SCC COURT FILE NO. 35591

SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
AND GLORIA TAYLOR

APPELLANTS

- and -

ATTORNEY GENERAL OF CANADA and
ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF QUEBEC

INTERVENERS

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF BRITISH COLUMBIA

(Pursuant to Rule 46 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND FACTS

Overview

1. Canada's system of costs is based on a presumption that in an adversarial hearing, a successful party will obtain partial indemnity (i.e., party-and-party) costs against the unsuccessful litigant. Interverners and other parties who do not participate on an adversarial basis usually bear their own costs, at least if they do not stray into an adversarial role. These presumptions represent a Canadian compromise between the English system of full indemnity for costs, and the American system in which all litigants presumptively bear their own costs. While trial courts have a discretion to provide special costs in exceptional circumstances[1], these circumstances must be truly exceptional and the discretion must be exercised in a principled way.

2. Historically, governments had a prerogative immunity from costs awards. When this immunity was altered by crown proceedings legislation, it was done so on the basis that governments should be placed in the same position as private litigants. This Court has rejected the idea that a "noble cause" or the supposed deep pockets of government should be grounds to depart from the presumptive rule of party-party costs following the event that apply to private litigants[2]. It should continue to do so.

3. The Attorneys General participate in constitutional and public law litigation to promote the public interest and assist in the orderly development of the law. Litigation budgets are limited, and special costs awards will deter Attorneys General from performing this function.

4. In this case, the trial judge awarded special costs even though there was no suggestion of reprehensible behaviour on the part of either of the government parties. Special costs were awarded against the Attorney General of British Columbia ("AGBC"), even though her role was limited to

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[1] As noted in *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at para. 45, special costs will normally be less than the amount a solicitor would actually be entitled to charge his or her own client. In most instances a bill for special costs will usually be about 80% to 90% of a similar bill assessed under the *Legal Profession Act*.

[2] *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, at para 86. This Court reversed the order for solicitor-client costs, finding at para. 87 that while "judicial independence is a noble cause that deserves to be firmly defended" it was "not appropriate" to grant solicitor-client costs rather than party-and-party costs.

participation under the British Columbia *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The Court of Appeal correctly reversed these awards.

5. The AGBC advances the following propositions:

- Except in those limited circumstances in which advance costs orders are appropriate, costs should follow the event. Canada should therefore not be liable for costs if it is successful in this Court.
- If an Attorney General participates as an intervener or as a "party" under the *Constitutional Question Act*, whose role is limited to assisting the court, it should not face costs liability at all and nor should it be entitled to costs.
- Even if a constitutional litigant is successful, in the absence of litigation misconduct it should almost always be limited to party-and-party costs. A "public interest" exception to this principle has proven unworkable and arbitrary, and arguably is contrary to the separation of powers.
- If the Court decides to retain a "public interest" exception to the rule in *Mackin* that a noble cause does not entitle a constitutional litigant to solicitor-and-client costs, it should provide further guidance on when that exception should be applied. The AGBC submits that an applicant for solicitor-and-client costs should prove the following:
    - First, that the public importance of the litigation is truly exceptional.
    - Second, that there is no means to fund the litigation, or part of it, that intrudes less on the government's responsibility for public funds.
    - Third, that the legal expenses claimed were necessary and proportional to the interests at stake.

Facts

6. At trial, the appellants challenged the *Criminal Code of Canada* provisions prohibiting physician-assisted suicide. They raised a division of powers argument alleging the impugned laws invaded provincial jurisdiction over health matters under s. 92(7), (13) and (16) of the *Constitution Act, 1867*.[3]

[3] The decision in *Attorney General of Canada v. PHS Community Services Society*, 2011 SCC 44, was released on September 30, 2011, less than two months before the hearing in this matter began on November 14, 2011. At the trial, the division of powers and interjurisdictional immunity issues were not argued as the appellants accepted that *PHS*

AGBC's Limited Participation at the Trial Level

7. The AGBC was provided notice, as required by the *Constitutional Question Act* and joined the litigation pursuant to the provisions of that statute: s. 8(4) & (6). The AGBC appeared as of right to assist the trial court, and any subsequent appellate court, by providing the court with evidence of legislative facts within provincial jurisdiction and with submissions on the constitutional questions set out by the appellants.

8. The AGBC had also been a party in the *Rodriguez* challenge, which raised the same issues with indistinguishable adjudicative facts, and in that litigation had led extensive evidence in support of the constitutionality of the legislation.[4] In addition to the AGBC being in possession of the entire record from *Rodriguez*, counsel for the AGBC throughout *Rodriguez* - George Copley, Q.C. - was counsel for the AGBC at trial in the instant matter.

9. The case was heard as a summary trial before the BC Supreme Court under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Evidence was presented through affidavits, but the parties could require deponents to attend for cross-examination either outside of court or at trial. The parties also had some opportunity to elicit evidence from their own deponents through examinations-in-chief.[5]

10. One hundred and sixteen affidavits were filed, and 18 affiants were cross-examined, including 11 before the court.[6] The appellants filed 85 affidavits (including 19 in reply), the AG Canada filed 21 affidavits in response and the AGBC filed 11. Of the 57 expert evidence affidavits, the AGBC filed two, the AG Canada filed 16 and the appellants filed 39. The modified summary trial took place over 23 days[7], with one additional day for the costs hearing.

Community Services Society rendered their proposed argument untenable (see *Carter v. Canada Attorney General,* 2012 BCSC 886 [Merits Reasons] at para. 29, Joint Record ("JR") VI, A.R. 14). These issues also were not argued at the appellate level but have been resurrected by the appellants in their factum before this Court.

[4] *Rodriguez v. British Columbia (Attorney General)*, 1992 CarswellBC 2292 (S.C.), aff'd (1993), 82 B.C.L.R. (2d) 273 (C.A.), aff'd [1993] 3 S.C.R. 519.

[5] Merits Reasons, at para. 137, J.R. VI, A.R. 38.

[6] Merits Reasons, at para. 114, J.R. VI, A.R. 34.

[7] Merits Reasons, at para. 1, J.R. VI, A.R. 8.

11. The AGBC's affidavit materials included the full record that had been before the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.[8] Otherwise, the AGBC's evidence primarily covered matters under provincial jurisdiction and supervision.[9]

12. The 11 affidavits filed by the AGBC consisted of:

a. the two expert affidavits and two other affidavits focussing on the hospice and palliative care system and, as well, other end-of-life provisions in British Columbia[10];
b. one affidavit setting out the positions taken by medical associations on euthanasia and assisted suicide[11];
c. two affidavits concerning provincial initiatives aimed at assisting people contemplating suicide and one more general affidavit on the National Suicide Prevention Strategy[12];
d. an affidavit containing the entire record that was before the court in *Rodriguez*[13];
e. an affidavit in reply to the Report of the Select Committee of the Assemblée Nationale of Québec on Dying with Dignity tendered by the appellants in April 2012[14]; and
f. an affidavit concerning anonymity of witnesses and the affidavit of L.M. tendered by the appellants, which was ultimately not admitted by Madam Justice Smith because the deponent wished to remain anonymous.[15]

13. Madam Justice Smith estimated that the amount of time the AGBC took during the modified summary trial was 10% of the time taken by AG Canada.[16] AG Canada took roughly one-half of the 23 days of hearing, meaning the AGBC's participation apportioned thusly totalled slightly more than one day. Most of this time was spent in legal argument on the constitutional questions before the court.

