COURT FILE NO. 33092

IN THE SUPREME COURT OF CANADA

(ON LEAVE FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

Appellant

- and -

GILLES CARON

Respondent

FACTUM OF THE APPELLANT HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA

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PART I – OVERVIEW AND FACTS

Overview

1. The key issue on this appeal is the extent to which a superior court may, absent *Charter* or statutory jurisdiction, order funding in matters of regulatory offences. The financial implications of the Court's decision for all levels of Government could be substantial.

2. The impact of the decision of the Alberta Court of Appeal is significant beyond the particulars of this case because:

(a) contrary to the discretionary award of civil costs which this Court applied in *British Columbia (Minister of Forests)* v. *Okanagan Indian Band* ("*Okanagan*") and *Little Sisters Book and Art Emporium* v. *Canada (Commissioner of Customs and Revenue)*("*Little Sisters*"), the Court of Appeal found a new "right" to costs that is not procedurally incidental to a matter before the Court;

> *British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 S.C.R. 371 ("*Okanagan*")
>
> *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38 ("*Little Sisters*")

(b) the decision effectively creates a right to funding for regulatory matters regardless of a *Charter* breach, statutory framework or the principles set out in *Okanagan* and *Little Sisters*;

(c) the decision creates a new funding regime (without appropriate parameters) leading to interference with Government budgets; and

(d) the decision significantly expands the breadth of "inherent jurisdiction" beyond its proper procedural bounds and into the realm of substantive law making. In this case, applications for funding were granted at Provincial Court but overturned on appeal. Instead of appealing further, Gilles Caron (the Accused) initiated a 'freestanding' application for funding in the Queen's Bench in circumstances where that Court was not seized of the matter, thus circumventing the appeal process.

3. In summary, it is the position of Her Majesty the Queen in Right of Alberta (the Crown) that the Alberta Court of Appeal erred in two central respects. First, the Court erred in finding "inherent jurisdiction" in superior courts to order funding in regulatory matters by which Government is required to fund an accused's case. Secondly, the Court erred in finding that a right to funding in regulatory matters falls within the parameters of *Okanagan* either generally or on the specific facts of this case.

Facts

4. This appeal arises from two Orders granted by Justice V. Ouellette of the Court of Queen's Bench of Alberta ordering the Crown to fund the surrebuttal evidence of the Accused in his constitutional challenge. The first Order (the Interim Order) was granted May 16, 2007, and the second Order was granted October 19, 2007 (collectively the Orders). In total the Orders covered the bills of defence experts called in surrebuttal and funded defence counsel.

> Interim Order of Mr. Justice Ouellette (Court of Queen's Bench of Alberta), Appellant's Record Vol. I at page 188
>
> Order of Mr. Justice Ouellette (Court of Queen's Bench of Alberta), Appellant's Record Vol. I at page 196

5. In 2003, the Accused received a traffic ticket in Alberta for making an unsafe left turn contrary to s.34(2) of the *Use of Highway and Rules of the Road Regulation* (under the *Traffic Safety Act* of Alberta). The ticket was issued in English. The Accused did not dispute the facts of the offence but ultimately, he raised a constitutional challenge to the *Languages Act* of Alberta. Specifically, by Constitutional Notice filed July 15, 2005, the Accused sought the following remedies:

> (a) a declaration that the *Languages Act* of Alberta, to the extent that it abolishes or reduces the linguistic rights that were in force in Alberta pursuant to s.110 of the *North-West Territories Act, 1875*, is incompatible with the Constitution of Canada and is inoperative;
>
> (b) a declaration that the Legislature of Alberta must adopt in French and have all Acts and Regulations of the Province of Alberta translated into French, beginning with those required by the Respondent for this trial: *Traffic Safety Act*; *Use of Highways and Rules of the Road Regulation*; *Provincial Court Act*; *Constitutional Notice Regulation*;

(c) a declaration that everyone has a constitutional right to proceedings in French or English in both criminal and civil matters before all Courts in Alberta, including the right to file all documents and forms in French and to be heard and understand by the courts without interpreters; and

(d) an Order pursuant to s.24(2) of the *Charter* that the charge be struck.

6. Prior to the start of the trial, the Accused received funding to advance his constitutional challenge from the (former) Federal Court Challenges Program ("CCP"). On June 14, 2004, the CCP approved $5000 for an initial study. On May 2, 2005, the CCP approved $55,000 to fund the constitutional challenge raised by the Accused. This arrangement (and subsequent arrangements, below, from CCP) provided for an hourly legal rate of $150.

Response to the Undertakings, August 21, 2007, Undertakings #1, #5 and #21, Appellant's Record Vol. III at page 148 and 151

7. At some point, Legal Aid was sought by the Accused and refused; funding from l'Association canadienne-français l'Alberta was denied but he received two anonymous loans each for $15,000. The Accused also reviewed a website to try to secure funding (franco.ca) and telephoned a francophone organization about funding but was unsuccessful in obtaining additional funding from these sources.

Response to the Undertakings, August 21, 2007, Undertakings #8, #10 and #11, Appellant's Record Vol. III at page 149

8. The trial began on March 6, 2006.

9. On July 20, 2006, the CCP approved another $50,000 toward the constitutional challenge. At or around September 25, 2006, the CCP was abolished by the federal government.

Response to the Undertakings, August 21, 2007, Undertakings #2, #4, #6, and #7, Appellant's Record Vol. III at page 148

10. On August 2, 2006, the Provincial Court trial judge refused to grant an order for state funded counsel based on *Okanagan* principles.

Decision of the Honourable L.J. Wenden (Provincial Court of Alberta), October 18, 2006, Appellant's Record Vol. I at page 2

11. On October 5, 2006, the Accused made an application to have the trial adjourned *sine die* to allow him to take steps to attempt to obtain financing to continue the trial. The trial judge dismissed this application.

Decision of the Honourable L.J. Wenden (Provincial Court of Alberta), October 18, 2006, Appellant's Record Vol. I at page 3 (second paragraph)

12. On October 18, 2006, the Provincial Court trial judge denied an application by the Accused for funding based on the principles set out in *Rowbotham* and *Rain* and refused the request by counsel for the Accused to withdraw from the case. This ruling was not appealed.

Decision of the Honourable L.J. Wenden (Provincial Court of Alberta), October 18, 2006, Appellant's Record Vol. I at page 2

R. v. *Rowbotham* (1988) 41 C.C.C. (3d) 1 (Ont.C.A.) pages 69 - 70

R. v. *Rain* (1999) 68 Alta.L.R. (3d) 371(C.A.) pages 382-383

13. On November 7, 2006, the Provincial Court trial judge granted an application for funding based on a "fairness" argument of the Accused under s. 11(d) of the *Charter*. That Order is not the subject of this Appeal.

Decision of the Honourable L.J. Wenden (Provincial Court of Alberta), November 7, 2006, Appellant's Record Vol. I at page 14

14. As a result of the November 7, 2006 Order, counsel for the Accused submitted his accounts to the Crown. The trial judge subsequently denied a request by the Crown for a review and taxation of the accounts of the Accused's counsel. An application to stay this Order was dismissed by the Court of Queen's Bench. From November 23, 2006, to April 19, 2007, the Crown made payment pursuant to this Order to legal counsel for the Accused in the amount of $317,602.64 based on invoices submitted.

