Court File No. T-1621-19

FEDERAL COURT

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPLICANT

-and-

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA, ASSEMBLY OF FIRST NATIONS, CANADIAN HUMAN RIGHTS COMMISSION, CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASKI NATION

RESPONDENTS

BOOK OF AUTHORITIES OF THE ATTORNEY GENERAL OF CANADA WITH REGARDS TO REPLY TO MOTION FOR A STAY OF EXECUTION AND RESPONSE RECORD TO MOTION TO HOLD JUDICIAL REVIEW IN ABEYANCE

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R.S.C., 1985, c. F-7

Current to August 28, 2019

Last amended on August 28, 2019

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CODIFICATION

Loi sur les Cours fédérales

L.R.C. (1985), ch. F-7

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Dernière modification le 28 août 2019

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How proceeding against Crown instituted

48 (1) A proceeding against the Crown shall be instituted by filing in the Registry of the Federal Court the original and two copies of a document that may be in the form set out in the schedule and by payment of the sum of $2 as a filing fee.

Procedure for filing originating document

(2) The original and two copies of the originating document may be filed as required by subsection (1) by being forwarded, together with a remittance for the filing fee, by registered mail addressed to “The Registry, The Federal Court, Ottawa, Canada”.

R.S., 1985, c. F-7, s. 48; 2002, c. 8, s. 45.

No juries

49 All causes or matters before the Federal Court of Appeal or the Federal Court shall be heard and determined without a jury.

R.S., 1985, c. F-7, s. 49; 2002, c. 8, s. 45.

Stay of proceedings authorized

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or

(b) where for any other reason it is in the interest of justice that the proceedings be stayed.

Stay of proceedings required

(2) The Federal Court of Appeal or the Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown if it appears that the claimant has an action or a proceeding in respect of the same claim pending in another court against a person who, at the time when the cause of action alleged in the action or proceeding arose, was, in respect of that matter, acting so as to engage the liability of the Crown.

Lifting of stay

(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.

R.S., 1985, c. F-7, s. 50; 2002, c. 8, s. 46.

Stay of proceedings

50.1 (1) The Federal Court shall, on application of the Attorney General of Canada, stay proceedings in any cause or matter in respect of a claim against the Crown where the Crown desires to institute a counter-claim or

Acte introductif d’instance contre la Couronne

48 (1) Pour entamer une procédure contre la Couronne, il faut déposer au greffe de la Cour fédérale l’original et deux copies de l’acte introductif d’instance, qui peut suivre le modèle établi à l’annexe, et acquitter la somme de deux dollars comme droit correspondant.

Procédure de dépôt

(2) Les deux formalités prévues au paragraphe (1) peuvent s’effectuer par courrier recommandé expédié à l’adresse suivante : Greffe de la Cour fédérale, Ottawa, Canada.

L.R. (1985), ch. F-7, art. 48; 2002, ch. 8, art. 45.

Audition sans jury

49 Dans toutes les affaires dont elle est saisie, la Cour fédérale ou la Cour d’appel fédérale exerce sa compétence sans jury.

L.R. (1985), ch. F-7, art. 49; 2002, ch. 8, art. 45.

Suspension d’instance

50 (1) La Cour d’appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

a) au motif que la demande est en instance devant un autre tribunal;

b) lorsque, pour quelque autre raison, l’intérêt de la justice l’exige.

Idem

(2) Sur demande du procureur général du Canada, la Cour d’appel fédérale ou la Cour fédérale, selon le cas, suspend les procédures dans toute affaire relative à une demande contre la Couronne s’il apparaît que le demandeur a intenté, devant un autre tribunal, une procédure relative à la même demande contre une personne qui, à la survenance du fait générateur allégué dans la procédure, agissait en l’occurrence de telle façon qu’elle engageait la responsabilité de la Couronne.

Levée de la suspension

(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

L.R. (1985), ch. F-7, art. 50; 2002, ch. 8, art. 46.

Suspension des procédures

50.1 (1) Sur requête du procureur général du Canada, la Cour fédérale ordonne la suspension des procédures relatives à toute réclamation contre la Couronne à l’égard de laquelle cette dernière entend présenter une demande

CANADA

CONSOLIDATION

Federal Courts Rules

SOR/98-106

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CODIFICATION

Règles des Cours fédérales

DORS/98-106

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writ of execution includes a writ of seizure and sale, a writ of possession, a writ of delivery and a writ of sequestration, and any further writ in aid thereof. (*bref d'exécution*)

2002, c. 8, s. 182; SOR/2002-417, s. 1; SOR/2004-283, s. 3; SOR/2007-301, s. 1; SOR/2015-21, s. 1.

vacances judiciaires d'été Les mois de juillet et août. (*summer recess*)

2002, ch. 8, art. 182; DORS/2002-417, art. 1; DORS/2004-283, art. 3; DORS/2007-301, art. 1; DORS/2015-21, art. 1.

General principle

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

Principe général

3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

Matters not provided for

4 On motion, the Court may provide for any procedural matter not provided for in these Rules or in an Act of Parliament by analogy to these Rules or by reference to the practice of the superior court of the province to which the subject-matter of the proceeding most closely relates.

Cas non prévus

4 En cas de silence des présentes règles ou des lois fédérales, la Cour peut, sur requête, déterminer la procédure applicable par analogie avec les présentes règles ou par renvoi à la pratique de la cour supérieure de la province qui est la plus pertinente en l'espèce.

Forms

5 Where these Rules require that a form be used, the form may incorporate any variations that the circumstances require.

Formules

5 Les formules prévues par les présentes règles peuvent être adaptées selon les circonstances.

Computation, Extension and Abridgement of Time

Interpretation Act

6 (1) Subject to subsections (2) and (3), the computation of time under these Rules, or under an order of the Court, is governed by sections 26 to 30 of the *Interpretation Act*.

Period of less than seven days

(2) Where a period of less than seven days is provided for in these Rules or fixed by an order of the Court, a day that is a holiday shall not be included in computing the period.

Christmas recess

(3) Unless otherwise directed by the Court, a day that falls within the Christmas recess shall not be included in the computation of time under these Rules for filing, amending or serving a document.

Extension by consent

7 (1) Subject to subsections (2) and (3), a period provided by these Rules may be extended once by filing the consent in writing of all parties.

Calcul et modification des délais

Application de la *Loi d'interprétation*

6 (1) Sous réserve des paragraphes (2) et (3), le calcul des délais prévus par les présentes règles ou fixés par une ordonnance de la Cour est régi par les articles 26 à 30 de la *Loi d'interprétation*.

Délai de moins de sept jours

(2) Lorsque le délai prévu par les présentes règles ou fixé par une ordonnance de la Cour est de moins de sept jours, les jours fériés n'entrent pas dans le calcul du délai.

Vacances judiciaires de Noël

(3) Sauf directives contraires de la Cour, les vacances judiciaires de Noël n'entrent pas dans le calcul des délais applicables selon les présentes règles au dépôt, à la modification ou à la signification d'un document.

Délai prorogé par consentement écrit

7 (1) Sous réserve des paragraphes (2) et (3), tout délai prévu par les présentes règles peut être prorogé une seule fois par le dépôt du consentement écrit de toutes les parties.

Setting aside or variance

(2) On motion, the Court may set aside or vary an order

(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or

(b) where the order was obtained by fraud.

