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Cost Strategies for Litigants: The Significance of *R. v. Caron*

Joseph J. Arvay, Q.C., and Alison Latimer*

I. INTRODUCTION

There is no want of important and interesting public law cases to be litigated in our courts. There is of course a big problem in how these cases are to be financed. It is a rare client with a *Canadian Charter of Rights and Freedoms*¹ issue who has deep pockets, and deep pockets are required for almost any Charter challenge. It is therefore a constant struggle to find ways in which to move the litigation forward. With cases that do not require more than a day or two of court time and a few days of preparation, there is always the possibility that a lawyer will take on the case *pro bono*, with at least some prospect of being able to collect and keep an award of costs made after the case is over. While not common, it is still possible for an unsuccessful public interest litigant to obtain a cost award after the case is over² and for successful public interest litigants there is the prospect of obtaining full or near full indemnity for costs.³

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² See, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315 (S.C.C.), where the unsuccessful applicants were awarded costs pursuant to r. 57.01(2) of the *Ontario Rules of Civil Procedure*, O. Reg. 560/84 that expressly authorized such an award; see also *Barclay (Guardian ad litem of) v. British Columbia*, [2006] B.C.J. No. 2194, 2006 BCCA 434 (B.C.C.A.).

³ This is an issue that has recently been addressed by the British Columbia Court of Appeal: *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563 (B.C.C.A.); *Vancouver (City) v. Zhang*, [2011] B.C.J. No. 469, 2011 BCCA 138 (B.C.C.A.) [hereinafter "*Zhang*"]. Very recently, in *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44, at paras. 158-159 (S.C.C.), the Supreme Court of Canada upheld an order of full indemnity costs that was awarded at trial following the principles articulated in *Adams*. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1, [1992] 1 S.C.R. 3 (S.C.C.); *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)*, [1998] O.J. No. 4331, 117 O.A.C. 174 (Ont. C.A.); *Assn. of Professional Engineers of Ontario v. Ontario (Minister of Municipal Affairs and Housing)*, [2007] O.J. No. 3440, 229 O.A.C. 245 (Ont. S.C.J.).

There are, of course, limits to how many or what kind of cases counsel can take on *pro bono* speculating that his or her services will be compensated in an award of costs. For even the “average” Charter challenge, hundreds of hours or more will be involved. For most Canadians this is simply out of their reach and for most lawyers beyond their willingness or ability to be philanthropic. It is for these types of cases that the law of advance (or interim) costs is needed. In the last few years, we have seen the pendulum swing in this area of the law. Prior to 2003, the very concept of advance costs in public interest litigation was, for most lawyers and judges, not only unheard of, but absurd. Absurd to suggest that a court could make the opposing side to a lawsuit finance the other side; outrageous, even, to suggest that this be done in advance of the litigation proceeding irrespective of the outcome and with every possibility that the case would fail. But then came *Okanagan*⁴ which not only granted advance costs in Aboriginal litigation at the behest of a very poor First Nation thrust into litigation with the Crown — a very significant development — but in which the Supreme Court of Canada went on to hold that such advance costs orders could be granted in any public interest litigation if certain, albeit strict, conditions were met. For public law lawyers it was a momentous day, but from the moment the decision was rendered I worried about its longevity and how its longevity might turn on how this newfound and powerful weapon (and make no mistake, that is what it was) was going to be deployed by the ground troops in the trenches of constitutional litigation.

Victory was short-lived. Although I declined to take on many advance costs applications after *Okanagan* because I did not think any of them were the “right case”, I did decide to bring an advance costs application when my long-time client, the Little Sisters Book and Art Emporium, was once again harassed by Canada Customs notwithstanding that we had barely left the Supreme Court of Canada after an arduous, 10-year odyssey to that Court.⁵ This felt like the right case to test the limits of *Okanagan*. My clients were not desperately poor, indeed were comfortably middle class; they operated the store through a small company but there was no way they could afford to take on Customs

⁴ *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, 2003 SCC 71, at para. 1 (S.C.C.) [hereinafter “*Okanagan*”]. Joseph J. Arvey was counsel for the intervener Chief Roger Williams in that case.

⁵ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 SCC 2, at para. 5 (S.C.C.) [hereinafter “*Little Sisters #2*”].

again, and it seemed very wrong to me that they would have to finance another challenge to the Customs practices that they thought they had more or less already demonstrated were unconstitutional. Surely, I thought, if Customs wanted to have another court battle, it should be required to finance it and not my clients. I met with success at the British Columbia Supreme Court⁶ and then lost in the B.C. Court of Appeal.⁷ I could have stopped there, and in retrospect maybe I should have, but I thought (and my clients agreed) that if the Supreme Court of Canada was truly committed to the principle of access to justice for ordinary Canadians, then this was the case to find out. We lost badly. I felt quite responsible for the decision that seemed to be the death knell for advance costs awards.⁸

Then word came down that the Supreme Court of Canada would be hearing another advance costs case in the matter of *Caron*.⁹ We were retained by the Canadian Civil Liberties Association to intervene in that case and I hoped to find a way to redeem, to some extent, the havoc I seemed to have played on the law of advance costs in *Little Sisters #2*. I called my former student and now friend Professor Benjamin L. Berger, then of the Faculty of Law of the University of Victoria, to see if he was interested in co-counselling me on the file and he enthusiastically agreed. He warned me that he had never been in any court before and would be happy to help write the factum and be delighted to appear as co-counsel with me in the Supreme Court of Canada, but that I would be the one to be “throwing the snowballs”. A day before the case was to be argued in the Supreme Court of Canada, I called Ben to tell him I had come down with a nasty flu and was not feeling well enough to travel, so he was

⁶ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2005] B.C.J. No. 885, 2005 BCSC 606 (B.C.S.C.).