Reasons for Judgment of the Honourable Mr. Justice R.P. Marceau (Court of Queen's Bench of Alberta) (English version), April 19, 2007, Appellant's Record, Vol. I at page 27

Affidavit of Shirley M. Jackson sworn June 21, 2007, Appellant's Record Vol. III at page 172

15. The Crown appealed the November 7, 2006 Order (which essentially provided full funding to the Accused) and the Accused cross-appealed the August 2, 2006 denial of the *Okanagan* Order. On April 19, 2007, the Court of Queen's Bench allowed the Crown's appeal and denied the Accused's appeal for *Okanagan* costs.

Reasons for Judgment of the Honourable Mr. Justice R.P. Marceau (Court of Queen's Bench of Alberta) (English version), April 19, 2007, Appellant's Record, Vol. I at page 21

16. The Accused did not appeal this decision.

17. Instead, the Accused advised that an application would be made in the Court of Queen's Bench for an order of advance interim costs pursuant to *Okanagan*.

18. In advance of the application for further funding, and before any pleadings were filed, on May 16, 2007, Justice V. Ouellette directed the Crown to pay costs on an interim basis to the Accused to cover all fees for his three upcoming expert witness fees called during surrebuttal and some defence counsel expenses (the Accused and the Crown had closed their case). In satisfaction of the Interim Order, the Crown paid the Accused an additional $30,833.36 based on accounts presented.

Interim Order, Appellant's Record Vol. I at page 188

Affidavit of Shirley M. Jackson sworn June 21, 2007, Appellant's Record Vol. III at page 171

19. On October 19, 2007, Justice Ouellette ordered the Crown pay an additional $91,046.29 plus GST to the Accused for the surrebuttal component of the trial. A stay of this Order was denied by both the Chambers Justice and the Court of Appeal.

Reasons for Judgment of the Honourable Mr. Justice V.O. Ouellette (Court of Queen's Bench of Alberta), October 19, 2007, Appellant's Record Vol. I at page 107

Order of Mr. Justice Ouellette (Court of Queen's Bench of Alberta), December 11, 2007, Appellant's Record Vol. I at page 196

Reasons for Decision of the Honourable Mr. Justice Keith Ritter (Court of Appeal for Alberta), March 19, 2008, Appellant's Record Vol. I at page 132

20. The Crown appealed both the Interim Order of May 16, 2007 and the October 19, 2007 Order. The Alberta Court of Appeal dismissed the Crown's appeal.

Reasons for Judgment of the Honourable Mr. Justice Keith Ritter (Court of Appeal for Alberta), January 30, 2009, Appellant's Record Vol. I at page 142

21. During the course of the trial the Accused received in excess of $600,000.00 in the following amounts to fund his constitutional challenge:

From CCP	$120,000.00
Two anonymous payments	$30,000.00
Pursuant to the August 2, 2006, Order	$15,949.65
Pursuant to the November 7, 2006, Order	$317,602.64
Pursuant to the May 16, 2007, Order	$30,833.36
Pursuant to the October 19, 2007, Order	$91,046.29

22. In brief, during the Provincial Court trial, the Accused made several unsuccessful applications for costs (both *Rowbotham* and *Okanagan* applications). Ultimately the Provincial Court ordered the Crown to fund the constitutional challenge raised by the Accused. This Order was overturned on appeal (Justice Marceau of the Court of Queen's Bench of Alberta) and the Accused did not appeal Justice Marceau's decision.

23. While the Provincial Court trial was ongoing, the Accused appeared before Justice Ouellette of the Court of Queen's Bench of Alberta and successfully sought funding for the last component of trial which consisted of providing surrebuttal expert evidence to the Provincial Court.

24. The Court of Appeal of Alberta upheld the funding Order of Justice Ouellette.

PART II – QUESTIONS AT ISSUE IN THIS APPEAL

25. This appeal raises the following issues:

(1) Did the Supreme Court of Canada in *Okanagan* and *Little Sisters* establish a "right" to costs?

It is the position of the Crown that there is no "right" to costs.

(2) Does a superior court have jurisdiction to order funding for an accused in a regulator matter of which it is not seized?

It is the position of the Crown that a superior court does not have jurisdiction to order funding for an accused in a regulatory matter of which it is not seized.

(3) Is the test set out in *Okanagan* and refined in *Little Sisters* adequate to address applications for funding in the context of regulatory offences?

It is the position of the Crown that the test set out in *Okanagan* and in *Little Sisters* does not apply to funding in the context of regulatory offences.

(4) Are the *Okanagan* and *Little Sisters* criteria met in this case?

It is the position of the Crown that the *Okanagan* and *Little Sisters* criteria are not met in this case.

PART III – ARGUMENT

A. Standard of Review

26. This appeal relates to errors in law committed by the Alberta Court of Appeal in finding that costs are a 'right' and the Court of Appeal's decision that the principles set out in *Okanagan* and *Little Sisters* justify the creation of a right to funding in the regulatory context. As a result, the standard of review is one of correctness.

Housen v. *Nikolaisen*, [2002] 2 S.C.R. 235 at page 247

27. This appeal also relates to errors in the application of the criteria set out in *Okanagan* and *Little Sisters*. These errors will also engage the jurisdiction of this court to intervene and set the funding orders aside.

Okanagan, supra, paragraph 43

Little Sisters, supra, paragraphs 92-93

B. Jurisdiction of the Court

a) <u>There is a regime in place to address costs in regulatory proceedings</u>

28. The Alberta Legislature has spoken with respect to costs in regulatory offences before the Provincial Court:

(a) The *Provincial Offences Procedure Act,* R.S.A. 2000, c. P-34 ("*POPA*") sets out the procedure with respect to traffic offences subject to express provisions in any Act. There is no other Act that provides a procedure with respect to the offence committed by the Accused in this case, nor for an application before the Court of Queen's Bench of Alberta by an accused for funding.

(b) A Provincial Court can award costs to an accused in a regulatory matter pursuant to the criteria set out in ss. 809 and 840 of the *Criminal Code of Canada*. Those costs are limited to reasonable costs that are not inconsistent with fees set out in s.840. The oft-stated rationale for limiting circumstances when an accused should receive costs from the Crown is the public policy that absent abuse or misconduct, the primary focus of criminal proceedings is the guilt or innocence of an accused.

Criminal Code of Canada, sections 809 and 840

R. v. Onevathana, (2002) 306 A.R. 345 (Q.B.) page 357

R. v. M. (C.A.) [1996] 1 S.C.R. 500 at page 569

France (Republic) v. Foster, (2006) 274 D.L.R. (4th) 253 (Ont.C.A.) page 277

(c) Costs may also be granted by a Provincial Court to an accused in a regulatory matter in the event of a s.24 (1) *Charter* remedy. This appeal does not arise out of a *Charter* breach or the granting of a Charter remedy.