Annulation

(2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :

a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;

b) l'ordonnance a été obtenue par fraude.

Effect of order

(3) Unless the Court orders otherwise, the setting aside or variance of an order under subsection (1) or (2) does not affect the validity or character of anything done or not done before the order was set aside or varied.

Effet de l'ordonnance

(3) Sauf ordonnance contraire de la Cour, l'annulation ou la modification d'une ordonnance en vertu des paragraphes (1) ou (2) ne porte pas atteinte à la validité ou à la nature des actes ou omissions antérieurs à cette annulation ou modification.

PART 11

Costs

Awarding of Costs Between Parties

Discretionary powers of Court

400 (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

Crown

(2) Costs may be awarded to or against the Crown.

Factors in awarding costs

(3) In exercising its discretion under subsection (1), the Court may consider

(a) the result of the proceeding;

(b) the amounts claimed and the amounts recovered;

(c) the importance and complexity of the issues;

(d) the apportionment of liability;

(e) any written offer to settle;

(f) any offer to contribute made under rule 421;

(g) the amount of work;

(h) whether the public interest in having the proceeding litigated justifies a particular award of costs;

(i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;

PARTIE 11

Dépens

Adjudication des dépens entre parties

Pouvoir discrétionnaire de la Cour

400 (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

La Couronne

(2) Les dépens peuvent être adjugés à la Couronne ou contre elle.

Facteurs à prendre en compte

(3) Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

a) le résultat de l'instance;

b) les sommes réclamées et les sommes recouvrées;

c) l'importance et la complexité des questions en litige;

d) le partage de la responsabilité;

e) toute offre écrite de règlement;

f) toute offre de contribution faite en vertu de la règle 421;

g) la charge de travail;

(j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;

(k) whether any step in the proceeding was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;

(m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;

(n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

(i) the nature of the litigation, its public significance and any need to clarify the law,

(ii) the number, complexity or technical nature of the issues in dispute, or

(iii) the amount in dispute in the proceeding; and

(o) any other matter that it considers relevant.

h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;

i) la conduite d'une partie qui a eu pour effet d'abréger ou de prolonger inutilement la durée de l'instance;

j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;

k) la question de savoir si une mesure prise au cours de l'instance, selon le cas :

(i) était inappropriée, vexatoire ou inutile,

(ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;

l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense;

m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;

n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants :

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) la somme en litige;

o) toute autre question qu'elle juge pertinente.

Tariff B

(4) The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.

Tarif B

(4) La Cour peut fixer tout ou partie des dépens en se reportant au tarif B et adjuger une somme globale au lieu ou en sus des dépens taxés.

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

R.S.C., 1985, c. I-5

L.R.C. (1985), ch. I-5

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n’y figurant qu’à titre de repère ou d’information.

NOTE

This consolidation is current to August 28, 2019. The last amendments came into force on August 15, 2019. Any amendments that were not in force as of August 28, 2019 are set out at the end of this document under the heading “Amendments Not in Force”.

NOTE

Cette codification est à jour au 28 août 2019. Les dernières modifications sont entrées en vigueur le 15 août 2019. Toutes modifications qui n'étaient pas en vigueur au 28 août 2019 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting Indians

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R.S.C., 1985, c. I-5

An Act respecting Indians

Short Title

Short title

1 This Act may be cited as the *Indian Act*.

R.S., c. I-6, s. 1.

Interpretation

Definitions

2 (1) In this Act,

band means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act; (*bande*)

Band List means a list of persons that is maintained under section 8 by a band or in the Department; (*liste de bande*)

child includes a legally adopted child and a child adopted in accordance with Indian custom; (*enfant*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

council of the band means

(a) in the case of a band to which section 74 applies, the council established pursuant to that section,

L.R.C., 1985, ch. I-5

Loi concernant les Indiens

Titre abrégé

Titre abrégé

1 *Loi sur les Indiens*.

S.R., ch. I-6, art. 1.

Définitions

Définitions

2 (1) Les définitions qui suivent s’appliquent à la présente loi.

argent des Indiens Les sommes d’argent perçues, reçues ou détenues par Sa Majesté à l’usage et au profit des Indiens ou des bandes. (*Indian moneys*)

bande Groupe d’Indiens, selon le cas :

a) à l’usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;

b) à l’usage et au profit communs desquels, Sa Majesté détient des sommes d’argent;

c) que le gouverneur en conseil a déclaré être une bande pour l’application de la présente loi. (*band*)

biens Tout bien meuble ou immeuble, y compris un droit sur des terres. (*estate*)

boisson alcoolisée Tout liquide — alcoolisé ou non —, mélange ou préparation ayant des propriétés enivrantes et susceptible de consommation humaine. (*intoxicant*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseil de la bande

(b) in the case of a band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that Act,

(c) in the case of a band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that Act, the council elected or in office in accordance with the community election code referred to in that section, or

(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band; (*conseil de la bande*)

Department means the Department of Indigenous Services; (*ministère*)

designated lands means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition; (*terres désignées*)

elector means a person who

(a) is registered on a Band List,

(b) is of the full age of eighteen years, and

(c) is not disqualified from voting at band elections; (*électeur*)

estate includes real and personal property and any interest in land; (*biens*)

Indian means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian; (*Indien*)

Indian moneys means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands; (*argent des Indiens*)

Indian Register means the register of persons that is maintained under section 5; (*registre des Indiens*)

intoxicant includes alcohol, alcoholic, spirituous, vinous, fermented malt or other intoxicating liquor or combination of liquors and mixed liquor a part of which is spirituous, vinous, fermented or otherwise intoxicating and all drinks, drinkable liquids, preparations or mixtures capable of human consumption that are intoxicating; (*boisson alcoolisée*)

a) Dans le cas d’une bande à laquelle s’applique l’article 74, le conseil constitué conformément à cet article;

b) s’agissant d’une bande dont le nom figure à l’annexe de la *Loi sur les élections au sein de premières nations*, le conseil élu ou en place conformément à cette loi;

c) s’agissant d’une bande dont le nom a été radié de l’annexe de la *Loi sur les élections au sein de premières nations* conformément à l’article 42 de cette loi, le conseil élu ou en place conformément au code électoral communautaire visé à cet article;

d) s’agissant de toute autre bande, le conseil choisi selon la coutume de celle-ci ou, en l’absence d’un conseil, le chef de la bande choisi selon la coutume de celle-ci. (*council of the band*)

électeur Personne qui remplit les conditions suivantes :

a) être inscrit sur une liste de bande;

b) avoir dix-huit ans;

c) ne pas avoir perdu son droit de vote aux élections de la bande. (*elector*)

enfant Sont compris parmi les enfants les enfants légalement adoptés, ainsi que les enfants adoptés selon la coutume indienne. (*child*)

Indien Personne qui, conformément à la présente loi, est inscrite à titre d’Indien ou a droit de l’être. (*Indian*)

Indien mentalement incapable Indien qui, conformément aux lois de la province où il réside, a été déclaré mentalement déficient ou incapable, pour l’application de toute loi de cette province régissant l’administration des biens de personnes mentalement déficientes ou incapables. (*mentally incompetent Indian*)

inscrit Inscrit comme Indien dans le registre des Indiens. (*registered*)

liste de bande Liste de personnes tenue en vertu de l’article 8 par une bande ou au ministère. (*Band List*)

membre d’une bande Personne dont le nom apparaît sur une liste de bande ou qui a droit à ce que son nom y figure. (*member of a band*)

ministère Le ministère des Services aux Autochtones. (*Department*)

member of a band means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List; (*membre d'une bande*)

mentally incompetent Indian means an Indian who, pursuant to the laws of the province in which he resides, has been found to be mentally defective or incompetent for the purposes of any laws of that province providing for the administration of estates of mentally defective or incompetent persons; (*Indien mentalement incapable*)

