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

MOTION RECORD OF THE PROPOSED INTERVENER, THE ADVOCATES' SOCIETY

(Pursuant to Rules 47, 55, 56 and 59(2) of the *Rules of the Supreme Court of Canada*)

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Tab 1

Court File No. 39323

IN THE SUPREME COURT OF CANADA
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NOTICE OF MOTION
OF THE PROPOSED INTERVENER,
THE ADVOCATES' SOCIETY
(Pursuant to Rules 47, 55, 56 and 59(2) of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that a motion is hereby made to a Justice of this Honourable Court, pursuant to Rules 47, 55, 56 and 59(2) of the *Rules of the Supreme Court of Canada*, for an Order: (i) granting The Advocates' Society leave to intervene in this appeal; (ii) permitting The Advocates' Society to file a factum not exceeding 10 pages; (iii) permitting The Advocates' Society to make oral submissions of up to 5 minutes at the hearing of this appeal; and (iv) such further and other Orders as the Court may deem just and appropriate.

AND FURTHER TAKE NOTICE that in support of this motion, The Advocates' Society will rely on the affidavit of Guy J. Pratte affirmed May 11, 2021, and such further and other materials as counsel may advise and this Court may permit.

AND FURTHER TAKE NOTICE that the motion will be made on the following grounds:

1. The Advocates' Society has an interest in this appeal and will leverage its expertise to provide useful and different submissions from those of the other parties;

(a) The Advocates' Society is a professional association for lawyers across Canada and has a membership of approximately 5,200 advocates with extensive on-the-ground experience in the justice system;

(b) The Advocates' Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice. Since this appeal gives rise to access to justice considerations, the issues raised fall within the mandate of The Advocates' Society;

(c) The issues raised by this appeal have implications that extend beyond those of the immediate parties. The Advocates' Society has an interest in these broader implications. Many of its members will be directly and significantly affected by the outcome of this appeal;

(d) This Court has previously recognized The Advocates' Society's ability to assist as intervener in cases that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court system.

The Advocates' Society is also regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform;

(e) The Advocates' Society has experience with issues similar to those raised by this appeal. The Advocates' Society has been granted leave to intervene in cases that involve (1) access to justice, (2) the cost of litigation and costs awards in the context of access to justice, and (3) vulnerable or historically disadvantaged groups. The Advocates' Society's active engagement in relation to these issues is not only indicative of its expertise, but also of its interest in the issues;

2. If granted leave to intervene, The Advocates' Society will make three main arguments;

(a) access to justice should be the paramount consideration in the advance costs framework;

(b) the impecuniosity requirement should be clarified in a manner that better reflects access to justice; and

(c) the impecuniosity requirement should be analyzed contextually.

3. Such further and other grounds as counsel may advise and this Court may permit.

Dated at Calgary this 12th day of May, 2021.

per Colin Feasby, Q.C.

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

Tab 2

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- and –

THE ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF GUY J. PRATTE
Affirmed May 11, 2021

I, Guy J. Pratte, of the City of Ottawa in the Province of Ontario, AFFIRM AS FOLLOWS:

1. I am the President of The Advocates' Society. As such, I have personal knowledge of the matters referred to in this affidavit, except where my knowledge is stated to be on information and belief, in which case I believe it to be true.

2. I am a partner at Borden Ladner Gervais LLP in Toronto. I was called to the Bar of Ontario in 1984, and to the Bar of Quebec in 2002. I have been a member of The Advocates' Society for approximately 30 years and have served on its Executive Committee for the past three years. I have served as President since June 11, 2020.

3. This affidavit is filed in support of The Advocates' Society's motion for leave to intervene in this appeal.

A. The Advocates' Society

4. The Advocates' Society was established in 1963 as a professional association for trial and appellate lawyers in Ontario. Over more than 50 years, The Advocates' Society has steadily grown its membership and now represents approximately 5,200 advocates across Canada. The Advocates' Society has members in every province of Canada. The Advocates' Society's Board includes Directors from Quebec, British Columbia, Alberta, Ontario, and Nova Scotia. The Advocates' Society is incorporated federally pursuant to the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23.

5. The Advocates' Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice. The Advocates' Society has established a respected presence within the legal profession and the judiciary. As such, it is regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform. Through regular submissions of papers and briefs, The Advocates' Society presents its views and initiates needed reforms to the legal system.

6. The Advocates' Society's mandate extends to intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting access to justice, advocates and the rights of litigants in Canada's court system. The Advocates' Society has, for more than 30 years, reviewed cases before the courts and identified cases related to its mandate in which it believes it should seek intervener status, based on the importance of the case to the profession and

to the public. Specifically, The Advocates' Society's policy on seeking intervener status is informed by criteria that include:

(a) Is there a demonstrated importance of and need for The Advocates' Society's intervention?

(b) Is the matter of broad interest to the profession, which extends beyond the interests of the parties to the litigation?

(c) Is intervention by The Advocates' Society in the interest of the public?

(d) Does the matter affect:

(i) Access to justice;

(ii) The practice of law by advocates;

(iii) Procedural matters of broad application;

(iv) The right to counsel;

(v) The independence of the bar;

(vi) The administration of justice; or

(vii) An issue of law that is of importance to the proper representation of parties before courts or tribunals?

(e) Are principles of equality, diversity, and inclusion in relation to the profession or the issues listed above present in the case, and would The Advocates' Society's intervention have a beneficial impact on equality, diversity, and inclusion in these areas?

