



SUPREME COURT OF CANADA

CITATION: R. v. Caron, 2011 SCC 5

DATE: 20110204

DOCKET: 33092

BETWEEN:

Her Majesty The Queen in Right of the Province of Alberta

Appellant

and

Gilles Caron

Respondent

- and -

**Commissioner of Official Languages for Canada, Canadian Civil Liberties
Association,**

**Council of Canadians with Disabilities, Charter Committee on Poverty Issues,
Poverty and Human Rights Centre, Women's Legal Education and Action Fund,**

Association canadienne-française de l'Alberta and

David Asper Centre for Constitutional Rights

Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron,
Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 49)

Binnie J. (McLachlin C.J. and LeBel, Deschamps, Fish,
Charron, Rothstein and Cromwell JJ. concurring)

CONCURRING REASONS:
(paras. 50 to 55)

Abella J.

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

R. v. CARON

Her Majesty The Queen in Right of the Province of Alberta

Appellant

v.

Gilles Caron

Respondent

and

**Commissioner of Official Languages for Canada,
Canadian Civil Liberties Association,
Council of Canadians with Disabilities,
Charter Committee on Poverty Issues,
Poverty and Human Rights Centre,
Women's Legal Education and Action Fund,
Association canadienne-française de l'Alberta and
David Asper Centre for Constitutional Rights**

Interveners

Indexed as: R. v. Caron

2011 SCC 5

File No.: 33092.

2010: April 13; 2011: February 4.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Courts — Jurisdiction — Interim costs — Serious constitutional issue arising in provincial court— Superior court making order for interim costs in provincial court proceeding — Whether superior court has inherent jurisdiction to grant interim costs in litigation taking place in the provincial court — If so, whether criteria for an interim costs order were met.

Costs — Interim costs — Whether superior court has inherent jurisdiction to grant interim costs in litigation taking place in the provincial court — If so, whether criteria for an interim costs order were met.

In the course of a routine prosecution for a minor traffic offence, the accused C claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted on his right to use French “in proceedings before the courts” of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*, arguing that the province could not abrogate French language rights and that the *Alberta Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, was therefore unconstitutional.

At issue in this case are interim cost orders made by the Alberta Court of Queen’s Bench — a *superior* court — to fund an accused defending the regulatory

prosecution in the *provincial* court. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

C had applied to the provincial court for interim funding late in his trial after the Crown filed a “mountain” of historical evidence in reply. He established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial. The provincial court, over the Crown’s objection, ordered the payment of C’s lawyer and his experts pursuant to s. 24(1) of the *Charter*. The Alberta Court of Queen’s Bench later set aside the provincial court order; this decision was not appealed. Subsequently, the Court of Queen’s Bench held that it could (and did) make a costs order itself in respect of the provincial court proceedings. This decision was upheld on further appeal. The Crown now seeks not only to have the interim funding order set aside but also repayment of monies already provided under the order of the Court of Queen’s Bench.

Held: The appeal should be dismissed.

Per McLachlin C.J. and **Binnie**, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted C’s financial resources. By that time substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges program. The Crown insisted on pursuing the prosecution in provincial court; C

insisted on his French language defence. Neither side expressed any interest in a stay of proceedings. The Courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A decision based on an incomplete record would not have put the languages issue to rest. C's challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the continuation of the constitutional challenge be adequately resourced and properly dealt with.

Superior courts possess an inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively, although this assistance can be rendered only in circumstances where the inferior tribunals are powerless to act and the intervention of the superior court is essential to avoid a serious injustice in derogation of the public interest. The very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. That being said, the apparent novelty of the interim costs order is not fatal. Indeed, the superior court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision.

The fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid a serious injustice. In this respect, the criteria formulated in

British Columbia (Minister of Forests) v. Okanagan Indian Band and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* (No. 2) are helpful in determining whether the intervention of the Court of Queen’s Bench is essential to enable the provincial court to “administer justice fully and effectively”. These criteria are: (1) the litigation would be unable to proceed if the order were not made; (2) the claim to be adjudicated is *prima facie* meritorious; (3) the issues raised transcend the individual interest of the particular litigant, are of public importance, and have not been resolved in previous cases. The superior court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the funding application, or whether it should consider other methods to facilitate the hearing of the case. The court is to consider all relevant factors that arise on the facts.

Here the provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away. It would be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because C — the putative standard bearer for Franco-Albertans in this matter — lacked the financial means to complete what he started.

The courts below made no palpable error in finding that the accused had exhausted his funds and that he had no realistic means of paying the further costs resulting from the continuance of the litigation. All other possibilities for funding had been exhausted. The Queen's Bench judge was impressed with the "responsible manner" in which C had pulled together finances for the anticipated length of trial and its unexpected continuances. C's claim had *prima facie* merit. Finally, the case is of public importance. It was an attack of *prima facie* merit on the validity of the entire *corpus* of Alberta's unilingual statute books. The public interest requires that the case be dealt with now. It is "sufficiently special" under the *Okanagan/Little Sisters (No. 2)* criteria.

