Court File No. 39323

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

BETWEEN:

GERMAINE ANDERSON ON HER BEHALF AND ON BEHALF OF ALL OTHER BEAVER LAKE CREE NATION BENEFICIARIES OF TREATY NO. 6 AND BEAVER LAKE CREE NATION

Appellant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Respondent

-and-

THE ATTORNEY GENERAL OF CANADA

Respondent

-and-

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PART I – OVERVIEW & FACTS

1. Access to justice is fundamental to the rule of law.[1] Chief Justice Wagner recently explained that the "[l]ack of access to justice reinforces existing inequities" and that "[t]o deny access to justice is to deny people their dignity, to say that some people are worthy of justice and some aren't."[2] He went on to identify the cost of litigation and the limited means of litigants to be a primary barrier to access, noting that some litigants "decide not to seek legal remedies…because of cost."[3]

2. The question of costs is acute in publicly important litigation, as such disputes are often complex and proceed through various court levels. Advance costs are a tool for ensuring that meritorious cases of public importance are addressed by the courts. However, the impecuniosity requirement in the test for advance costs is an insurmountable hurdle for many litigants of limited means. It suggests that a litigant with a modest amount of money should be forced to exhaust all of their resources in litigation before being eligible for advance costs. It raises the question as to whether this should truly be the threshold when the litigation is against the state. The Advocates' Society submits that this cannot be the case in a democratic country like Canada. Instead what is required is a contextual approach to the impecuniosity requirement that takes into account the choices faced by public interest litigants about how to spend scarce funds.

3. The Advocates' Society submits that the impecuniosity requirement in the test for advance costs ought to be clarified to ask whether it would be *unduly onerous* for the plaintiff to be expected to fund the litigation – not whether they may have *some funds available* to do so. With this contextual approach to impecuniosity, rather than a narrow economic approach, the advance costs framework will better promote access to justice.

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[1] *Trial Lawyers Association of British Columbia v British Columbia (AG)*, 2014 SCC 59 at para 39 [*Trial Lawyers*].

[2] Chief Justice Richard Wagner, "Access to Justice: A Social Imperative" (Remarks delivered at the 7th Annual Pro Bono Conference in Vancouver, BC on October 4, 2018).

[3] Chief Justice Richard Wagner, "Access to Justice: A Social Imperative" (Remarks delivered at the 7th Annual Pro Bono Conference in Vancouver, BC on October 4, 2018).

4. This Court must be particularly concerned about appeals in cases like this one that are acknowledged to be of "public importance".[4] The Supreme Court of Canada has a statutory mandate to hear and determine cases of public importance.[5] If cases of public importance fail to be heard in lower courts because of a lack of resources, the Supreme Court of Canada's ability to fulfill its institutional purpose will be impaired. The present appeal gives the Court an historic opportunity to improve access to justice for vulnerable and historically disadvantaged Indigenous communities and, indeed, for people of limited or ordinary means of all kinds. Improving access to justice in this way will also enable the Court to fulfill its role as a court for all Canadians.

5. The Advocates' Society takes no position on the facts or the application of the legal principles to the facts in the present case.

PART II – POSITION ON QUESTIONS IN ISSUE

6. The Advocates' Society offers submissions to assist the Court in answering the first issue raised by the Appellant: whether the test for advance costs should recognize that it may be "impossible" for impoverished First Nation governments making "reasonable financial choices" to fund section 35 litigation.

7. The Advocates' Society submits that the framework for advance costs in public interest litigation, particularly the impecuniosity requirement, ought to be clarified in a manner that supports access to justice.

PART III – STATEMENT OF ARGUMENT

A. Access to Justice Must be at the Forefront of the Advance Costs Framework

8. To start with, the usual approach to costs awards should be adjusted in public interest litigation. The Honourable Robert J. Sharpe, writing extra-judicially, explained that the traditional rationales for costs rules (indemnifying successful litigants, encouraging settlement, and

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[4] *Anderson v Alberta (AG)*, 2020 ABCA 238 at para 15 noting that the appellant (Alberta) did not raise the public importance criterion [*ABCA Decision*].