7. The Advocates' Society has previously obtained intervener status in cases at all levels of court, including:

(a) *Blake v Blake* (Ontario Divisional Court File No. DC-19-409), to be heard on June 18, 2021 (obligation of counsel to bring legal authority to the Court's attention, and ability of the Court to impose costs on a party when not given advance notice or opportunity to make submissions on the basis for the costs order);

(b) *R v Chouhan*, 2020 CanLII 75817 (SCC), reasons to follow (constitutionality of the repeal of peremptory challenges to jurors in criminal trials);

(c) *Crowder and TLABC v British Columbia (Attorney General)*, 2019 BCSC 1824 (validity of provisions of British Columbia's *Supreme Court Civil Rules* purporting to limit the number of experts a party may tender at trial on the issue of damages arising from personal injury or death);

(d) *Kapoor v Kuzmanovski*, 2018 ONSC 4770 (juror bias in motor vehicle accident cases) – the Court invited The Advocates' Society to make submissions as *amicus curiae*;

(e) *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 (discretion of provincial regulator to accredit law school that imposes discriminatory requirements on its students); The Advocates' Society also intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 518), the Ontario Divisional Court (2015 ONSC 4250), and the Court of Appeal for British Columbia (2016 BCCA 423);

(f) *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2018 SCC 27 (professionalism and civility in the courtroom); The Advocates' Society also

intervened in the proceedings before the Court of Appeal for Ontario (2016 ONCA 471), the Ontario Divisional Court (2015 ONSC 686), and the Law Society Appeal Panel (2013 ONLSAP 41); the Court of Appeal, Divisional Court and Appeal Panel all referenced The Advocates' Society's *Principles of Civility for Advocates* in their respective reasons;

(g) *Alberta v Suncor Energy Inc.*, 2017 ABCA 221 (protection of solicitor-client privilege in the face of statutory disclosure obligations);

(h) *Information and Privacy Commissioner of Alberta v Board of Governors of the University of Calgary*, 2016 SCC 53 (protection of solicitor-client privilege in the face of statutory disclosure obligations);

(i) *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 (protection of litigation privilege in the face of statutory disclosure obligations);

(j) *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 (constitutionality of provisions of the *Income Tax Act* that require the production of potentially privileged documents);

(k) *R v Nur*, 2015 SCC 15 (constitutionality of prosecutorial discretion in mandatory minimum sentencing); the Society also intervened before the Court of Appeal for Ontario (2013 ONCA 677), and the related case of *R v Smickle*, 2013 ONCA 678;

(l) *Moore v Getahun et al.*, 2015 ONCA 55 (practice of counsel reviewing draft reports with experts; The Advocates' Society's *Principles Governing Communications with Testifying Experts* were referred to favourably in the Court's reasons and appended thereto);

(m) *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 (constitutionality of various provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, as applied to lawyers and notaries in view of ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* and the protection of solicitor-client privilege);

(n) *R v Kokopenace*, 2015 SCC 28 (representativeness of First Nations persons on juries);

(o) *Trial Lawyers Association of British Columbia, et al. v Attorney General of British Columbia*, 2014 SCC 59 (constitutionality of the Province charging hearing fees);

(p) *Bruno Appliance and Furniture, Inc. v Hryniak*, 2014 SCC 8 (appeal of *Combined Air v Flesch* – The Advocates' Society's submissions on access to justice and the traditional trial process are expressly referred to in the Supreme Court's reasons in the companion appeal of *Hryniak v Mauldin*, 2014 SCC 7);

(q) *Ontario v Criminal Lawyers Association of Ontario*, 2013 SCC 43 (the Court's jurisdiction to appoint *amicus* and set their rate of remuneration);

(r) *R v Nedelcu*, 2012 SCC 59 (whether s. 13 of the *Canadian Charter of Rights and Freedoms* precludes the use of civil discovery evidence to impeach the credibility of an accused who chooses to testify at his criminal trial);

(s) *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 (solicitor-client privilege);

(t) *1465778 Ontario Inc. v 1122077 Ontario Ltd.* (2006), 82 OR (3d) 757 (CA) (the Court of Appeal for Ontario requested The Advocates' Society to act as *amicus curiae* in respect of the issue of the award of costs to counsel acting on a *pro bono* basis, an issue arising from such a request being sought by counsel who had volunteered for the Court of Appeal *pro bono* project for unrepresented litigants);

(u) *McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257 (CA) (validity of contingency fee arrangements in civil actions in Ontario);

(v) *R v Davis* (1982), 39 OR (2d) 604 (HCJ) (conduct of defence counsel delaying trial and whether counsel fee could be judicially reduced).

B. The Advocates' Society's Interest In This Appeal

8. The Advocates' Society has a significant and clear interest in this appeal. This appeal engages the promotion and improvement of litigants' access to justice. As mentioned above, this issue is part of The Advocates' Society's mandate. It is also an issue that The Advocates' Society has actively engaged in through prior interventions, including in cases that pertain to the cost of litigation and costs awards in the context of access to justice (for example: *Trial Lawyers Association of British Columbia, et al. v Attorney General of British Columbia*; *Bruno Appliance and Furniture, Inc. v Hryniak*; *Ontario v Criminal Lawyers Association of Ontario*; *1465778 Ontario Inc. v 1122077 Ontario Ltd.*; *McIntyre Estate v Ontario (Attorney General)*). This history reflects The Advocates' Society's interest in the issue.