⁷ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2005] B.C.J. No. 291, 2005 BCCA 94 (B.C.C.A.). Our fate may well have been sealed, perhaps long before we got to the Supreme Court of Canada, by the fact that in the *Tsilhqot'in Nation* land title case, plaintiff's counsel had received an advance costs award in *Tsilhqot'in Nation v. British Columbia*, [2004] B.C.J. No. 937, 2004 BCSC 610 (B.C.S.C.) [hereinafter “*Tsilhqot'in* (2004)”], and had been paid some \$10 million as “costs” as of 2006, and the trial was not yet over. The quantum of costs incurred not only attracted adverse judicial commentary in the B.C. Court of Appeal in *Tsilhqot'in Nation v. British Columbia*, [2006] B.C.J. No. 2, 2006 BCCA 2, at paras. 18, 73, 89, 112, 122-124 (B.C.C.A.) [hereinafter “*Tsilhqot'in* (2006)”], but was also very much brought to the attention of the Supreme Court of Canada hearing *Little Sisters #2*. While \$10 million is a lot of money, what few people have asked is how much the lawyers for the governments had spent, especially since they were outside counsel and thus likewise in receipt of public funding and “in advance and irrespective of the outcome”.

⁸ *Little Sisters #2*, *supra*, note 5.

⁹ *R. v. Caron*, [2011] S.C.J. No. 5, 2011 SCC 5 (S.C.C.) [hereinafter “*Caron*”].

going to have to make his first-ever court appearance, do it in the Supreme Court of Canada and do it solo. I watched him from home via webcast and, in my humble opinion, he was dazzling.

That personal note aside, *Caron* is not a very interesting decision on the issue of advance costs (nor perhaps is my personal note). The best that can be said about *Caron* is that the Court may not have displayed quite the same hostility toward advance costs awards as it did in *Little Sisters #2*. As will be seen, we see a relaxation of certain elements of two prongs of the three-prong test¹⁰ for advance costs: in particular, what makes a case of “public importance” and when the “impecuniosity” requirement is met. But the Court still requires that such awards only be granted in exceptional cases. In its deference to the rulings of the lower courts, it may have sent a signal that the question of advance costs is a matter for the trial courts and perhaps courts of appeal which “have primary responsibility for the administration of justice in the province”.¹¹ We suspect, therefore, that it will be a long time before there is another advance costs case in the Supreme Court of Canada. It also means that counsel likely only have one shot for an order of advance costs and that will be in the court of first instance. It might also possibly mean that instead of “*Rowbotham*” orders,¹² “*Caron*” orders will be made in certain, albeit a very narrow category of, criminal cases. Where the case might have more important implications is with respect to the Court’s ruling on the inherent power of the superior court to come to the aid of an inferior tribunal. Given that the Court recognized an express power of the superior court to come to the aid of an inferior court (and likely as well an administrative tribunal) whenever it is “essential to avoid an injustice”, this is a power that may now only be limited by the imagination of inventive lawyers and explicit statutory provisions to the contrary.

¹⁰ Being (1) *prima facie* merit, (2) public importance and (3) impecuniosity.

¹¹ *Id.*, at para. 5.

¹² In *R. v. Rowbotham*, [1988] O.J. No. 271, 41 C.C.C. (3d) 1 (Ont. C.A.) [hereinafter “*Rowbotham*”], the Ontario Court of Appeal held that the denial of state-funded counsel to an indigent, unrepresented accused facing serious and complex criminal charges violates the right to a fair trial guaranteed by the Charter. The Court determined that the appropriate remedy under s. 24(1) of the Charter was a conditional stay of proceedings pending the appointment of state-funded counsel by the Attorney General or legal aid program. Now accused individuals can bring a *Rowbotham* application wherein the accused must show on a balance of probabilities that he or she has been denied legal aid and has exhausted the legal aid appeal process, that he or she is indigent, that the trial involves serious and complex issues and that the applicant will be denied a fair trial absent the assistance of legal counsel. If the accused individual is successful, the court orders a stay of proceedings unless and until the Attorney General or legal aid provides funding for counsel.

Justice Abella's concurring opinion also raises an interesting question as to whether statutory courts or tribunals will have the jurisdiction to order advance costs themselves and without the aid of the superior courts and indeed to grant other orders that up until now were considered the sole reserve of courts with inherent jurisdiction.

II. BRIEF HISTORY OF INTERIM COSTS IN CANADA

Okanagan was the first of three cases rendered by the Supreme Court of Canada dealing with advance costs in the context of public interest litigation. *Okanagan* was a civil case that was initially heard in the superior court of British Columbia. Members of four Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*.¹³ 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 Supreme Court of Canada noted that the discretionary power to award interim costs had already been recognized in Canada and was more typically exercised in matrimonial, trust, bankruptcy and corporate cases. Nevertheless, the Court held that interim costs were available in cases of public importance to ensure "that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance".¹⁴

The Court upheld an award of interim costs made by the B.C. Court of Appeal in *Okanagan* and in so doing, the Court set out the criteria governing the discretionary award in the context of litigation of public importance:

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

¹³ R.S.B.C. 1996, c. 159.

¹⁴ *Okanagan*, *supra*, note 4, at paras. 32-35, 38.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.¹⁵

The Court noted that while each of these are “necessary conditions that must be met for an award of interim costs to be available”, the fact that they are met in a given case is not necessarily sufficient to justify such an award.¹⁶ The case must also be “rare and exceptional” in order to attract interim costs.¹⁷

Okanagan-style interim costs were ordered in four superior court cases in the four years leading to the Supreme Court of Canada’s decision in *Little Sisters #2*. Three of these cases dealt with issues of Aboriginal rights or title.¹⁸ The fourth was *Little Sisters #2*.