[5] *Supreme Court Act*, RSC 1985, c S-26, s 40(1).

discouraging frivolous suits) have limited resonance in constitutional litigation.[6] Financial incentives are often absent in public interest suits, and "the encouragement of settlements rationale is, at best, an awkward fit as *Charter* claims are not ordinarily susceptible to compromise."[7]

9. Indeed, this Court recognized in *British Columbia (Minister of Forests) v Okanagan Indian Band* that access to justice "has increased in importance" in the assessment of advance costs and that policy objectives often supersede the usual purposes of costs awards in these applications.[8] The Court was particularly concerned about access to justice for "litigants of limited means" and "ordinary citizens" who engage in public interest litigation.[9] This Court also recognized that "[c]oncerns about access to justice and the desirability of mitigating severe inequality between litigants…feature prominently in the rare cases where interim costs are awarded."[10]

10. Despite the recognition of the increasing importance of access to justice considerations in *Okanagan*, the Court in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)* de-emphasized the role that access to justice ought to play in shaping the legal framework for advance costs.[11] In addition, this Court's decisions in both *Little Sisters No. 2* and *R v Caron* highlighted the exceptionality of granting advance costs awards.[12] This has created a situation where advance costs awards are exceptional in theory and impossible in fact, leading one author to describe *Little Sisters No. 2* as the "death knell" for advance costs.[13]

11. In the ten years since this Court last meaningfully considered the advance costs framework, further light has been shed on the inability of vulnerable and historically disadvantaged groups to

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[6] Robert J Sharpe, "Access to Charter Justice" (2013) 63 SCLR (2d) 3 at 7.

[7] Robert J Sharpe, "Access to Charter Justice" (2013) 63 SCLR (2d) 3 at 7.

[8] 2003 SCC 71 at paras 27, 38 [*Okanagan*].

[9] *Okanagan,* 2003 SCC 71 at para 27.

[10] *Okanagan,* 2003 SCC 71 at para 31.

[11] 2007 SCC 2 at para 35 [*Little Sisters No. 2*].

[12] *R v Caron,* 2011 SCC 5 [*Caron*].

[13] See Alison M Latimer, "A Plumber with Words: Practical Solutions for Concrete Problems" (Paper delivered at the Osgoode Constitutional Cases Conference, 9 April 2021) SCLR (forthcoming) at 8, n 29 [The Advocates' Society Book of Authorities, Tab 1].

access the courts.[14] In that time, this Court also further emphasized that access to justice is fundamental to the rule of law, warranting constitutional protection.[15]

12. Justice Cromwell, as he then was, observed extra-judicially that Canada's World Justice Project Rule of Law Index score is sobering evidence of Canada's problem with access to civil justice.[16] The Rule of Law Index presents a portrait of the rule of law in 128 jurisdictions by providing scores and rankings based on eight factors. According to the 2020 results, Canada ranks ninth in the world for overall rule of law, but one of its lowest scores is in access to civil justice, where Canada ranks 56th out of the total 128 countries surveyed.[17]

13. Access to justice is Canada's "most pressing justice issue," because we are facing a "crisis" where litigants, especially those who belong to vulnerable or historically disadvantaged groups, cannot seek redress in our courts.[18] Issues with access to justice not only affect litigants and would-be litigants, they also undermine public confidence in the judicial system.[19] As stated by Karakatsanis J in *Hryniak v Mauldin*, "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."[20]

14. As a court with a statutory mandate to hear cases of public importance,[21] this Court ought to seek to ensure that litigants who want to advance publicly important cases are not denied access to courts of first instance. If such litigants are denied access to justice at the outset because they lack funding, then courts, including this Court, will not have a meaningful opportunity to hear cases of public importance brought by Canadians of limited or ordinary means that address legal

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[14] Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 959, 962–965; See generally Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2021); World Justice Project, "WJP Rule of Law Index: 7 – Civil Justice for Canada, 2020" (2020), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/country/2020/Canada/Civil%20Justice/>.

[15] *Trial Lawyers*, 2014 SCC 59 at para 39.

[16] Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (Viscount Bennett Memorial Lecture delivered at the UNB Faculty of Law, 27 October 2011), (2012) 63 UNBLJ 38 at 39.

[17] World Justice Project, "WJP Rule of Law Index: 7 – Civil Justice for Canada, 2020" (2020), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/country/2020/Canada/Civil%20Justice/>.

[18] Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 959, 962–965.

[19] Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (Viscount Bennett Memorial Lecture delivered at the UNB Faculty of Law, 27 October 2011), (2012) 63 UNBLJ 38 at 40.

[20] 2014 SCC 7 at para 26.

[21] *Supreme Court Act*, RSC 1985, c S-26, s 40(1).

issues affecting them. To maintain public confidence in the judicial system as one that is open to all Canadians, not just governments or the wealthy, a focus on access to justice must be reflected in the framework for advance costs.