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[8] Costs Reasons, at para. 15, J.R. VII, A.R. 47.
[9] *Ibid.*
[10] Merits Reasons, at paras. 689-700, J.R. V-I, A.R. 198 & J.R. VII, A.R. 1 - A.R. 3.
[11] Merits Reasons, at paras. 273-275, J.R. VI, A.R. 85 - A.R. 88.
[12] Affidavit #1 of Derek Sturko, Affidavit #2 of Heather Davidson, and Affidavit #1 of Christine Fairey all filed October 12, 2011.
[13] Merits Reasons, at paras. 943-945, J.R. VII, A.R. 67 - A.R. 68.
[14] Affidavit #2 of Nancy Reimer filed April 12, 2012.
[15] Merits Reasons, at para. 1260, J.R. VII, A.R. 155 - A.R. 156; Affidavit #1 of Craig Jones filed September 19, 2011.
[16] *Carter v. Canada (Attorney General)*, 2012 BCSC 1587 (the "Costs Reasons") at para. 100, JR VIII, A.R. 32.

14. The AGBC made submissions on the following legal issues:

a. Section 7 of the *Charter* – it was submitted that section 241(b) of the *Criminal Code* did not violate the principles of fundamental justice since it is not arbitrary, overbroad or grossly disproportionate. As well the AGBC submitted that just as in *Rodriguez*, and contrary to the position taken by the appellants, societal considerations should continue to play a role in determining the principles of fundamental justice where the onus of proof is on the challenger of the legislation; it was submitted that such considerations should not be confined to s. 1 where the onus is on the defenders of the impugned law.

b. Section 15 of the *Charter* – it was submitted that section 241(b) of the *Criminal Code* applies to everyone and makes no distinctions based on an enumerated or analogous ground of prohibited discrimination.

c. Section 1 of the *Charter* – it was submitted that section 241(b) of the *Criminal Code* had a pressing and substantial objective as found by Justice Melvin in the *Rodriguez* trial, that the prohibition was a rational means of attaining that objective, that there was minimal impairment since no lesser measure than a blanket prohibition would suffice to protect vulnerable persons and that the salutary effects of the prohibition outweighed the deleterious effects.

d. *Stare decisis* – Madam Justice Smith invited submissions on the effect of the Ontario Court of Appeal's decision in *Bedford*[17] and its consideration of the precedential binding effect that must be given to earlier Supreme Court of Canada decisions if there are matters that go beyond the core issue earlier decided.

e. Additionally the AGBC made submissions that the legalization of assisted suicide is a matter for Parliament and not for the courts to determine.

[17] *Bedford v. Canada (Attorney General)*, 2012 ONCA 186.

15. The AGBC made no submissions with respect to interjurisdictional immunity, as the appellants chose not to pursue that argument in light of this Court's decision in *PHS Community Services Society*.

16. The AGBC took no position with respect to the personal remedy sought by Ms. Taylor, but did make submissions in support of the protective conditions that all of the dissenting justices in *Rodriguez* would have imposed. Madam Justice Smith adopted those protective conditions as a component of the constitutional exemption granted to Ms. Taylor.

17. At no time did the AGBC seek an award of costs or take the position that the appellants should be responsible for paying costs to AGBC if they were not successful in the litigation.

The Costs Judgments

18. Madam Justice Smith issued her reasons for judgment on costs on November 1, 2012, found that the plaintiffs would have special costs from the AG Canada and the AGBC and allocated those costs as 90% payable by the AG Canada and 10% payable by AGBC.[18]

19. The appellants estimated the costs for the preparation and hearing of the matter before the British Columbia Supreme Court at $1.3 million.

20. The AGBC appealed from the Costs Reasons pursuant to leave granted by the Court of Appeal on January 9, 2013.

21. On October 10, 2013, a majority of the Court of Appeal found that their differing conclusion on the application of the doctrine *stare decisis,* from that of Madam Justice Smith, meant that neither special costs nor any order for costs as against the successful party were appropriate. The majority departed from the ordinary costs rule by ordering that no costs be awarded to the successful party and it made no order for payment of costs with respect to the appeal.[19]

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[18] Costs Reasons, J.R. VIII, A.R. 32.
[19] *Carter v. Canada (Attorney General)*, 2013 BCCA 434, at paras. 338-346 and 351, J.R. VIII, A.R. 146 - A.R. 149 [Appeal Reasons].

22. The majority of the Court of Appeal further found that Madam Justice Smith did not have a principled rationale for departing from the general practice of not awarding costs against an intervening Attorney General:

> It cannot be said in this case that British Columbia assumed carriage of the proceeding, which was vigorously defended at all times by Canada. British Columbia's role was limited, on the trial judge' [sic] calculation, to 10% of the time taken by Canada, and included such proper steps as placing before the Court the record that had been before the Court in *Rodriguez*, setting out the position of the medical associations on issues of physician-assisted death, and describing the palliative care system in British Columbia. In other words, British Columbia directed its efforts to placing relevant materials before the Court. One cannot say this limited degree of participation on the part of an intervenor in proceedings challenging federal laws, was improper or otherwise deserving of a costs order against it.[20]

23. Therefore, the majority of the Court of Appeal allowed the AGBC's appeal and set aside the order requiring the AGBC to pay trial costs.[21]

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[20] Appeal Reasons, at paras. 349, J.R. VII, A.R. 150.
[21] Appeal Reasons, at para. 350, J.R. VII, A.R. 151.

PART II - POINTS IN ISSUE

THE ATTORNEY GENERAL OF BRITISH COLUMBIA'S POSITION ON THE ISSUES

24. The AGBC takes the following positions on the issues in this appeal:

i. Neither Canada nor the AGBC should be liable for costs if the main appeal is unsuccessful on the merits;

ii. If the appeal is successful on the merits, Canada should only be liable for costs on a party-and-party basis.

iii. In any event, the AGBC should not be liable for costs.

PART III - STATEMENT OF ARGUMENT

A. Overview

25. This Court's leading statement on when the presumptive award of party-and-party costs should be departed from in a constitutional case is at paragraphs 86 and 87 of *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13:

> At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80).
>
> Although judicial independence is a noble cause that deserves to be firmly defended, it is not appropriate in my opinion to grant such a form of costs to the respondents in this case. I would accordingly award them their costs on a party-and-party basis.

26. The AGBC says there is no reason to depart from the principle that solicitor-client costs are awarded rarely, and that the existence of a noble cause, even a noble cause vindicated by a court, is insufficient. There is also no need to depart from the principle that solicitor-client costs are appropriate if a party, including a government, has displayed reprehensible, scandalous or outrageous conduct. The AGBC says that the principle that solicitor-client costs may be awarded for "reasons of public interest" has created considerable confusion, and is not consistent with respect for division of powers. It should either be jettisoned or clarified.