9. This appeal also engages the ability of litigants who are vulnerable or historically disadvantaged to access justice. The Advocates' Society has consistently taken a keen interest in issues that relate to vulnerable or historically disadvantaged groups and their ability to participate

in our justice system in an equal and fair manner. Indeed, this interest can be gleaned from the cases in which The Advocates' Society has intervened in the past (for example: *R v Chouhan*; *Trinity Western University v Law Society of Upper Canada*; *Law Society of British Columbia v Trinity Western University*; *R v Kokopenace*).

10. Moreover, The Advocates' Society's interest in this appeal is linked to the inevitable impact the decision will have on its members. The Advocates' Society's members practise in a broad array of legal fields. The Court's decision in this appeal will undoubtedly affect many of The Advocates' Society's members. This is especially the case for those who practise in public interest litigation.

C. The Advocates' Society's Proposed Submissions

11. An outline of The Advocates' Society's proposed submissions, if granted leave to intervene, appears in the Memorandum of Argument on this motion. Generally, however, The Advocates' Society's proposed submissions are threefold: (1) access to justice should be the paramount consideration in the advance costs framework; (2) the impecuniosity requirement should be clarified in a manner that better reflects access to justice; and (3) the impecuniosity requirement should be analyzed contextually.

D. The Advocates' Society's Submissions Will Be Useful and Different

12. Given its mandate to promote and improve access to justice, as well as its prior experience in intervening in cases that engage access to justice and issues that pertain to vulnerable or historically disadvantaged groups, The Advocates' Society is well-positioned to provide this Court with a useful and different perspective from the other parties. Indeed, as an association with a mandate to promote the fair and equitable administration of justice, The Advocates' Society offers a unique and independent perspective on the importance of access to justice in the context of

advance costs awards in public interest litigation, especially when the litigation involves vulnerable or historically disadvantaged groups.

13. While the Appellant raises access to justice considerations in her factum, the written argument does not address the issue in depth. As such, the arguments to be made by The Advocates' Society will be different and unique from those made by the Appellant. The Advocates' Society will work with other prospective interveners to avoid duplication in submissions.

E. The Advocates' Society's Intervention Will Not Prejudice the Parties

14. There will be no prejudice to any party if The Advocates' Society is granted leave to intervene.

15. The Advocates' Society does not, and will not, take any position on the underlying facts relevant to the merits of the dispute between the Appellant and the Respondents.

16. The Advocates' Society undertakes not to seek to enlarge the record or to raise any new issues in the appeal.

17. The Advocates' Society will not seek costs and asks that it not be held liable for the costs of any other party or intervener.

AFFIRMED remotely by Guy J. Pratte of the City of Ottawa in the Province of Ontario, before me at the City of Toronto, in the Province of Ontario, on this 11th day of May, 2021 in accordance with O Reg. 431/20, Administering Oath or Declaration Remotely.

A Commissioner for taking Affidavits

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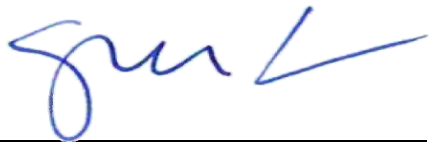

Guy J. Pratte

Tab 3

MEMORANDUM OF ARGUMENT OF THE ADVOCATES' SOCIETY

PART I – OVERVIEW AND FACTS

A. Overview

1. The Advocates' Society seeks an Order granting it leave to intervene in this appeal.

2. This appeal engages access to justice considerations in the context of public interest litigation. The ramifications of this Court's decision on advocates and members of the public, especially those who belong to vulnerable or historically disadvantaged groups (which include First Nations), cannot be understated. The Advocates' Society has a clear interest in this appeal and, if granted leave to intervene, will make arguments about access to justice that are different from those made by the parties.

3. Specifically, The Advocates' Society's submissions will be threefold: (1) access to justice should be the paramount consideration in the advance costs framework; (2) the impecuniosity requirement should be clarified in a manner that better reflects access to justice; and (3) the impecuniosity requirement should be analyzed contextually.

4. In providing these submissions, The Advocates' Society will draw on the unique knowledge and expertise it has developed as an organization that represents approximately 5,200 advocates with extensive on-the-ground experience in the justice system.

B. The Advocates' Society

5. The Advocates' Society is a national professional association that represents approximately 5,200 advocates from across the country.[1] The Advocates' Society's mandate includes advocacy education, legal reform, protection of the rights of litigants, protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice.[2]

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[1] Affidavit of Guy J. Pratte at para 4.

[2] Affidavit of Guy J. Pratte at para 5.

6. The Advocates' Society has established a respected presence within the legal profession and the judiciary. As such, it is regularly called upon by elected officials and public servants for advice and input into virtually every area of litigation and court reform.[3] Through regular submissions of papers and briefs, The Advocates' Society presents its views and initiates needed reforms to the legal system.[4] The Advocates' Society has intervened in numerous cases that affect the administration of justice, advocates, and the public.[5]

PART II – QUESTION IN ISSUE

7. The only issue on this motion is whether The Advocates' Society should be granted leave to intervene in this appeal.

PART III – ARGUMENT

A. The Requirements For Granting Leave To Intervene

8. The granting of leave to intervene is based on two requirements. The first requirement is concerned with whether the applicant has an interest in the issues raised by the parties to the appeal.[6] This requirement is a flexible one. Indeed, "any interest is sufficient, subject always to the exercise of discretion" by the Court.[7] The second requirement is concerned with whether the applicant's submissions will be useful and different from those of the other parties.[8] This requirement will be "easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter."[9]

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[3] Affidavit of Guy J. Pratte at para 5.

