Ontario Court of Appeal

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[15] Louise Arbour & Fannie Lafontaine, "Beyond Self Congratulation: The Charter at 25 in an International Perspective" (2007) 45 Osgoode Hall L.J. 239 at 274.
[16] Faisal Bhabha, "Institutionalizing Access to Justice: Judicial, Legislative and Grassroots" (2007) 33 Queen's L.J. 139 at 165.
[17] Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2009) 25 Nat'l J. Const. L. 191 at 204.
[18] *Ibid*.
[19] Lorne Sossin, "The Public Interest, Professionalism, and *Pro Bono Publico*" (2008) 46 Osgoode Hall L. J. 131.
[20] Sossin notes that providing costs incentives "may not be necessary in the context of a large urban firm, but in smaller centres and rural areas, lawyers may find that taking on a significant case pro bono without the hope of recovering costs may prove prohibitive." *Ibid*. at 144.

affirmed in *Cavalieri*, access to justice is an appropriate criterion to consider in the awarding of costs:

> I agree with the submission of PBLO that the list of the purposes of costs awards should now include access to justice as a fifth consideration. It is clear that the profession sees the availability of costs orders in favour of *pro bono* counsel as a tool to potentially reduce the necessary financial sacrifice associated with taking on *pro bono* work and to thereby increase the number of counsel who may be willing and able to accept *pro bono* cases. This will facilitate access to justice. [21]

B. Availability of Costs in the Regulatory Context

11. The availability of a costs award in the context of quasi-criminal regulatory proceedings was recognized by this Court in *Ontario v. 974649 Ontario Inc.*[22] While this case dealt specifically with the constitutional jurisdiction of the provincial court to issue a remedy under s.24(1) of the *Charter* for failure to provide timely disclosure, this Court also acknowledged the concurrent and inherent jurisdiction of the superior courts to award costs. Significantly, the case recognizes the award of costs as a remedial tool for the vindication of *Charter* rights within the regulatory context.

12. Limiting interim costs and restricting the flexibility of judicial discretion in this regard would prevent important constitutional issues from being litigated. In particular, preventing the award of *Okanagan* costs in quasi-criminal cases would have a significant impact on the adjudication of constitutional issues since, as stated by Justice Ritter in the Court of Appeal, "many significant constitutional decisions started with quasi-criminal charges."[23] This is particularly so with respect to issues concerning freedom of expression, legal rights, equality, minority language and Aboriginal and treaty rights.[24] If costs are categorically not available in these types of cases there is a danger to the rule of the law if and when the state prosecutes individuals who are unable to raise constitutional

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[21] *Cavalieri*, *supra* note 7 at para. 45.
[22] [2001] 3 S.C.R. 575 ("*Dunedin Construction")*.
[23] Appellant's Record, *supra* note 1 at para. 22.
[24] See *R. v. Mercure*, [1988] 1 S.C.R. 234 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

challenges as part of their defense. This Court has in *R. v. Big M Drug Mart Ltd.*[25] and *R. v. Wholesale Travel Group Inc.*[26] recognized that a person charged with a law should have standing to challenge its constitutionality. If advance costs are categorically unavailable in the vast majority of cases where offences are tried by a court of statutory jurisdiction, this standing right, as well as other constitutional rights that may be raised in its defense, may be illusory.

13. Durbach has noted that there is a growing appreciation by courts internationally of the necessary interdependence of human rights (political, social and economic), such that the grounds for making a distinction between criminal and civil proceedings, particularly in respect of legal aid, are becoming less tenable.[27] Arguably, regulatory offences which in many ways fall between the two should not be relegated to a category where neither legal aid nor civil costs awards are available. Rather, the analysis should focus on the nature of the rights at stake and/or the public interest aspect of the proceedings together with the other elements of the *Okanagan* test where interim costs are sought.

C. *Okanagan* and *Little Sisters*

14. The test for interim costs enunciated in *Okanagan* and modified in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*,[28] provides a very narrow set of circumstances in which a party may receive them. The bar has been set very high for public interest litigants, possibly too high when one reviews the subsequent reported cases virtually all of which have refused to grant the request. It is indeed an exceptional and rare order that would be even more infrequent if the Appellant's submissions on the application of the factors were to be followed.