27. The appellants urge this Court to adopt the approach established by the British Columbia Court of Appeal in *Adams* for awards of special costs in public interest litigation.[22] With this approach a court is asked to consider the "most relevant factors" for determining whether to order special costs, namely whether: (a) the case involves matters of public importance that transcend the immediate interests of the named parties and have not previously been resolved; (b) the successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically; (c) the unsuccessful party has a superior capacity to bear the costs of the proceeding; and (d) the successful party has not conducted the litigation in an abusive, vexatious or frivolous manner. These factors then are subject to an overarching final question, "Does the public interest in resolving a legal issue of broad importance, which would otherwise not be resolved, justify the exceptional measure of awarding special costs?"[23]

28. The AGBC submits there are three problems with the *Adams* approach to special costs in constitutional or public interest litigation:

a. The *Adams* approach has not created the certainty and predictability this area of the law requires.[24]

b. The *Adams* approach does not adequately address the exceptional nature of a deviation from general costs rules in the public interest litigation context. The criteria as

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[22] *Victoria (City) v. Adams*, 2009 BCCA 563, at paras. 188-189.
[23] *Adams, supra,* at paras. 188-189.
[24] See, e.g., *Vancouver (City) v. Zhang*, 2011 BCCA 138: Two years after its decision in *Adams*, the Court of Appeal split on whether or not, in light of the *Adams* test, special costs should be awarded in *Zhang*.

outlined in *Adams* could be met in almost any constitutional or *Charter* challenge. The Court of Appeal recognized this, noting at paragraph 191 that they were not suggesting "that a successful public interest litigant will automatically be entitled to special costs." Presumably, the intent of the overarching question was to limit special costs to "cases involving matters of public interest that are highly exceptional [so that] special costs (even for successful public interest litigants) must be the exception rather than the norm".[25]

The approach taken by Madam Justice Smith at trial demonstrates how unpredictable and malleable is the *Adams* test, especially regarding previous cases that have determined issues placed again before the courts . After addressing the four relevant factors, Madam Justice Smith turned to the overarching question. In finding special costs were warranted, she considered that (a) the issues in the litigation were complex and momentous, would affect many people and would have an impact on the development of fundamental principles of Canadian law; (b) the plaintiffs would not have been able to prosecute their claim without the assistance of "pro bono" counsel[26]; and (c) the required degree of exceptionality was "somewhat less" for an award of special costs than for advance costs or costs to an unsuccessful litigant.[27]

Most major instances of *Charter* litigation will meet all three of these factors: such litigation is typically complex, impacts the development of fundamental principles of law, affects many people and, once in receipt of a successful decision, appears to require less exceptionality than advance costs or a costs award to an unsuccessful

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[25] See also *Zhang, supra*, at para. 28 and see also para. 35. This reflects this Court's statement in *Little Sisters* at para. 35 that "[b]ringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs."

[26] If special costs (i.e. almost full indemnification) becomes the norm rather than the exception with a successful constitutional challenge then it may "start to look like a cousin to contingency fee arrangements (*i.e.,* a lawyer expecting to be compensated if successful but willing to bear the financial risk of an unsuccessful outcome)": Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46 Osgoode Hall L.J. 131 at 144.
If special costs even when unsuccessful becomes the norm then the work should not be considered "pro bono" (i.e. legal work done without compensation for the public good) as counsel is simply delaying payment until the conclusion of a file. While large law firms may be able to defer recovery of such costs, lawyers in smaller firms or who practice in smaller cities and rural areas would likely not be able to and thus any "incentive" such an award would provide is much more limited than an award of advance costs.

[27] Costs Reasons, at paras. 87-89, J.R. VIII, A.R. 29

party: see, e.g., *Chaoulli*,[28] *Khadr*,[29] *Bedford*,[30] and *Reference re Same-Sex Marriage*.[31] It is difficult to say at this point the impact this low threshold for special costs in public interest litigation will have going forward.

c. The *Adams* approach does not adequately balance the competing goals that must be reflected in any order for costs. Instead, the *Adams* approach, by contemplating an asymmetrical cost regime, overemphasizes a plaintiff's access to justice at the expense of the separation of powers. It neglects how the Canadian principle of presumptive partial immunity for legal expenses balances the ability of *all* parties to participate in legal proceedings by avoiding over-deterring the risk averse from pursuing legitimate litigation (the danger of the English system) with under-deterring unmeritorious claims (the danger of the American system). The asymmetry of the cost award puts the court in the position of favouring one side in a litigation battle.

29. The AGBC submits that in establishing a principled approach, this Court must be alive to the various competing principles that underlie these awards.[32] The best approach is to follow the standard in private litigation, a result mandated by s. 11(1) of the B.C. *Crown Proceeding Act,* R.S.B.C. 1996, c. 89. This provision, which overturned the Crown's historic immunity from costs, did so only where such an order was one that might be made in proceedings between persons other than the Crown. If the Court does not go this far, the AGBC submits that in determining whether to depart from the ordinary approach to costs for "public interest reasons", a court must consider:

a. Is the importance of the case advanced by the party truly exceptional?
b. Is there no other way to fund the litigation in whole or in part?
c. Are the expenditures necessary and proportional to the interests at stake?

If the party seeking the order successfully establishes these three things, then a court may exercise its discretion to order a different costs award so long as that party also establishes that the case is

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[28] *Chaoulli, supra.*
[29] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.
[30] *Bedford, supra.*
[31] *Reference re Same-Sex Marriage*, 2004 SCC 79.
[32] See for instance *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, per Bastarache and LeBel J.J. at para. 35 in which the majority of this Court noted that access to justice had not been established as "the paramount consideration in awarding costs" but instead "[c]oncerns about access to justice must be considered and weighed against other important factors."

sufficiently exceptional that the ordinary approach to costs in the circumstances would be contrary to the interests of justice and further that the award sought reflects the minimum deviation necessary to prevent injustice.

30. Finally, the AGBC also respectfully submits that under this approach, and even under the test from *Adams*, Madam Justice Smith erred in finding this was an appropriate case to justify an award of special costs against the AGBC who appeared in a limited role pursuant to the *Constitutional Question Act*.

B. Was the Case Advanced by a Party an Important Public Matter for the Courts to Resolve?

31. It determining whether a party has established that the case it advances is an important matter for the courts to resolve, the courts should consider whether: (i) the matter has been previously resolved; (ii) the matter transcends the immediate interests of the party; (iii) the resolution will have or has a significant and widespread impact; (iv) the arguments raised by the party are sufficiently meritorious; and (v) there is no other realistic means by which the matter could be resolved. Only if all of these considerations demonstrate that the public importance of the matter is truly exceptional, even in the context of constitutional challenges to legislation, should an award of special costs be considered.

32. Where the matter has already been the subject of a prior lower court ruling, a court should determine whether: (a) subsequent decisions have affected the validity of the prevoius judgment; (b) the judge who made the impugned decision did not consider some binding authority or relevant statute; or (c) the impugned decision was unconsidered and the judge did not have the opportunity to fully consult authority given existing exigencies (a *nisi prius* judgment).[33]

33. When the matter has already been resolved by a binding appellate court decision, a court should look to the test articulated by this Court in *Bedford*:

> ... As the David Asper Centre noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as

[33] *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.).

> discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its role.[34]

34. The AGBC submits that because the issues raised by the appellants had previously been decided by this Court in *Rodriguez* special costs should not have been ordered by the trial judge. The fact that a litigant may wish to make different arguments or rely on different evidence does not automatically meet the threshold established in *Bedford* and should not justify an order for special costs after a lengthy and costly proceeding had previously determined the matter.