[4] Affidavit of Guy J. Pratte at para 5.

[5] Affidavit of Guy J. Pratte at paras 6-7.

[6] *Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*, [1989] 2 SCR 335 at 339 [*Reference re Workers' Compensation Act*]; *R v Finta*, [1993] 1 SCR 1138 at 1142.

[7] *Reference re Workers' Compensation Act*, [1989] 2 SCR 335 at 339-340.

[8] *Reference re Workers' Compensation Act*, [1989] 2 SCR 335 at 339.

[9] *Reference re Workers' Compensation Act*, [1989] 2 SCR 335 at 340.

9. The Advocates' Society meets both of these requirements.

B. The Advocates' Society Has An Interest In This Appeal

10. The Advocates' Society has a significant and clear interest in this appeal. This appeal engages the promotion and improvement of litigants' access to justice. The ability to pay for the cost of litigation is an access to justice issue when it becomes a barrier to equal and fair participation in our justice system. As mentioned above, access to justice is part of The Advocates' Society's mandate. It is also an issue that The Advocates' Society has actively engaged in through prior interventions, including in cases that pertain to the cost of litigation and costs awards in the context of access to justice.[10] This history reflects The Advocates' Society's interest in the issue.

11. This appeal also engages the ability of litigants who are vulnerable or historically disadvantaged to have access to justice through public interest litigation. Historical disadvantage contributes to litigants' inability to pay for the cost of litigation. The Advocates' Society has consistently taken a keen interest in issues that relate to vulnerable or historically disadvantaged groups and their ability to participate in our justice system in an equal and fair manner. Indeed, this interest can be gleaned from the cases in which The Advocates' Society has intervened in the past.[11]

12. The Advocates' Society's interest in this appeal is linked to the potential impact the decision will have on its members. The Advocates' Society's members practise in a broad array of legal fields.[12] The Court's decision in this appeal will undoubtedly affect many of The Advocates' Society's members. This is especially the case for those who practise in public interest litigation.

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[10] For example: *Trial Lawyers Association of British Columbia, et al. v Attorney General of British Columbia*; *Bruno Appliance and Furniture, Inc. v Hryniak*; *Ontario v Criminal Lawyers Association of Ontario*; *1465778 Ontario Inc. v 1122077 Ontario Ltd.*; *McIntyre Estate v Ontario (Attorney General)*. See Affidavit of Guy J. Pratte at para 7.

[11] For example: *R v Chouhan*; *Trinity Western University v Law Society of Upper Canada*; *Law Society of British Columbia v Trinity Western University*; *R v Kokopenace*. See Affidavit of Guy J. Pratte at para 7.

[12] Affidavit of Guy J. Pratte at para 10.

C. The Advocates' Society Will Present A Different And Useful Perspective

13. The Advocates' Society is uniquely positioned to provide the Court with submissions on access to justice considerations. Indeed, given its mandate to promote and improve access to justice as well as its prior experience in intervening in cases that engage (1) access to justice; (2) the cost of litigation and costs awards in the context of access to justice; and (3) issues that pertain to vulnerable or historically disadvantaged groups, The Advocates' Society is well-positioned to provide this Court with a useful and different perspective from the other parties.

14. As an association with a mandate to promote the fair and equitable administration of justice, The Advocates' Society offers a unique and independent perspective on the importance of access to justice in the context of advance costs awards in public interest litigation, especially when the litigation involves vulnerable or historically disadvantaged groups.

15. While the Appellant raises access to justice considerations in her factum, the written argument does not address the issue in depth. As such, the arguments to be made by The Advocates' Society will be different and unique from those made by the Appellant. The Advocates' Society will work with other prospective interveners to avoid duplication in submissions.

D. Overview Of The Advocates' Society's Proposed Submissions

16. If granted leave to intervene, The Advocates' Society's submissions will focus on how access to justice should influence the much-needed development in the legal framework that governs advance costs in public interest litigation. Specifically, The Advocates' Society's proposed submissions will be threefold: (1) access to justice should be the paramount consideration in the advance costs framework; (2) the impecuniosity requirement should be clarified in a manner that better reflects access to justice; and (3) the impecuniosity requirement should be analyzed contextually.

(1) Access To Justice Should Be The Paramount Consideration In The Advance Costs Framework

17. The first argument that The Advocates' Society will make is that this Court should adopt access to justice as the paramount consideration that underpins advance costs, especially when constitutional rights are at issue.

18. In *British Columbia (Minister of Forests) v Okanagan Indian Band*, this Court recognized that costs awards are animated by considerations that surpass indemnifying the successful party in litigation and can play an instrumental role in achieving desired policy objectives.[13] Indeed, this Court recognized that "indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award."[14] In *Okanagan*, this Court recognized that access to justice "has increased in importance," especially in relation to "litigants of limited means" and "ordinary citizens" who engage in public interest litigation.[15] 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."[16]

19. Despite this Court's recognition of the increasing importance of access to justice considerations and their prominence in public interest litigation, this Court's subsequent jurisprudence de-emphasized the role that access to justice ought to play in shaping the legal framework for advance costs. Specifically, in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, this Court held that "*Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs."[17]

20. The Advocates' Society will argue that this case provides an ideal opportunity not only to clarify the precise role that access to justice ought to play in shaping the law of advance costs, but

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[13] 2003 SCC 71 at paras 21-22, 26 [*Okanagan*].
[14] *Okanagan*, 2003 SCC 71 at para 22.
[15] *Okanagan*, 2003 SCC 71 at para 27.
[16] *Okanagan*, 2003 SCC 71 at para 31.
[17] 2007 SCC 2 at para 35 [*Little Sisters No. 2*].

also to recognize access to justice as the paramount consideration in shaping the requirements that have to be met for advance costs orders, especially when constitutional rights are at issue.