R v. Pang (1994) 95 C.C.C. (3d) 60 (Alta. C.A.) page 70-71

R v. Robinson (1999) 142 C.C.C. (3d) 303 (Alta.C.A.) page 315

Ontario v. 974649 Ontario Inc. [2001] 3 S.C.R. 575 at pages 620-621

29. Thus, there is already a regime in place to address costs or partial funding, including funding of counsel in a regulatory context. There is neither legislative authority nor case law which supports a right to full funding (as ordered by the Superior Court in this case) in regulatory matters.

b) <u>The Accused did not appeal his denial of *Okanagan* costs but rather made a 'Freestanding' Request to the Superior Court which was not Seized of the Regulatory Matter</u>

30. The 'freestanding' funding request made by the Accused to the Court of Queen's Bench of Alberta arose out of a regulatory matter for which the Provincial Court had exclusive statutory jurisdiction at the trial level and for which, at the time of the request, the Provincial Court was seized. The Court of Queen's Bench of Alberta does not possess the jurisdiction to create a right to funding against the Crown in a regulatory matter for which it was <u>not seized</u>.

31. The *POPA* does not provide for an application before the Court of Queen's Bench of Alberta by an accused for funding.

Provincial Offences Procedure Act, supra

32. By ordering funding is this matter, the Court of Queen's Bench of Alberta indirectly did what the Provincial Court was not entitled to do directly and effectively allowed the Accused to usurp the appeal process he ought to have followed. Put another way, instead of appealing further (as provided for procedurally) the Accused essentially circumvented the appeal process and sought funding before the Court of Queen's of Bench in the form of a 'freestanding' request.

33. Given that the Accused had failed to pursue all available appeal remedies, it was inappropriate for the Court of Queen's Bench of Alberta to award funding under the circumstances of this case. With respect, the Court of Queen's Bench of Alberta should have held there was no right to funding for regulatory offences in the present circumstances.

34. There is no statutory authority for a funding award by the Court of Queen's Bench of Alberta in relation to a matter before the Provincial Court dealing with a regulatory offence. Section 21 of the *Court of Queen's Bench Act* speaks of costs "in any matter authorized to be taken before the Court". Section 8 of the *Judicature Act* speaks of exercising jurisdiction "in every proceeding pending before it" and Rules 600 and 601 of the *Alberta Rules of Court* provide for costs in matters "before the Court." Within this statutory framework, the Court of Queen's Bench of Alberta does not have jurisdiction to direct the Crown to fund an accused in a regulatory matter for which the Provincial Court is seized given that the regulatory prosecution is not "before" the Superior Court.

Court of Queen's Bench Act, R.S.A. 2000, c.C-31, s.21
Judicature Act, R.S.A. 2000, c.J-2, s.8
Alberta Rules of Court, A.R. 390/68, Rule 600 and 601

35. The Court of Appeal's apparent basis for finding jurisdiction in this case to order funding was that where there is a 'right', there must be a forum in which the right holder can vindicate that 'right.' In doing this, the Court of Appeal created a 'freestanding' right to funding for regulatory offences and found that, in the absence of another court with jurisdiction to award this funding, the Court of Queen's Bench of Alberta had jurisdiction to do so.

36. Given that that the Court of Queen's Bench of Alberta was not seized with the prosecution of the Accused and given that *POPA* does not provide for a 'freestanding' application to the Court of Queen's Bench in regulatory matters, but rather provides for an appeal process, the Court of Queen's Bench of Alberta should not have awarded funding to the Accused under the circumstances of this case.

Provincial Offences Procedure Act, *supra*, ss. 18 and 19

c) *Okanagan* does not establish a 'right' to costs in the civil context

37. Contrary to the finding of the Court of Appeal, *Okanagan* and *Little Sisters* do not establish a substantive 'right' to advance costs in civil litigation.

38. *Okanagan* recognized that the jurisdiction of a superior court includes, in extraordinary circumstances, discretion to order advanced costs. Those costs, as a matter of law, are and can only be incidental to the civil proceedings for which that Superior Court is seized. That incidental procedural nature is the essential characteristic that lies at the core of the Court's jurisdiction to award costs.

39. *Okanagan* recognizes that in a very narrow class of cases and in special circumstances, an ordinary but impecunious party to civil litigation, with a *prima facie* case of merit, may be able to obtain some advance costs in order to proceed with a litigious matter which is of importance to the community as a whole. At its core, the advance of civil costs under *Okanagan* is a discretionary matter, falling within the jurisdiction of a Court to exercise its discretion to order costs in a matter before that Court.

40. It does not therefore follow that *Okanagan* and *Little Sisters* stand for the proposition that there is a right to costs in a regulatory matter for which a court, other than the Superior Court, is seized.

41. In reaching the conclusion that there is a 'right' to costs, the Court of Appeal erred in applying *Board v. Board*, which was cited for the position that where there is a right, there must be a Court in which that right can be vindicated:

> The right to divorce had, before the setting up of a Supreme and Superior Court of Record in Alberta, been introduced into the substantive law of the Province. (...) *that Court* was bound to entertain and to give effect to proceedings for making *that right* operative. [Emphasis added.]
>
> *Board v. Board*, [1919] A.C. 956, page 962

42. While the principle established in *Board v. Board* remains good law, with respect, it is not applicable in the circumstances of this case. *Board v. Board* does not stand for the proposition that where a costs regime is limited in relation to regulatory matters for which a Provincial Court is seized, a superior court may supplement that regime by

creating a right to funding for regulatory offences. As noted in *R.* v. *Sandmaier*:

> . . . that particular principle [where there is a right, there must be a Court to enforce it] however, deals largely with whether or not there should be a Court available to do something within the limits of the law, and not that a Court should be able to dream something up outside the limits of the law in order to come up with some kind of answer that they would make of "evening the score"
>
> *R. v. Sandmaier,* [2006] 396 A.R. 275 (Q.B.) pages 285 – 286

43. It is illogical to suggest that where there is no 'right' to funding before the Superior Court in relation to a regulatory matter for which the Provincial Court is seized, the Accused's application for a *discretionary* remedy, can create jurisdiction where there is none. The comments of Justice Wilson in *R. v. Rahey,* are somewhat extant:

> I pause here to emphasize that it is rights that are guaranteed under the *Charter*, not remedies. The content of those rights cannot, in my opinion, be determined by the procedural context. This would be to have the tail wag the dog. Remedies follow upon the violation of rights. It must first be determined that a violation has occurred before remedies are considered. *It is the remedy which must be tailored to the right and not vice versa.* [Emphasis added.]
>
> *R. v. Rahey,* [1987] 1 S.C.R. 588 at page 621

44. The Court of Appeal misapplied *Board* v. *Board* in concluding that there is a 'right' to funding in regulatory matters, that the Provincial Court cannot enforce a funding right and therefore that 'right' must be enforceable by the Superior Court.

d) No Inherent Jurisdiction to Establish a Right to Funding

i) Historical Backdrop of Inherent Jurisdiction

45. A careful examination of the evolution of the doctrine of inherent jurisdiction shows that there is no inherent jurisdiction for a Superior Court to establish a funding right for an accused charged with a regulatory offence in a matter for which the Provincial Court is seized. A good starting point is perhaps the following words of this Court in *Okanagan*:

> The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion. [Emphasis Added]

Okanagan, supra, at paragraph 19

46. This brief discussion sets out the basic principles of jurisdiction over costs which existed in England in the common law courts and the courts of equity before those courts were combined in 1874. The jurisdiction of common law courts was statutory. The jurisdiction of the Courts of equity was discretionary.

