S.C.C. File No. 33092

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Alberta)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Appellant

and

GILLES CARON

Respondent

and

CANADIAN CIVIL LIBERTIES ASSOCIATION, COUNCIL OF CANADIANS WITH DISABILITIES, COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA, DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, ASSOCIATION CANADIENNE-FRANÇAISE DE L'ALBERTA, CHARTER COMMITTEE ON POVERTY ISSUES, POVERTY AND HUMAN RIGHTS CENTRE AND WOMEN'S LEGAL EDUCATION AND ACTION FUND

Interveners

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PART I - STATEMENT OF FACTS

1. The Intervenors, the Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre and Women's Legal Education and Action Fund [the "Coalition"] offer no comments on the facts as outlined by the Appellant and Respondent.

PART II – POINTS IN ISSUE

2. The Coalition takes no position on whether the Appellant should have been granted advance costs and confines its submission to the nature of the applicable test.

3. The Coalition's position is that the "interests of justice" component of the criteria for an award of advance costs under *Okanagan Indian Bands*[1] must have regard to the societal interests that are sought to be furthered through official language minority claims, and equality rights claims brought by disadvantaged groups. It is because of the societal interests at stake that justice requires claimants seeking to advance the social and political inclusion of marginalized and minority groups to have access to the courts, whether their claims arise in defence to proceedings brought by the state or through the positive assertion of rights. These cases are by definition "exceptional".

4. In addition, the Coalition's position is that the underlying rationale for the existence of judicial discretion to make an award of advance costs provides a principled basis for finding that the inherent jurisdiction of a superior court extends to authorizing that court to make an award of costs in an inferior court proceeding.

PART III – STATEMENT OF ARGUMENT

Introduction

5. The first three steps of the test laid out in *Okanagan* to structure the discretion to award advance costs dealing with the impecuniosity of the litigant, the merit of the claim

and the public importance and novel character of the claim are all relatively straightforward, capable of further refinement over time, and provide adequate guidance to trial judges. However, in the Coalition's submission, the additional requirement that a case be "rare and exceptional" and "special enough" results in significant indeterminacy. The Appellant has raised the scope and application of the *Okanagan* test as an issue on appeal and the Coalition submits that this an important opportunity for this Court to clarify and expand upon the situations in which the "interests of justice" require an advance costs award.

6. The Coalition submits that the courts' discretion to award costs should be understood as fulfilling two important and related functions within Canadian constitutional democracy. First, it assists the citizenry in holding the state to account for unconstitutional actions. This rationale is analogous to the discretion to grant public interest standing to ensure that potentially unconstitutional laws or government actions are not immunized from judicial scrutiny[2]. According to the reasons of Laskin J. in *Thorson v. Canada (A.G.)* "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[3] Similarly, *Okanagan* contemplates cases in which there is no way to address a question of public importance except through an award of advance costs. The principle supports Binnie J.'s observation in *Little Sisters* that "[t]he public has an interest in whether or not its government respects the law."[4]

7. Second, *Okanagan* is concerned with addressing profound asymmetries in Canadian society and in Canadian law that amount to a "profaning of legal values," and,

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[1] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCC 371. [hereinafter *Okanagan*]

[2] *Canadian Council of Churches v. Canada(Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at para.36

[3] *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138 at p.145

[4] *Little Sisters Book and Art Emporium v. Canada*, [2007] 1 S.C.R. 38, at para. 130 (per Binnie J., dissenting)

in particular, a profaning of the right to equality under the rule of law.[5] In *Okanagan,* the Court was justly concerned about the precarious and unequal position of an Aboriginal band. A similar requirement to provide an antidote for the extreme power imbalance in accessing courts arises in some cases involving the rights of minority and historically disadvantaged groups. The Coalition's submissions focus on this second counterbalancing function of costs awards.

8. The meaning and legal requirements of the "interests of justice" under the *Okanagan* test must be considered in light of a contemporary understanding of the rule of law, the imperatives of substantive equality and the equal access to justice as well as the legal principles embedded in Canada's international human rights obligations. These three interrelated sets of principles provide the foundation and parameters for including claims that seek to advance the social and political inclusion of marginalized and minority groups within the narrow class of exceptional cases eligible for advance costs.

9. From the perspective of the Coalition, this appeal is concerned with the meaningful opportunity to exercise rights enshrined in the *Charter*, and whether it is consistent with the interests of justice to have constitutionally enshrined rights that cannot be exercised by their intended beneficiaries. The judicial discretion to award advance costs in exceptional cases is one limited but important means through which courts can ensure the proper administration of justice.