15. This Court has held that "access to justice is fundamental to the rule of law",[22] which in turn is an unwritten constitutional principle and a "fundamental postulate of our constitutional structure."[23] This Court need not go so far in the present case as to conclude that there is a blanket constitutional *right* to public interest litigation funding, as that would be contrary to this Court's admonition in *R v Caron* that "[t]he fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice".[24] Instead, the constitutional weight afforded to access to justice must guide any clarification to the advance costs framework and ensure that advance costs are available not just in theory but also reality. Anything less would work an injustice. A framework that emphasizes access to justice is demanded by the rule of law and is consistent with our constitutional structure.

16. This Court reiterated the importance of access to justice in *AIC Limited v Fisher*, holding that achieving access to justice hinges on the ability to ensure that two interconnected dimensions of the concept are satisfied.[25] One dimension of access to justice "focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims" and the other dimension focuses on "substance – the results to be obtained – and is concerned with whether the claimants will receive a just and effective remedy for their claims if established."[26]

17. Both the procedural and substantive dimensions of access to justice are reflected in this Court's recognition that litigants have a right to a fair trial and the right to present their case.[27] In many circumstances this right will be tied to the need to retain and instruct counsel. Yet, the ability

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[22] *Trial Lawyers,* 2014 SCC 59 at para 39.

[23] *Roncarelli v Duplessis,* [1959] SCR 121 at 142; *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 49.

[24] *Caron,* 2011 SCC 5 at para 38; and Joseph Arvay, Alison Latimer, and Benjamin Berger in their factum for the Canadian Civil Liberties Association in *R v Caron* submitted that the injustice that advance costs seeks to avoid is "the complicity of the judiciary in preventing the ordinary citizen from vindicating constitutional rights and addressing matters of substantial public importance…." at para 25.

[25] 2013 SCC 69 at para 24 [*AIC Limited*].

[26] *AIC Limited,* 2013 SCC 69 at para 24.

[27] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 50.

to retain and instruct counsel in public interest litigation is often associated with being able to bear astonishing financial burdens. The late Joseph J. Arvay and his co-author Alison Latimer contended that "courts should not require communities or individuals to assume crippling debt because to do so unduly taxes individuals and communities meant to enjoy the protection of the Charter."[28] The complexity and scope of public interest litigation can be expected to sometimes make it impossible to obtain *pro bono* counsel. Indeed, the present case with its long duration and costs running into the millions of dollars is a good example of why *pro bono* representation is not a reliable solution for access to justice in significant public interest litigation. No court could expect a lawyer or law firm to bear the enormous cost of bringing this case to trial, let alone the costs of the inevitable appeals, on a *pro bono* basis.[29]

B. The Impecuniosity Requirement Should Examine Whether it Would be Unduly Onerous for an Applicant to Fund the Litigation

18. This Court held in *Okanagan* that a public interest litigant must be impecunious to be granted advance costs. To meet this requirement, "[t]he party seeking interim costs [must show that it] 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."[30]

19. The Alberta Court of Appeal in the present case held that the impecuniosity test "is whether there are funds available, not whether there would be funds left over once all other preferred expenditures of the applicant have been met."[31] It held that the test is not met if the applicant has funds, but chooses to spend the funds on other priorities, "regardless of how reasonable those other priorities may be".[32]

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[28] Joseph J Arvay & Alison Latimer, "Cost Strategies for Litigants: The Significance of R. v. Caron." (2011) 54 SCLR 427 at 445–446 [Cost Strategies for Litigants].

[29] See *Carter v Canada (AG)*, 2015 SCC 5 at para 140 noting that "it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim."; see also Cost Strategies for Litigants at 428 for the proposition that for even an "average" *Charter* claim, hundreds of hours or more will be involved.

[30] *Okanagan*, 2003 SCC 71 at para 40.

[31] *ABCA Decision*, 2020 ABCA 238 at para 26.

[32] *ABCA Decision*, 2020 ABCA 238 at para 26.

20. The framework in *Okanagan* was developed in recognition that advance costs awards forestall the danger that a legal argument that is both *prima facie* meritorious and publicly important will not be advanced merely because a party lacks the financial resources to proceed.[33] However, the Alberta Court of Appeal's narrow application of the test will only lead to zero-sum analyses, and the very injustices that *Okanagan* sought to avoid.