Per Abella J.: The unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles in *Okanagan* and *Little Sisters (No. 2)*. It is important to note, however, that the issue of the jurisdiction of the provincial courts to award such costs was not before us. This case, therefore, should not be seen as unduly expanding the superior court's inherent jurisdiction into a broad plenary power to "assist". Instead, inherent jurisdiction should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory courts and tribunals. When considering the proper limits of a superior court's inherent jurisdiction on matters on which a statutory court or tribunal is seized, any such inquiry should reconcile the common law scope of inherent jurisdiction with the implied legislative mandate of a statutory

court or tribunal to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives.

Cases Cited

By Binnie J.

Applied: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38;

referred to: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *R. v. Rain* (1998), 223 A.R. 359; *R. v. Mercure*, [1988] 1 S.C.R. 234; *R. v. Paquette*, [1990] 2 S.C.R. 1103; *R. v. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307; *R. v. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321, leave to appeal granted in part, 2010 ABCA 343 [2010] A.J. No. 1304 (QL); *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212; *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383; *Lefebvre v. Alberta* (1993), 135 A.R. 338, leave to appeal refused, [1993] 3 S.C.R. vii; *R. v. Rémillard*, 2009 MBCA 112, 249 C.C.C. (3d) 44; *R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *R. v. Peel Regional*

Police Service (2000), 149 C.C.C. (3d) 356; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *R. v. Caron*, 2006 ABPC 278, 416 A.R. 63.

By Abella J.

Referred to: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601; *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13; *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182, aff'd [1985] 1 S.C.R. 174; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731; *Children's Aid Society of Huron County v. P. (C.)*, 2002 CanLII 45644; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287; *Canadian Broadcasting Corp. v. New*

Brunswick (Attorney General), [1996] 3 S.C.R. 480; *R. v. Jewitt*, [1985] 2 S.C.R. 128;
Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 390/68, rr. 600, 601.

Constitution Act, 1867, s. 133.

Constitution Act, 1982, s. 45.

Court of Queen's Bench Act, R.S.A. 2000, c. C-31, s. 21.

Criminal Code, R.S.C. 1985, c. C-46, ss. 809, 840.

Judicature Act, R.S.A. 2000, c. J-2, s. 8.

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

North-West Territories Act, R.S.C. 1886, c. 50, s. 110 [rep. & sub. 1891, c. 22, s. 18].

North-West Territories Act, 1875, S.C. 1875, c. 49.

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34.

Royal Proclamation (1869).

Saskatchewan Act, S.C. 1905, c. 42 [reprinted in R.S.C. 1970, App. II, No. 20], ss. 14, 16(1).

Authors Cited

Holdsworth, Sir William Searle. *A History of English Law*, vol. IV, 3rd ed. London: Methuen & Co., 1945.

Jacob, I. H. "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23.

Macaulay, Robert W., and James L. H. Sprague. *Practice and Procedure Before Administrative Tribunals*, vol. 3. Toronto: Carswell, 2004 (loose-leaf updated 2010, release 8).

Mason, Keith. "The Inherent Jurisdiction of the Court" (1983), *57 Aust. L.J.* 449.

Morgan, George Osborne, and Horace Davey. *A Treatise on Costs in Chancery*. London: Stevens, Sons, and Haynes, 1865.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Alberta Court of Appeal (Hunt, Ritter and Rowbotham JJ.A.), 2009 ABCA 34, 1 Alta. L.R. (5th) 199, 446 A.R. 362, [2009] 6 W.W.R. 438, 241 C.C.C. (3d) 296, 185 C.R.R. (2d) 9, 71 C.P.C. (6th) 319, [2009] A.J. No. 70 (QL), 2009 CarswellAlta 94, affirming a judgment of Ouellette J., 2007 ABQB 632, 84 Alta. L.R. (4th) 146, 424 A.R. 377, [2008] 3 W.W.R. 628, [2007] A.J. No. 1162 (QL), 2007 CarswellAlta 1413. Appeal dismissed.

Margaret Unsworth, Q.C., and Teresa Haykowsky, for the appellant.

Rupert Baudais, for the respondent.

Amélie Lavictoire and Kevin Shaar, for the intervener the Commissioner of Official Languages for Canada.

Benjamin L. Berger, for the intervener the Canadian Civil Liberties Association.

Written submissions only by *Gwen Brodsky* and *Melina Buckley*, for the interveners the Council of Canadians with Disabilities, the Charter Committee on Poverty Issues, the Poverty and Human Rights Centre and the Women’s Legal Education and Action Fund.