10. This question is of particular concern to the Coalition because its member organizations seek to obtain substantive equality for groups that suffer "social, political and legal disadvantage in our society", groups for whom lack of equal access to the courts is both an indicia of systemic inequality, and a systemic impediment to the enforcement of constitutional equality rights, including s. 15 equality rights.[6]

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[5] K. Froc, "Is the Rule of Law the Golden Rule? Accessing "Justice" for Canada's Poor", [2008] 87 *Can. Bar Rev.* 460 at 510-511. [hereinafter *Froc*]

[6] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 at para 10 (QL) (per Wilson J.); *R. v. Turpin,* [1989] 1 S.C.R. 1296 at p.1333 (para 47 QL)

11. The Coalition's submissions are informed by the social reality that poverty and low income status are disproportionately concentrated among women, people with disabilities, racial minorities and Aboriginal people.[7] These groups are the targeted beneficiaries of constitutional rights and therefore have legitimate expectations that they will be able to obtain that benefit. However, systemic barriers to the court process reinforce subordination of poor litigants who are members of historically marginalized groups and as a consequence subvert justice in a constitutional democracy.

The Rule of Law, Substantive Equality and Access to Justice

12. The rule of law is an unwritten constitutional principle which provides a foundation for the exercise of all powers under the Canadian Constitution including the exercise of the courts' equitable jurisdiction.

13. The rule of law describes the state of a society where law is supreme, that is, where the highest representative of the Crown as well as the most humble citizen must act in accordance with and benefit from the same protection of the law. This presupposes the existence of a right of access to justice. Without access to justice the rule of law cannot be maintained. The state is not bound by law where it can violate rights with impunity, knowing that it will not be called upon to justify its actions in open court.

14. The courts have a role as guardian of the Constitution and they cannot exercise this function unless constitutional issues can be brought to court for adjudication. If disadvantaged members of society cannot bring claims, then the important dialogue between Parliament and the courts within which the courts are the "constitutionally mandated referee" cannot occur.[8] Constitutional litigation will be limited to those matters of interest to groups with the means to finance their own litigation.

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[7] Aboriginal persons, recent immigrants, "visible minorities," persons with disabilities, and female lone parents live in families below the Statistics Canada low-income cut-offs "LICOs" in disproportionate numbers; Statistics Canada, *Women in Canada 2005* (Ottawa: Statistics Canada, 2005) at 145, 146, 200, 228, 254, and 297.

15. The rule of law also encompasses the value of equality. Under the traditional Diceyan conception the equality component of the rule of law was understood to be satisfied by mere formally equal access to the courts. However, today, the rule of law must be understood in light of the norm of substantive equality. The *de facto* exclusion of disadvantaged groups from the courts is inconsistent with substantive equality.

16. This Court has consistently endorsed a substantive conception of s. 15 equality rights and statutory human rights protections.[9] The norm of substantive equality means that the right of access to justice, and by necessary implication the rule of law and the interests of justice, can only be satisfied if barriers, including financial barriers to disadvantaged groups are removed so they can have meaningful access to the courts to enforce their *Charter* rights.[10]

17. Integrating the touchstone of equality shifts our understanding of the rule of law away from purely procedural terms and gives it a substantive component. Within this framework, the rule of law must be understood as requiring "not only orderly law-making, but *justice*."[11] The notion that the rule of law exists to protect justice is not novel or controversial. Canadian courts have recognized that lack of meaningful access to assert meritorious claims related to fundamental constitutional rights flouts the very notion of legality.[12] In the context of this case, the rule of law supports the creation of a presumption in favour of making an award of advance costs where these groups of litigants meet the *Okanagan* criteria. Canada's constitutional democracy depends upon

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[8] *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at paras 105, 111, 116; *Vriend v. Alberta,* [1998] 1 S.C.R. 493 at paras. 36, 132-135

[9] *Andrews v. Law Society of British Columbia*, *supra*; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Vriend v. Alberta, supra*; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R v. Kapp,* [2008] 2 S.C.R. 483

[10] P. Hughes, "Recognizing Equality as a Fundamental Constitutional Principle", (1999) 22 *Dalhousie Law Journal* 5, at p. 33

[11] Froc, *supra* at p. 466

[12] *British Columbia Government Employees' Union v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214 at p. 229-230

the lessening of poor and marginalized people's "experience of oppression within the justice system".[13]