21. Giving access to justice this paramount role, it will be argued, is needed for two reasons. First, it reflects the reality that access to justice in Canada is "the most pressing justice issue," because we are facing a "crisis" whereby individuals, especially those that belong to vulnerable or historically disadvantaged groups, cannot seek redress in our courts.[18] As Chief Justice Richard Wagner highlighted in a 2018 speech, 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." Wagner C.J. 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."[19] A legal framework that is intended to facilitate access to ordinary litigants through a costs awards regime ought to be concerned, first and foremost, with how access to justice is reflected and what weight it is given in establishing the preconditions for obtaining advance costs. This is especially the case when constitutional rights are at issue.

22. Second, giving access to justice a paramount role accords with this Court's jurisprudence about the importance of access to justice and what type of justice our system ought to achieve. In particular, in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, this Court held that since "access to justice is fundamental to the rule of law, … it is only natural that s. 96 provide some degree of constitutional protection for access to justice".[20] While *Trial Lawyers* was concerned with hearing fees and their effect on precluding litigants from accessing courts, the recognition that access to justice is naturally deserving of some constitutional protection must influence the development of the legal framework of advance costs, which is inherently concerned with accessing courts.

23. Further, in *AIC Limited v Fisher*, this Court reiterated the importance of access to justice (in the context of a class proceeding) and held that achieving access to justice hinges on the ability

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

[19] Chief Justice Richard Wagner, "Access to Justice: A Social Imperative" (October 4, 2018).

[20] 2014 SCC 59 at para 39 [*Trial Lawyers*].

to ensure that two interconnected dimensions of the concept are satisfied.[21] In particular, this Court held that 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."[22]

24. Both the procedural and substantive dimensions of access to justice are reflected in this Court's recognition that, regardless of whether a proceeding is criminal or civil, litigants have a right to a fair trial and the right to present their case.[23] While this right is clearly intended to protect litigants, it is also intended to preserve the legitimacy of the judiciary and its role of ensuring that justice is done in every case.[24] In many circumstances, especially complex public interest litigation, the right to a fair trial and the right to present one's case will be tied to the need to retain and instruct counsel. Yet, the ability to retain and instruct counsel in complex litigation is associated with being able to bear astonishing costs. In public interest litigation, the principle of access to justice ought to influence how advance costs awards can alleviate barriers. That is, if access to justice is truly to be achieved, any inquiry about the ability to access courts must look beyond the formalities of instituting proceedings and ought to inquire about how a litigant will be able to present their case and whether their right to a fair trial will be fulfilled.

25. An advance costs framework that does not take into consideration both the procedural and substantive aspects of access to justice by ensuring that litigants engaged in public interest litigation are able to access a fair process that leads to fair outcomes that will benefit the public as a whole is not a framework that is compatible with access to justice considerations. As further expanded upon below, fairness in this context includes considering and recognizing the historical disadvantage of an applicant for advance costs, particularly where that disadvantage can be attributed to the actions of the defendant.

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[21] 2013 SCC 69 at para 24 [*AIC Limited*].

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

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

[24] *Sierra Club*, 2002 SCC 41 at para 50.

26. This Court's jurisprudence on access to justice has recognized that the concept has constitutional, procedural and substantive dimensions. But, without giving paramountcy to access to justice in the advance costs framework, these dimensions will not provide sufficient influence. As The Advocates' Society will argue if granted leave, the time has come to give access to justice the weight that it deserves, especially in constitutional rights litigation.

(2) The Impecuniosity Requirement Should Be Clarified In A Manner That Better Reflects Access To Justice

27. The second argument that The Advocates' Society will make is that the impecuniosity requirement for advance costs should be clarified in a way that better reflects access to justice considerations.

28. In *Okanagan*, this Court held that a public interest litigant must be impecunious to be granted advance costs. To meet this requirement, "[t]he party seeking interim costs [has to 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."[25] The impecuniosity requirement has been adopted by this Court in cases that followed *Okanagan*.[26]

29. This case provides an ideal opportunity for this Court to clarify that the analysis of the impecuniosity requirement must take into consideration access to justice concerns. As it stands, the requirement leads to analyses that are zero-sum in nature: either the litigation would be able to proceed or not. But, if it is accepted that the paramount consideration that should underpin advance costs orders is access to justice, the question is not whether the litigation would be able to proceed or not. Rather, the question is what kind of burden public interest litigants should be expected to bear when the substantive outcome of the litigation will benefit the public as a whole. Stated differently, an access to justice perspective means the impecuniosity requirement should be interpreted as necessitating an inquiry into whether there is an undue burden on the litigant to bear the costs of litigating the issues, the determination of which will benefit the public.

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

[26] *Little Sisters No. 2*, 2007 SCC 2 at para 37; *R v Caron*, 2011 SCC 5 at para 39.