Written submissions only by *Michel Doucet, Q.C.*, *Mark Power* and *François Larocque*, for the intervener Association canadienne-française de l’Alberta.

Written submissions only by *Cheryl Milne* and *Lorne Sossin*, for the intervener the David Asper Centre for Constitutional Rights.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

[1] BINNIE J. — This appeal raises anew the difficult issue of whether and to what extent the courts can (or should) order funding by the state of what may broadly be described as public interest litigation. The novel twist in this case is that an interim costs order was made by the Alberta Court of Queen’s Bench — a *superior* court — in favour of an accused defending a regulatory prosecution in the *provincial* court of Alberta. The appellant Crown says that the superior court had no jurisdiction to make such an interim costs order and that even if it did have such jurisdiction the interim costs order was improper in any event.

[2] The context in which this appeal arises is as follows.

[3] In the course of a routine prosecution for a minor traffic offence — a wrongful left turn — the accused, Mr. Caron, claimed the proceedings were a nullity because the court documents were uniquely in English. He insisted that he has the right to use French in “proceedings before the courts” of Alberta as guaranteed in 1886 by the *North-West Territories Act*, R.S.C. 1886, c. 50, and the *Royal Proclamation of 1869*. His position is that French language rights may not now be abrogated by the province, and that the *Alberta Languages Act*, R.S.A. 2000, c. L-6, which purported to do so, is therefore unconstitutional.

[4] The only issue before our Court at this time is two orders for interim costs made by the Court of Queen’s Bench. Mr. Caron’s application came late in his trial before the provincial court when, after about 18 months of on-again-off-again hearings, the Crown filed in reply what Mr. Caron’s counsel described as a mountain of historical evidence. Mr. Caron — having run out of money — established to the satisfaction of the provincial court that he was unable to finance the rebuttal evidence necessary to complete the trial unless he were provided with interim costs. The provincial court made such an order. The Alberta Court of Queen’s Bench, setting aside the provincial court order as being made without jurisdiction, nevertheless held that it could (and did) make the interim costs orders itself. It is the validity of the Queen’s Bench orders for interim funding of the provincial court defence that is now before us.

[5] The Crown takes the view that even though the Alberta Court of Queen's Bench identified what it regarded as an unacceptable outcome facing the provincial court in a constitutional challenge of great public significance, the *superior* court was powerless to intervene with a funding order to keep the *provincial* court proceedings on the rails. I agree that such orders must be highly exceptional and made only where the absence of public funding would work a serious injustice to the *public* interest, but I disagree with the Crown's argument that faced with this exceptional situation the Court of Queen's Bench was powerless to invoke its inherent jurisdiction to right the injustice perceived by the courts below. As to whether that discretionary jurisdiction ought to have been exercised in favour of Mr. Caron on the facts of this case, I defer to the affirmative answer given by the Alberta Court of Queen's Bench and upheld by a unanimous Court of Appeal (2009 ABCA 34, 1 Alta. L.R. (5th) 199). Those courts have primary responsibility for the administration of justice in the province and, in my view, made no legal error in the exercise of their jurisdiction. I would dismiss the appeal.

I. Overview

[6] As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings

unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359 (C.A.). In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, extended the class of civil cases for which public funding on an interim basis could be ordered to include “special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate” (para. 36). *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice. In *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (“*Little Sisters (No. 2)*”), the majority affirmed that

the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. [para. 39]

Neither *Okanagan* nor *Little Sisters (No. 2)* concerned an interim funding order made in respect of matters proceeding in a lower court. Nevertheless, the Alberta courts were faced here with a constitutional challenge of great importance.

[7] At issue was (and is) a fundamental aspect of the rule of law in Alberta. While the Crown argues that French language rights in that province were settled by

this Court in *R. v. Mercure*, [1988] 1 S.C.R. 234, and *R. v. Paquette*, [1990] 2 S.C.R. 1103, Mr. Caron was able to distinguish these cases to the satisfaction of the Alberta provincial court (see *R. v. Caron*, 2008 ABPC 232, 95 Alta. L.R. (4th) 307). That decision on the merits was reversed by the Alberta Court of Queen’s Bench in *R. v. Caron*, 2009 ABQB 745, 23 Alta. L.R. (5th) 321, but even in upholding the Crown’s position the Queen’s Bench declared that “the Supreme Court’s decision in *Mercure* does not answer the issue raised at trial and in this appeal” (para. 143). Mr. Caron’s application for leave to appeal on the merits was granted in part by the Alberta Court of Appeal (2010 ABCA 343, [2010] A.J. No. 1304 (QL)).