Legal Principles Embedded in International Human Rights Protections

18. Canada's obligations under international human rights law has as a central component the legal commitment to effective access to the courts to seek remedies for rights violations. Moreover, it is clear that the duty to ensure that people do have access to the courts to seek remedies for rights violations, imposes obligations on state parties to provide rights adjudication mechanisms that are accessible.[14]

19. Articles 14(1), 26, and 2(2) of the *International Covenant on Civil and Political Rights* (ICCPR) require substantively equal access to the courts. Conditions that have the effect of preventing individuals from effectively exercising their rights are considered to violate the ICCPR. The Human Rights Committee has held that a rigid duty under law to award costs to a winning party, without discretion to consider its implications "for access to court" by rights claimants violates Article 14(1) in conjunction with Article 2 of the ICCPR[15].

20. All of the international human rights instruments contain a requirement for states to provide equal access to courts and tribunals in order to ensure that any person whose rights are violated have an effective remedy. These include the: ICCPR[16]; the *Convention on the Elimination of All Forms of Racial Discrimination*[17]; the *Convention*

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[13] Froc, *supra* at 463

[14] *Universal Declaration of Human Rights*, G.A. Res. 217 (III) UN GAOR, 3d Sess., Supp. No. 13, Doc. A/810 (1948) 71Universal Declaration, Articles 8, 10

[15] *International Covenant on Civil and Political Rights,* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force for Canada Mar. 23, 1976 Articles 14(1), 26, and 2(2) ; *Äärelä and Näkkäläjärvi v. Finland* Communication No. 779/1997 24 October 2001 CCPR/C/73/D/779/1997 at para 7.2

[16] ICCPR, *supra*, Articles 2(3)(a)

[17] *International Convention on the Elimination of All Forms of Racial Discrimination,* G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969: Art.6

on the Elimination of All Forms of Discrimination Against Women;[18] and the *Convention on the Rights of Persons with Disabilities.*[19]

21. It is generally understood by international treaty bodies that the duty of state parties to fulfil the obligation to provide effective remedies for rights violations imposes an obligation on governments to remove economic and other barriers to the effective presentation of a claim. For example, the CESCR Committee explained in General Comment No.16 that the duty of states parties to fulfil rights includes an obligation to "take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality," and that such steps should include establishing "appropriate venues for redress such as courts and tribunals or administrative mechanisms that **are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women**"[20]. [emphasis added]

22. Although the primary responsibility for ensuring the accessibility of rights adjudication rests with governments, courts also have a role to ensure that justice is accorded - and available - to the parties before them. The substantive equality principles embedded in international human rights instruments, particularly the duty on states to ensure that people can access the courts to seek remedies for rights violations, provides a further grounding for the court's equitable jurisdiction to award costs to minority and equality seeking groups.

Charter **Litigation as a Means to Achieve Full Social and Political Inclusion**

23. The *Canadian Charter of Rights and Freedoms*, and in particular the s.15 right to equality, is the central mechanism to remedy the stark inequalities within Canadian law

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[18] *Convention on the Elimination of All Forms of Discrimination against Women,* G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981): Art. 2(c)

[19] *Convention on the Rights of Persons with Disabilities* A/RES/61/106, Annex 1, entered into force March 5, 2008: Art. 13

[20] Committee on Economic Social and Cultural Rights, General Comment No. 16 (2005), at para 7

and society which give rise to systemic discrimination and the continued exclusion of members of marginalized groups from full social and political participation.

24. The *Charter* reflects values that Canadians have endorsed as being of fundamental and overriding importance. It is in the public interest to ensure that such values are given full consideration and effect in courts of law. The *Charter* is "the primary vehicle through which international human rights achieve domestic effect."[21]

25. It is to be hoped that one day, instances of systemic violations of *Charter* rights will be rare and exceptional. Where the claim concerns a systemic violation of *Charter* rights, however, it is inappropriate to ask whether ongoing violations are exceptional enough to warrant an award of advance costs. The supervisory jurisdiction of courts to hold government accountable to the rules by which it is bound is sufficient to justify the need for a hearing on those merits. Where financial resources are a barrier to such a hearing, and *Charter* rights are at stake, equitable jurisdiction may be legitimately invoked.

26. *Charter* rights are entrenched in our Constitution as a means of identifying and providing remedies for both individual and systemic injustices. Given that systemic injustices are felt most keenly by members of groups suffering social, political and legal disadvantage, and they are also economically vulnerable members of our society, courts should be encouraged to exercise their equitable jurisdiction in such a way as to ensure that cases affecting *Charter* rights are resolved on their merits, rather than allowing them to perish for lack of resources.