15. The Asper Centre is not suggesting herein that the test for advanced costs should be rewritten within the context of this Appeal. It does respectfully submit that the test

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[25] [1985] 1 S.C.R. 295.
[26] [1991] 3 S.C.R. 154.
[27] Andrea Durbach, "The Right to Legal Aid in Social Rights Litigation" in Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) at 63.
[28] [2000] 2 S.C.R. 1120 [*Little Sisters*].

established in *Okanagan* does provide an approach to this exceptional order that is contained, accountable and practical, and that should not be unduly restricted. Such awards fall at one end of a spectrum of costs awards in public interest litigation that provides nuanced, flexible and individually tailored approaches to enable meaningful public participation in our court system.

16. The Asper Centre respectfully submits that a strict application of the "public importance" aspect of the test in *Little Sisters* may be too narrow an approach that would further restrict the availability of the interim costs remedy in deserving cases. The addition of the requirements that a case be "special enough" or "rare and exceptional" introduces a highly subjective and vague element that arguably reduces the accountability and practicality of the interim costs award.

17. In respect of the impecuniosity requirement of the test – establishing that the applicant genuinely cannot afford the litigation – there appears to be a tendency to overestimate the ability of parties to afford litigation contrary to the concerns that have been consistently raised about the inability of even the middle class to have sufficient financial resources to access the court system.[29] For example, in *Doe v. Canada*, the Federal Court held that a plaintiff that was of modest income was far from being impoverished and thus did not meet the test.[30]

18. The essential inquiry into the impecuniosity of the applicant for interim costs also needs to be grounded in current economic reality, which has meant a reduction in legal aid funding (unavailable in any event in respect of this case), decreased ability of middle income earners to afford legal services, and the decreased availability of charitable dollars to fund such endeavours on behalf of marginalized communities. Impecuniosity is at the core of concerns about access to justice that advanced costs orders are designed to address, but to define it so narrowly as to require unrealistic efforts at fundraising or to place unrealistic burdens on *pro bono* counsel, particularly in relation to the costs of

[29] Right Honourable Beverly McLachlin, *supra* note 8.
[30] (2005), 273 F.T.R. 60. Note that the plaintiff also failed to meet the other criteria of the test.

experts and other disbursements, sets the bar so high as to undermine the principles underlying the Court's ruling in *Okanagan* altogether. In *Abdelrazik v. Canada*,[31] the order for advanced costs was denied on the basis that counsel was providing *pro bono* services and that the court was not satisfied that counsel would need to withdraw despite evidence that it would cause counsel personal hardship to continue without remuneration. Additionally, the Federal Court was not satisfied that the applicant had fully explored alternative funding arrangements despite evidence that funding by friends and relatives would expose them to criminal sanctions.

19. The European Court of Human Rights, in *Airey v. Ireland*,[32] long ago acknowledged that the ability to present a case "properly and effectively" before a court was intrinsic to the right of access to courts. The Courts below appropriately acknowledged that an imbalance in resources is a relevant consideration[33] in the approach to costs in *Okanagan* which acknowledges that one of the purposes of costs awards in public interest litigation stems from "the desirability of mitigating severe inequality between litigants"[34] and thereby facilitating equal and symmetrical participation in the legal system. Despite the Appellant's submissions in regard to the total amount of costs ordered to be paid to the Respondent, it should be noted that the amount at issue in this appeal relates in particular to the ability of the Respondent to meet the extensive expert evidence submitted by the Appellant in the case. While the Crown should not be viewed as having unlimited funds to pay for the litigation against it, it is appropriate to address the imbalance in resources which it may have actually brought to the litigation in question.[35]

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[31] [2008] F.C.J. 1046; (2008) 73 Imm. L.R. (3d) 139 [*Abdelrazik*] at paras. 31, 36, 37.
[32] (1979) 2 EHRR 305.
[33] Appellant's Record *supra* note 1 at para.55.
[34] *Okanagan*, *supra* note 3 at para. 31.
[35] For example, in *Abdelrazik* (*supra* note 31) there was a significant discrepancy in the end between the government's legal expenditures ($880,089.58) and the costs ultimately awarded to Abdelrazik ($47,500.00). Canada, Parliament, House of Commons, Debates, 40th Parliament, 2nd Session, Volume 144, Issue 110, November 16, 2009, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=2&DocId=4225811> and *Abdelrazik v. Canada* (2009), F.C. 816 (Canlii).

PART IV – COSTS

20. The Asper Centre seeks no costs in the appeal and respectfully requests that none be awarded against it.

PART V – ORDER REQUESTED

21. The Asper Centre takes no position on the disposition of the appeal.

22. The Asper Centre respectfully seeks permission to present oral argument at the hearing of this appeal.

All of which is respectfully submitted, this 30th day of March, 2010

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Lorne Sossin

Counsel for the Asper Centre

PART VI- TABLE OF AUTHORITIES

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