Minister means the Minister of Indigenous Services; (*ministre*)

registered means registered as an Indian in the Indian Register; (*inscrit*)

Registrar means the officer in the Department who is in charge of the Indian Register and the Band Lists maintained in the Department; (*registraire*)

reserve

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and

(b) except in subsection 18(2), sections 20 to 25, 28, 37, 38, 42, 44, 46, 48 to 51 and 58 to 60 and the regulations made under any of those provisions, includes designated lands; (*réserve*)

superintendent includes a commissioner, regional supervisor, Indian superintendent, assistant Indian superintendent and any other person declared by the Minister to be a superintendent for the purposes of this Act, and with reference to a band or a reserve, means the superintendent for that band or reserve; (*surintendant*)

surrendered lands means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart; (*terres cédées*)

survivor, in relation to a deceased individual, means their surviving spouse or common-law partner. (*survivant*)

Definition of *band*

(2) The expression ***band***, with reference to a reserve or surrendered lands, means the band for whose use and benefit the reserve or the surrendered lands were set apart.

ministre Le ministre des Services aux Autochtones. (*Minister*)

registraire Le fonctionnaire du ministère responsable du registre des Indiens et des listes de bande tenus au ministère. (*Registrar*)

registre des Indiens Le registre de personnes tenu en vertu de l'article 5. (*Indian Register*)

réserve Parcelle de terrain dont Sa Majesté est propriétaire et qu'elle a mise de côté à l'usage et au profit d'une bande; y sont assimilées les terres désignées, sauf pour l'application du paragraphe 18(2), des articles 20 à 25, 28, 37, 38, 42, 44, 46, 48 à 51 et 58 à 60, ou des règlements pris sous leur régime. (*reserve*)

surintendant Sont assimilés à un surintendant un commissaire, un surveillant régional, un surintendant des Indiens, un surintendant adjoint des Indiens et toute autre personne que le ministre a déclarée un surintendant pour l'application de la présente loi; relativement à une bande ou une réserve, le surintendant de cette bande ou réserve. (*superintendent*)

survivant L'époux ou conjoint de fait survivant d'une personne décédée. (*survivor*)

terres cédées Réserve ou partie d'une réserve, ou tout droit sur celle-ci, propriété de Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé. (*surrendered lands*)

terres désignées Parcelle de terrain, ou tout droit sur celle-ci, propriété de Sa Majesté et relativement à laquelle la bande à l'usage et au profit de laquelle elle a été mise de côté à titre de réserve a cédé, avant ou après l'entrée en vigueur de la présente définition, ses droits autrement qu'à titre absolu. (*designated lands*)

Définition de *bande*

(2) En ce qui concerne une réserve ou des terres cédées, ***bande*** désigne la bande à l'usage et au profit de laquelle la réserve ou les terres cédées ont été mises de côté.

Exercise of powers conferred on band or council

(3) Unless the context otherwise requires or this Act otherwise provides,

(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and

(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

R.S., 1985, c. I-5, s. 2; R.S., 1985, c. 32 (1st Supp.), s. 1, c. 17 (4th Supp.), s. 1; 2000, c. 12, s. 148; 2014, c. 5, s. 43, c. 38, s. 3; 2019, c. 29, s. 372; 2019, c. 29, s. 375.

Exercice des pouvoirs conférés à une bande ou un conseil

(3) Sauf indication contraire du contexte ou disposition expresse de la présente loi :

a) un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l’être en vertu du consentement donné par une majorité des électeurs de la bande;

b) un pouvoir conféré au conseil d’une bande est censé ne pas être exercé à moins de l’être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée.

L.R. (1985), ch. I-5, art. 2; L.R. (1985), ch. 32 (1er suppl.), art. 1, ch. 17 (4e suppl.), art. 1; 2000, ch. 12, art. 148; 2014, ch. 5, art. 43, ch. 38, art. 3; 2019, ch. 29, art. 372; 2019, ch. 29, art. 375.

Administration

Superintendent general

3 The Minister of Indigenous Services shall be the superintendent general of Indian affairs.

R.S., 1985, c. I-5, s. 3; 2019, c. 29, s. 357.

Administration

Surintendant général

3 Le ministre des Services aux Autochtones est le surintendant général des affaires indiennes.

L.R. (1985), ch. I-5, art. 3; 2019, ch. 29, art. 357.

Application of Act

Application of Act

4 (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

Act may be declared inapplicable

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or

(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

Authority confirmed for certain cases

(2.1) For greater certainty, and without restricting the generality of subsection (2), the Governor in Council shall be deemed to have had the authority to make any declaration under subsection (2) that the Governor in Council has made in respect of section 11, 12 or 14, or any

Application de la loi

Application de la loi

4 (1) La mention d’un Indien, dans la présente loi, exclut une personne de la race d’aborigènes communément appelés Inuit.

Pouvoir de déclarer la loi inapplicable

(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s’applique pas :

a) à des Indiens ou à un groupe ou une bande d’Indiens;

b) à une réserve ou à des terres cédées, ou à une partie y afférente.

Il peut en outre, par proclamation, révoquer toute semblable déclaration.

Confirmation de la validité de certaines déclarations

(2.1) Sans que soit limitée la portée générale du paragraphe (2), il demeure entendu que le gouverneur en conseil est réputé avoir eu le pouvoir de faire, en vertu du paragraphe (2), toute déclaration qu’il a faite à l’égard des articles 11, 12 ou 14, ou d’une disposition de ceux-ci, dans leur version antérieure au 17 avril 1985.

provision thereof, as each section or provision read immediately prior to April 17, 1985.

Certain sections inapplicable to Indians living off reserves

(3) Sections 114 to 117 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada or a province.

R.S., 1985, c. I-5, s. 4; R.S., 1985, c. 32 (1st Supp.), s. 2; 2014, c. 38, s. 4.

Certains articles ne s'appliquent pas aux Indiens vivant hors des réserves

(3) Les articles 114 à 117 et, sauf si le ministre en ordonne autrement, les articles 42 à 52 ne s'appliquent à aucun Indien, ni à l'égard d'aucun Indien, ne résidant pas ordinairement dans une réserve ou sur des terres qui appartiennent à Sa Majesté du chef du Canada ou d'une province.

L.R. (1985), ch. I-5, art. 4; L.R. (1985), ch. 32 (1er suppl.), art. 2; 2014, ch. 38, art. 4.

Provisions that apply to all band members

4.1 A reference to an Indian in any of the following provisions shall be deemed to include a reference to any person whose name is entered in a Band List and who is entitled to have it entered therein: the definitions *band*, *Indian moneys* and *mentally incompetent Indian* in section 2, subsections 4(2) and (3) and 18(2), sections 20 and 22 to 25, subsections 31(1) and (3) and 35(4), sections 51, 52, 52.2 and 52.3, subsections 58(3) and 61(1), sections 63 and 65, subsections 66(2) and 70(1) and (4), section 71, paragraphs 73(g) and (h), subsection 74(4), section 84, paragraph 87(1)(a), section 88, subsection 89(1) and paragraph 107(b).