35. Whether a matter transcends the immediate interests of a party and the resolution will have a significant and widespread impact are often interconnected. This Court in *Okanagan Indian Band* noted that many cases contain issues that are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. While this categorizes a case as one of "public law" as opposed to an "ordinary civil dispute", it does not automatically make the case "special enough" to justify a different type of costs order.[35]

36. The circumstances of *Okanagan Indian Band*, a case concerning aboriginal title, raised issues that were "of profound importance to the people of British Columbia, both aboriginal and non-aboriginal" and the determination of those issues "would be a major a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province." The majority of this Court concluded that "the circumstances of this case are indeed special, even extreme."[36]

37. In *Caron*, while Mr. Caron also had a personal interest in the matter he had brought before the Court, the case concerned "the validity of the entire corpus of Alberta's unilingual statute books" and

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[34] *Bedford, supra,* at para. 44.
[35] *Okanagan Indian Band, supra,* at para. 38.
[36] *Okanagan Indian Band, supra,* at para. 46. As described in one of the decisions concerning advance costs in *Tsilhqot'in Nation v. British Columbia*, 2006 BCCA 2, at para. 70: "Someday, the Supreme Court of Canada will have to come to some conclusion as to what is aboriginal title, a conclusion which may, depending upon how broad that title is found to be, have a shattering impact upon Confederation. There can thus be no doubt of the importance of this litigation, not only to British Columbia but also to the whole of Canada."

the "injury created by continuing uncertainty about French language rights in Alberta transcend[ed] Mr. Caron's particular situation and risks injury to the broader Alberta public interests."[37]

38. Simply because a matter may contribute to the development of the law in an area of relevance to the public is not sufficient to depart from the traditional approach to costs:

> In making this order [granting the unsuccessful litigant costs], we recognize that this case is highly unusual, and that orders that an unsuccessful appellant be granted costs will be extraordinarily rare. Such an order will not be made simply because it is perceived to be in the public interest that jurisprudence develop in a particular area of law. It must, at the very least, be shown that the development of jurisprudence in the area is of a critical public importance. We are satisfied that in the unique circumstances of this case [concerning aboriginal title], the Court is justified in taking the extraordinary step of awarding costs to an unsuccessful litigant.[38]

39. While the appellants have raised important issues here and the resolution of the matter will have an impact beyond the appellants, the AGBC submits it does not have the same wide-reaching impact that made cases like *Okanagan Indian Band* and *Caron* "special enough" to warrant being underwritten by the public purse. Additionally, if the appellants are not successful on their appeal, then the resolution of this matter will have no impact – the law will remain as it was following *Rodriguez*.

40. With respect to whether arguments are sufficiently meritorious, when a deviation is sought at the conclusion of trial, this should be relatively clear. While success on an argument is not required for it to be meritorious, arguments should be *"prima facie* plausible and supported by … evidence".[39]

41. Finally the court should consider whether there are other realistic means for the matter to be resolved, judicially or otherwise. For instance, in cases concerning the *Criminal Code*, it may be realistic to wait to have a matter determined during the course of a criminal proceeding where a specific factual record will be before the Court and where an individual will be entitled to state-funded counsel in certain circumstances.

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[37] *Caron, supra,* at paras. 44-45.
[38] *William v. British Columbia,* 2013 BCCA 1, at para. 41. This case concerned the aboriginal title of the Tsilhqot'in Nation later determined by this court in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[39] *Okanagan Indian Band, supra,* at para. 44.

C. Was There No Other Way to Fund the Litigation or Part of the Litigation?

42. As awards of special costs to public interest litigants, whether successful or unsuccessful, become more frequent the Court must be sensitive to the concern that the public purse will become the funder of first resort for all major constitutional litigation challenging the validity of legislation.

43. The *Adams* criterion of whether the unsuccessful party has a superior capacity to bear the costs of the proceeding does little to narrow and assist in determining when a case is so exceptional as to warrant a substantial indemnity costs award. In all but the rarest cases, a court that does not need to think about other fiscal commitments of government will find it to have a superior capacity to a private litigant.[40] As a result, the *Adams* test in effect reverses the policy of the crown proceeding statutes to impose costs on government on the *same* basis as they are imposed on private persons. An allocation of public funds in this manner should depend on a public and democratic debate.

44. The *Adams* test highlights concerns over the institutional capacity of the judicial branch of government in the creation of an alternate legal aid scheme.[41] This concern has been recognized as valid on a number of occasions.[42] For instance, in *B.(R.)*, L'Heureux-Dubé J., dissenting in the result but not on the relevant and applicable legal principles, said:

> It is, in my view, contrary to public policy that an Attorney General be, as a matter of course, treated as having an unlimited source of funds and for that sole reason be required, even if successful, to pay the other party's costs. Such a result could open the floodgates and result in encouraging marginal applications for constitutional challenges.

45. This Court rearticulated this concern in *Little Sisters*:

> ... People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them

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[40] On the rare occasions where the party to the constitutional challenge is not the government, this factor may still be relevant and should be considered.

[41] See, *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 15, 38-43.

[42] *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, per L'Heureux-Dubé J. dissenting in part at 411; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, per Bastarache and LeBel J.J. at para. 44; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 14; *Caron, supra,* at para. 37.

> all through the mechanism of advance cost awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.[43]

46. When public funding is being sought, courts should consider whether such public funding is required and, if so, the amount of public funding required. Simply asking who has the greater "capacity" to bear the financial burden sidesteps the question of alternatives.

47. The test established in *Okanagan Indian Band* requires the party seeking an advance costs order to "be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case."[45] In that case, the bands had been forced to run deficits to finance their day-to-day operations and had no way to raise the money needed for a full trial. Similarly, when public funding is sought after the state initiates court proceedings where life, liberty or security of the person are implicated, such as in criminal or child apprehension proceedings, the court will consider the finances of the party seeking the funding.

48. In *G.(J.)*, the court found state-funded counsel would be required for a child apprehension hearing to be fair if the parent was indigent and the parent's capacities, such as his or her intelligence, education and communication skills, were insufficient to effectively present his or her case.[46]

49. In *Rowbotham* applications seeking state-funded counsel in criminal proceedings an applicant must provide detailed financial information with substantial corroborating documentation and evidence of efforts made to fund counsel privately. The applicant must also establish that the matter is so serious and complex that to proceed to trial without a lawyer would result in a violation of his or her *Charter* right to a fair trial.[47] Furthermore, the applicant's financial circumstances must be extraordinary and not merely difficult. An applicant must make attempts to save money, borrow money, obtain employment or additional employment, look for counsel willing to work at legal aid rates and exhaust all efforts to utilize assets that the applicant owns to raise funds. An applicant must be prudent with his or her expenses. Further, if an applicant can pay some of the costs of legal

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[43] *Little Sisters, supra,* at para. 44.
[45] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, at para. 36.
[46] *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 80, 82, 86 and 89.
[47] *R. v. Malik*, 2003 BCSC 1439, at paras. 22-23 provides an extensive overview of the relevant principles and criteria to be considered by a court in an application for state-funded counsel drawn from prior jurisprudence.

counsel, he or she is expected to do so and an applicant may be obliged to repay the Attorney General all or a portion of the legal costs.

50. In many ways the *Caron* case reflects the *Rowbotham* application model of state-funding. Mr. Caron had expended his own money and borrowed money; he had exhausted his financial resources. He had pulled together finances in a "responsible manner" and it was not realistically possible for him to obtain further funding.[48]

51. The requirement for an applicant to provide evidence of their financial position appears to have been endorsed by the British Columbia Court of Appeal in *Zhang*:

> [34] We are told the appellants are people of modest means, but nothing is said about how many of them there are or how well their organization may be financed. No mention is made of the need for *pro bono* representation. ...[49]

52. The problem has become that both litigants and the courts have approached awards of special costs as an "all or nothing" proposition: if the appellants could not afford the $1.3 million legal fees billed then they have met the hurdle for special costs.[50]

53. While the AGBC does not dispute that the appellants could not have funded this litigation entirely on their own and without counsel acting on a *pro bono* basis, that does not equate to the appellants being unable to make *any* contribution to the legal challenge as would have been the case with the homeless plaintiffs in *Adams*, the impoverished plaintiffs addicted to controlled substances in *PHS Community Services Society* or the recipients of social assistance in *Broomer*.