[8] As stated, the Alberta *Languages Act* enacted following this Court’s decision in *Mercure* purports to abolish minority French language rights in the province. The impact of Mr. Caron’s challenge, if ultimately successful, could be widespread and severe and include, according to Mr. Caron, the requirement for Alberta to re-enact most if not all of its laws in both French and English. The case, in short, has the potential (if successful) to become an Alberta replay of the *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212. This is what makes the case “sufficiently special” in terms of *Okanagan/Little Sisters (No. 2)*.

[9] The courts in Alberta saw sufficient merit in Mr. Caron’s legal argument to necessitate its resolution in the broader public interest. This was an outcome beyond the financial capacity of Mr. Caron and the Alberta courts were not willing to allow the issue to go unresolved for want of a champion with “deep pockets”. The

exercise of the superior court's inherent jurisdiction to fashion an exceptional remedy to meet highly unusual circumstances must be seen in that light.

II. Facts

[10] On December 4, 2003, Mr. Caron was charged with the regulatory offence of failure to make a left turn safely. If convicted, he faced a fine of \$100. Five days later he gave notice to the provincial court that his defence would consist of a constitutional languages challenge. Indeed, Mr. Caron did not contest the facts of the offence and advised the Crown that he would be presenting evidence only on the languages question. In taking this position he followed in the well-trodden path of other minority language advocates including Georges Forest's English-only parking ticket in *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032; the unilingual traffic summons of Roger Bilodeau in Manitoba (*Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449) and Duncan Cross MacDonald in Quebec (*MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460); the English-only trial of André Mercure in *Mercure* and the unilingual provision of police services available to Marie-Claire Paulin in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15, [2008] 1 S.C.R. 383. See also *Lefebvre v. Alberta* (1993), 135 A.R. 338 (C.A.), leave to appeal refused, [1993] 3 S.C.R. vii, and *R. v. Rémillard*, 2009 MBCA 112, 249 C.C.C. (3d) 44.

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

[12] Following presentation of the defence evidence in March 2006, the Crown requested an adjournment in order to prepare reply evidence from expert witnesses. Given the continuing length of the trial, Mr. Caron made a further request of the Court Challenges Program for additional funding, but the Program was abolished by the federal government on September 25, 2006, before additional funding could be considered. Subsequent requests for reconsideration by Legal Aid were also unsuccessful.

[13] The trial resumed in October 2006 to hear the Crown's expert evidence. The scale of the battle of the experts became clear, and Mr. Caron's finances left the defence unable to proceed further. The provincial court judge had denied an *Okanagan* order (2006 ABPC 278, 416 AR 63, at para. 164), but later ordered the Crown to pay the fees of Mr. Caron's lawyer and his experts' fees from and after that

date pursuant to s. 24(1) of the *Charter*. Subsequently, the Court of Queen's Bench quashed the trial judge's s. 24(1) order. However, the merits of the *Okanagan* application were not further dealt with on appeal because, in the view of the Queen's Bench judge, "the learned provincial court judge did not have jurisdiction to award *Okanagan* interim costs in any event" (*R. v. Caron*, 2007 ABQB 262, 75 Alta. L.R. (4th) 287, at para. 131). No appeal was taken from the decision to quash (which is therefore not before us) because on May 16, 2007, the superior court itself rendered an interim order that the expert fees be paid for the continuation of the trial anticipated to take place from May 22 to June 15, 2007. On October 19, 2007, it rendered an additional order requiring the Crown to pay Mr. Caron's costs for the surrebuttal component of the trial (2007 ABQB 632, 84 Alta. L.R. (4th) 146, *per* Ouellette J.).

[14] The Crown requested an adjournment, to a date after completion of the trial to argue the question of defence counsel's fees, on the agreed term that such delay would not prejudice the defence application.

[15] The trial ended on June 15, 2007. The historical record was substantial. It included 12 witnesses, eight of whom were experts, 9,164 pages of transcripts and 93 exhibits (2008 ABPC 232, at paras. 14 and 16). As stated, the provincial court was persuaded by this record to declare the English-only prosecution a nullity.

[16] The Crown now seeks to have set aside the interim funding orders made on May 16 and October 19, 2007. It also seeks an order requiring Mr. Caron to repay

about \$120,000 provided thereunder as fees and disbursements for lawyers and experts, presumably long since disbursed to the intended recipients.

III. Issues

- [17] 1. Does the Court of Queen’s Bench have inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court?
2. If so, were the criteria for an interim costs order met in this case?

IV. Analysis

[18] The parties fundamentally disagree about what is at stake in this case. The Crown characterizes the dispute as a traffic offence which has a constitutional element, as have many criminal and quasi-criminal cases. In Mr. Caron’s view the traffic offence is irrelevant except as a backdrop to his constitutional challenge. As such, he says, the ordinary rules governing costs in traffic court are irrelevant to the outcome of the appeal. The courts in Alberta essentially agreed with Mr. Caron on this point and I believe they were correct in that approach.