Supreme Court of Judicature Act, 1873 (UK) 36 & 37 Vict., c. 66, ss. 3 and 16

47. Historically, the jurisdiction of the courts of equity over costs did not include jurisdiction to award costs *against the Crown.* In England, as a general proposition, in Courts of Law the Crown neither received nor paid costs, while in Courts of Equity the Crown could receive costs

but could not be made to pay costs. The courts could not give costs "to a party as against the Crown, except in cases falling within the statute 18 & 19 Vict. c. 90."

Attorney General v. Ashburnham (1823), 75 E.R. 157 at page 159

Attorney-General v. Hanmer (1859), 45 E.R. 80

48. As a general proposition, the Court of Chancery's jurisdiction to award costs against the Crown is derived from a relatively modern statutory grant of power. The courts of both common law and equity had no inherent jurisdiction to award costs against the Crown, and did not award costs against the Crown until Parliament conferred such jurisdiction by statute.

> Apart from statutory provisions, the general rule at common law is that neither the Sovereign, nor any person suing to his use, pays or receives costs.

Viscount Hailsham, *Halsbury's Laws of England.* 2d ed. (London: Butterworth, 1942), v. 6 at pages 485 and 486

> The payment of costs in criminal proceedings, except when an indictment has been removed by certiorari, depends entirely upon statute, and is governed mainly by the Costs in Criminal Cases Act, 1908.

Viscount Hailsham, *Halsbury's Laws of England.* 2d ed. (London: Butterworth, 1942), v. 9 at 283

Also see: *Kane* v. *Reynolds* (1854), 43 E.R. 628 at pages 630 and 631

49. In Alberta, the jurisdiction of the Court of Queen's Bench, as it applies to this case, originates from the *Judicature Act*, R.S.A. 2000, c. J-2, ss. 4, and 5. That jurisdiction is essentially the same as the Courts existing on July 15, 1870 in England. Those Courts did not have jurisdiction to grant costs against the Crown except as set out in statute.

Judicature Act, R.S.A. 2000, c. J-2, ss. 4, and 5

National Arts Services Corp. v. Bank of British Columbia (1981), 16 Alta L.R. (2d) 111 at 114-117 referred to in *Despins v. St. Albert (City)*, 2004 ABQB 328, at paragraph 18, Fraser, J.

50. Given that historically costs could only be awarded against the Crown as provided by statute, the Crown submits that the inherent equitable power of the Court of Queen's Bench to award such costs should be interpreted accordingly. On this basis, the Crown submits that:

> (a) The Court of Queen's Bench does not possess statutory jurisdiction to create a right to funding in regulatory proceedings before another court; and
>
> (b) any inherent equitable power to create such a right as against the Crown cannot be extended this far.

Court of Queen's Bench Act, supra, s. 21

51. Canadian courts have recognized that costs could be ordered against the Crown by a superior court in a criminal case in exceptional circumstances; specifically, misconduct, dishonesty, or abuse of process that would satisfy the criteria for contempt of court. However, the Alberta Court of Queen's Bench has held there is no inherent jurisdiction to award costs against the Crown, in a criminal case, in the absence of such misconduct or dishonesty.

R. v. Brasok, [1993] A.J. No. 982 (Alta. Q.B.) at paragraphs 5 – 12

52. More recently, in *Okanagan* and *Little Sisters*, this Court has recognized a narrow equitable jurisdiction to exercise its discretion and order advance costs against the Crown in civil cases. The Court recognized this inherent power as implicit in the superior courts' jurisdiction over costs as set out in statutes such as the British Columbia *Rules of Court.*

Okanagan, supra, at paragraphs 19 and 35

53. The Crown submits that the issue before this Court is not, fundamentally, whether the court has equitable jurisdiction to award advance costs with respect to a matter properly before it in the civil context. That was the issue before the Supreme Court in Canada in *Okanagan* and *Little Sisters*. What is at issue in this case is whether the Court of Queen's Bench has inherent equitable jurisdiction to create a right to funding against the Crown with *respect to a regulatory matter before the Provincial Court* where a regime providing a limited ability to funding already exists in the regulatory context.

54. It is submitted therefore that Alberta superior courts do not enjoy inherent equitable jurisdiction to award costs against the Crown. Courts must rely on statutory jurisdiction to make such awards. In *Okanagan*, this Court ordered advanced costs pursuant to the applicable legislation and Rules of Court in British Columbia.

Okanagan, supra, at paragraph 6

Little Sisters, supra, at paragraph 112

ii) Inherent Jurisdiction of the Superior Court to act in aid of an Inferior Court

55. The decision of Justice Ouellette at the Court of Queen's Bench and, to a lesser degree, that of the Court of Appeal relies upon the inherent power of a superior court to "render assistance to inferior courts to enable them to administer justice fully and effectively".

Sir Jack I. H. Jacob, "The Inherent Jurisdiction of the Court", (1970) *Current Legal Problems* 23 at 23-25

Keith Mason, "The Inherent Jurisdiction of the Court" (1983) 53 *Australian L.J.* 449 at 456

56. The jurisdiction of a superior court to act in aid of an inferior court is intended to allow a superior court to enforce rights to assist the inferior court in performing its assigned jurisdiction, by punishing contempt, issuing subpoenas, staying proceedings, or doing other similar things to ensure the proper administration of justice.

57. With respect, neither the Court of Queen's Bench nor the Court of Appeal considered in detail whether the Provincial Court in this instance needed the aid of a superior court. Their analysis focused on the Accused. The Provincial Court had, by the time of the decision of Justice Ouellette, already denied an application to adjourn the trial, denied an application for *Rowbotham* costs, denied an application for counsel to withdraw and denied an *Okanagan* application. The trial was continuing and no action by the superior court was needed to aid the Provincial Court. Funding of the nature ordered in this case is not something that falls within these categories of assistance to an inferior court that a superior court is entitled to provide.

58. Until the Accused has established a right to funding in Provincial Court and the inability of the Provincial Court to ensure funding is available, it is respectfully submitted that a superior court cannot make an order for funding on the basis of its inherent jurisdiction to act in aid of the Provincial Court. There is no entitlement in the Provincial Court process to *Okanagan* funding and the superior court's inherent equitable jurisdiction to order *Okanagan* funding cannot be engaged.

59. The *POPA* gives the unambiguous legislative intent respecting costs in regulatory offences before Provincial Court [see paragraph 28 above]. Given that legislative intent:

> . . . the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a Judge of that Court to make an order negating the unambiguous expression of the Legislative will. The effect of the order made in this case was to alter the statutory priorities, which a Court simply cannot do.
>
> *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.,* [1976] 2 S.C.R. 475 at page 480

60. As was pointed out in *Baxter Student Housing Ltd, supra* this restriction continues even if a superior court Justice is of the view that there exists compelling reasons to override the statute. As noted by the Quebec Court of Appeal in *St. Arnaud* v. *C.L.*, it is not up to the courts to intervene but to the Legislature to decide whether there is a need to provide for legislation.