54. Here, unlike Ms. Carter, three of the individual appellants did not provide any financial information. Their affidavits simply contained assertions that they could not have funded litigation in excess of $1 million.[51] This does not necessarily mean, however, that they would have been unable to contribute funds towards their legal challenge.

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[48] *Caron, supra,* at para. 41.
[49] *Zhang, supra,* at para. 34.
[50] With this approach, if a litigant could afford $500,000 towards legal costs but chose expensive counsel who ultimately billed $1,000,000 and agreed to work pro bono, counsel for that litigant could be entitled to almost full indemnification from the public purse.
[51] Affidavit #3 of Carter; Affidavit #2 of Johnson; Affidavit #2 of Shoichet

55. With respect to the British Columbia Civil Liberties Association ("BCCLA"), who is both a party and who entered into retainer agreements with individual appellants to underwrite the litigation and indemnify them against any potential costs orders, Madam Justice Smith, in discussing standing, noted that BCCLA's participation allowed for the fundraising necessary to cover legal costs and, thus, achieved access to justice.[52]

56. In *Caron*, this Court noted that "the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice."[53] Requiring persons who have an interest in particular litigation to contribute to the litigation they have initiated, if they are able to do so, cannot be unjust. And if counsel chooses to act *pro bono* in circumstances in which a client can partially contribute to the overall litigation costs, it cannot be unjust for counsel to be expected to bear some of the burden of the litigation rather than to have an expectation that their full bill will be borne by the public purse.[54] All other alternatives, including class proceedings, joinder, financing by public interest groups, and partial or total financing by litigants themselves, must be considered and rejected before public funding is considered.

57. In that regard, the AGBC submits that courts should not consider whether counsel acted *pro bono* in this analysis. Not only might such an approach skew towards the creation of an extensive legal aid system[55] not otherwise provided for by the provincial legislatures, but also it puts litigants who actually risk their own resources in pursuit of important litigation, such as Mr. Caron, at a disadvantage. If a person takes out loans or mortgages their home in order to afford a constitutional challenge, why should they be less likely to receive special costs than counsel who agreed to work without the expectation of compensation (and who would still receive standard costs if successful in the litigation).

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[52] Merits Reasons, at para. 89, J.R. VI, A.R. 28.
[53] *Caron, supra,* at para. 38.
[54] Lorne Sossin, *supra,* at 140 notes that one dimension of pro bono work relates to the legal profession's ability to regulate membership in the profession and prohibit non-members from competing, thus resulting in the price of legal services being pushed much higher than in an unregulated market which leads to more persons being unable to afford legal services. He concludes noting "the legal profession has internalized the ethic of pro bono service as a kind of quid pro quo for the privileges enjoyed by its members."
[55] Ironically it would also be more economically beneficial to lawyers than the legal aid system as legal aid lawyers "contribute more pro bono services than any other sector since they are so rarely compensated for all of the work they undertake on a file": Lorne Sossin, *supra,* at 135.

D. Were the Expenditures Necessary and Proportional to the Interests at Stake?

58. The final criterion in *Adams*, that the litigant not have conducted the litigation in an abusive, vexations or frivolous manner, again sets the bar too low for an award that should only be made in exceptional circumstances. Rather, the AGBC submits that courts should consider both whether the expenditures (disbursements as well as legal fees) were necessary and whether those expenditures were proportional to the requirements of the litigation and the interests at stake.

59. Even where state-funded counsel is required pursuant to a *Rowbotham* order, the accused does not have the right to the very best, most expensive brief. Nor does counsel have the ability to demand the government pay a certain rate of legal fees. Madam Justice Southin considered *Rowbotham* principles in *Tsilhqot'in Nation*, which concerned an award for advance costs, when analyzing the question, "Does a litigant whose counsel is being paid from the public purse have a right to counsel who demands high fees":

> [81] This issue arises on Rowbotham applications and was curiously enough before this Court just two years ago in *R. v. Ho* ..., 2003 BCCA 663, a drug conspiracy case. What had happened was that, in the middle of the trial, counsel who was acting for Ho gave up his brief. Counsel who was asked by Ho to act for him, having declined to undertake the rest of the defence on the fees offered by the Crown, and the Crown declining to meet counsel's demands, the learned trial judge stayed the prosecution. The issue before the Court was whether he was right to do so and the Court said "no".
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> ...
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> [83] In the course of the hearing, the Court had been referred to the judgment of the Alberta Court of Appeal in *R. v. Cai* (2002), 170 C.C.C. (3d) 1, 2002 ABCA 299, in which that court had said:
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> > [18] Paragraph 65 found that the $150 per hour which the court imposed on the Crown would be "better suited" to this prosecution than would something unstated. But that is not the test. One can always find resources, persons, or means of higher quality. The "best around" is emphatically not the test. All that is required is a level of legal representation which ensures that the accused's answer to the allegations of his guilt is made available to the adjudicating court. Certainly not matchless Nobel-level privately retained representation.
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> [84] Later, I remarked, at para. 72:
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> > 9. The legal profession, as such, has no constitutional status, important though it is generally thought to be to the maintenance of a civil society. Thus, in

> considering the question of a "fair" trial, the court must give no weight to the economic well-being of the legal profession or any member of it.[56]

60. In *Criminal Lawyers' Association of Ontario*, a majority of the Court found that the inherent jurisdiction of a court to appoint an *amicus curiae* did not give the court authority to set a specific rate of compensation for that amicus. To find otherwise would not respect the roles and institutional capacities of the legislative, executive and judicial branches of government.[57]

61. In the context of advanced costs, the Court has stated its concern over providing counsel with a blank cheque from the public purse because, while it may provide access to justice, it does not encourage reasonable and efficient litigation.[58] In *Caron*, the Court found that advance costs awards "should be carefully fashioned and reviewed over the course of the proceedings to ensure … the reasonable and efficient conduct of litigation".[59] This concern was addressed in *Caron* by the superior court putting a cap on allowable hours for an expert witness and disallowing payments for a "temporary assistant".[60]

62. Justice Thackray in *Tsilhqot'in Nation* also recognized the need for a balance between access to justice and the impact on the public purse:

> [123] I would further note that, as said by Mr. Justice LeBel in *Okanagan Indian Band*, an award of interim costs must not impose an unfair burden on the other party. The fact that in the case at bar it is the public purse that is bearing the burden does not detract from that principle. In *Little Sisters Book & Art Emporium v. British Columbia (Commissioner of Customs & Revenue)* (2005), 38 B.C.L.R. (4th) 288 (C.A.), the Court said that while the gay and lesbian communities had other priorities for their funds than the lawsuit in question, "so does the public purse." When the first advance cost order was made, the estimate from counsel for the plaintiff was that the fees and disbursement would range from a low of $248,250 to a high of $649,180. As noted by Madam Justice Southin, $6 million had been advanced by May 2004 and as of the hearing date of this appeal it was in excess of $10 million.

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[56] *Tsilhqot'in Nation, supra,* at paras. 81 and 83-84.
[57] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, at para. 15.
[58] See for instance, *Tsilhqot'in Nation, supra,* at para. 73.
[59] *R. v. Caron*, 2011 SCC 5, at para. 47.
[60] *Caron, supra,* at para. 47.