[19] This being said, the history of this litigation — with its numerous adjournments, mutual recriminations about “trial by ambush” and periodic trips to the appellate courts — demonstrates once again that a prosecution in a provincial court

does not generally provide, from a procedural point of view, an efficient institutional forum to resolve this sort of major constitutional litigation: *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, at paras. 142-44. There is no mutuality between the prosecution and the defence in the discovery of documents or pre-trial disclosure. The procedural powers of the provincial court are limited (although, as stated in para. 13, above, the quashing of the provincial court order for costs for want of jurisdiction was not appealed and we therefore refrain from expressing any opinion on its validity). Nevertheless, Mr. Caron's having announced his intention to use the prosecution as a springboard to launch his constitutional challenge to the validity of the Alberta *Languages Act*, the Crown persisted in the provincial court rather than seeking to have the constitutional question (as opposed to the minor driving infraction) brought before the superior court.

[20] The Crown agrees that if the language issue had been litigated in the superior court (perhaps as a direct challenge to the Alberta *Languages Act*), that court would have had jurisdiction in relation to a case pending before it to make a costs order in the terms now complained of.

[21] The provincial court was confronted with a potential failure of justice once the unexpected length of the trial had exhausted Mr. Caron's financial resources. By that time, substantial trial time and costs had already been expended, including the substantial public monies provided under the Court Challenges Program. In mid-trial the provincial court, so to speak, had a tiger by the tail. The Crown insisted on

pursuing the prosecution in provincial court; Mr. Caron insisted on his French language defence. Neither side expressed any interest in a stay of proceedings.

[22] The courts in Alberta were clearly concerned lest the Crown achieve, by pressing on with the prosecution in the provincial court, an unfair advantage (“lopsided”, Ritter J.A. called it) over the accused in the creation of the crucial factual record on which an important constitutional issue would be determined. A lopsided trial would not have put the languages issue to rest. Mr. Caron’s challenge was considered by the courts below to have merit and in their view it was in the interest of all Albertans that the challenge be properly dealt with.

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

A. *Does the Inherent Jurisdiction of the Alberta Court of Queen’s Bench Extend to Making the Interim Costs Order in Respect of Proceedings in the Provincial Court?*

[24] The inherent jurisdiction of the provincial superior courts, is broadly defined as “a residual source of powers, which the court may draw upon as necessary

whenever it is just or equitable to do so”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived “not from any statute or rule of law, but from the very nature of the court as a superior court of law” (Jacob, at p. 27) to enable “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner” (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30), referred to “those powers which are essential to the administration of justice and the maintenance of the rule of law”, at para. 38. See also *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18 *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32.

[25] One of the earliest manifestations of the superior court’s inherent jurisdiction was the appointment of counsel to represent impecunious litigants *in forma pauperis* (W. S. Holdsworth, *A History of English Law*, vol. IV (3rd ed. 1945), at p. 538, and G. O. Morgan and H. Davey, *A Treatise on Costs in Chancery* (1865), at p. 268).

[26] The Crown argues that whatever may be a superior court’s inherent jurisdiction in relation to matters pending before it, such jurisdiction cannot extend to an order of interim funding of a litigant in a matter pending in the provincial court. However, as Jacob points out, superior courts *do* possess inherent jurisdiction “to

render assistance to inferior courts to enable them to administer justice fully and effectively” (p. 48). For example, superior courts have long intervened in respect of contempt not committed “in the face of” the inferior court because “the inferior courts have not the power to protect themselves” (p. 48). See, e.g., *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.), and *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901. In the same vein, Mr. Keith Mason, Q.C., a former President of the New South Wales Court of Appeal, has written in an article titled “*The Inherent Jurisdiction of the Court*” (1983), 57 *Aust. Law J.* 449, that

[i]t is not surprising that a general concern with the “due administration of justice” has been invoked to justify the Supreme Court creating or enforcing procedural rights applicable to other courts and tribunals. Such helpful intervention has been offered where the other body has been considered powerless to act or where undue expense or delay might be caused if parties were forced to resort to it.

...

Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice. [Emphasis added; p. 456.]

The Mason article was also cited with approval by Lamer C.J. in *MacMillan Bloedel* (para. 33).

[27] Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. Novelty

has not been treated as a barrier to necessary action. In the *Peel Regional Police* case, the superior court cited the Regional Police Service and the Police Services Board for contempt based on repeated delays in transferring prisoners to court rooms for hearings. This caused days of court time to be lost and inconvenienced lawyers, witnesses, and members of the public (paras. 20-28). The delays were said to undermine the rule of law. Citing *MacMillan Bloedel*, the court explained the basis for its action:

This court acted in order to terminate the systemic delays in the timely delivery of prisoners to courtrooms throughout the Peel Courthouse. The court was desirous of averting a multiplicity of coercive proceedings. As well, the superior court was conscious of its duty to assist provincially created courts to restore the paramountcy of the rule of law. . . . [Emphasis added; para. 68.]