> *St. Arnaud* v. *C.L.* 2009 Carswell Que 39 (C.A.) at paragraph 29 [leave to appeal refused June 18, 2009]

61. With the utmost of respect, inherent jurisdiction is not a matter that a superior court may use for any purpose:

> ... inherent jurisdiction is not a convenient label which enables a judge to impose some personal view of justice whenever he or she believes a litigant has been wronged. Historically, inherent jurisdiction has been invoked only in limited circumstances.
>
> *Bass v. McNally* (2003), 35 C.P.C. (5th) 219 (C.A.) pages 225 and 230
>
> ... it has been argued that the court has inherent jurisdiction to order anything it thinks necessary to do justice in pending proceedings. Such a rule is too vague and unpredictable to be treated as having the quality of law. Taken literally, this claim is an invitation to the court to assume virtually despotic powers; it

> was unequivocally rejected by Lord Hailsham in the *Siskina*, by Ackner L.J. in *A.J. Bekhor & Co. Ltd.* v. *Bilton* and by the Court of appeal in *Moore* v. *Assignment Courier Ltd.*
>
> M.S. Dockray, The Inherent Jurisdiction to Regulate Civil Proceedings (1997) 113 *L.Q.R.* 120 at 128-129.

62. It is respectfully submitted that there is no general right to be represented by a lawyer in court proceedings even where a person's legal rights and obligations are at stake:

> The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamentally important aspect of the rule of law. In our view it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad right to legal counsel as an aspect of, or precondition to, the rule of law.
>
> *British Columbia (A.G.)* v. *Christie*, [2007] 1 S.C.R. 873 at pages 883-884

63. To date, access to justice has not lead to the creation of a funding right for an accused involved in a regulatory matter before the Provincial Court. The access to justice case law does not warrant the establishment of a funding regime in regulatory matters and would constitute a significant departure from the current cost rules in the regulatory context. Bringing an issue of public importance to the Courts will not automatically entitle a litigant to preferential treatment with respect to costs, as noted by this Honourable Court in *Little Sisters*.

> *Little Sisters*, *supra* at paragraph 35

64. It is further submitted that inherent jurisdiction does not impart a jurisdiction to override legislative priorities by effectively creating a funding regime (without appropriate parameters) for regulatory offences. With respect, the superior court's broad inherent jurisdiction is not unconfined.

65. As noted by the British Columbia Court of Appeal in *Okanagan*, the jurisprudence is clear that Courts may not order expenditure of public funds aside from a *Charter* breach or a statutory scheme. No body, other than a directly elected Legislature, can provide for payment from the consolidated revenue fund:

> Where no breach of the *Charter* is shown or threatened and where no "fund" or "program" has been established, it seems clear that Courts of Law do not have the jurisdiction to order the Crown to defray legal fees or retain counsel.
> This of course is a principle of responsible government under a democratic constitution. Similarly, it ensures parliamentary control over an accountability for, not only taxation but also appropriation of public funds. No body other than a directly elected Legislature can provide for payment from the consolidated revenue fund without contravening ss. 53 and 54 of the *Constitution Act, 1867*.
>
> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, (2001) 208 D.L.R. (4th) 301 (B.C.C.A.) paragraph 34 (also see paragraph 27)

See also:

> *Auckland Harbor Board v. R.* (1923), (1924) A.C. 318 (New Zealand P.C.)
>
> *R. v. Savard*, (1996) 106 C.C.C. (3d) 130 (Y.T.C.A.) 157 - 160; leave to appeal refused (1997) SCR x1

66. On the facts of this case, a superior court does not have jurisdiction to order the Crown to pay funds out of the General Revenue Fund to fund regulatory matters which are prosecuted before the Provincial Court, absent *Charter* or statutory jurisdiction. The financial implications of the decision of the lower courts in this matter are significant: where a constitutional issue is raised in a regulatory matter by an impecunious litigant, the government would be exposed to the risk of a funding order. This not only threatens Government budgets, it also usurps the Legislature's lawmaking role.

e) <u>*Okanagan* in the Regulatory Context</u>

67. The test set out in *Okanagan* and refined in *Little Sisters* for the advance interim costs in civil litigation is wholly inadequate for ordering funding in regulatory matters where the Crown

is always a party and cannot be put in a position as nearly as possible as in a suit between person and person. The Crown's unique role in prosecuting regulatory offences precludes such a possibility. The reasons in *Okanagan* do not suggest that this Honourable Court intended the principles established in *Okanagan* to apply other than in a civil context, and then only rarely.

68. The principles discussed in *Okanagan* and *Little Sisters* include partial indemnification of the successful party, encouraging settlement, deterrence of frivolous actions and defenses, and to discourage unnecessary steps in the litigation. These costs principles are unique, specific to the civil context and generally do apply in the criminal context.

Okanagan, supra, at paragraph 23

69. In civil proceedings, costs are routinely granted to the successful party. This is distinct from the criminal context where costs awards are only given in extraordinary circumstances. In *R.* v. *Robinson*, the Alberta Court of Appeal noted that, in criminal proceedings, costs may be awarded against the Crown only when there has been serious misconduct:

> The reasons for limiting costs are that the Crown is not an ordinary litigant, does not win or lose criminal cases, and conducts prosecutions and makes decisions respecting prosecutions in the public interest. In the absence of proof of misconduct, an award of costs against the Crown would be a harsh penalty for a Crown officer carrying out such public duties.

R. v. Robinson, supra

70. The courts have highlighted the difference between costs in a civil proceeding and costs in a regulatory proceeding. It is respectfully submitted that, the different legal principles underlying costs awards in the civil and criminal context militates against the application of civil costs rules in a criminal proceeding.

R. v. Derose, [2003] 6 W.W.R. 554 (Alta.P.C.) at pages 580-581

R. v. Sappier, (2004) 242 D.L.R. (4th) 433 (CA) at pages 468 – 469 [appealed on other grounds]

71. With respect, making an *Okanagan* Order available in a regulatory proceeding would tend to encourage complexity and additional expense and frustrate the summary nature of the proceedings.

72. This Honourable Court was very clear in *Little Sisters* that *Okanagan* did not create a parallel system of legal aid or a court managed funding program. The advance of interim costs is not to constitute a new financing method for self appointed representatives of the public interest. This Court's decision in Okanagan was not intended to provide a general funding mechanism for important cases.

Little Sisters, supra, paragraphs 5, 44 and 94
Okanagan, supra, paragraph 41

73. According to *Okanagan* and *Little Sisters*, an advance award of costs is based on the provincial Rules of Court pursuant to the relevant scale. In the case of the Accused, the orders appealed from were granted on the basis of full indemnity funding in the absence of a *Charter* breach and in the absence of any statutory or case authority to do so.

Okanagan, supra, paragraph 19
Little Sisters, supra, paragraph 112

74. In this case, the schedule of costs in Alberta's Rules of Court was not followed. In addition, the Court expressly denied the right of the Crown to have the costs taxed. Under the Orders appealed from, the Accused received in excess of approximately $100,000 in addition to the $300,000 already advanced pursuant to earlier orders overturned on appeal, which were not repaid. The impact of the Court of Appeal's decision is the creation of a new funding scheme, absent Crown misconduct or a *Charter* breach.

75. It is submitted that if the Court of Queen's Bench did have jurisdiction to issue the funding order, which Alberta explicitly denies, Court of Appeal erred in failing to set clear, identifiable limits on the funding award.