21. Access to justice should inform the advance costs framework, so that access is more than just theoretical. Litigants should not be asked to expend all of their available resources short of "basic necessities" in order to have their case heard.[34] The impecuniosity requirement must be clarified to better reflect access to justice considerations.[35]

22. This Court has cautioned that it cannot solve problems of access to justice by creating an alternative and extensive legal aid system.[36] By maintaining the three-part *Okanagan* framework, there is no risk of inadvertently creating an extensive new system of legal aid. This Court can clarify the impecuniosity requirement in a manner that brings access to justice to the forefront, while still maintaining the three-part framework.

23. When a case is meritorious and of public importance, a narrow and purely economic impecuniosity analysis should not prevent it from being heard. This Court should not be concerned that loosening the impecuniosity requirement would open the floodgates for advance costs – as it stands, applications for advance costs awards are not brought before the courts with great frequency given the exceptional nature of such cases.[37] Rather, this Court should be guided by the opposite: a concern that an impecuniosity requirement that is too strict will prevent cases of public importance from seeing the light of day.

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[33] *Okanagan*, 2003 SCC 71 at para 31.

[34] *ABCA Decision*, 2020 ABCA 238 at para 28.

[35] Joseph Arvay and Alison Latimer suggest that *R v Caron* offered a more reasonable approach than *Little Sisters No. 2* to how much personal fundraising a litigant should be required to pursue, especially in face of timing constraints, before concluding that a litigant has no realistic means of paying the fees resulting from litigation: Cost Strategies for Litigants at 444–445. In The Advocates' Society's submission, this Court ought to explicitly disapprove of the standard articulated by the Alberta Court of Appeal, in favour of a standard that is closer to what was espoused in *R v Caron,* such that access to justice remains at the forefront.

[36] *Little Sisters No. 2,* 2007 SCC 2 at para 44.

[37] Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011) 39 Adv Q 197 at 214.

24. To achieve the goals of the advance costs framework, The Advocates' Society submits that this Court ought to adopt the approach to impecuniosity from the New Zealand Court of Appeal in *Berkett v Cave* which asks whether "[i]t would be unduly onerous for the plaintiff to be expected to fund the litigation even in the interim."[38] This approach to the impecuniosity analysis would allow this Court to shift towards a much-needed focus on the *impact* that funding the litigation would have on a litigant, rather than a purely economic analysis of whether a litigant has *access* to any financial resources.

25. The question of whether funding the litigation would be "unduly onerous" for the applicant uses language and concepts familiar to courts in the context of costs. When considering solicitor-client costs and security for costs orders, courts often weigh whether an order would be unduly onerous.[39]

26. This clarification will allow courts to better take access to justice concerns into consideration and give them appropriate weight within the particular context of a given case. The point at which bearing the costs of public interest litigation becomes unduly onerous has to be determined on a case-by-case basis and should be driven by a contextual inquiry.

C. The Impecuniosity Requirement Should be Analyzed Contextually

27. This Court in *Little Sisters No. 2* explained that in analyzing a litigant's entitlement to advance costs, "the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application".[40] This Court stated that in exercising discretion to award advance costs, a court may consider all relevant factors that arise on the facts.[41]

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[38] [2001] 1 NZLR 667 at para 13 [The Advocates' Society Book of Authorities, Tab 2].

[39] See for e.g. *Rozdilsky v Kokanee Mortgage M.I.C. Ltd.*, 2020 SKCA 1 at paras 10–11; *3058354 Nova Scotia Company v On*Site Equipment Ltd.*, 2011 ABCA 168 at para 101; *D.L. Pollock Professional Corporation v Blicharz*, 2018 ABCA 252 at para 18.

[40] *Little Sisters No. 2,* 2007 SCC 2 at para 37. The Advocates' Society submits that the requirement that the case be special is only relevant to the public importance stage of the test. "Special" cannot refer to the degree of impecuniosity.

[41] *Little Sisters No. 2,* 2007 SCC 2 at para 37.

28. Despite a court's ability to consider all relevant factors in exercising its discretion to award advance costs, The Advocates' Society submits that this Court ought to clarify that the impecuniosity analysis *itself* requires a contextual approach. In determining whether it would be "impossible" to proceed (or, as proposed by The Advocates' Society, whether it would be "unduly onerous" for a litigant to fund the litigation), the inquiry must consider factors other than the amount of funds presently available to an applicant. A contextual impecuniosity analysis might examine the type of claim at issue, the unique circumstances of the plaintiff, the unique circumstances surrounding the financial condition of the plaintiff, the obligations placed on the plaintiff, or the potential impact of the litigation beyond the interest of the immediate parties.