When *Little Sisters #2* came before the Supreme Court of Canada, the Court was faced once again with a civil case arising out of proceedings in the superior court of British Columbia. The applicants in *Little Sisters #2* were a small corporation appealing a detention order made against four books by the Commissioner of Customs and Revenue. The applicants were successful in the superior court, but lost in the British Columbia Court of Appeal and again in the Supreme Court of Canada. In rejecting *Little Sisters Book and Art Emporium’s* request for interim costs, the majority made the stringent *Okanagan* analysis even more restrictive. The majority placed much emphasis on the “rare and exceptional” quality that any case warranting such an order must have. Perhaps the most stark illustration of why *Little Sisters #2* was such a defeat for constitutional litigators is the contrast between judgments of the dissent and the majority rendered in that case on this last factor. Specifically, the dissent was prepared to afford much greater deference to the judge at

¹⁵ *Id.*, at para. 40.

¹⁶ *Id.*, at para. 41.

¹⁷ *Id.*, at paras. 1, 31, 32.

¹⁸ *R. v. Fournier*, [2004] O.J. No. 1136, [2004] O.T.C. 260 (Ont. S.C.J.), revd [2006] O.J. No. 2434, 209 C.C.C. (3d) 58 (Ont. C.A.); *Tsilhqot’in Nation v. Canada (Attorney General)*, [2002] B.C.J. No. 1652, 2002 BCCA 434 (B.C.C.A.); reconsidered *Tsilhqot’in* (2004), *supra*, note 7; reconsidered *Tsilhqot’in* (2006), *supra*, note 7; *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418, 32 C.P.C. (6th) 258 (Ont. S.C.J.).

first instance on the question of whether a case was “special enough” to warrant an award of advance costs. The dissent would have upheld the chambers judge’s award of advance costs, at least in part, noting that “[w]hether a case, though special, is not ‘special enough’ or fails to ‘rise to the level’ of compelling public importance is a subjective test whose outcome will inevitably depend to a significant extent on the eye of the beholder.”¹⁹ In contrast, Bastarache and LeBel JJ. for the majority gave a singularity to the ratio of *Okanagan* putting advance costs awards practically out of reach of any future litigation when they noted: “The rule in *Okanagan* arose on a very specific and compelling set of facts that created a situation that should hardly ever reoccur.”²⁰

Okanagan-style interim costs were awarded in only five cases (including *Caron*) in the four years leading to the Supreme Court of Canada’s decision in *Caron*. Two of the five cases were superior court cases dealing with Aboriginal rights.²¹ One of the cases was actually two superior court actions that were being tried together. The first was a derivative action brought by Deloitte & Touche Inc. in its capacity as Trustee of the Estate of Bre-X Minerals Ltd., a Bankrupt; the second action was a class proceeding commenced by investors who lost money on the collapse of Bre-X Minerals Ltd. Interim costs were ordered against Deloitte & Touche, the Trustee, and that decision has been appealed to the Ontario Court of Appeal.²² A fourth case was a proposed class action for a number of classes or persons who claimed to be affected by invalid Temporary Guardianship Orders issued by the Director of Child and Family Services. Interim costs were ordered in favour of one of the children, whose case arose when she was a temporary ward of the state.²³ The fifth case was *Caron*.

¹⁹ *Little Sisters #2*, *supra*, note 5, at para. 154.

²⁰ *Id.*, at para. 78.

²¹ *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2008] F.C.J. No. 723, 2008 FC 574 (F.C.); *Québec (Procureure générale) c. Corneau*, [2010] J.Q. no 1019, 2010 QCCS 463 (Que. S.C.).

²² *Carom v. Bre-X Minerals Ltd.*, [2010] O.J. No. 5498, 2010 ONSC 6921 (Ont. S.C.J.) (leave to appeal granted January 25, 2011).

²³ *C. (L.) v. Alberta (Metis Settlements Child & Family Services, Region 10)*, [2011] A.J. No. 84, 2011 ABQB 42 (Alta. Q.B.).

III. CONTEXT OF *CARON*

As with any case, it is important to have regard to the particular context in which *Caron* arose. Specifically, Mr. Caron was subject to a very common quasi-criminal regulatory charge of failing to make a left turn safely. If convicted, he faced a fine of \$100. He admitted the underlying offence, but claimed that the proceedings were a nullity because the court documents were not provided to him in French. He claimed he had the right to use French in proceedings before the courts of Alberta. His position was that this right could not be abrogated and that the *Alberta Languages Act*²⁴ was therefore unconstitutional.

Mr. Caron's lawyer estimated that the matter would take two to five days. Mr. Caron exhausted his personal resources, including borrowed money. He also sought funding from the Alberta francophone association. The association refused to fund his case; however, he obtained two loans of \$15,000 each from its supporters. Mr. Caron sought additional donations and also received \$70,000 from the federal Court Challenges Program. He also solicited support over the Internet. Legal aid was not available.

The proceedings were before the Provincial Court of Alberta. After approximately 18 months of on-again-off-again hearings, Mr. Caron ran out of money. By this time, the Court Challenges program had been abolished.

The Supreme Court of Canada described the situation as follows:

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

The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage ("lop-sided", Ritter J.A. called it) over the accused in the creation of the crucial factual record on which an important

²⁴ R.S.A. 2000, c. L-6.

constitutional issue would be determined. A lopsided trial would not have put the languages issue to rest. Mr. Caron's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the challenge be properly dealt with.²⁵

Mr. Caron applied to the provincial court for interim costs. The provincial court was satisfied that he would be unable to complete the trial unless he was provided with funding and made an order for same pursuant to section 24(1) of the Charter.²⁶ The Alberta Court of Queen's Bench set aside this order and held that the provincial court lacked jurisdiction to make an order for interim costs;²⁷ however, the Alberta Court of Queen's Bench also recognized that Mr. Caron could not proceed without an award for interim costs and came to the assistance of the lower court by making such an order.²⁸ It was the validity of the latter order from the Alberta Court of Queen's Bench that was appealed to the Supreme Court of Canada.