Little Sisters, supra, at paragraph 4 and 112

76. Finally, the presence of the following factors in this case does not qualify the Accused's circumstances as a "proper case" to apply *Okanagan*:

(a) The fact that state action triggered the prosecution of the illegal left turn committed by the Accused does not warrant an Order from the Superior Court that the Crown fund the constitutional challenge raised by the Accused. To hold otherwise would unfairly penalize the state, particularly where the state was obligated to act.

(b) The fact that the Accused challenged the constitutionality of Alberta's *Language Act* is not a basis to establish a right to fund the constitutional challenge raised by the Accused. Clearly the Crown was obligated to defend the constitutionality of its legislation and, absent impropriety, the mere fact of state involvement cannot be the basis for ordering the Government to fund a constitutional challenge of an Accused involved in a regulatory offence. As noted by L'Heureux-Dubé in her dissent in *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 at page 419:

> ... one can easily appreciate the floodgates that would be opened if state action was a proper factor to consider in apportioning cost. State action is present in most cases, criminal ones and constitutional ones in particular. To make it a consideration in awarding costs would pose an unbearable burden on the state, a burden that would add to the millions of dollars already devoted to legal aid. In addition, it would provide a means to bypass legal aid norms. Consequently, as a matter of policy, it should be discouraged.

(c) The fact that the Accused raised a constitutional challenge does not warrant any special treatment. The mere fact of a constitutional challenge does not automatically raise a case outside the statutory boundaries:

> There is nothing remarkable about this case, no oppressive or improper conduct is alleged against the Crown, and it was the appellant, not the Crown, who brought the matter to this court.

R. v. Trask [1987] 2 S.C.R. 304 at pages 307 - 308

(d) The fact that this matter involves an argument of francophone minority linguistic rights does not automatically take the considerations of the Court out of the norm. To hold otherwise would mean that any accused raising a language rights issue in the regulatory context would be entitled to have their constitutional challenge funded by Government. In addition, all the other individuals charged who have felt discriminated against on grounds other than linguistic rights could seek funding.

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise (2008) 440 A.R. 56 (NWTCA)

77. The fact that the Crown provided a detailed reply to the constitutional challenge raised by the Accused and vigorously defended provincial legislation, and that the trial was lengthy (due to a number of circumstances beyond the control of the Crown) does not mean Government should fund the trial of the Accused. It would create a dangerous precedent for Government to fund the constitutional challenge in these circumstances.

C. *Okanagan* and *Little Sisters*

78. The test set out by this Honourable Court in *Okanagan* requires an examination of three factors. This Court held that even if those three factors are met, the Court considering the application must still carefully review the terms of advance interim costs and control the limits. The creation of a parallel funding regime was not the intention of this Honourable Court's rulings in *Okanagan* and *Little Sisters.*

Okanagan, *supra*, at paragraph 41

Little Sisters, *supra*, paragraphs 42 to 43, 94 and 112

79. The majority in *Little Sisters* confirmed these criteria but applied them in a different order so as to put the impecuniosity of the parties in context. In *Little Sisters* this Court considered impecuniosity only after considering the merit of the claim and whether the issues raised are of public importance and have not been resolved in previous cases.

Little Sisters, *supra*, paragraphs 51 and 67

80. *Little Sisters* also made it clear that if an applicant failed to meet any one of the criteria, then the application would fail.

Okanagan, *supra*, at paragraph 36, 40, 41

Little Sisters, *supra*, paragraphs 37 and 88

81. In a separate concurring opinion Chief Justice McLaughlin cast some light on the limits of the rule laid down in *Okanagan* stating that the circumstances of the case must be special, even extreme.

Little Sisters, *supra*, paragraphs 102 and 103

82. This Honourable Court in *Little Sisters* made it clear that the fulfillment of the three listed conditions is necessary but not sufficient to justify an advance costs order. The Court must examine all the circumstances of the case and determine not only if its importance is sufficiently "special" to support an extraordinary order, but also if there are any other factors which might militate for or against the granting of relief.

Little Sisters, *supra*, paragraphs 37 and 103 to 105

83. As well, both *Okanagan* and *Little Sisters* make it clear that the precise nature of the order needs to be carefully crafted.

Okanagan, *supra*, at paragraph 41

Little Sisters, *supra*, paragraphs 40 to 43, 94 and 112

a) <u>First Factor: A party cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial</u>

84. The first part of the test relates not only to the Accused's financial circumstance but also to other realistic options for getting the issue to Court. The Court of Queen's Bench stated that this test was met because the Accused "has no realistic means of paying the fees resulting from this litigation and that al other possibilities for funding have been canvassed but in vain". The Court of Appeal agreed, noting a "gross imbalance of resources" and upholding the ruling from below that the Accused had explored all other avenues of funding.

Reasons for Judgment of the Honourable Mr. Justice V. Ouellette (Court of Queen's Bench of Alberta), October 19, 2007, Appellant's Record, Vol. I, page 123, paragraph 31

Reasons for Judgment of the Court of Appeal of Alberta (The Honourable Mr. Justice K. Ritter) January 30, 2009, Appellant's Record, Vol. I, page 169, paragraph 56

85. It is respectfully submitted that both the Court of Queen's Bench and the Court of Appeal erred in their assessment of this element of the *Okanagan* test. It is not only the Accused's resources that are to be considered but also other realistic options for getting the matter to Court. In fact the issue of the constitutionality of Alberta's *Languages Act*, or variations of it, has already been litigated at all levels of Court.

Little Sisters, supra

R. v. Mercure [1988] 1 S.C.R. 234, page 282

R. v. Paquette [1990] 2 S.C.R. 1103

R. v. Lefebvre [1993] 3 W.W.R. 436 (Alta.C.A.)

R. v. Rottiers [1995] 4 W.W.R. 93 (Sask. C.A.) page 96

86. The Accused received his traffic ticket in 2003. The trial did not commence until March of 2006 and the Accused swore his Affidavit in support of his application for funding in May 2007. The Accused's attempts to get funding were minimal at best, and include:

(a) The Accused used <u>none</u> of his own money to fund the challenge (beyond what he may have to repay in relation to the two loans ($15,000 each) from the anonymous donors;

Gilles Caron (on Affidavit) Cross-examination June 7, 2007, Appellant's Record Vol. III, at page 19 (page 223 of Transcript), lines 20 to 22; page 20 (page 223 of Transcript), lines 4 and 5, page 26 (page 230 of Transcript), lines 21 to 23

Response to the Undertakings, August 21, 2007, Undertaking #11, Appellant's Record Vol. III at page 149

(b) Legal counsel for the Accused anticipated that the trial, including the constitutional challenge raised by the Accused, would take between two to five

days. Their view of this started to change during the trial which commenced on March 1, 2006;

> Response to the Undertakings, August 21, 2007, Undertaking #9, Appellant's Record Vol. III at page 149

(c) The Accused had been advised by his legal counsel that the $60,000 from the CCP should be enough to cover the costs of the Provincial Court trial.