> [124] The question as to whether this is an "unfair burden" must be considered. In my opinion to continue payments at the level provided for in the order under appeal would be an unfair burden.[61]

63. When the order is made after trial, however, there should be recognition that litigation ought to have been conducted in a reasonable and efficient manner. A costs award beyond the general costs rules should only reflect what a reasonably competent counsel would have required to adequately advance the litigation in an efficient manner so as not to impose an "unfair burden" on the public purse.[62]

E. Is the Case Sufficiently Exceptional Such That a Normal Costs Order in the Circumstances Will be Contrary to the Interests of Justice and What is the Minimum Deviation That Will Prevent that Injustice?

64. The AGBC submits that not requiring an unsuccessful litigant to pay costs to the successful party is already a significant accommodation that may sometimes be granted to unsuccessful public interest litigants. Such an accommodation in the present case is sufficient if the appellants are not successful in challenging the impugned laws.

F. No Costs Should be Ordered or Should Have Been Ordered Against the Attorney General of British Columbia

65. As with special costs orders, clarity and a principled approach are needed with respect to when an Attorney General who becomes involved in constitutional litigation as of right[63] will be liable for costs so that an Attorney General can determine what role, if any, to take in a particular matter and what impact such an appearance may have on the public purse. Any approach that risks creating a disincentive to an Attorney General from appearing in the public interest to provide relevant evidence, arguments and assistance to the courts should be avoided.

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[61] *Tsilhqot'in Nation, supra,* at paras. 123-124.

[62] If the issue is whether the court should deviate from the general rule in ordering that an unsuccessful party not pay costs, then certainly whether the unsuccessful party conducted the litigation in a reasonable and efficient manner also should be a factor.

[63] Section 8(6) of the *Constitutional Question Act* provides:

> (6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

66. The order of Madam Justice Smith did not recognize that an order for costs as against an Attorney General appearing in the public interest pursuant to legislation should only rarely be made and the occasions for making such an order should be carefully defined so as to respect that principle. In fact, Madam Justice Smith went so far as to find that there is no firm rule that an Attorney General who becomes involved in constitutional litigation as of right will be immune from costs in only the rarest of circumstances.[64]

67. The AGBC submits that costs should be awarded as against an Attorney General appearing in the public interest pursuant to legislation only if (a) there is serious misconduct on the part of the Attorney General; (b) the Attorney General materially prolongs the proceedings or (c) the Attorney General's actions indicate the intervening Attorney General has effectively assumed carriage of the entirety of the litigation.

68. Several courts have articulated principled bases for deviating from the general rule that costs are not awarded for or against interveners. Simply because these cases do not involve Attorneys General appearing in the public interest pursuant to a statutory right does not make the principles articulated therein inapplicable or mean that an Attorney General should be more susceptible to an order of costs than any other intervener. This ignores the finding by the majority in *B.(R.)* that the general rule is that awards against an intervening Attorney General should only be made on rare occasions:

> The order to award costs against an intervening Attorney General, acting as she is statutorily authorized to, in the public interest in favour of a party who raises the constitutionality of a statute, appears highly unusual, and only in very rare cases should this be permitted. ... [Emphasis added.][65]

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[64] Costs Reasons, at para. 95, J.R. VI, A.R. 28.

[65] *B.(R.), supra*, per LaForest J. for the majority on this issue at 390. See also *Victoria (City) v. Adams*, 2009 BCSC 1043, at para. 10:

> With respect to an order of costs against an intervening Attorney General, acting as authorized by statute in the public interest in relation to the litigation of constitutional questions, there is a discretion but it is only to be exercised in highly unusual and rare cases ...

This issue was not addressed by the Court of Appeal in *Adams*.

69. With respect to costs as against interveners generally, Chief Justice Esson described the practice in the British Columbia Supreme Court and offered one justification for deviating from the general rule:

> ... While there is no rule precluding costs being awarded to or against interveners, it has not been the practice to do so. I think that there are good practical reasons for maintaining that as the general practice although, if an intervener were to materially prolong the proceedings, costs might be awarded against it.[66]

70. The Ontario Court of Appeal in *Daly* also addressed the circumstances in which an intervener may be subject to a costs order:

> Ordinarily intervenors are neither awarded costs nor have costs awarded against them: [citations omitted]. In this case, however, having regard to the terms granting leave to intervene, the fact that OSSTF effectively assumed carriage of the litigation, ... it is appropriate that OSSTF pay the respondents' costs of the appeal.[67]

71. In *Daly*, Mr. Daly and others applied at trial for a declaration that s. 136 of the *Ontario Education Act* was unconstitutional. The Attorney General of Ontario was a respondent to the application and the Ontario Secondary School Teachers Federation ("OSSTF") intervened to support AG Ontario's defence of the constitutional validity of s. 136 and advance a statutory interpretation argument. The applicants were successful and AG Ontario declined to appeal the judgment. OSSTF did appeal and sought costs against the applicants in the courts below. The AG Ontario did not appear on the appeal. It was in the dismissal of the appeal, that the Ontario Court of Appeal found OSSTF had "effective carriage" and awarded costs as against OSSTF in the courts below.

72. None of the conditions that motivated the Ontario Court of Appeal in *Daly* to award costs as against an intervener for having "effective carriage" exist in the context of the case at bar:

a. the AGBC did not seek costs as against the plaintiff;
b. there was no order governing the AGBC in this case as in the order granting leave to intervene in Daly which provided that if OSSTF sought to appeal, costs might be ordered against OSSTF; and

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[66] *Evans Forest Products Ltd. v. British Columbia (Chief Forester)* (1995), 40 C.P.C. (3d) 322 (B.C.S.C.), at para. 6. See also, *Faculty Assn. of the University of British Columbia v. University of British Columbia*, 2009 BCCA 56, at paras 4-5.
[67] *Daly v. Ontario (Attorney General)* (1999), 124 O.A.C. 152 (Ont. C.A.), at para. 6.

c. AG Canada did not drop out of these proceedings, leaving carriage of this case in the hands of AGBC; in fact, it was AGBC who declined to participate in AG Canada's subsequent appeal.

73. The three decisions relied upon by the appellants, and Madam Justice Smith, present circumstances that are clearly distinguishable from the case at bar. Both the case from the British Columbia Supreme Court and the Northwest Territories Supreme Court raise serious questions about whether the articulated exceptions provide an appropriate basis for not following the general rule.

74. In *B.(R.)*, this Court noted the highly unusual nature of such an order but found that it was not inappropriate in the highly unusual circumstances of that case. In *B.(R.)*, the Court of Appeal had sent the matter back to the first appellate court which had not initially determined the matter on its merits because it found it was moot. Following the Court of Appeal's decision, the Divisional Court reheard the appeal on its merits but the matter proceeded as a trial *de novo* with fresh evidence being adduced. The Attorney General of Ontario called six of the eight experts for the respondents and cross-examined the appellants' expert witnesses. The hearing ran for over a 20-day period.[68] As well, the courts took into account the fact that it was an act of the state (namely a matter involving state wardship over a child) that triggered the constitutional challenge.[69]

75. In the 1979 *Polglase* decision, the trial judge provided minimal reasons and no analysis as to when or why an intervening AGBC should be liable for costs. As well, the trial judge did not appear to consider that such an award should be exceptional or rare. The trial judge first noted that the *Crown Costs Act* had been repealed so there was no statutory impediment to an award of costs against the Crown.[70] The basis provided by Justice Hutcheon for ordering the intervening AGBC to pay the costs of both the petitioner and the respondent in the family law matter was simply:

> ... The validity of the Family Relations Act was placed in serious doubt by a judgment of Govan Prov. J. in April 1979 ... That judgment was later set aside on technical grounds and

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[68] *B.(R.), supra,* at 394.