R.S., 1985, c. 32 (1st Supp.), s. 3, c. 48 (4th Supp.), s. 1.

Dispositions applicables à tous les membres d'une bande

4.1 La mention du terme « Indien » dans les définitions de *bande*, *argent des Indiens* ou *Indien mentalement incapable* à l'article 2 et la mention de ce terme aux paragraphes 4(2) et (3) et 18(2), aux articles 20 et 22 à 25, aux paragraphes 31(1) et (3) et 35(4), aux articles 51, 52, 52.2 et 52.3, aux paragraphes 58(3) et 61(1), aux articles 63 et 65, aux paragraphes 66(2) et 70(1) et (4), à l'article 71, aux alinéas 73g) et h), au paragraphe 74(4), à l'article 84, à l'alinéa 87(1)a), à l'article 88, au paragraphe 89(1) et à l'alinéa 107b) valent également mention de toute personne qui a droit à ce que son nom soit consigné dans une liste de bande et dont le nom y est consigné.

L.R. (1985), ch. 32 (1er suppl.), art. 3, ch. 48 (4e suppl.), art. 1.

Definition and Registration of Indians

Indian Register

Indian Register

5 (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

Existing Indian Register

(2) The names in the Indian Register immediately prior to April 17, 1985 shall constitute the Indian Register on April 17, 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

Définition et enregistrement des indiens

Registre des Indiens

Tenue du registre

5 (1) Est tenu au ministère un registre des Indiens où est consigné le nom de chaque personne ayant le droit d'être inscrite comme Indien en vertu de la présente loi.

Registre existant

(2) Les noms figurant au registre des Indiens le 16 avril 1985 constituent le registre des Indiens au 17 avril 1985.

Additions et retranchements

(3) Le registraire peut ajouter au registre des Indiens, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans ce registre.

Date of change

(4) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

Application for registration

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

Unknown or unstated parentage

(6) If a parent, grandparent or other ancestor of a person in respect of whom an application is made is unknown — or is unstated on a birth certificate that, if the parent, grandparent or other ancestor were named on it, would help to establish the person's entitlement to be registered — the Registrar shall, without being required to establish the identity of that parent, grandparent or other ancestor, determine, after considering all of the relevant evidence, whether that parent, grandparent or other ancestor is, was or would have been entitled to be registered. In making the determination, the Registrar shall rely on any credible evidence that is presented by the applicant in support of the application or that the Registrar otherwise has knowledge of and shall draw from it every reasonable inference in favour of the person in respect of whom the application is made.

No presumption

(7) For greater certainty, if the identity of a parent, grandparent or other ancestor of an applicant is unknown or unstated on a birth certificate, there is no presumption that this parent, grandparent or other ancestor is not, was not or would not have been entitled to be registered.

R.S., 1985, c. I-5, s. 5; R.S., 1985, c. 32 (1st Supp.), s. 4; 2017, c. 25, s. 1.

Persons entitled to be registered

6 (1) Subject to section 7, a person is entitled to be registered if

(a) that person was registered or entitled to be registered immediately before April 17, 1985;

(a.1) the name of that person was omitted or deleted from the Indian Register, or from a band list before September 4, 1951, under subparagraph 12(1)(a)(iv), paragraph 12(1)(b) or subsection 12(2) or under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as any of those provisions;

Date du changement

(4) Le registre des Indiens indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a le droit d'être inscrite soit consigné dans le registre des Indiens, à moins qu'une demande à cet effet soit présentée au registraire.

Ascendants inconnus ou non déclarés

(6) Si une demande est présentée à l'égard d'une personne dont le parent ou un autre de ses ascendants est inconnu — ou est non déclaré sur un certificat de naissance, lequel serait utile pour établir le droit à l'inscription de la personne si le nom du parent ou de l'ascendant y était inscrit —, le registraire, sans devoir établir l'identité du parent ou de l'ascendant, décide, après avoir considéré toute la preuve pertinente, si ce parent ou cet ascendant a le droit d'être inscrit, ou avait ou aurait eu ce droit. Pour arriver à la décision, le registraire se fonde sur tout élément de preuve crédible que lui fournit le demandeur à l'appui de sa demande, ou sur tout élément de preuve crédible dont il a connaissance par ailleurs, et en tire les conclusions raisonnables les plus favorables à la personne à l'égard de laquelle la demande est présentée.

Aucune présomption

(7) Il est entendu que, si l'identité d'un parent ou un autre des ascendants du demandeur est inconnue ou non déclarée sur un certificat de naissance, il n'y aucune présomption que le parent ou l'autre ascendant n'a pas le droit d'être inscrit ou n'avait pas ou n'aurait pas eu ce droit.

L.R. (1985), ch. I-5, art. 5; L.R. (1985), ch. 32 (1er suppl.), art. 4; 2017, ch. 25, art. 1.

Personnes ayant droit à l'inscription

6 (1) Sous réserve de l'article 7, toute personne a le droit d'être inscrite dans les cas suivants :

a) elle était inscrite ou avait le droit de l'être le 16 avril 1985;

a.1) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iv), de l'alinéa 12(1)b) ou du paragraphe 12(2) ou en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(2), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de l'une de ces dispositions;

(a.2) that person meets the following conditions:

(i) they were born female during the period beginning on September 4, 1951 and ending on April 16, 1985 and their parents were not married to each other at the time of the birth,

(ii) their father was at the time of that person's birth entitled to be registered or, if he was no longer living at that time, was at the time of death entitled to be registered, and

(iii) their mother was not at the time of that person's birth entitled to be registered;

(a.3) that person is a direct descendant of a person who is, was or would have been entitled to be registered under paragraph (a.1) or (a.2) and

(i) they were born before April 17, 1985, whether or not their parents were married to each other at the time of the birth, or

(ii) they were born after April 16, 1985 and their parents were married to each other at any time before April 17, 1985;

(b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;

(c) [Repealed, 2017, c. 25, s. 2.1]

(c.01) [Repealed, 2017, c. 25, s. 2.1]

(c.02) [Repealed, 2017, c. 25, s. 2.1]

(c.1) [Repealed, 2017, c. 25, s. 2.1]

(c.2) [Repealed, 2017, c. 25, s. 2.1]

(c.3) [Repealed, 2017, c. 25, s. 2.1]

(c.4) [Repealed, 2017, c. 25, s. 2.1]

(c.5) [Repealed, 2017, c. 25, s. 2.1]

(c.6) [Repealed, 2017, c. 25, s. 2.1]

(d) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(a)(iii) pursuant to an order made under subsection 109(1), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

a.2) elle remplit les conditions suivantes :

(i) elle est une personne née de sexe féminin pendant la période commençant le 4 septembre 1951 et se terminant le 16 avril 1985, et ses parents n'étaient pas mariés l'un à l'autre au moment de sa naissance,

(ii) son père avait le droit d'être inscrit au moment de sa naissance ou, s'il était décédé à ce moment, avait ce droit à la date de son décès,