[28] In *United Nurses of Alberta*, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal.

[29] While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, *e.g.*, to admit to bail" (Jacob, at pp. 48-49). In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of

circumstances and may be exercised in different ways” (p. 23 (emphasis added)). I agree with this analysis. A “categories” approach is not appropriate.

[30] Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render “assistance” (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken. This requirement is consistent with the “sufficiently special” circumstances required for interim costs orders by *Little Sisters (No. 2)*, at para. 37, as will be discussed.

[31] Accordingly, I would not accept the argument that the apparent novelty of the interim costs order in this case is, on account of its novelty, beyond the inherent jurisdiction of the Court of Queen’s Bench.

[32] The Crown argues that even if the making of such an interim costs order could *in theory* fall within the inherent jurisdiction of the superior court, such jurisdiction has been taken away by statutory costs provisions. In this respect the Crown relies on the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, and the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 809 and 840, which provides for example \$4 a day for witnesses. The Crown argues that while not expressly limited, the inherent jurisdiction of the Court of Queen’s Bench is *implicitly* ousted by these enactments. However on this point, as well, the Jacob analysis is helpful:

. . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. [Emphasis added; p. 24.]

I agree with Jacob on this point as well.

[33] The Crown's premise here and elsewhere in its argument is that this case is an ordinary "garden variety" regulatory proceeding of the sort to which these provincial court costs provisions were intended to apply, a premise which I cannot accept. The provincial court was confronted with language rights litigation of major significance that after months of trial had reached the point of collapse. The intervention of the superior court was not a matter of routine. It was part of a salvage operation to avoid months of effort, costs and judicial resources from being thrown away.

[34] The Crown also relies on various statutes dealing with costs in matters pending before the Court of Queen's Bench itself, including the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, s. 21, the *Judicature Act*, R.S.A. 2000, c. J-2, s. 8, and the *Alberta Rules of Court*, Alta. Reg. 390/68, rr. 600 and 601. Certainly these enactments authorize the award of costs in various circumstances, but words of authorization in this connection should not be read as words limiting the court's inherent jurisdiction to do what is essential "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (Jacob, at p. 28). It would be contrary to all authority to draw a negative inference

against the inherent jurisdiction of the superior court based on “implication” and conjecture about legislative intent: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

[35] I am satisfied that the supervisory jurisdiction of the superior courts over the provincial courts in Alberta includes the power to order interim funding before an inferior tribunal where it is “essential to the administration of justice and the maintenance of the rule of law” (*MacMillan Bloedel*, at para. 38 (emphasis added)). It remains to determine, of course, the conditions under which such jurisdiction should be exercised in the present case. In my view, the *Okanagan/Little Sisters (No. 2)* criteria are helpful to this delineation.

B. *Criteria for the Grant of a Public Interest Funding Order*

[36] Although Mr. Caron seeks what he calls an *Okanagan* order, the Crown points out that there are many distinctions between that case and the one before us. *Okanagan* was a civil case. The fight here arose in the context of a quasi-criminal proceeding and, generally speaking, as the Crown emphasizes, the costs regimes in civil and criminal cases are very different. Secondly, *Okanagan* did not involve the exercise of the court’s inherent jurisdiction, but addressed the equitable exercise of a statutory costs authority. Thirdly, the original *Okanagan* order was made in relation to proceedings before the court that ordered the funding, namely the superior court of British Columbia. It dealt with an award of advance costs to a plaintiff, not an accused. The same distinctions apply to *Little Sisters (No. 2)*.

[37] The Crown argues that the courts cannot create an alternative legal aid scheme by judicial fiat. Nor, says the Crown, can the courts judicially reinstate the Court Challenges Program. These points are valid so far as they go, but in my opinion they do not control the outcome of the appeal.

[38] Clearly, this case is not *Okanagan* where the Court viewed the funding issue from the perspective of a proposed civil trial not yet commenced. We are presented with the issue of public interest funding in a different context. Nevertheless, *Okanagan/Little Sisters (No. 2)* provide important guidance to the general paradigm of public interest funding. In those cases, as earlier emphasized in the discussion of inherent jurisdiction, the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice.

[39] The *Okanagan* criteria governing the discretionary award of interim (or “advanced”) costs are three in number, as formulated by LeBel J., at para. 40:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Even where these criteria are met there is no “right” to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)*:

In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts. [Emphasis added; para. 37.]