30. If granted leave, The Advocates' Society will argue that the needed clarification can be accomplished by adopting the approach to the impecuniosity requirement as put forth by the New Zealand Court of Appeal in *Berkett v Cave*, namely "[i]t would be unduly onerous for the plaintiff to be expected to fund the litigation even in the interim."[27] 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.

(3) The Impecuniosity Requirement Should Be Analyzed Contextually

31. The third argument that The Advocates' Society will make is that the analysis of the impecuniosity requirement should be conducted contextually. Specifically, it will be argued that in determining whether it would be unduly onerous for a litigant to fund the litigation, the inquiry must take into consideration factors other than the amount of funds presently available to a plaintiff. Such factors may include:

(a) The type of claim at issue – for example: is it a claim against the Crown?

(b) The unique circumstances of the plaintiff – for example: is the plaintiff a member of a vulnerable or historically disadvantaged group?

(c) The unique circumstances surrounding the financial condition of the plaintiff – for example: did the defendant's conduct affect the financial condition of the plaintiff, such as the Crown's conduct in respect of First Nations?

(d) The obligations placed on the plaintiff – for example: is the plaintiff under a fiduciary or other obligation in relation to others and their future financial stability?

(e) The potential impact of the litigation beyond the interest of the immediate parties and whether it is reasonable to expect a plaintiff to bear the costs of the litigation

[27] [2001] 1 NZLR 667 at para 13. See Additional Documents In Support, **Tab 4.A.1**.

in the interim – for example: does the outcome of the litigation have the potential to have widespread impact or would the outcome only have a limited effect?

32. The adoption of a contextual approach, it will be argued, will lead to more informed outcomes that give effect to access to justice considerations and reflect the realities that many public interest litigants face. At bottom, an impecuniosity requirement that merely looks into the amount of funds that a plaintiff has without considering the broader context is inadequate, and exploits and perpetuates existing inequities.

33. While the appeal before this Court arises in the context of an Aboriginal rights claim, and The Advocates' Society submits that such context must be given appropriate consideration, there are many other examples where public interest litigation, including constitutional litigation, would arise, meriting a contextual approach. Looking solely at a plaintiff's present finances, without considering the broader context and whether it would be unduly onerous for that plaintiff to fund the litigation, will slam the doors of justice shut to many claimants who have claims that affect the public as a whole.

PART IV – SUBMISSIONS ON COSTS

34. If granted leave to intervene, The Advocates' Society will not seek costs and asks that it not be liable to pay the costs of any party or intervener.

PART V – ORDER SOUGHT

35. The Advocates' Society respectfully asks: (1) for leave to intervene in this appeal; (2) to file a factum not exceeding 10 pages; and (3) to make oral submissions not exceeding 5 minutes at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 12th day of May, 2021.

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

PART VI – TABLE OF AUTHORITIES

Cases	**Paragraph Where Referred to**
AIC Limited v Fisher, 2013 SCC 69	23
Berkett v Cave, [2001] 1 NZLR 667	30
British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71	18, 28
Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue), 2007 SCC 2	19, 28
R v Caron, 2011 SCC 5	28
R v Finta, [1993] 1 SCR 1138 at 1142	8
Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene), [1989] 2 SCR 335	8
Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41	24
Trial Lawyers Association of British Columbia v British Columbia (Attorney General), 2014 SCC 59	22

Secondary Sources	**Paragraph Where Referred to**
Chief Justice Richard Wagner, "Access to Justice: A Social Imperative" (October 4, 2018).	21
Trevor C. W. Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ at 959, 962-965.	21

PART VII – STATUTORY PROVISIONS

Legislation	Paragraph Where Referred to
N/A	

Tab 4

DOCUMENTS IN SUPPORT

Tab	**Document**
A.	Case Law Not Hyperlinked Within This Leave Application
1.	*Berkett v Cave*, [2001] 1 NZLR 667

Tab A

Tab 1

Berkett v Cave — [2001] 1 NZLR 667

New Zealand Law Reports · 5 Pages

Court of Appeal Wellington

4, 14 December 2000

Thomas, Tipping and McGrath JJ

Headnotes

Practice and procedure — Costs — Indemnity costs — Order for indemnity costs in advance of hearing and irrespective of result — Principles — Litigation by customers of energy trust in interests of all customers — Whether order appropriate.

The substantive litigation concerned the conduct of the Hutt Mana Energy Trust. Allegations of exceeding powers and failing to act with the prudence and care expected of trustees were made. The plaintiffs were electricity consumers who purported to represent the interests of all consumers but they were unable to fund the litigation even in the interim. The defendants were the majority of the trustees. At an early stage of the proceedings, the High Court Judge made an order requiring the trust to pay indemnity costs to the plaintiffs for the whole of the rest of the proceeding, irrespective of the result. The trustees appealed to the Court of Appeal.

Held:

An order of the kind in question was only to be made in an exceptional case. An order would not be made unless the applicant showed at a minimum that the case mounted was clearly arguable; that there was a substantial public interest in obtaining the decision of the Court on the issue, irrespective of the result; and that it would be truly onerous to expect the plaintiff to fund the litigation, even in the interim. If these factors were demonstrated the case would be on the way to being a qualifying one but the decision had to depend on the Judge's appreciation of whether it was appropriate, considering all relevant factors, for such an order to be made. The plaintiffs had not demonstrated that there was a public interest in the decision of the Court being obtained nor that it would be unduly onerous to expect them to fund the litigation, nor that the case was an exceptional one. An allegation of lack of care and prudence was not an appropriate subject for such an order (see paras [12], [13], [14], [15]).