(iii) sa mère n'avait pas le droit d'être inscrite au moment de sa naissance;

a.3) elle est un descendant en ligne directe d'une personne qui a droit à l'inscription, ou qui avait ou aurait eu ce droit, en vertu de l'un des alinéas a.1) ou a.2) et elle est née soit avant le 17 avril 1985, que ses parents aient été ou non mariés l'un à l'autre au moment de sa naissance, soit après le 16 avril 1985 et ses parents se sont mariés à n'importe quel moment avant le 17 avril 1985;

b) elle est membre d'un groupe de personnes déclaré par le gouverneur en conseil après le 16 avril 1985 être une bande pour l'application de la présente loi;

c) [Abrogé, 2017, ch. 25, art. 2.1]

c.01) [Abrogé, 2017, ch. 25, art. 2.1]

c.02) [Abrogé, 2017, ch. 25, art. 2.1]

c.1) [Abrogé, 2017, ch. 25, art. 2.1]

c.2) [Abrogé, 2017, ch. 25, art. 2.1]

c.3) [Abrogé, 2017, ch. 25, art. 2.1]

c.4) [Abrogé, 2017, ch. 25, art. 2.1]

c.5) [Abrogé, 2017, ch. 25, art. 2.1]

c.6) [Abrogé, 2017, ch. 25, art. 2.1]

d) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande, en vertu du sous-alinéa 12(1)a)(iii) conformément à une ordonnance prise en vertu du paragraphe 109(1), dans leur version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui d'une de ces dispositions;

e) son nom a été omis ou retranché du registre des Indiens ou, avant le 4 septembre 1951, d'une liste de bande :

(e) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951,

(i) under section 13, as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or

(ii) under section 111, as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or

(f) both parents of that person are entitled to be registered under this section or, if the parents are no longer living, were so entitled at the time of death.

(i) soit en vertu de l'article 13, dans sa version antérieure au 4 septembre 1951, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article,

(ii) soit en vertu de l'article 111, dans sa version antérieure au 1er juillet 1920, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet article;

f) ses parents ont tous deux le droit d'être inscrits en vertu du présent article ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

Persons entitled to be registered

(2) Subject to section 7, a person is entitled to be registered if one of their parents is entitled to be registered under subsection (1) or, if that parent is no longer living, was so entitled at the time of death.

Personnes ayant droit à l'inscription

(2) Sous réserve de l'article 7, une personne a le droit d'être inscrite si l'un de ses parents a le droit d'être inscrit en vertu du paragraphe (1) ou, s'il est décédé, avait ce droit à la date de son décès.

Clarification

(2.1) A person who is entitled to be registered under both paragraph (1)(f) and any other paragraph of subsection (1) is considered to be entitled to be registered under that other paragraph only, and a person who is entitled to be registered under both subsection (2) and any paragraph of subsection (1) is considered to be entitled to be registered under that paragraph only.

Précision

(2.1) La personne qui a le droit d'être inscrite à la fois en vertu de l'alinéa (1)f) et d'un autre alinéa du paragraphe (1) est considérée avoir le droit d'être inscrite en vertu de cet autre alinéa seulement et celle qui a le droit d'être inscrite à la fois en vertu du paragraphe (2) et d'un alinéa du paragraphe (1) est considérée avoir le droit d'être inscrite en vertu de cet alinéa seulement.

Deeming provision

(3) For the purposes of paragraphs (1)(a.3) and (f) and subsection (2),

(a) a person who was no longer living immediately prior to April 17, 1985 but who was at the time of death entitled to be registered shall be deemed to be entitled to be registered under paragraph (1)(a);

(b) a person who is described in paragraph (1)(a.1), (d), (e) or (f) or subsection (2) and who was no longer living on April 17, 1985 is deemed to be entitled to be registered under that paragraph or subsection; and

(c) [Repealed, 2017, c. 25, s. 2.1]

(d) a person who is described in paragraph (1)(a.2) or (a.3) and who was no longer living on the day on which that paragraph came into force is deemed to be entitled to be registered under that paragraph.

R.S., 1985, c. I-5, s. 6; R.S., 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 1; 2010, c. 18, s. 2; 2017, c. 25, s. 2; 2017, c. 25, s. 2.1.

Présomption

(3) Pour l'application des alinéas (1)a.3) et f) et du paragraphe (2) :

a) la personne qui est décédée avant le 17 avril 1985 mais qui avait le droit d'être inscrite à la date de son décès est réputée avoir le droit d'être inscrite en vertu de l'alinéa (1)a);

b) la personne qui est visée à l'un des alinéas (1)a.1), d), e) ou f) ou au paragraphe (2) et qui est décédée avant le 17 avril 1985 est réputée avoir le droit d'être inscrite en vertu de l'alinéa ou du paragraphe en cause;

c) [Abrogé, 2017, ch. 25, art. 2.1]

d) la personne qui est visée à l'un des alinéas (1)a.2) ou a.3) et qui est décédée avant la date d'entrée en vigueur de l'alinéa en cause est réputée avoir le droit d'être inscrite en vertu de celui-ci.

L.R. (1985), ch. I-5, art. 6; L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 43 (4e suppl.), art. 1; 2010, ch. 18, art. 2; 2017, ch. 25, art. 2; 2017, ch. 25, art. 2.1.

Persons not entitled to be registered

7 (1) The following persons are not entitled to be registered:

(a) a person who was registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and whose name was subsequently omitted or deleted from the Indian Register under this Act; or

(b) a person who is the child of a person who was registered or entitled to be registered under paragraph 11(1)(f), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, and is also the child of a person who is not entitled to be registered.

Exception

(2) Paragraph (1)(a) does not apply in respect of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

Idem

(3) Paragraph (1)(b) does not apply in respect of the child of a female person who was, at any time prior to being registered under paragraph 11(1)(f), entitled to be registered under any other provision of this Act.

R.S., 1985, c. I-5, s. 7; R.S., 1985, c. 32 (1st Supp.), s. 4.

Band Lists

Band Lists

8 There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

R.S., 1985, c. I-5, s. 8; R.S., 1985, c. 32 (1st Supp.), s. 4.

Band Lists maintained in Department

9 (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

Existing Band Lists

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

Personnes n’ayant pas droit à l’inscription

7 (1) Les personnes suivantes n’ont pas le droit d’être inscrites :

a) celles qui étaient inscrites en vertu de l’alinéa 11(1)f), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et dont le nom a ultérieurement été omis ou retranché du registre des Indiens en vertu de la présente loi;

b) celles qui sont les enfants d’une personne qui était inscrite ou avait le droit de l’être en vertu de l’alinéa 11(1)f), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, et qui sont également les enfants d’une personne qui n’a pas le droit d’être inscrite.

Exception

(2) L’alinéa (1)a) ne s’applique pas à une personne de sexe féminin qui, avant qu’elle ne soit inscrite en vertu de l’alinéa 11(1)f), avait le droit d’être inscrite en vertu de toute autre disposition de la présente loi.

Idem

(3) L’alinéa (1)b) ne s’applique pas à l’enfant d’une personne de sexe féminin qui, avant qu’elle ne soit inscrite en vertu de l’alinéa 11(1)f), avait le droit d’être inscrite en vertu de toute autre disposition de la présente loi.

L.R. (1985), ch. I-5, art. 7; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Listes de bande

Tenue

8 Est tenue conformément à la présente loi la liste de chaque bande où est consigné le nom de chaque personne qui en est membre.

L.R. (1985), ch. I-5, art. 8; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Liste de bande tenue au ministère

9 (1) Jusqu’à ce que la bande assume la responsabilité de sa liste, celle-ci est tenue au ministère par le registraire.