While these criteria were formulated in the very different circumstances of *Okanagan* and *Little Sisters (No. 2)*, in my opinion they apply as well to help determine whether the costs intervention of the Court of Queen’s Bench was essential to enable the provincial court to “administer justice fully and effectively”, and may therefore be said to fall within the superior court’s inherent jurisdiction.

C. Application of the Public Funding Criteria to the Present Case

[40] The courts below addressed each of the above criteria.

(1) Impecunious Litigant

[41] As to Mr. Caron’s financial circumstances, the superior court judge concluded that, while he was willing to expend (and had expended) his own and borrowed money (as well as funding from the Court Challenges Program) to the limit, Mr. Caron’s resources had been exhausted by the time the applications for the orders

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

(2) Prima Facie Meritorious Case

[42] The order for interim costs in this case did not prejudge the outcome. Mr. Caron, however, persuaded the Alberta courts that his challenge differs from *Mercure, Paquette, and Lefebvre*. In *Mercure*, it will be recalled, minority language rights on the prairies were addressed in terms of the *North-West Territories Act, 1875*, S.C. 1875 c. 49. The key provision, which is essentially the same as s. 133 of the *Constitution Act, 1867*, was reproduced in the 1886 consolidation as s. 110 (am. S.C. 1891, c. 22, s. 18):

110. Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

Mercure itself held that in Saskatchewan this provision was subject to repeal by virtue both of ss. 14 and 16(1) of the *Saskatchewan Act* and s. 45 of the *Constitution Act, 1982* (p. 271).

[43] Mr. Caron's contention is that the *Mercure* case did not consider much of the relevant historical evidence including, in particular, the *Royal Proclamation* of December 6, 1869, annexing to Canada what was then the North-West Territories, whose effect was characterized by the provincial court judge as follows:

[TRANSLATION] I therefore believe that the proclamation had to be constitutional to appease the Métis by giving them greater certainty. A political guarantee can be cancelled more easily than a constitutional guarantee. . . . In my opinion, in light of the historical context, the proclamation is a constitutional document. This means that "all your civil . . . rights" mentioned in the proclamation are protected by the Constitution. As I held above, relying on the historical evidence, the expression "civil rights" was broad enough to include language rights, which means that the same protection applies to language rights.

(2008 ABPC 232, at para. 561)

Whether or not this view of the 1869 Proclamation survives final appellate consideration is not, of course, the issue. All the courts below recognized that there was *prima facie* merit to Mr. Caron's claim (*R. v. Caron*, 2006 ABPC 278, 416 A.R. 63, at para. 149; 2007 ABQB 632, at paras. 32-36 and 40; 2009 ABCA 34, at paras. 58-61). It would, in the words of *Okanagan*, be contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because Mr. Caron — the putative standard bearer for Franco-Albertans in this matter — lacked the financial means to complete what he started.

(3) Public Importance

[44] The public importance aspect of the *Okanagan* test has three elements, namely that “[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases” (para. 40). Not every constitutional case meets these criteria, as it could not be said in each and every case that it is “sufficiently special that it would be contrary to the interests of justice to deny the advanced costs application” (*Little Sisters (No. 2)*, para. 37). What is “sufficiently special” about this case is that it constitutes an attack of *prima facie* merit (as that term is used in *Okanagan*) on the validity of the entire corpus of Alberta's unilingual statute books. The impact on Alberta legislation, if Mr. Caron were to succeed, could be extremely serious and the resulting problems ought, if it becomes necessary to do so, to be addressed as quickly as possible. A lopsided contest in which the challenger, by reason of impecuniosity, had to abandon

his defence in the midstream of the trial would not lay the issue to rest. The result of Mr. Caron's collapse at the final stage of the trial would simply be that the costs and judicial resources already expended on resolving this issue by the public, as well as by Mr. Caron, would be thrown away.

[45] The injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron's particular situation and risks injury to the broader Alberta public interest. The Alberta courts have taken the view that the status and effect of the 1869 Proclamation was not fully dealt with in the previous litigation. It is in the public interest that it be dealt with now. This makes the case "sufficiently special" under the *Okanagan/Little Sisters (No. 2)* criteria, in my opinion.

D. The Exercise of the Superior Court's Inherent Jurisdiction

[46] The proper perspective from which this case is to be viewed (and was viewed by the Court of Queen's Bench) is that of the provincial court judge who was on the last lap of a complex trial, with substantial costs incurred already, and months of court time under his belt, facing the prospect that all of this cost and effort would be wasted — despite its constitutional significance — because of Mr. Caron's impecuniosity. I believe that in these very unusual circumstances it was open to the Queen's Bench judge to determine, in the exercise of his discretion, whether or not to come to the assistance of the provincial court with the interim costs order, and that such an order was, in the words of *MacMillan Bloedel*, "essential to the

administration of justice and the maintenance of the rule of law” (para. 38). Although he did not use these words, they describe in my opinion the tenor of his judgment.