> Gilles Caron (on Affidavit) Cross-examination June 9, 2007, Appellant's Record Vol. III, at page 69 (page 273 of Transcript), lines 13 to 24; page 125 (page 327 of Transcript), line 7 to page 128 (page 330 of Transcript) at line 11

(d) Prior to the commencement of the trial on March 1, 2006, the CCP funds in the amount of $55,000.00 (which had been approved by the CCP on May 2, 2005) had been exhausted. These funds had been used by the end of February 2006;

> Response to the Undertakings, August 21, 2007, Undertakings #1 and 5, Appellant's Record Vol. III at page 148

(e) The Accused did not attempt to secure funds from Legal Aid until after the start of trial in March 2006;

> Affidavit of Gilles Caron, sworn May 3, 2007 and filed May 4, 2007, Appellant's Record, Vol. II at page 4, paragraph 9

(f) The Accused asked the l'Association canadienne-française de l'Alberta (a body which has an objective the promotion of French language use in Alberta and which has funded other litigation relating to French linguistic minority language rights) to fund his constitutional challenge. L'ACFA chose not to fund the challenge raised by the Accused at the Provincial Court level;

> Gilles Caron (on Affidavit) Cross-examination June 9, 2007, Appellant's Record, Vol. II, page 92 (page 79 of Transcript), line 23 to page 94 (page 81 of Transcript), line 10

(g) No public fund raising was attempted in the two years prior to the start of the trial; and

Gilles Caron (on Affidavit) cross examination, June 9, 2007, Appellant's Record Vol. III, page 37 (page 241 of Transcript), line 23 to page 38 (page 242 of Transcript), line 16

(h) The CCP provided the Accused with a maximum amount of money. At the time of abolishment of the CCP, the Accused had already received $ 120,000.00 to fund his constitutional challenge.

87. It may be considered unfortunate that the Accused found he was unable to fund the constitutional challenge he wished to bring in defence of his traffic ticket. However, Government should not be made to fund the defense of an accused in a regulatory prosecution simply because an accused has chosen to litigate a particular issue as a self-appointed representative of the public interest, especially when a potentially larger interested and financially able community may be able to pursue the claim if it should so choose. In fact, the Accused himself (or indeed any Albertan) could have at any time advanced the constitutional challenge in a civil context. This Accused did not need to wait until he was charged with an offence. Consequently, the Provincial Court proceedings with its procedure are not the only realistic option to bring the issue to trial.

Little Sisters, supra, paragraphs 5 & 44

88. The impact of the ruling from the Court of Appeal that an imbalance of resources meets the first part of the *Okanagan* test means the test will frequently be met when one of the parties involved is a government. This frequency will increase significantly in the context of regulatory prosecutions where the Crown is always a party. With respect, the Court of Appeal has created a court ordered funding arrangement and significantly altered the *Okanagan* test by making the first part of the test irrelevant.

89. It is further submitted that the Record does not support the factual finding of the Courts below, that the Accused canvassed all other avenues of funding.

b) Second *Okanagan* Factor - *Prima Facie* Merit to the Claim

90. The Constitutional Notice filed by the Accused raises legal issues which have previously been determined by this Court and the Alberta Court of Appeal. The Notice seeks a declaration "that the *Languages Act* of Alberta, to the extent that it abolishes or reduces the linguistic rights that were in force in Alberta pursuant to s.110 of the *North-West Territories Act, 1875*, is incompatible with the Constitution of Canada and is inoperative". That precise issue has already been determined by this Court.

R. v. Mercure, supra
R. v. Paquette, supra
R. v. Lefebvre, supra
R. v. Rottiers , supra

91. This Court and the Alberta Court of Appeal have long decided that there is no constitutional requirement for Alberta to enact its laws in French. An allegation that a law is unconstitutional, when that law complies with the constitutional requirements as identified, considered, and stated by the Supreme Court of Canada and the Alberta Court of Appeal, is *prima facie* unmeritorious.

R. v. Mercure, supra
R. v. Paquette, supra
R. v. Lefebvre, supra
R. v. Rottiers , supra

92. In any event, the Court of Appeal recognized that the Court of Queen's Bench failed to apply the second criterion set out in *Okanagan*. *Okanagan* and *Little Sisters* are clear that all three criteria must be met. As a result, the Court of Appeal erred in concluding that there was no error when the Court of Queen's Bench failed to apply the second criteria in his analysis.

Okanagan, supra, paragraph 40 and 41
Little Sisters, supra, paragraph 37

c) Third *Okanagan* Factor - public importance

93. The third branch of the *Okanagan* test identifies the existence of special circumstances necessary to warrant the award of advance costs and has three elements: (1) the issues transcend individual issues; (2) the issues are of public importance; and (3) the issues have not been resolved in previous cases.

94. It is submitted that the Court of Appeal erred in failing to address this part of the *Okanagan* test. It is further submitted that the Court of Queen's Bench erred in stating that this part of the test is met because of (1) the scope of the question; (2) the amount of evidence and (3) and impact of the decision.

95. Public importance, within the meaning of the *Okanagan* test, must be based on the nature of the litigation and not on the apprehended or desired outcome of the case.

Little Sisters, *supra*, paragraphs 64 & 66

96. Finally, in this case, the third element of the third branch of the Okanagan criteria is not satisfied. This Court has already decided the relevant issues concerning linguistic rights in Alberta. The Accused's Constitutional Notice challenging Alberta's language laws raised issues which had previously been determined in *R. v. Mercure, R. v. Paquette*, *R. v. Lefebvre* and *R. v. Rottiers*.

R. v. Mercure, *supra*
R. v. Paquette, *supra*
R. v. Lefebvre, *supra*
R. v. Rottiers, *supra*

97. Even if the three criteria set out in *Okanagan* and refined in *Little Sisters* had been met in this case (which is denied), the Court of Appeal erred in creating a funding right, on the basis of *Okanagan* and *Little Sisters*, against the Crown in relation to a regulatory matter for which an inferior court is seized. The *Okanagan* test is inadequate for granting an order against the Crown

to fund an accused who challenges a charge arising from a breach of a regulation before the Provincial Court.

PART IV – COSTS

98. The Appellant is not seeking costs of this appeal and submits that this is not an appropriate case in which the Accused is entitled to costs.

PART V - ORDER SOUGHT

99. Her Majesty the Queen in Right of Alberta seeks an order that this appeal is allowed and that the Accused is to repay money received under terms of the Orders appealed from.

100. In the alternative, such relief as this Honourable Court deems appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 11th day of December, 2009.

Per: Margaret Unsworth
Margaret Unsworth, Q.C.
Counsel for the Crown

Per: Teresa Haykowsky
Teresa Haykowsky
Counsel for the Crown

LIST OF AUTHORITIES

STATUTES

ARTICLES

44. M.S. Dockray, *The Inherent Jurisdiction to Regulate Civil Proceedings* (1997) 113 L.Q.R. 120 at 128-129. 61

45. Viscount Hailsham, *Halsbury's Laws of England*. 2d ed. (London: Butterworth, 1942), v. 6, pp. 485-486 and Vol. 9 at p. 283 48

PART VII - STATUTE AT ISSUE

Languages Act, R.S.A. 2000, c.L-6

Loi Linguistique, R.S.A. 2000, c. L-6

LANGUAGES ACT

Chapter L-6

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

"Act" means an Act of the Legislature;

"Assembly" means the Legislative Assembly of Alberta;

"Ordinance" means an Ordinance of the North-West Territories that is or was at any time in force in Alberta or that part of the North-West Territories that formed Alberta;

"regulation" means a regulation, order, bylaw or rule that is enacted under an Act or an Ordinance;

"Standing Orders" means the document of the Assembly entitled the "Standing Orders of the Legislative Assembly of Alberta".