Listes existantes

(2) Les noms figurant à la liste d’une bande le 16 avril 1985 constituent la liste de cette bande au 17 avril 1985.

Deletions and additions

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

Date of change

(4) A Band List maintained in the Department shall indicate the date on which each name was added thereto or deleted therefrom.

Application for entry

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

R.S., 1985, c. I-5, s. 9; R.S., 1985, c. 32 (1st Supp.), s. 4.

Band control of membership

10 (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

Membership rules

(2) A band may, pursuant to the consent of a majority of the electors of the band,

- **(a)** after it has given appropriate notice of its intention to do so, establish membership rules for itself; and
- **(b)** provide for a mechanism for reviewing decisions on membership.

Exception relating to consent

(3) Where the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect in respect of the band, the consents required under subsections (1) and (2) shall be given by a majority of the members of the band who are of the full age of eighteen years.

Acquired rights

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a

Additions et retranchements

(3) Le registraire peut ajouter à une liste de bande tenue au ministère, ou en retrancher, le nom de la personne qui, aux termes de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

Date du changement

(4) La liste de bande tenue au ministère indique la date où chaque nom y a été ajouté ou en a été retranché.

Demande

(5) Il n'est pas requis que le nom d'une personne qui a droit à ce que celui-ci soit consigné dans une liste de bande tenue au ministère y soit consigné, à moins qu'une demande à cet effet soit présentée au registraire.

L.R. (1985), ch. I-5, art. 9; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Pouvoir de décision

10 (1) La bande peut décider de l'appartenance à ses effectifs si elle en fixe les règles par écrit conformément au présent article et si, après qu'elle a donné un avis convenable de son intention de décider de cette appartenance, elle y est autorisée par la majorité de ses électeurs.

Règles d'appartenance

(2) La bande peut, avec l'autorisation de la majorité de ses électeurs :

- **a)** après avoir donné un avis convenable de son intention de ce faire, fixer les règles d'appartenance à ses effectifs;
- **b)** prévoir une procédure de révision des décisions portant sur l'appartenance à ses effectifs.

Statut administratif sur l'autorisation requise

(3) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)p.4), un règlement administratif mettant en vigueur le présent paragraphe à l'égard de la bande, l'autorisation requise en vertu des paragraphes (1) et (2) doit être donnée par la majorité des membres de la bande âgés d'au moins dix-huit ans.

Droits acquis

(4) Les règles d'appartenance fixées par une bande en vertu du présent article ne peuvent priver quiconque avait droit à ce que son nom soit consigné dans la liste de bande avant leur établissement du droit à ce que son nom y soit consigné en raison uniquement d'un fait ou d'une mesure antérieurs à leur prise d'effet.

situation that existed or an action that was taken before the rules came into force.

Idem

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(c) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

Notice to the Minister

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

Notice to band and copy of Band List

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(a) give notice to the band that it has control of its own membership; and

(b) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

Effective date of band's membership rules

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

Band to maintain Band List

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(b), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

Deletions and additions

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

Idem

(5) Il demeure entendu que le paragraphe (4) s'applique à la personne qui avait droit à ce que son nom soit consigné dans la liste de bande en vertu de l'alinéa 11(1)c) avant que celle-ci n'assume la responsabilité de la tenue de sa liste si elle ne cesse pas ultérieurement d'avoir droit à ce que son nom y soit consigné.

Avis au ministre

(6) Une fois remplies les conditions du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre du fait que celle-ci décide désormais de l'appartenance à ses effectifs et lui transmet le texte des règles d'appartenance.

Transmission de la liste

(7) Sur réception de l'avis du conseil de bande prévu au paragraphe (6), le ministre, sans délai, s'il constate que les conditions prévues au paragraphe (1) sont remplies :

a) avise la bande qu'elle décide désormais de l'appartenance à ses effectifs;

b) ordonne au registraire de transmettre à la bande une copie de la liste de bande tenue au ministère.

Date d'entrée en vigueur des règles d'appartenance

(8) Lorsque la bande décide de l'appartenance à ses effectifs en vertu du présent article, les règles d'appartenance fixées par celle-ci entrent en vigueur à compter de la date où l'avis au ministre a été donné en vertu du paragraphe (6); les additions ou retranchements effectués par le registraire à l'égard de la liste de la bande après cette date ne sont valides que s'ils sont effectués conformément à ces règles.

Transfert de responsabilité

(9) À compter de la réception de l'avis prévu à l'alinéa (7)b), la bande est responsable de la tenue de sa liste. Sous réserve de l'article 13.2, le ministère, à compter de cette date, est dégagé de toute responsabilité à l'égard de cette liste.

Additions et retranchements

(10) La bande peut ajouter à la liste de bande tenue par elle, ou en retrancher, le nom de la personne qui, aux termes des règles d'appartenance de la bande, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans la liste.

Date of change

(11) A Band List maintained by a band shall indicate the date on which each name was added thereto or deleted therefrom.

R.S., 1985, c. I-5, s. 10; R.S., 1985, c. 32 (1st Supp.), s. 4.

Date du changement

(11) La liste de bande tenue par celle-ci indique la date où chaque nom y a été ajouté ou en a été retranché.

L.R. (1985), ch. I-5, art. 10; L.R. (1985), ch. 32 (1^{er} suppl.), art. 4.

Membership rules for Departmental Band List

11 (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

(a) the name of that person was entered in the Band List for that band, or that person was entitled to have it entered in the Band List for that band, immediately prior to April 17, 1985;

(b) that person is entitled to be registered under paragraph 6(1)(b) as a member of that band;

(c) that person is entitled to be registered under paragraph 6(1)(a.1) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

Règles d’appartenance pour une liste tenue au ministère

11 (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

a) son nom a été consigné dans cette liste, ou elle avait droit à ce qu’il le soit le 16 avril 1985;

b) elle a le droit d’être inscrite en vertu de l’alinéa 6(1)b) comme membre de cette bande;

c) elle a le droit d’être inscrite en vertu de l’alinéa 6(1)a.1) et a cessé d’être un membre de cette bande en raison des circonstances prévues à cet alinéa;

d) elle est née après le 16 avril 1985 et a le droit d’être inscrite en vertu de l’alinéa 6(1)f) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s’ils sont décédés, avaient ce droit à la date de leur décès.

Additional membership rules for Departmental Band List

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(a) if that person is entitled to be registered under paragraph 6(1)(d) or (e) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

Règles d’appartenance supplémentaires pour les listes tenues au ministère

(2) À compter du jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l’article 13.1, lorsque la bande n’a pas la responsabilité de la tenue de sa liste prévue à la présente loi, une personne a droit à ce que son nom soit consigné dans la liste de bande tenue au ministère pour cette dernière dans l’un ou l’autre des cas suivants :

a) elle a le droit d’être inscrite en vertu des alinéas 6(1)d) ou e) et elle a cessé d’être un membre de la bande en raison des circonstances prévues à l’un de ces alinéas;

b) elle a le droit d’être inscrite en vertu de l’alinéa 6(1)f) ou du paragraphe 6(2) et un de ses parents visés à l’une de ces dispositions a droit à ce que son nom soit consigné dans la liste de bande ou, s’il est décédé, avait ce droit à la date de son décès.