IV. CARON'S THREE "IMPLICATIONS"

1. Quasi-Criminal Cases

The Crown argued forcefully that the context of the *Caron* case — the underlying quasi-criminal offence — disentitled Mr. Caron from an award of interim costs. This argument proceeded on the basis that costs regimes in the civil and criminal context are very different and costs awards are not generally available at all, let alone in advance, in criminal and quasi-criminal proceedings. The Crown argued that interim costs were really a civil remedy.

In our preparation for the appeal, it was this aspect of the case that concerned us the most. Costs were rarely ordered in criminal cases and then only where there was misconduct or abuse.²⁹ Nevertheless, we

²⁵ *Caron, supra*, note 9, at paras. 21-22.

²⁶ *R. c. Caron*, [2006] A.J. No. 1760, 2006 ABPC 278 (Alta. Prov. Ct.).

²⁷ *R. v. Caron*, [2007] A.J. No. 448, 2007 ABQB 262 (Alta. Q.B.).

²⁸ *R. v. Caron*, [2007] A.J. No. 1162, 2007 ABQB 632 (Alta. Q.B.).

²⁹ *Caron, supra*, note 9, at para. 49. A distinction has historically been drawn between "costs" and "funding". Costs are a matter of statutory and/or inherent jurisdiction for courts of first instance. Funding, in contrast, requires a legislative appropriation. Funding and cost orders can be made pursuant to s. 24 of the Charter. See, e.g., for funding *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.); for costs see *R. v. 974649 Ontario Inc.*, [2001] S.C.J. No. 79, 2001 SCC 81 (S.C.C.) [hereinafter "974649 Ontario

argued that superior courts always had inherent jurisdiction to award costs in a criminal case. We recognized that the rare instances where they had done so in the past were in cases where there was Crown misconduct, but argued that those instances were simply an illustration of a more general rule that a superior court could do so where there were exceptional circumstances. We argued that the law of advance costs where exceptional circumstances were required meshed rather nicely with the law of costs in criminal proceedings, which also required exceptional circumstances, and hence there was no doctrinal reason why the superior court could not, in a regulatory or criminal proceeding, order advance costs.

The Court in *Caron* spent little time discussing the role of costs in criminal proceedings and in two paragraphs sent a pretty clear message that its decision should be understood as more a branch of civil rather than criminal litigation. The plurality said:

I should make it clear that the present decision does not constitute a general invitation for applications to fund the defence of ordinary criminal cases where constitutional (including *Charter*) issues happen to be raised. In those cases the gravamen is truly the criminal offence. Here the traffic court context is simply background to the constitutional fight. A more appropriate analogy, as will be discussed, is the *Okanagan/Little Sisters (No. 2)* paradigm for public interest funding in a civil case.³⁰

And in its conclusion it said this as well:

Although costs are not generally available in quasi-criminal proceedings (absent special circumstances such as Crown misconduct of which there is none here), this case is more in the nature of regular constitutional litigation conducted (as discussed) by an impecunious plaintiff for the benefit of the Franco-Albertan community generally. In these unusual circumstances, Mr. Caron should have his costs on a party and party basis in this Court.³¹

Inc.”]; but the more common example (and misconception) of a “funding” order is a *Rowbotham* order, which actually only imposes a stay of the prosecution unless and until the Crown issues funding to the defence in circumstances where without funding the trial would be unfair. See, e.g., *R. v. Rowbotham*, *supra*, note 12, at 46 C.C.C. It is interesting that the Court in *Caron*, *supra*, note 9, now seems to use the terms “funding” and “costs” interchangeably: see, e.g., paras. 1, 6, 23, 38.

³⁰ *Caron*, *supra*, note 9, at para. 23.

³¹ *Id.*, at para. 49.

The question remains whether, notwithstanding these cautions, *Caron* will spawn applications for advance costs in situations where *Rowbotham* orders would otherwise have to be brought? It is at least possible that there might be such situations. We encountered one such situation in a case that preceded our involvement in *Caron*. We had been retained to defend Winston Blackmore, the “Bishop of Bountiful”, who was charged with practising “polygamy” contrary to section 293(1)(a) of the *Criminal Code*.³² The prosecution was ultimately stayed following a judgment of the B.C. Supreme Court quashing the decision to charge Mr. Blackmore as being unlawful for what we described as essentially “special prosecutor shopping”.³³ Prior to that decision, however, we were preparing an application for an order that would have been a type of hybrid between a *Rowbotham* order and an order of interim costs pursuant to the principles articulated in *Okanagan* and *Little Sisters #2*. Our thinking was that even if the Court would not order an absolute stay of the prosecution because of our allegation of “special prosecutor shopping”, the Court should at least conditionally stay the prosecution until there was funding for such prosecution (à la *Rowbotham*, except that the funding was a form of “remedy” for the abuse rather than a prospective remedy to ensure a “fair trial”). Alternatively, we would have argued directly for an order of advance costs on the basis of the analysis in *Okanagan/Little Sisters #2* because (somewhat like *Caron*) the case was more “constitutional” than “criminal”, although it was clearly both. We also believed that with an *Okanagan* analysis we might be entitled to higher levels of funding if we were successful³⁴ and that there should not be the same rather onerous “impecuniosity” requirements as existed in *Rowbotham*. We believed our case exceptional, in part, because Mr. Blackmore was being prosecuted under a law that the Criminal Justice Branch was presently on record as considering unconstitutional. Our premise was that if the Crown wanted to run a “test case” to establish the constitutional validity of a law then the Attorney General should pay for it without regard to whether Mr. Blackmore had the financial means to pay. Again, the emphasis was more on the need for funding in a criminal case because of its public importance than on the need for funding to ensure a fair trial, but admittedly both interests were engaged.

³² R.S.C. 1985, c. C-46.

³³ *Blackmore v. British Columbia (Attorney General)*, [2009] B.C.J. No. 1890, 2009 BCSC 1299 (B.C.S.C.).

³⁴ We address “quantum” issues below.