29. First and foremost, courts should consider whether the applicant for advance costs is a member of a vulnerable or historically disadvantaged group. In the context of litigation involving First Nations, a court should be required to consider the historical oppression of Indigenous people in Canada and the particular First Nation in question. The Advocates' Society submits that a contextual interpretation that advances the goals of reconciliation is one that *does not* require a First Nation to make choices between its *prima facie* meritorious and publicly important litigation and providing services to its people that most Canadians take for granted.

30. A court should be required to consider any conduct of the respondent that may have affected the financial position of an applicant for advance costs. For example, in assessing impecuniosity in the family law context, courts take into account whether one spouse has income and control of assets, leaving another spouse without means to advocate for their fair share.[42] Similarly, in the context of claims between the Crown and First Nations, courts should be directed to consider the fiduciary relationship between the Crown and First Nations and past conduct of the Crown that may have had adverse financial implications on the particular applicant.

31. A contextual approach to impecuniosity would be equally applicable outside the context of vulnerable or historically disadvantaged groups; for example, in the context of non-profit organizations that bring forward claims on behalf of others pursuant to public interest standing. Consider the case of *Canada (Attorney General) v PHS Community Services Society*, in which this Court ordered that the Minister of Health grant an exemption to a safe injection site from the

[42] *VMH v JH*, 2020 ABCA 389 at para 17.

criminal prohibitions of possession and trafficking of controlled substances.[43] PHS Community Services Society ("PHS") was a non-profit organization that, among other things, oversaw the operation of the safe injection site. Had PHS been unable to retain *pro bono* counsel, and applied instead for advance costs, a court would have known that PHS had some revenue, and was not completely impecunious in the strict economic sense.[44] But in a contextual impecuniosity analysis, a court could have considered whether PHS could uphold its mandate in providing social housing and health services to Vancouver's Downtown Eastside while continuing to pursue the litigation on behalf of the safe injection site. Reducing the analysis to an examination of whether PHS would be choosing to spend available funds on "basic necessities" would not be workable in the context of a non-profit organization.

D. Conclusion

32. The approach to advance costs proposed by The Advocates' Society promotes access to justice and makes it clear that all people are worthy of justice thereby affirming their human dignity. A renewed focus on access to justice holds the promise of breaking down existing inequities in the justice system and society at large. By making advance costs awards more accessible, the Court would open the justice system and its own docket to cases brought by, and meaningful to, ordinary people of limited means. The clarification to the impecuniosity branch of the advance costs test proposed by The Advocates' Society would be a clear and unmistakeable statement that the justice system serves all Canadians.

PART IV – SUBMISSIONS ON COSTS

33. The Advocates' Society requests that there be no order for costs for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of July, 2021.

per **Colin Feasby, Q.C. and Kelly Twa**
Counsel for The Advocates' Society

[43] 2011 SCC 44.

[44] 2008 BCSC 1453 at para 26.

PART V – TABLE OF AUTHORITIES

Secondary Sources	**Paragraph**
Alison M Latimer, "A Plumber with Words: Practical Solutions for Concrete Problems" (Paper delivered at the Osgoode Constitutional Cases Conference, 9 April 2021) SCLR (forthcoming)	10
Chief Justice Richard Wagner, "Access to Justice: A Social Imperative" (Remarks delivered at the 7th Annual Pro Bono Conference in Vancouver, BC on October 4, 2018).	1
Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011) 39 Adv Q 197	23
Joseph J Arvay & Alison Latimer, "Cost Strategies for Litigants: The Significance of R. v. Caron." (2011) 54 SCLR 427	17, 21
Robert J Sharpe, "Access to Charter Justice" (2013) 63 SCLR (2d) 3	8
Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (Viscount Bennett Memorial Lecture delivered at the UNB Faculty of Law, 27 October 2011), (2012) 63 UNBLJ 38 at 39.	12, 13
Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2021)	11
Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 959, 962-965.	11, 13
World Justice Project, "WJP Rule of Law Index: 7 – Civil Justice for Canada, 2020" (2020), online: World Justice Project <worldjusticeproject.org/rule-of-law-index/country/2020/Canada/Civil%20Justice/>.	11, 12

PART VI – STATUTORY PROVISIONS

Legislation	**Paragraph**
Supreme Court Act, RSC 1985, c S-26	4, 14