Wallersteiner v Moir (No 2) [1975] QB 373; [1975] 1 All ER 849 (CA), *Government Insurance Office of New South Wales v Ivanoff* (1991) 22 NSWLR 368 (CA) and *R v Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 WLR 347; [1998] 2 All ER 755 referred to.

Appeal allowed.

Appeal

This was an appeal by Jeffrey Robert Berkett, John Brian Burke, Chris Kirk-Burnnand and Richard John Werry, as trustees of the Hutt Mana Energy Trust, from an order of Wild J (High Court, Wellington, CP 180/00,

23 November 2000) awarding indemnity costs to the plaintiffs, Murray Peter Cave and Barry David Brown, in advance and irrespective of the result in the pending substantive litigation in which an application for an interim injunction had been refused by Wild J on 19 September 2000.

R A Dobson QC and *E M E Bird* for the trustees.

J C Gwilliam for the plaintiffs.

Cur adv vult

The judgment of the Court was delivered by

TIPPING J.

[1] This appeal is concerned with an order requiring the appellants (the defendants in the High Court) to pay indemnity costs to the respondents (plaintiffs in the High Court). That order was made in the early stages of the litigation and was to apply to the whole of the rest of the proceeding, irrespective of the result. The appellants are the present trustees of the Hutt Mana Energy Trust (the trust). The respondents, Dr Cave and Mr Brown, to whom we will refer as the plaintiffs, have brought proceedings against the trust raising a number of issues. Included are contentions that the trust has exceeded its powers in specified respects, and has improperly exercised certain other powers in the sense of having failed to act with the prudence and care to be expected of trustees. The plaintiffs do not seek to make the present trustees personally liable. They do, however, upon a single multifaceted cause of action, seek declarations to the effect that the present and prior trustees have in seven specified ways acted unlawfully or in breach of their fiduciary duties to the plaintiffs.

[2] Various other orders are sought including an order setting aside a number of amendments to the trust deed, an order "unwinding" an associated charitable trust, an order for account directing the trustees "to account for all remuneration received by them from the Charitable Trust", two different injunctions, and an order directing that the trust be wound up or, alternatively, an order directing "the beneficiaries" to commission an independent review "of the future of the Trust".

[3] The proceedings are thus of considerable width, both as to the elements of the cause of action, and as to the relief sought. Mr Gwilliam for the plaintiffs forecast that they might undergo substantial refinement and narrowing, following completion of discovery, but for present purposes they must be taken as they stand.

[4] For the appellants Mr Dobson QC argued that Wild J, who made the order under appeal, had exercised his discretion on an erroneous legal premise and was in any event plainly wrong in the conclusion to which he came. Counsel accepted that the Judge had jurisdiction to make an order of the kind in question, but contended that the present was not an appropriate case for the exercise of that jurisdiction. Mr Gwilliam endeavoured to support the Judge's order, arguing that he had not erred in law and that this Court should not interfere with his exercise of discretion. Mrs Melhuish, one of the trustees, appeared in person to support the Judge's order, she being of the view that it was justified.

Factual background

[5] We will set out the relevant background as asserted in the plaintiffs' amended statement of claim. The plaintiffs are customer beneficiaries of the trust which was established by deed dated 6 April 1993. Pursuant to the

Energy Companies Act 1992, EnergyDirect Corporation Ltd (the company) acquired the assets and undertaking of the Hutt Valley Energy Board. The trust (then known as EnergyDirect Community Trust) was established in terms of the company's share allocation and establishment plan approved by the Minister of Energy pursuant to s 27 of the Energy Companies Act 1992. The company established the trust to enable it to acquire 30 per cent of the company's share capital and to allow the benefits of ownership of the shares to be distributed to customers and to the community served by the company's energy distribution network.

[6] The trust was established to receive the shares in the company, to enter into and comply with the terms of what is described as the placement deed, and to retain and hold the trust assets on the terms of the trust. An additional purpose and objective of the trust was to encourage and assist the company in meeting its objective of operating as a successful business and return any benefits of ownership to customers and to the community within its district.

[7] Following various mergers and acquisitions, the company became known as TransAlta New Zealand Ltd and

the trust owned approximately 14.6 per cent of its share capital. The transaction whereby the trust became instead a shareholder in National Gas Corporation Holdings Ltd is not immediately relevant to the present appeal; albeit that transaction may feature in the proceedings which are the subject of the order under appeal.

High Court judgment

[8] After setting out the relevant evidence and submissions, the Judge made reference to the new costs rules which came into force on 1 January 2000. He referred to a number of authorities including *Wallersteiner v Moir (No 2)* [1975] QB 373 (CA), *Government Insurance Office of New South Wales v Ivanoff* (1991) 22 NSWLR 368 (CA), and *R v Lord Chancellor, ex parte Child Poverty Action Group* [1998] 2 All ER 755 (Dyson J). We have borne in mind all the cases mentioned by the Judge and cited by counsel, but see no advantage in making citations from them. The Judge suggested that all the issues raised were "of public interest, at least to the Trust beneficiaries but very possibly of wider public interest".

[9] The Judge was satisfied that, on the unexamined evidence before him, the plaintiffs were motivated in bringing the proceeding by genuine concerns they held as beneficiaries, and not by ulterior motives. Whilst he accepted that they would benefit financially if the trust was wound up, so equally would all the beneficiaries. Accordingly, the Judge said he did not consider that the plaintiffs' interests could properly be described as only a private interest in the outcome of the case such as might disqualify them from a costs indemnity.