27. This is particularly true where the results of such cases affect the whole of Canadian society and thus are part of the *Charter*'s promise of transformation. Cases such as *Vriend*, *Via Rail* and *McIvor*, which might not have been heard in the absence of government funding, have helped to clarify the fundamental rights of members of

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[21] *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para 73

disadvantaged groups in Canadian society, and to affirm the principle that everyone is entitled to the equal benefit and protection of the law, without discrimination.[22]

28. Nor is it correct to assume that it is sufficient to leave the interests of the poor and disadvantaged to be handled by the legal profession on a *pro bono* basis. Canadian courts have recognized the importance of legal representation in *Charter* claims[23] and the need to extend the availability of *pro bono* resources through the award of costs in public interest cases. [24]

29. The Coalition submits by way of illustration of its proposed approach, that in the s. 15 context, the following criteria, while not necessarily exhaustive, should suffice to establish *prima facie* entitlement to advance costs:

- lack of recourse to other sources of funds to begin or continue the litigation;
- the claim has a reasonable chance of success;
- the case is a test case in that it involves breaking new jurisprudential ground;
- the claim is brought by a minority or a marginalized, historically disadvantaged group;
- the case has the potential to advance substantive equality by working toward the full social and political inclusion of a disadvantaged group to which s. 15 of the *Charter* applies; and
- the claim can arise either in defence to proceedings brought by the state or through the positive assertion of a rights claim.

30. Judicial discretion to award advance costs should not be constrained by a requirement that such awards be rare. As long as *Charter* rights are being violated on a systemic basis, and obtaining effective remedies depends on access to the courts,

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[22] *Vriend v. Alberta*, *supra*; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650; *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2009] B.C.J. No. 669 (B.C.C.A.)

[23] *John Carten Personal Law Corp. v. British Columbia (Attorney General),* 153 D.L.R. (4th) 460, per MacEachern CJBC (dissenting) at paras 85-86.

[24] *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.), at para. 19

frequency of rights claiming should not be a factor justifying a refusal to grant advance costs.

Advance Cost Awards: Inherent Jurisdiction

31. The Coalition submits that the underlying rationale for the existence of the discretion to make an award of advance costs provides a principled basis for finding that the inherent jurisdiction of a superior court extends to ensuring that the interests of justice are met in an inferior courts' proceedings.

32. A superior court can and should utilize its inherent jurisdiction to contribute to the administration of justice by ensuring that hearings are conducted efficiently and in accordance with the principles of natural justice. In particular, courts must act to correct unremediated injustice.[25] This power extends to ensuring access to legal rights and remedies in inferior courts where the inferior court is considered powerless to act or cannot act in a timely fashion.[26]

PART IV – SUBMISSIONS REGARDING COSTS

33. The Coalition makes no submission on costs.

PART V – ORDER REQUESTED

34. The Coalition requests the right to make oral submission of up to 15 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

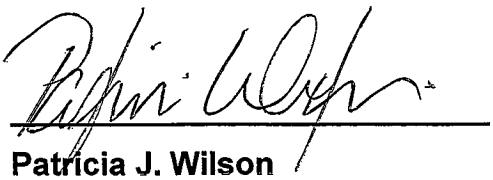
Dated: March 25, 2010

Gwen Brodsky

Melina Buckley

[25] *Board v. Board*, [1919] A.C. 956 (J.C.P.C.)

[26] K. Mason, "The Inherent Jurisdiction of the Court" (1983) 57 Australian L.J. 449 at 456



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PART VI - TABLE OF AUTHORITIES

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21.	Committee on Economic Social and Cultural Rights, General Comment No. 16 (2005)	21
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25.	Statistics Canada, *Women in Canada 2005* (Ottawa: Statistics Canada, 2005)	11

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26.	*Convention on the Elimination of All Forms of Discrimination against Women,* G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981: Art. 2(c)	20
27.	*Convention on the Rights of Persons with Disabilities* A/RES/61/106, Annex 1, entered into force March 5, 2008: Art. 13	20
28.	*International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969: Art. 6	20
29.	*International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force for Canada Mar. 23, 1976: Articles 14(1), 26, 2(2) and 2(3)(a)	19
30.	*Universal Declaration of Human Rights,* G.A. res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, Doc. A/810 (1948) 71 Universal Declaration, Articles 8, 10	18