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

V. Conclusion

[48] In my view, the Alberta Court of Queen’s Bench possessed the inherent jurisdiction to make the funding order that it did in respect of proceedings in the provincial court. There was no error of principle in taking into consideration the *Okanagan/Little Sisters (No. 2)* criteria in the exercise of that inherent jurisdiction.

On the merits, I defer to what seems to me to be the reasonable exercise of the discretion by the Queen's Bench judge. I would therefore affirm the decision of the Alberta Court of Appeal and dismiss the appeal.

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

The following are the reasons delivered by

[50] ABELLA J. — I agree with Binnie J. that the unique circumstances of this case appropriately attract the award of interim public interest funding based on the principles developed by this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38. I am concerned, however, that the reasons may be seen to unduly expand the scope of the common law authority of a superior court in the exercise of its inherent jurisdiction.

[51] In particular, it is important that these reasons not be seen to encourage the undue expansion of a superior court's inherent jurisdiction into matters this Court has increasingly come to see as part of a statutory court's implied authority to do what is necessary, in the fulfilment of its mandate, to administer justice fully and effectively. (See *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at paras. 70 and 71 (“*Dunedin*”); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. See also *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601 (C.A.); *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 182 (C.A.), aff'd [1985] 1 S.C.R. 174; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641 (Ont. Div. Ct.), aff'd (1983), 42 O.R. (2d) 731 (C.A.); *Children's Aid Society of Huron County v. P.(C.)*, 2002 CanLII 45644 (Ont. S.C.J.); *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; R.W. Macaulay and J. L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, at p. 29-1; Ruth Sullivan, *Sullivan on the Construction of Statutes* (2008), at pp. 290-91).

[52] The superior court's inherent jurisdiction, it seems to me, should not be seen as a broad plenary power to “assist”, but should be interpreted consistently with this Court's evolving jurisprudence about the role, authority and mandate of statutory

courts and tribunals. This includes an awareness of the need to avoid bifurcated proceedings in all but exceptional cases. (See *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 29; and, *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 79.) The fundamental purpose of such intervention by the superior court must be limited, as Binnie J. points out, to “what is essential to avoid an injustice” (para. 38). For the first time, that inherent jurisdiction was, interpreted in this case to include the ability to make an interim costs award in a proceeding before a statutory court or tribunal.

[53] It is worth remembering, as Binnie J. acknowledged, that this exercise of inherent jurisdiction was based on the premise that the provincial court lacked the jurisdiction to make the order. Regrettably that piece in the jurisdictional puzzle is not, strictly speaking, before us. Mr. Caron had made an unsuccessful application for *Okanagan* funding directly to the provincial court. The court concluded that while the *Okanagan* criteria were met, *Okanagan* costs could not be ordered by the provincial court. That decision was essentially undisturbed by the Court of Queen's Bench (2007), 75 Alta. L.R. (4th) 287, *per* Marceau J. and was not appealed by Mr. Caron. He chose instead to seek his funding by way of a new claim to the Queen's Bench, seeking the exercise of its inherent jurisdiction as a superior court to make the order. As a result, the question of whether a statutory court or tribunal has jurisdiction to order *Okanagan* costs will have to be determined in a future case.

[54] That leaves us in the problematic position of having to decide Mr. Caron's ability to obtain funding and continue with this litigation *as if* no other

jurisdictional course were available to him. I therefore simply raise a cautionary note: this Court's evolutionary acknowledgment of the independence, integrity and expertise of statutory courts and tribunals may well be inconsistent with an approach that has the effect of expanding the reach of a superior court's common law inherent jurisdiction into matters of which a statutory court or tribunal is seized. When considering the proper limits of a superior court's inherent jurisdiction, any such inquiry should reconcile the common law scope of inherent jurisdiction *with* the implied legislative mandate of a statutory court or tribunal, to control its own process to the extent necessary to prevent an injustice and accomplish its statutory objectives. (See *Cunningham*, at para. 19; *ATCO*, at para. 51; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 37; *R. v. Jewitt*, [1985] 2 S.C.R. 128; and, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 35.) The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin*, costs awards are significant remedial tools and "integrally connected to the court's control of its trial process" (para. 81).

[55] With the above caution in mind, therefore, in the exceptional circumstances of this case I agree with Binnie J. that the award of *Okanagan* costs should be upheld and the appeal dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Balfour Moss, Regina.

Solicitor for the intervener the Commissioner of Official Languages for Canada: Office of the Commissioner of Official Languages, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the interveners the Council of Canadians with Disabilities, the Charter Committee on Poverty Issues, the Poverty and Human Rights Centre and the Women's Legal Education and Action Fund: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener Association canadienne-française de l'Alberta: Heenan Blaikie, Ottawa.

Solicitor for the intervener the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.