As noted above, that application was never brought because the prosecution was stayed, but it does at least provide another example of when an advance costs application might be brought in the criminal context.³⁵

Even if advance costs will not be used in purely criminal cases, perhaps because there is either legal aid or *Rowbotham* orders available, because neither is the norm for regulatory cases, it is difficult to see how the lid on *Caron* is going to be closed to other regulatory cases that otherwise meet the requirement of *Okanagan* and *Little Sisters #2*. Given the proliferation of regulatory offences, this type of offence is likely one of the most common ways that a citizen will interact with the state, and no doubt there will be other cases where issues of public importance are raised in such proceedings and, thus, assuming the other criteria are met, they could well attract advance costs awards.

2. Inherent Jurisdiction to Act in Aid

If *Caron* is important, it may be because of the robust interpretation it gave to the inherent power of the superior court to come to the aid of inferior courts or tribunals. In the past, this jurisdiction has been exercised only in certain categories of cases such as granting subpoenas, granting bail or dealing with contempt, but the Supreme Court of Canada has held that this “categories approach” is not appropriate. Instead, the Court adopted the view expressed in I.H. Jacob’s seminal article “The Inherent Jurisdiction of the Court” that the inherent jurisdiction of the court may be invoked “in an apparently inexhaustible variety of circumstances”.³⁶

While the Court held that this power should still be exercised “sparingly and with caution” and only where the inferior court or tribunal is “powerless to act”, it otherwise allowed for considerable application of

³⁵ We later brought a separate application for advance costs for Mr. Blackmore to participate in the polygamy Reference, which was more or less a pure *Okanagan/Little Sisters #2* approach. That application was dismissed in *Reference re Criminal Code of Canada (B.C.)*, [2010] B.C.J. No. 682, 2010 BCSC 517 (B.C.S.C.). The Court held that Mr. Blackmore did not have a direct interest in the outcome of the Reference and therefore did not need to be a “party” to the Reference. The Court found that costs are not generally awarded in a Reference and that, given the Court’s finding on the issue of party standing, Mr. Blackmore’s participation was not necessary to move the proceedings forward. The Court therefore dismissed the application.

³⁶ *Caron*, *supra*, note 9, at para. 29, citing I.H. Jacob, “The Inherent Jurisdiction of the Court” (1970) 23 *Curr. Legal Probs.* 23. See also, *e.g.*, *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.); *R. v. Cunningham*, [2010] S.C.J. No. 10, 2010 SCC 10 (S.C.C.); *R. v. Hinse*, [1995] S.C.J. No. 97, [1995] 4 S.C.R. 597 (S.C.C.).

the doctrine since it would seem to apply whenever it was necessary to “avoid an injustice”.³⁷ The Court did not seem to even limit the superior court’s power to act in aid of inferior *courts*, leaving open the possibility of superior courts acting in aid of *administrative tribunals* as well. One expects to find now a “variety of circumstances”, whether involving provincial courts (child protection proceedings come to mind) or administrative tribunals (the list is “inexhaustible”), where inventive counsel will be seeking the assistance of the superior courts. This, in other words, might be why *Caron*, a case we describe as not very interesting or important, turns out to be the “sleeper” of last year’s cases from the Court.

There is one limit, however, on the inherent power of superior courts to come to the assistance of an inferior tribunal, and that is if to do so would be to contravene a statutory provision. However, no contravention will be found simply because there are statutory provisions which cover similar territory (such as the various statutes in Alberta dealing with costs). The Court insisted that any contrary statutory provisions would have to be express and not implied before its inherent jurisdiction to “do what is essential ‘to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner’” could be displaced.³⁸

The issue of whether the Alberta Provincial Court had jurisdiction to make an award of interim costs was not before the Supreme Court of Canada and the Court expressly declined to comment on the correctness of the Alberta Court of Queen’s Bench assessment that the provincial court had no jurisdiction to make such an order.³⁹

However, Abella J.’s concurring opinion certainly leaves open the question whether inferior courts or tribunals might enjoy this power without the assistance of the superior court. She held:

It is worth remembering, as Binnie J. acknowledged, that this exercise of inherent jurisdiction was based on the premise that the provincial court lacked the jurisdiction to make the order. Regrettably that piece in the jurisdictional puzzle is not, strictly speaking, before us. Mr. Caron had made an unsuccessful application for *Okanagan* funding directly to the provincial court. The court concluded that while the

³⁷ *Caron, supra*, note 9, at para. 30.

³⁸ *Id.*, at paras. 32, 34.

³⁹ *Id.*, at paras. 13, 19.

Okanagan criteria were met, *Okanagan* costs could not be ordered by the provincial court. That decision was essentially undisturbed by the Court of Queen's Bench (2007), 75 Alta. L.R. (4th) 287, *per* Marceau J. and was not appealed by Mr. Caron. He chose instead to seek his funding by way of a new claim to the Queen's Bench, seeking the exercise of its inherent jurisdiction as a superior court to make the order. As a result, the question of whether a statutory court or tribunal has jurisdiction to order *Okanagan* costs will have to be determined in a future case.

That leaves us in the problematic position of having to decide Mr. Caron's ability to obtain funding and continue with this litigation *as if* no other jurisdictional course were available to him. I therefore simply raise a cautionary note: this Court's evolutionary acknowledgment of the independence, integrity and expertise of statutory courts and tribunals may well be inconsistent with an approach that has the effect of expanding the reach of a superior court's common law inherent jurisdiction into matters of which a statutory court or tribunal is seized. *When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction with the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives.* (See *Cunningham*, at para. 19; *ATCO*, at para. 51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128; and, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35.) The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin*, costs awards are significant remedial tools and "integrally connected to the court's control of its trial process" (para. 81).⁴⁰

In other words, Abella J. relied on the Court's earlier jurisprudence which emphasized that "the powers of a statutory court or tribunal extend beyond the express language of its enabling legislation to the powers necessary to perform its intended functions."⁴¹ Given the facts of this case, namely, that it was a practical impossibility for the trial to be

⁴⁰ *Id.*, at paras. 53-54 (emphasis added).