[69] Similarly in not ordering advance costs in *Little Sisters, supra*, the majority of this Court noted that the applicants in *Little Sisters* had not been "thrust" into the litigation like those in *Okanagan* and instead had taken the large-scale litigation upon themselves.

[70] *Polglase v. Polglase* (1979) 18 B.C.L.R. 294, at para. 5.

> the petitioner and respondent became involved in a constitutional question which ought to have been resolved before the commencement of their proceedings in August 1979.[71]

76. The AGBC respectfully submits that this ground (essentially that a matter should have been decided earlier) is not a proper foundation for such an award and, in any event, this ground is not present here where the matter has been decided by this Court in *Rodriguez*.

77. *Hegeman v. Carter* was not a constitutional matter but rather was in the nature of a judicial review where the Attorney General applied to be granted intervener status.[72] The law in British Columbia, however, with respect to costs and an Attorney General appearing on such a review is well settled. First, unlike in the Northwest Territories the Attorney General must be given notice and is entitled to be heard at the hearing of the application.[73] Second, when an Attorney General appears and does not present submissions on behalf of the decision-maker, the Attorney General is immune from costs. If the Attorney General does appear on behalf of the decision-maker, the Attorney General will be liable for costs only if there is evidence of misconduct or perversity in the proceedings before the decision-maker or counsel makes an inappropriate argument on the merits of the judicial review.[74] In so far as *Hegeman* appears to be in direct conflict with British Columbia jurisprudence, the AGBC submits this Court should give little if any weight to it.

78. Further, the hearing judge in *Hegeman* found the Attorney General was liable for costs as an intervener because, while the Attorney General's appearance had a public interest component to it, the Attorney General also had a personal interest and stake in the outcome of the proceedings even though the Attorney General's intervention did not materially change anything with respect to the issues at bar or alter the complexity of the hearing.[75] The AGBC questions whether this is a valid basis for departing from the general rule with respect to costs orders against intervening Attorneys General because most court decisions with respect to governmental policy, let alone decisions involving constitutional law and *Charter* issues, would have "the potential of having an impact on the government", "operational consequences" and an outcome that would affect government more than

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[71] *Polglase*, *supra*, at para. 7.
[72] *Hegeman v. Carter*, 2008 NWTSC 48, at paras. 1-2.
[73] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 15.
[74] *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244, at paras. 39 and 44-54.
[75] *Hegeman, supra*, at paras. 10-12 and 19-20.

the members of the public.[76] Such a low threshold for costs against an intervening Attorney General would make such costs orders the norm rather than the exception.

79. In any event, there is no evidence in the case at bar, nor did the trial judge so find, that the AGBC was appearing for any reason other than the public interest to assist in the orderly development of the law. There was no finding, nor could there be, that the AGBC would be more affected by the outcome than members of the public. Any such finding would likely undercut the appellant's arguments with respect to public interest litigation.

80. The majority of the British Columbia Court of Appeal correctly found that Madam Justice Smith erred in finding the AGBC assumed carriage of the proceeding when it was "vigorously defended at all times by Canada" and the AGBC's role "was limited ... to 10% of the time taken by Canada." The majority recognized that the steps taken by the AGBC were proper and that the materials placed before the court were relevant. This limited participation was not "improper or otherwise deserving of a costs order against it."[77]

81. Given that the AGBC did not act improperly, did not materially prolong the proceedings[78] or did not assume carriage of the proceedings,[79] the question arising is whether there are any other principled and clearly articulable reasons for finding that this case presents one of the rare circumstances where costs should be awarded against an Attorney General appearing as of statutory right.

82. The AGBC respectfully submits that an Attorney General's participation as a party pursuant to the *Constitutional Question Act* should not be determinative, for this would make costs against an Attorney General the general rule.

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[76] *Hegeman, supra,* at para. 10-12.
[77] Appeal Reasons, at para. 349, A.R. VIII, A.R. 150.
[78] By the trial judge's own estimate, the AGBC used a total of one day out of 23 days for hearing and, as such, there is no evidence that the AGBC materially prolonged the proceedings.
[79] Again, the AGBC only provided two of the 56 total expert reports that were referred to by the judge and only 11 of 116 affidavits in total that were filed.

83. Even in the *Adams* case this point was not determinative, and that issue was not appealed. At the trial court, the defendants in *Adams* sought an order for special costs against both the City of Victoria and the AGBC who had appeared pursuant to s. 8 of the *Constitutional Question Act*.[80] In *Adams*, the AGBC filed written submissions and made oral submissions with respect to the constitutional issues raised. The City of Victoria simply adopted the AGBC's submissions on those points.

84. In not ordering costs as against the AGBC, the trial judge found:

> [13] ... The litigation was hard fought; however it was hard fought in the sense that the Defendants and AGBC took positions that were open to them in the context of an adversarial system. ...
> ...
>
> [21] The Defendants also seek an order for costs against the AGBC on the basis that it acted as a full party in the litigation beyond the role of an intervener. The AGBC submits that its conduct was not such as to take the case out of the traditional rule that in constitutional litigation the AG as intervener neither pays no receives its costs.
>
> [22] I have concluded that there is nothing in the circumstances of this case that would qualify as the unusual circumstances justifying a departure from the ordinary rule. ...[81]

85. Likewise, in the first *Little Sisters* litigation, the AGBC took a similarly active role in the litigation as in the instant case but the trial court found that his participation did not extend beyond that of an intervener and costs were not awarded as against the AGBC:

> [8] Although the provincial Attorney General is a nominal party by operation of s. 8(6) of the *Constitutional Question Act* ..., he is in reality an intervener. He participated in the action out of a concern that the Court should be fully apprised of the constitutional implications of certain arguments raised by the plaintiffs, particularly in respect of the *Motion Picture Act,* S.B.C. 1986, c. 17. His counsel led no oral testimony and cross-examined only those witnesses touching on the areas of legitimate provincial concern. They tendered written evidence relating to s. 1 of the *Charter* that supplemented but did not duplicate that offered by the federal Crown. Their helpful submissions augmented those of the federal Crown on the issues of concern to the province. Neither the evidence nor the submissions dealt directly with

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[80] *Victoria (City) v. Adams*, 2009 BCSC 1043, at para. 3 [*Adams Costs Reasons*].

[81] *Adams Costs Reasons, supra,* at paras. Costs had previously been ordered against the AGBC with respect to an interlocutory application he brought to strike the pleadings in which he had been unsuccessful.

> the challenge to the impugned federal legislation and its application. Moreover, the plaintiffs' attack on the legislation failed, and the issue on which they succeeded was of no concern to the Attorney General and was not addressed by his counsel.
>
> [9] The Attorney General was acting in the public interest in participating in this action. There is nothing exceptional here that would justify departure from the usual rule that no costs should be awarded against him in such circumstances ...[82]

86. Having an Attorney General appear to provide relevant evidence of legislative fact and legal argument in the public interest is of value to the judiciary and the orderly development of the law.