Deeming provision

(3) For the purposes of paragraph (1)(d) and subsection (2),

(a) a person whose name was omitted or deleted from the Indian Register or a Band List in the circumstances set out in paragraph 6(1)(a.1), (d) or (e) and who was no longer living on the first day on which the person would otherwise be entitled to have the person's name entered in the Band List of the band of which the person ceased to be a member is deemed to be entitled to have the person's name so entered;

(a.1) a person who would have been entitled to be registered under paragraph 6(1)(a.2) or (a.3), had they been living on the day on which that paragraph came into force, and who would otherwise have been entitled, on that day, to have their name entered in a Band List, is deemed to be entitled to have their name so entered; and

(b) a person described in paragraph (2)(b) shall be deemed to be entitled to have the person's name entered in the Band List in which the parent referred to in that paragraph is or was, or is deemed by this section to be, entitled to have the parent's name entered.

Présomption

(3) Pour l'application de l'alinéa (1)d) et du paragraphe (2) :

a) la personne dont le nom a été omis ou retranché du registre des Indiens ou d'une liste de bande dans les circonstances prévues à l'un des alinéas 6(1)a.1), d) ou e) et qui est décédée avant le premier jour où elle a acquis le droit à ce que son nom soit consigné dans la liste de la bande dont elle a cessé d'être membre est réputée avoir droit à ce que son nom y soit consigné;

a.1) la personne qui, n'eût été son décès, aurait eu le droit d'être inscrite en vertu des alinéas 6(1)a.2) ou a.3) à la date d'entrée en vigueur de l'alinéa en cause et qui aurait eu, à cette date, le droit à ce que son nom soit consigné dans la liste de bande est réputée avoir droit à ce que son nom y soit consigné;

b) la personne visée à l'alinéa (2)b) est réputée avoir droit à ce que son nom soit consigné dans la même liste de bande que celle dans laquelle le parent visé au même paragraphe a ou avait, ou est réputé avoir, en vertu du présent article, droit à ce que son nom y soit consigné.

Additional membership rules — paragraphs 6(1)(c.01) to (c.6)

(3.1) A person is entitled to have their name entered in a Band List that is maintained in the Department for a band if

(a) they are entitled to be registered under paragraph 6(1)(a.2) and their father is entitled to have his name entered in the Band List or, if their father is no longer living, was so entitled at the time of death; or

(b) they are entitled to be registered under paragraph 6(1)(a.3) and one of their parents, grandparents or other ancestors

(i) ceased to be entitled to be a member of that band by reason of the circumstances set out in paragraph 6(1)(a.1), or

(ii) was not entitled to be a member of that band immediately before April 17, 1985.

(c) [Repealed, 2017, c. 25, s. 3.1]

(d) [Repealed, 2017, c. 25, s. 3.1]

(e) [Repealed, 2017, c. 25, s. 3.1]

(f) [Repealed, 2017, c. 25, s. 3.1]

Règles d'appartenance supplémentaires — alinéas 6(1)c.01) à c.6)

(3.1) Toute personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour celle-ci au ministère dans l'un ou l'autre des cas suivants :

a) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)a.2) et son père a droit à ce que son nom soit consigné dans la liste de bande ou, s'il est décédé, avait ce droit à la date de son décès;

b) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)a.3) et l'un de ses parents ou un autre de ses ascendants, selon le cas :

(i) a cessé d'avoir le droit d'être membre de la bande en raison des circonstances prévues à l'alinéa 6(1)a.1),

(ii) n'avait pas droit d'être membre de la bande le 16 avril 1985.

c) [Abrogé, 2017, ch. 25, art. 3.1]

d) [Abrogé, 2017, ch. 25, art. 3.1]

e) [Abrogé, 2017, ch. 25, art. 3.1]

f) [Abrogé, 2017, ch. 25, art. 3.1]

(g) [Repealed, 2017, c. 25, s. 3.1]

(h) [Repealed, 2017, c. 25, s. 3.1]

(i) [Repealed, 2017, c. 25, s. 3.1]

Where band amalgamates or is divided

(4) Where a band amalgamates with another band or is divided so as to constitute new bands, any person who would otherwise have been entitled to have his name entered in the Band List of that band under this section is entitled to have his name entered in the Band List of the amalgamated band or the new band to which that person has the closest family ties, as the case may be.

R.S., 1985, c. I-5, s. 11; R.S., 1985, c. 32 (1st Supp.), s. 4, c. 43 (4th Supp.), s. 2; 2010, c. 18, s. 3; 2017, c. 25, s. 3; 2017, c. 25, s. 3.1.

Entitlement with consent of band

12 Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, any person who

(a) is entitled to be registered under section 6, but is not entitled to have his name entered in the Band List maintained in the Department under section 11, or

(b) is a member of another band,

is entitled to have his name entered in the Band List maintained in the Department for a band if the council of the admitting band consents.

R.S., 1985, c. I-5, s. 12; R.S., 1985, c. 32 (1st Supp.), s. 4.

Limitation to one Band List

13 Notwithstanding sections 11 and 12, no person is entitled to have his name entered at the same time in more than one Band List maintained in the Department.

R.S., 1985, c. I-5, s. 13; R.S., 1985, c. 32 (1st Supp.), s. 4.

Decision to leave Band List control with Department

13.1 (1) A band may, at any time prior to the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, decide to leave the control of its Band List with the Department if a majority of the electors of the band gives its consent to that decision.

Notice to the Minister

(2) Where a band decides to leave the control of its Band List with the Department under subsection (1), the

g) [Abrogé, 2017, ch. 25, art. 3.1]

h) [Abrogé, 2017, ch. 25, art. 3.1]

i) [Abrogé, 2017, ch. 25, art. 3.1]

Fusion ou division de bandes

(4) Lorsqu’une bande fusionne avec une autre ou qu’elle est divisée pour former de nouvelles bandes, toute personne qui aurait par ailleurs eu droit à ce que son nom soit consigné dans la liste de la bande en vertu du présent article a droit à ce que son nom soit consigné dans la liste de la bande issue de la fusion ou de celle de la nouvelle bande à l’égard de laquelle ses liens familiaux sont les plus étroits.

L.R. (1985), ch. I-5, art. 11; L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 43 (4e suppl.), art. 2; 2010, ch. 18, art. 3; 2017, ch. 25, art. 3; 2017, ch. 25, art. 3.1.

Inscription sujette au consentement du conseil

12 À compter du jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, ou de la date antérieure choisie en vertu de l’article 13.1, la personne qui :

a) soit a le droit d’être inscrite en vertu de l’article 6 sans avoir droit à ce que son nom soit consigné dans une liste de bande tenue au ministère en vertu de l’article 11;

b) soit est membre d’une autre bande,

a droit à ce que son nom soit consigné dans la liste d’une bande tenue au ministère pour cette dernière si le conseil de la bande qui l’admet en son sein y consent.

L.R. (1985), ch. I-5, art. 12; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Nom consigné dans une seule liste

13 Par dérogation aux articles 11 et 12, nul n’a droit à ce que son nom soit consigné en même temps dans plus d’une liste de bande tenue au ministère.

L.R. (1985), ch. I-5, art. 13; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Première décision

13.1 (1) Une bande peut, avant le jour qui suit de deux ans la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, décider de laisser la responsabilité de la tenue de sa liste au ministère à condition d’y être autorisée par la majorité de ses électeurs.

Avis au ministre

(2) Si la bande décide de laisser la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), council of the band shall forthwith give notice to the Minister in writing to that effect.

le conseil de la bande, sans délai, avise par écrit le ministre de la décision.