⁴¹ 974649 *Ontario Inc.*, *supra*, note 29, at para. 70.

completed without an order of advance costs, Abella J. suggests, without deciding, that the ability of the lower court to complete hearing a potentially meritorious case of public importance is within their mandate such that the power to order advance costs should be implied.

As noted above, it would seem that the power of the superior court to come in aid extends not just to courts but to administrative tribunals, and this would thus include orders for advance costs. Indeed, in light of Abella J.'s concurring decision, it may be that such administrative tribunals *themselves* hold such a power in circumstances where such a power is necessary for them to perform their intended functions.

3. Clarification of the Analysis for Advance Costs

While *Caron* does not represent a significant development in the law of advance costs, there are at least three aspects of the decision that do suggest that an order of advance costs might be slightly easier to obtain in the future than was heretofore the case.

(a) *Public Importance*

Often in the course of an interim costs application brought in the context of a constitutional challenge to a law, the Attorney General will argue that the case will only be of importance if the litigant is successful because only then will the law be struck down. In such cases the Attorney General's position is invariably that the litigation is not of sufficient importance because if the litigant loses, the law will remain the same. Of course, this style of analysis stems from *Little Sisters #2*, where the majority held that "[r]ecognizing 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."⁴² The majority went on to find that the litigation in *Little Sisters #2* would only be of exceptional public importance if Canada Customs was shown to be acting unconstitutionally, but not exceptional if Customs was proven to have acted in accordance with its constitutional duties. The Court held that it could not find a case to be of exceptional importance based on the

⁴² *Little Sisters #2*, *supra*, note 5, at para. 64.

possible future success of the case. To do so risked prejudging the merits of the case.

However dubious we find that reasoning — after all, the court need only find the case has *prima facie* merit to qualify for advance costs and the fact is that a successful challenge is almost always of more significance than an unsuccessful one — *Caron* shifts this analysis ever so slightly. In *Caron*, the Court characterized the importance of the case both in terms of the impact it would have on Alberta legislation if Mr. Caron were to succeed (which was described as “extremely serious” and necessitating a quick resolution),⁴³ and in terms of the “injury created by continuing uncertainty” if the case was unable to proceed or even if it proceeded in a lopsided manner.⁴⁴ Thus, the Court recognized that a consideration of the impact of the decision, *if the case were to succeed*, may lend support to a finding that it is of public importance. A trial judge may consider this factor without necessarily prejudging the merits of the case. Yet, in cases like *Caron* where there has been long-standing uncertainty about the constitutional validity of a law, it remains this latter factor which should be emphasized — the crucial question is whether *the uncertainty about the law* transcends the applicant’s particular situation and risks injury to the broader public interest.⁴⁵

The utility of *Caron* may be somewhat muted by the fact that the award for interim costs was not required or made until after 18 months of litigation. This will no doubt be how Crown counsel will attempt to explain and distinguish it in future cases. The order was required to prevent loss of “substantial costs incurred already, and months of court time” and to keep the provincial court proceedings “on the rails”. This context was unusual and weighed heavily in the Court’s analysis.⁴⁶

We would argue that the deference that the Supreme Court exercised in *Caron* is now more indicative of that Court’s *attitude* toward interim costs than might be said of its attitude in *Little Sisters #2*. These awards remain “exceptional” and available only in cases that are “sufficiently special”; however, nowhere in *Caron* does the Court express the view that interim costs are only available as a “last resort”. In rejecting the

⁴³ *Caron*, *supra*, note 9, at para. 44.

⁴⁴ *Id.*, at para. 45.

⁴⁵ This point has very recently been emphasized by the British Columbia Supreme Court in making an award of advance costs in *Dish Network L.L.C. v. Rex*, [2011] B.C.J. No. 1557, 2011 BCSC 1105, at paras. 68, 256-258 (B.C.S.C.). That case is currently under appeal.

⁴⁶ *Caron*, *supra*, note 9, at paras. 4-5, 21-22, 46.

application in *Little Sisters #2*, the Court compared the applicants, Little Sisters Book and Art Emporium, to those in *Okanagan* and noted that the former had not been “thrust” into the litigation and instead had taken the large-scale litigation upon themselves. Nowhere in *Caron* is a similar comparison made to ill effect, notwithstanding the Court notes that Mr. Caron himself did not want a stay of proceedings. It also seems to be the case that the Court’s deference to the decisions of the trial and appeal courts (a deference that was not displayed to the trial court in *Little Sisters #2*, or in *Okanagan* for that matter⁴⁷), means that it may be some time before another advance costs case makes its way to the highest court. As noted above, it also means that counsel who want to win an award of advance costs had better try to secure that win in the trial court.

(b) *Impecuniosity*

(i) Other Means of Bringing the Issues to Court

In practice, the Attorney General has often relied on the existence of other potential plaintiffs (of means) in defence of an interim costs application.

In *Caron*, the Court appears to have returned to the test articulated in *Okanagan* and affirmed by the Chief Justice and Binnie J. in dissent in *Little Sisters #2*, which is that 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.”⁴⁸ In other words, the fact that other plaintiffs are subject to prosecution under the same provisions is not determinative of the question whether other realistic options exist for bringing the issues to trial.

Recall that the issue of French-language rights in Alberta had already come before the courts on a number of occasions; however, the previous cases were distinguishable and not considered binding for a variety of reasons. Furthermore, civil and criminal prosecutions involving court documents occur regularly in Alberta and the issue of an individual’s

⁴⁷ To the point is Binnie J.’s comment in *Little Sisters #2*, *supra*, note 5, at para. 154, that despite the recognition in *Okanagan* that “it is for the trial court to determine” whether advance costs should be ordered, “[i]t is ironic that in both cases to reach this Court on the advance costs issue, the trial court has been reversed.”