1988 cL-7.5 s1

Validation of Acts and other matters

2(1) All Acts, Ordinances and regulations enacted before July 6, 1988 are declared valid notwithstanding that they were enacted, printed and published in English only.

(2) All

(a) actions, proceedings, transactions or other matters taken, done or arising by or under an Act, Ordinance or regulation validated under subsection (1) are declared not to be invalid,

(b) rights, obligations, duties, powers and other effects created, limited, revoked or otherwise dealt with by or under an Act, Ordinance or regulation validated under subsection (1) are declared not to have been invalidly created, limited, revoked or otherwise dealt with, and

(c) matters or things, in addition to those referred to in clauses (a) and (b), done by, in, in reliance on or under an Act, Ordinance or regulation validated under subsection (1) are declared not to have been invalidly done,

solely by reason of the fact that the Act, Ordinance or regulation was enacted, printed and published in English only.

1988 cL-7.5 s2

Language of Acts and regulations

3 All Acts and regulations may be enacted, printed and published in English.

1988 cL-7.5 s3

Language in the courts

4(1) Any person may use English or French in oral communication in proceedings before the following courts:

(a) the Court of Appeal of Alberta;

(b) the Court of Queen's Bench of Alberta;

(c) repealed RSA 2000 c16(Supp) s50;

(d) The Provincial Court of Alberta.

(2) The Lieutenant Governor in Council may make regulations for the purpose of carrying this section into effect, or for any matters not fully or sufficiently provided for in this section or in the rules of those courts already in force.

RSA 2000 cL-6 s4;RSA 2000 c16(Supp) s50

Language in the Assembly

5(1) Members of the Assembly may use English and French in the Assembly.

(2) The Standing Orders and the records and journals of the Assembly, within the meaning of section 110 of *The North-West Territories Act* (Canada) as it applied to Alberta, made before July 6, 1988 are declared valid notwithstanding that they were made, printed and published in English only.

(3) The Standing Orders and records and journals of the Assembly may be made, printed and published in English.

(4) The Assembly may, by resolution, direct that all or part of the Standing Orders or the records and journals of the Assembly shall be made, printed and published in English or French or both.

1988 cL-7.5 s5

Effect of validation

6 The declaration of validity of Acts, Ordinances, regulations and the Standing Orders under this Act does not revive any Act, Ordinance, regulation and Standing Order that has been repealed, substituted or superseded or that has otherwise ceased to be in force on or before July 6, 1988.

1988 cL-7.5 s6

Non-application

7 Section 110 of *The North-West Territories Act* (Canada), RSC 1886 c50, as it existed on September 1, 1905, does not apply to Alberta with respect to matters within the legislative authority of Alberta.

1988 cL-7.5 s7

English and French versions

8 The English version and the French version of this Act are equally authoritative.

1988 cL-7.5 s8

LOI LINGUISTIQUE

Chapitre L-6

Table des Matières

LOI LINGUISTIQUE

Sa Majesté, sur l'avis et avec le consentement de l'Assemblée législative de la province de l'Alberta, édicte ce qui suit:

Définitions

1 Dans la présente loi

*Assemblée+ désigne l'Assemblée législative de l'Alberta;

*loi+ désigne une loi de la Législature de l'Alberta;

*ordonnance+ désigne les Ordonnances des Territoires du Nord-Ouest en vigueur à un moment donné en Alberta ou dans la partie de ces territoires dont elle a été formée;

*règlements de l'Assemblée+ désigne le document intitulé *Standing Orders of the Legislative Assembly of Alberta+;

*règlements+ désigne les règlements, décrets, arrêtés, règlements administratifs ou règles édictés en application d'une loi ou d'une ordonnance.

1988 cL-7.5 art1

Validation des lois et actes divers

2(1) Il est declaré que les lois, ordonnances et règlements édictés avant le 6 juillet 1988 sont tous valides, indépendamment du fait qu'ils ont été édictés, imprimés et publiés en anglais seulement.

(2) Il est déclaré qu'aucun des actes accomplis sous le régime, en conséquence ou sur le fondement de lois, ordonnances ou règlements validés par le paragraphe (1) n'est invalide du seul fait que ces lois, ordonnances ou règlements n'ont été édictés, imprimés et publiés qu'en anglais. Sont notamment visées les actions, procédures, opérations ou autres initiatives, ainsi que la création, la limitation ou la suppression de droits, obligations, pouvoirs, attributions ou autres effets, ou la prise de toute autre mesure à cet égard.

1988 cL-7.5 art2

Langue des lois et règlements

3 Les lois et règlements peuvent être édictés, imprimés et publiés en anglais.

1988 cL-7.5 art3

Langue dans les tribunaux

4(1) Chacun peut employer le français ou l'anglais dans les communications verbales dans les procédures devant les tribunaux suivants de l'Alberta:

(a) la cour d'appel de l'Alberta;

(b) la cour du banc de la Reine de l'Alberta;

(c) abrogé RSA 2000 c16(Supp) art50;

(d) la cour provinciale de l'Alberta.

(2) Le Lieutenant-gouverneur en conseil peut établir des règlements en vue de donner effet aux dispositions du présent article ou de préciser ou compléter le présent article ou les règles de procédures des tribunaux précitées déjà en vigueur.

RSA 2000 cL-6 art4;RSA 2000 c16(Supp) art50

Langue de travail de l'Assemblée

LOI LINGUISTIQUE

5(1) Les membres de l'Assemblée peuvent employer le français ou l'anglais dans l'Assemblée.

(2) Il est déclaré que les règlements de l'Assemblée et les procès-verbaux et journaux au sens de l'article 110 de *l'Acte des Territoires du Nord-Ouest* (Canada) établis avant le 6 juillet 1988 sont valides indépendamment du fait qu'ils ont été établis, imprimés et publiés en anglais seulement.

(3) Les règlements de l'Assemblée et ses procès-verbaux et journaux peuvent être établis, imprimés et publiés en anglais.

(4) L'Assemblée peut toutefois, par résolution, décider de faire établir, imprimer et publier tout ou partie de ses procès-verbaux et journaux et des règlements de l'Assemblée en français ou en anglais ou dans ces deux langues.

1988 cL-7.5 art5

Non-remise en vigueur

6 La déclaration de validité, par la présente loi, des lois, règlements, ordonnances ou des règlements de l'Assemblée n'a pas pour effet de remettre en vigueur ou de rendre de nouveau valides les lois, règlements, ordonnances ou les règlements de l'Assemblée, qui ont été abrogés, annulés ou remplacés ou, d'une façon générale, qui sont devenus inopérants au plus tard le 6 juillet 1988.

1988 cL-7.5 art6

Non-application

7 L'article 110 de *l'Acte des Territoires du Nord-Ouest* (Canada), LRC 1886 c50, en sa version du 1er septembre 1905, ne s'applique pas à l'Alberta pour ce qui est des matières relevants de la compétence législative de celle-ci.

1988 cL-7.5 art7

Versions française et anglaise

8 Les versions française et anglaise de la présente loi ont également force de loi.

1988 cL-7.5 art8