[10] The Judge held that the plaintiffs did not have the financial resources properly to conduct the proceeding. He did not think they could reasonably be expected to sell their homes for the purpose. That conclusion was reached without the plaintiffs having put before the Court any detailed evidence as to their overall financial position. The Judge indicated that if the plaintiffs were not indemnified for their costs, they might be able to "struggle on" to and through a hearing, but the hearing would not be a satisfactory one. He considered that the Court would in that event be unlikely to have the benefit of the evidence and opposing arguments it would need properly to decide the case. He suggested that a case not properly and adequately decided was arguably best not decided at all.

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[11] The orders made by the Judge were:

(a) The defendant trustees are to indemnify the plaintiffs out of the funds of the Hutt Mana Energy Trust for their actual, reasonable costs of this proceeding, from and including preparation for and the hearing of today's application. Thus, the indemnity is retrospective only to the extent that it covers the filing of today's application, and preparation for it. Otherwise, it covers only the plaintiffs' costs of the proceeding incurred from the delivery of this judgment onwards.

(b) The plaintiffs' solicitor is to bill the Hutt Mana Energy Trust promptly, monthly. The first bill is to be submitted at the end of this month. The bill is to be properly itemised including as to any disbursements or counsel's fees.

(c) If the defendants' solicitor has any concern as to the reasonableness and/or level of costs being incurred by the plaintiffs, then he has leave to apply to me immediately. Any such application may be done simply by notifying the Registrar that counsel wish to see me in respect of costs.

Discussion

[12] The authorities noted by the Judge suggest that the course he took should be taken only in an exceptional case. The Judge did not, however, specifically address that issue, nor indicate on what basis he regarded the present as being an exceptional case. Mr Gwilliam did not find it easy to state why that was so. The basic starting point is that, subject to the Court's discretion at the interlocutory stage, costs are normally awarded after trial and generally follow the event. It is only after trial that the ultimate merits are apparent and account can be taken of the way in which the litigation has been conducted. Mr Dobson was right to submit that costs are the only real sanction available to the Court for inappropriate use of the legal process. That is not to say the present plaintiffs are acting or will act irresponsibly. The point is relevant in a general way and supports the general rule.

[13] As Mr Dobson properly accepted there will be cases, exceptional for whatever reason, in which the Court can properly make an order of the kind now in question. The authorities can be summarised as indicating that to obtain such an order the applicant must, as a minimum, show:

(1) The case mounted is clearly arguable.

(2) There is a substantial public interest in obtaining a decision of the Court on the point or points at issue, irrespective of the result.

(3) It would be unduly onerous for the plaintiff to be expected to fund the litigation even in the interim.

[14] It is difficult to envisage a case qualifying for an advance order for indemnity costs unless the applicant can demonstrate at least these three points. Such demonstration will take the case along the way towards being a qualifying one, but ultimately the outcome will depend on the Judge's appreciation of whether it is appropriate, against all relevant factors, for such an order to be made. The Judge did not direct himself in these terms or to this effect. It is therefore necessary for us to consider the case afresh on that basis.

[15] Although the position is by no means clear, we are prepared to accept for present purposes that the plaintiffs have an arguable case on at least some of the issues they have raised. But we are not satisfied on the material before the Court

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that there is a public interest in the case being brought, irrespective of the result, sufficient to justify the order made. It is possible that when this breach of trust case has concluded, an order for indemnity costs in favour of the plaintiffs may be justified on a retrospective basis. At the present stage we consider the plaintiffs have fallen short of showing grounds for the exceptional course of making an indemnity order in advance. We are also of the view that the plaintiffs did not lay a sufficient evidentiary foundation to support the conclusion that it would be unduly onerous for them to be expected to fund the litigation, even in the interim. They did not specifically assert any difficulty in funding the legal costs, albeit that position may have changed in the light of the suggestion by Mr Gwilliam that other counsel may be instructed.

[16] The plaintiffs' primary point in the High Court appears to have been an inability to fund a variety of expert witnesses. It is not clear how the legal attack which the plaintiffs make on the administration of the trust will be assisted by expert evidence. To the extent that the plaintiffs assert lack of care and prudence, we do not consider that sort of allegation, even in the present context, should be the subject of an advance order for indemnity costs.

Conclusion

[17] Having carefully reviewed the points made by Mr Gwilliam, and those made by Mrs Melhuish in an endeavour to support the Judge's orders, we are satisfied that when the correct legal approach is taken those orders cannot be sustained. We therefore allow the appeal, and set aside the orders made by the Judge.

[18] The question of costs in relation to the application in the High Court and this appeal also arises. The plaintiffs' application was made essentially at the Judge's invitation during the course of earlier interlocutory proceedings. The plaintiffs can hardly be blamed for applying. They achieved success and were thereby encouraged to appear in this Court to defend that success. While we appreciate the position of the trust, we consider that overall justice requires that the plaintiffs should have an order for costs on their application in this Court and below. We therefore order the trustees to pay the plaintiffs the sum of $6000 plus disbursements, to be fixed if necessary by the Registrar to cover the indemnity costs issue both in this Court and in the High Court.

Appeal allowed.

Solicitors for the trustees: *Quigg Partners* (Wellington).

Solicitors for the plaintiffs: *John Gwilliam* (Upper Hutt).

Reported by: Bernard Robertson, *Barrister*