⁴⁸ *Okanagan*, *supra*, note 4, at para. 36 (emphasis added); see also *Little Sisters #2*, *supra*, note 5, at paras. 98, 142.

right to use French in “proceedings before the courts” could have been raised in any one of those proceedings. Nevertheless, this fact was no bar to Mr. Caron’s claim for costs.

Indeed, the Supreme Court of Canada accepted that no palpable error had been made in reaching the conclusion that the matter could not proceed without funding. The Court accepted the reasonableness of the Alberta courts’ refusal “to allow the issue to go unresolved for want of a champion with ‘deep pockets’”.⁴⁹

Following *Caron*, a similar argument was made and rejected in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*.⁵⁰ The defendants challenged whether in the context of an interim costs order the fact that there were other cases proceeding which could bring the issues to trial should negate the claim. The Court rejected this argument on the particular facts of the case and also declined to accede to this argument, noting that to answer the question of whether other cases would provide the answer to the one raised in the case “would be to speculate on the reasons and results which may be obtained in other cases.”⁵¹

This return to the judgment in *Okanagan* is a positive step forward for interim costs jurisprudence. In the wake of *Caron* this type of argument — which can realistically be made in most non-Aboriginal rights or title cases — is likely to have less traction.⁵²

(ii) Fundraising Requirement

Caron reminds counsel of the importance of the applicant exhausting all personal sources of funds and seeking funds from the community. While the majority in *Little Sisters #2* said that “[t]he impecuniosity requirement ... means that it must be proven to be impossible to proceed ...”,⁵³ the judgment in *Caron* appears to reflect more closely that of Binnie J. in *Little Sisters #2*.⁵⁴ Specifically, in rejecting the Crown’s argument that

⁴⁹ *Caron*, *supra*, note 9, at paras. 5, 9, 41.

⁵⁰ [2011] F.C.J. No. 281, 2011 FC 230 (F.C.).

⁵¹ *Id.*, at para. 20.

⁵² See, e.g., *Dish Network L.L.C. v. Rex*, [2011] B.C.J. No. 1557, 2011 BCSC 1105, at para. 158 (B.C.S.C.), where the British Columbia Supreme Court rejected such an argument by Canada.

⁵³ *Little Sisters #2*, *supra*, note 5, at para. 71.

⁵⁴ *Id.*, at para. 141.

Mr. Caron should have done more both personally and by way of a fundraising campaign, the Supreme Court of Canada explained:

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

.....

As to Mr. Caron's financial circumstances, the superior court judge concluded that, while he was willing to expend (and had expended) his own and borrowed money (as well as funding from the Court Challenges Program) to the limit, Mr. Caron's resources had been exhausted by the time the applications for the orders in issue were made. He could not finance the last leg of his protracted trial. The Crown argues that Mr. Caron ought to have pursued a more aggressive fundraising campaign, particularly within Alberta's francophone community. The Queen's Bench judge, on the contrary, was impressed with the "responsible manner" in which Mr. Caron had pulled together finances for the anticipated length of trial and its unexpected continuances. However, as the scope of the expert evidence continued to expand, it was not "realistically possible" for him to launch a formal fundraising campaign given the trial schedule and its demands (2007 ABQB 632, at para. 30). The Queen's Bench judge declared himself "satisfied that Mr. Caron has no realistic means of paying the fees resulting from this litigation, and that all other possibilities for funding have been canvassed, but in vain" (para. 31). The Crown's objection on this point was not accepted in the courts below and those courts made no palpable error in reaching the conclusion they did.⁵⁵

We argued that the question must be whether a superior court judge is satisfied that an *ordinary citizen* does not have the reasonable means of meeting the expense of determining his or her constitutional rights and other issues of broad public importance. We also argued that courts should not require communities or individuals to assume crippling debt

⁵⁵ *Caron*, *supra*, note 9, at paras. 11, 41.

because to do so unduly taxes individuals and communities meant to enjoy the protection of the Charter. The Court did not expressly adopt our argument on these points, but the Court does now seem more alive to the realities of litigation and the fact that trial scheduling may impact the ability of a litigant to undertake a formal fundraising campaign. The judgment in *Caron* suggests that this lack of time will not be held against the litigant who is otherwise diligent in pursuing funding options.

V. QUANTUM OF COSTS

On the critical issue of quantum of costs, the Supreme Court of Canada's decision was brief:

Such funding orders, if made, “should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards” (*Okanagan*, at para. 41). In the present case, the judges were working within the confines of a trial in progress. Nevertheless, the order of Ouellette J. in the Court of Queen's Bench did put a cap on allowable hours for the expert witnesses, and disallowed a payment of \$3,504.60 for a “temporary assistant”. It seems that Judge Wenden in the provincial court was working with invoices not in the record before us. In his October 18, 2006 order (A.R., vol. 1, at pp. 2-13), Wenden Prov. Ct. J. clearly refused to make an *ex ante* blank cheque. On August 2, 2006, he ordered the Crown to pay Mr. Caron's already incurred (and therefore quantified) legal fees. All in all, I accept the conclusion of the Court of Appeal that the financial controls in place were adequate and met the *Okanagan* standard.⁵⁶

To be sure, the question of quantum of costs to be paid on an interim costs order is a matter of discretion for the trial judge.

Substantial indemnity costs (“special costs” in B.C. and “solicitor client costs” in most other jurisdictions) are only awarded *after the hearing* of a matter in “exceptional cases”,⁵⁷ which is to say they are “the exception, not the norm.”⁵⁸ It is our strong view that a litigant who has

⁵⁶ *Id.*, at para. 47.

⁵⁷ *Finney v. Barreau du Québec*, [2004] S.C.J. No. 31, [2004] 2 S.C.R. 17, 2004 SCC 36, at para. 48 (S.C.C.).