87. Even when one Attorney General may be present as a named party, this Court has recognized the value other Attorneys General can offer and stated its preference for hearing from Attorneys General on constitutional matters. For instance in *Godbout*, six of the nine members of this Court declined to make a determination on whether the city's resolution violated s. 7 of the *Charter* when only the Attorney General of Quebec was before this Court. Justice Major noted it was "unnecessary and perhaps imprudent to consider whether the residence requirement infringes s. 7 of the *Canadian Charter of Rights and Freedoms* in the absence of submissions from interested parties".[83] Likewise, Justice Cory found:

> ... I would prefer to withhold consideration of the application of s. 7 to a situation such as that presented in this case. The case raises important questions as to the scope of s. 7. Further, its application may have a significant effect upon municipalities. Before reaching a conclusion on an issue that need not be considered in determining this appeal I would like to hear further argument with regard to it including the submissions of interested parties and intervening Attorneys General of the provinces and Territories. Those submissions might well serve to change, vary or modify the approach the Court will take on this issue. Without hearing further argument on this question I would prefer not to hazard an opinion about it. [Emphasis added.][84]

88. In *Alliance for Marriage and Family v. A.A.*, when the Attorney General of Ontario chose not to participate at the Ontario Court of Appeal, that court appointed an *amicus curiae* who supported

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[82] *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)* (1996), 134 D.L.R. (4th) 286 at paras. 8-9 (S.C.); aff'd with respect to costs order 2000 SCC 69, at para. 161.
[83] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 1.
[84] *Godbout, supra*, at para. 118.

A.A.'s argument[85], the implication being that the Court of Appeal required such assistance in light of the lack of the Attorney General's presence.

89. The fact that an intervening Attorney General leads evidence or questions the evidence provided by another party should not by itself be a justification for an award of costs, much less an award of special costs. Such evidence may be highly relevant and of assistance to the court. As noted by L'Heureux-Dubé J. in *B.(R.)*:

> While it is true that the Attorney General of Ontario adduced evidence and made submissions in respect of the constitutionality of the *Child Welfare Act*, this was in accordance with the *Courts of Justice Act*. ... Whealy D.C.J. did not find that this was an improper course of action. In constitutional challenges, such evidence may be crucial to enable the court to arrive at a decision.[86]

90. Similarly, the fact that an intervening Attorney General raises constitutional arguments or procedural concerns that were not raised by another party does not mean they have taken "carriage" of the litigation. These are matters that an Attorney General has a duty to bring to the court's attention, much like an *amicus curiae*, so the court is in the best possible position to render a decision.

91. In the present circumstances, the AGBC also faced deadlines that were the same as those for AG Canada due to the appellants' insistence that the matter proceed expeditiously. Further, given the highly-expedited time frame allowed by the trial judge, it was not unreasonable for the AGBC to address some matters that the AG Canada may not have been able to address in the time provided. Nor would it be unreasonable for the AGBC to address matters that were not within the knowledge of AG Canada.

92. Finally, even if it is appropriate for the AGBC to bear some of the costs, in light of the AGBC's actual participation in the proceedings it would be undesirable and disproportionate to award special costs against her.

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[85] *Alliance for Marriage and Family v. A.A.*, 2007 SCC 40, at para. 5. The AGBC submits that it would be highly unlikely an order for costs would ever be made as against an *amicus curiae* and if costs become the norm rather than the exception, Attorneys General may well choose not to participate leaving the matters to *amici* as necessary.

[86] *B.(R.)*, *supra*, at 419. See also *Lang*, *supra*, at paras. 30 and 39.

PART IV – COSTS

93. Consistent with her position throughout, the AGBC does not seek costs and respectfully requests that no costs are ordered as against her.

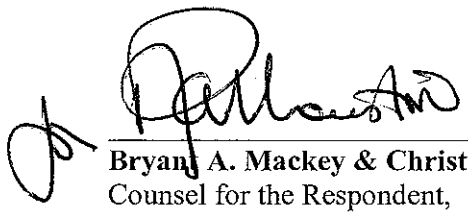
PART V - ORDER SOUGHT

94. The AGBC takes no position and seeks no orders with respect to the issues arising from the British Columbia Court of Appeal's decision on the appeal brought by AG Canada as it was not a party to that appeal.

95. The AGBC respectfully requests that the appeal of the British Columbia Court of Appeal's decision on the appeal brought by the AGBC with respect to costs (CA40454) be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Dated at Victoria, British Columbia, this 7th day of July, 2014.



Bryan A. Mackey & Christina Drake
Counsel for the Respondent,
Attorney General of British Columbia

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CONSTITUTIONAL QUESTION ACT
[RSBC 1996] CHAPTER 68

Contents

Lieutenant Governor in Council to refer matters to court

1 The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it.

Court to certify opinion

2 (1) The Court of Appeal or the Supreme Court must give to the Lieutenant Governor in Council its opinion on the matter referred, with reasons, in the manner of a judgment in an ordinary action.

(2) A justice of the Court of Appeal who differs from the opinion of the majority may give to the Lieutenant Governor in Council the justice's opinion, with reasons.

Notice to Attorney General of Canada

3 In case the matter referred relates to the constitutional validity of all or part of an Act, the Attorney General of Canada must be notified of the hearing, and must be heard if the Attorney General of Canada sees fit.

Notice of reference

4 On a reference by the Lieutenant Governor in Council under the agreement made between the government of British Columbia and the government of Canada under the *Federal Provincial Fiscal Arrangements Act* (Canada), the Attorney General of Canada and the Attorney General of any province of Canada that has, after December 1, 1961, entered into a similar agreement must be notified of the hearing, and may appear and be heard as a party.

Notice to persons interested

5 The Court of Appeal or the Supreme Court may direct that a person interested, or, if there is a class of persons interested, any one or more persons as representatives of that class, must be notified of the hearing, and those persons are entitled to be heard.

Appeal

6 The opinion of the Court of Appeal or the Supreme Court is a judgment of the Court of Appeal or of the Supreme Court, as the case may be, and an appeal lies from it in the manner of a judgment in an ordinary action.

Publication in Gazette

7 The reasons given by the Court of Appeal or the Supreme Court under this Act must, as soon as practicable, be published in the Gazette.

Notice of questions of validity or applicability

8 (1) In this section:

"constitutional remedy" means a remedy under section 24 (1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion;

"law" includes an enactment and an enactment within the meaning of the *Interpretation Act* (Canada).

(2) If in a cause, matter or other proceeding

(a) the constitutional validity or constitutional applicability of any law is challenged, or

(b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

(3) If in a cause, matter or other proceeding the validity or applicability of a regulation is challenged on grounds other than the grounds referred to in subsection (2) (a), the regulation must not be held to be invalid or inapplicable until after notice of the challenge has been served on the Attorney General of British Columbia in accordance with this section.

(4) The notice must

(a) be headed in the cause, matter or other proceeding,

(b) state

(i) the law in question, or

(ii) the right or freedom alleged to be infringed or denied,

(c) state the day on which the challenge or application under subsection (2) or (3) is to be argued, and

(d) give particulars necessary to show the point to be argued.

(5) The notice must be served at least 14 days before the day of argument unless the court authorizes a shorter notice.

(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

(7) If in a cause, matter or other proceeding to which this section applies the Attorney General of Canada appears, the Attorney General of Canada is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

Action for declaration of validity of Act

9 (1) The Supreme Court has jurisdiction to entertain an action at the instance of either the Attorney General of Canada or the Attorney General of British Columbia for a declaration as to the validity of an Act of the Legislature, though no further relief is sought.

(2) The action is sufficiently constituted if the 2 Attorneys General are parties.

(3) An appeal lies from the judgment in the manner of a judgment in an ordinary action.