⁵⁸ *Zhang*, *supra*, note 3, at para. 28.

met the stringent test for advance costs, including showing that the case is rare and exceptional should by definition always be granted substantial indemnity or special costs. The only exception is if counsel or the court is of the view that the litigation can proceed on the basis of party-party costs, and that will likely only happen if there are other sources of partial funding available or if the lawyer is prepared to do the case on a partial contingency basis. If special costs are not ordered, the litigation will not be able to go forward, or if it does, the court will not avoid a “lopsided” trial with significant adverse effects on seeing justice done.

Nevertheless, we must acknowledge that there is some resistance to this proposition in the jurisprudence. For instance in *Little Sisters #2*, McLachlin C.J.C., in concurring reasons, held:

I wish to add a note on the scale of costs. The chambers judge said nothing about the scale of costs. My colleagues appear to endorse a capped limit on spending, having regard to the projected costs of the litigation and litigation strategy. It is not clear to me that interim costs, where justified, should be awarded on the basis of indemnification or partial indemnification. In the seminal case of *Jones v. Coxeter*, the court spoke of directing the defendant “to pay something to the plaintiff in the mean time” (p. 642). In *Okanagan*, the costs were explicitly stated to be “‘costs’ in the way it is usually used in the *Supreme Court Rules* [B.C. Reg. 221/90] and in litigation parlance — i.e., taxable costs described in R. 57 [party and party costs]”: see para. 10 of Newbury J.A.’s reasons in *Okanagan* ((2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647), which were approved by this Court, at para. 47, when it dismissed the appeal. It seems reasonable that an advance costs award cannot give the applicant more than it would receive were it successful at trial.⁵⁹

The difficulty we have with this passage is that an award of advance costs will only be made when without it the case will not proceed. And it will be a rare case where the case will proceed if all that is awarded is party-party costs. Hence, it is respectfully submitted that it is simply not reasonable to limit an applicant for advance costs to the same amount of costs that a litigant who was not impecunious and was able to proceed with the litigation was entitled to at the conclusion of the trial. Justice Binnie was more generous in *Little Sisters #2* accepting that the award

⁵⁹ *Id.*, at para. 112.

should be capped at the applicant's estimate of costs and otherwise endorsing the agreement worked out between the parties.⁶⁰

To the extent the Court has commented on this where the issue was actually part of their order, they have upheld (in *Okanagan*) an order that might have led to substantial indemnity costs⁶¹ and have upheld (in *Caron*) an order that amounted to substantial indemnity costs.⁶²

VI. CONCLUSION

At the heart of an order for interim costs in litigation of public importance is a concern about access to justice. Chief Justice Finch of the B.C. Court of Appeal recently emphasized the constitutional, practical and moral import of this principle in an address to the Canadian Bar Association:

[A]ccess to justice is a constitutionally recognized principle in Canada. It is a necessary element for maintaining the legitimacy of our judicial system. It is also morally wrong that some are able to enforce or defend their civil rights while others, based solely on their inability to pay, are denied access to justice.⁶³

The jurisprudence on advance costs, including *Caron*, represents an important development of ensuring that justice is not beyond the reach of citizens of ordinary means who shoulder the burden of litigation of public importance. Yet more needs to be done if the constitutional principle of access to justice is to be a practical reality in our law and society. The requirement of "exceptionality" is one that will no doubt be with us for some time. However, one hopes that with time, trial courts will be emboldened to find many more "exceptional" cases even if the questions they raise may not put an end to the survival of a community (*Okanagan*) or call into question the validity of the entire corpus of a jurisdiction's statutes (*Caron*). While not every Charter case

⁶⁰ *Id.*, at paras. 159-160.

⁶¹ In *Okanagan*, *supra*, note 4, at paras. 17, 47, the Supreme Court of Canada sustained the order made by Newbury J.A. in the B.C. Court of Appeal that explicitly left open the possibility that the Chambers Judge could award special costs as interim costs.

⁶² In *Caron*, *supra*, note 9, at para. 4, the Alberta Court of Appeal upheld two awards of interim costs that amounted to full funding of the last leg of Mr. Caron's case.

⁶³ Address of Chief Justice Finch to the Canadian Bar Association – B.C. Branch, Scottsdale, Arizona (November 20, 2010). Available online: <http://www.courts.gov.bc.ca/court_of_appeal/about_the_court_of_appeal/speeches/CBA%20Scottsdale%20-Final%20Nov%202010.pdf>.

is of transcendent importance, many of those that we have to turn away for want of funding had the potential to advance some very important values in Canadian society and, if successful, would make Canada a better place for minorities and those for whom the Charter was enacted in the first place.

It is difficult to take too seriously the notion that advance costs orders need to be unduly constrained on fiscal grounds given that the (usually) government defendant that is alleged to have violated the citizens' rights or freedoms exercises little or no such fiscal restraint when defending itself.⁶⁴ Government lawyers, whether in public or private practice, get paid from the same tax dollars that would fund advance costs awards paid to lawyers retained by citizens to protect their fundamental rights and freedoms. Notwithstanding that the government is presumed to act in the public interest, when a case of public importance that is *prima facie* meritorious is before the courts, there needs to be a way to ensure those tax dollars are spent more equitably and fairly than the present law allows.

⁶⁴ We are grateful for comments we received on an earlier draft of this paper wherein the reviewer noted: "While government undoubtedly has greater fiscal resources than most private litigants, the suggestion that it exercises 'no such fiscal restraint' is, at least in my experience in Ontario, an unfair exaggeration. All Ministries operate within budgetary constraints and spending on litigation must be justified and is subject to approval. Nobody that I know gets a blank cheque to defend Charter challenges." While we accept this statement as far as it goes, it fails to meet our point, which is that if government is exercising fiscal restraint it is certainly not noticeable from the perspective of plaintiff's counsel. Indeed, we have asked the Court, on occasion, to simply order that the plaintiff receive the same budget and rates as the government defendant's counsel — a request that is always vigorously opposed by those same lawyers. Having been a government lawyer, I know just how spoiled and privileged I was, given the resources at my command in comparison to those available to lawyers on the other side acting for poor or even middle-class individuals.