Subsequent band control of membership

(3) Notwithstanding a decision under subsection (1), a band may, at any time after that decision is taken, assume control of its Band List under section 10.

R.S., 1985, c. 32 (1st Supp.), s. 4.

Seconde décision

(3) Malgré la décision visée au paragraphe (1), la bande peut, à tout moment par la suite, assumer la responsabilité de la tenue de sa liste en vertu de l'article 10.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Return of control to Department

13.2 (1) A band may, at any time after assuming control of its Band List under section 10, decide to return control of the Band List to the Department if a majority of the electors of the band gives its consent to that decision.

Transfert de responsabilités au ministère

13.2 (1) La bande peut, à tout moment après avoir assumé la responsabilité de la tenue de sa liste en vertu de l'article 10, décider d'en remettre la responsabilité au ministère à condition d'y être autorisée par la majorité de ses électeurs.

Notice to the Minister and copy of membership rules

(2) Where a band decides to return control of its Band List to the Department under subsection (1), the council of the band shall forthwith give notice to the Minister in writing to that effect and shall provide the Minister with a copy of the Band List and a copy of all the membership rules that were established by the band under subsection 10(2) while the band maintained its own Band List.

Avis au ministre et texte des règles

(2) Lorsque la bande décide de remettre la responsabilité de la tenue de sa liste au ministère en vertu du paragraphe (1), le conseil de la bande, sans délai, avise par écrit le ministre de la décision et lui transmet une copie de la liste et le texte des règles d'appartenance fixées par la bande conformément au paragraphe 10(2) pendant qu'elle assumait la responsabilité de la tenue de sa liste.

Transfer of responsibility to Department

(3) Where a notice is given under subsection (2) in respect of a Band List, the maintenance of that Band List shall be the responsibility of the Department from the date on which the notice is received and from that time the Band List shall be maintained in accordance with the membership rules set out in section 11.

R.S., 1985, c. 32 (1st Supp.), s. 4.

Transfert de responsabilités au ministère

(3) Lorsque est donné l'avis prévu au paragraphe (2) à l'égard d'une liste de bande, la tenue de cette dernière devient la responsabilité du ministère à compter de la date de réception de l'avis. Elle est tenue, à compter de cette date, conformément aux règles d'appartenance prévues à l'article 11.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Entitlement retained

13.3 A person is entitled to have his name entered in a Band List maintained in the Department pursuant to section 13.2 if that person was entitled to have his name entered, and his name was entered, in the Band List immediately before a copy of it was provided to the Minister under subsection 13.2(2), whether or not that person is also entitled to have his name entered in the Band List under section 11.

R.S., 1985, c. 32 (1st Supp.), s. 4.

Maintien du droit d'être consigné dans la liste

13.3 Une personne a droit à ce que son nom soit consigné dans une liste de bande tenue par le ministère en vertu de l'article 13.2 si elle avait droit à ce que son nom soit consigné dans cette liste, et qu'il y a effectivement été consigné, avant qu'une copie en soit transmise au ministre en vertu du paragraphe 13.2(2), que cette personne ait ou non droit à ce que son nom soit consigné dans cette liste en vertu de l'article 11.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Notice of Band Lists

Copy of Band List provided to band council

14 (1) Within one month after the day an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, the Registrar shall provide the council of each band with a copy of the Band List for the band as it stood immediately prior to that day.

List of additions and deletions

(2) Where a Band List is maintained by the Department, the Registrar shall, at least once every two months after a copy of the Band List is provided to the council of a band under subsection (1), provide the council of the band with a list of the additions to or deletions from the Band List not included in a list previously provided under this subsection.

Lists to be posted

(3) The council of each band shall, forthwith on receiving a copy of the Band List under subsection (1), or a list of additions to and deletions from its Band List under subsection (2), post the copy or the list, as the case may be, in a conspicuous place on the reserve of the band.

R.S., 1985, c. I-5, s. 14; R.S., 1985, c. 32 (1st Supp.), s. 4.

Inquiries

Inquiries relating to Indian Register or Band Lists

14.1 The Registrar shall, on inquiry from any person who believes that he or any person he represents is entitled to have his name included in the Indian Register or a Band List maintained in the Department, indicate to the person making the inquiry whether or not that name is included therein.

R.S., 1985, c. 32 (1st Supp.), s. 4.

Protests

Protests

14.2 (1) A protest may be made in respect of the inclusion or addition of the name of a person in, or the omission or deletion of the name of a person from, the Indian Register, or a Band List maintained in the Department, within three years after the inclusion or addition, or omission or deletion, as the case may be, by notice in writing to the Registrar, containing a brief statement of the grounds therefor.

Affichage des listes de bande

Copie de la liste de bande transmise au conseil de bande

14 (1) Au plus tard un mois après la date de sanction de la loi intitulée *Loi modifiant la Loi sur les Indiens*, déposée à la Chambre des communes le 28 février 1985, le registraire transmet au conseil de chaque bande une copie de la liste de la bande dans son état antérieur à cette date.

Listes des additions et des retranchements

(2) Si la liste de bande est tenue au ministère, le registraire, au moins une fois tous les deux mois après la transmission prévue au paragraphe (1) d'une copie de la liste au conseil de la bande, transmet à ce dernier une liste des additions à la liste et des retranchements de celle-ci non compris dans une liste antérieure transmise en vertu du présent paragraphe.

Affichage de la liste

(3) Le conseil de chaque bande, dès qu'il reçoit copie de la liste de bande prévue au paragraphe (1) ou la liste des additions et des retranchements prévue au paragraphe (2), affiche la copie ou la liste, selon le cas, en un lieu bien en évidence sur la réserve de la bande.

L.R. (1985), ch. I-5, art. 14; L.R. (1985), ch. 32 (1er suppl.), art. 4.

Demandes

Demandes relatives au registre des Indiens ou aux listes de bande

14.1 Le registraire, à la demande de toute personne qui croit qu'elle-même ou que la personne qu'elle représente a droit à l'inclusion de son nom dans le registre des Indiens ou une liste de bande tenue au ministère, indique sans délai à l'auteur de la demande si ce nom y est inclus ou non.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Protestations

Protestations

14.2 (1) Une protestation peut être formulée, par avis écrit au registraire renfermant un bref exposé des motifs invoqués, contre l'inclusion ou l'addition du nom d'une personne dans le registre des Indiens ou une liste de bande tenue au ministère ou contre l'omission ou le retranchement de son nom de ce registre ou d'une telle liste dans les trois ans suivant soit l'inclusion ou l'addition, soit l'omission ou le retranchement.

Protest in respect of Band List

(2) A protest may be made under this section in respect of the Band List of a band by the council of the band, any member of the band or the person in respect of whose name the protest is made or that person's representative.

Protest in respect of Indian Register

(3) A protest may be made under this section in respect of the Indian Register by the person in respect of whose name the protest is made or that person's representative.

Onus of proof

(4) The onus of establishing the grounds of a protest under this section lies on the person making the protest.

Registrar to cause investigation

(5) Where a protest is made to the Registrar under this section, the Registrar shall cause an investigation to be made into the matter and render a decision.

Evidence

(6) For the purposes of this section, the Registrar may receive such evidence on oath, on affidavit or in any other manner, whether or not admissible in a court of law, as the Registrar, in his discretion, sees fit or deems just.

Decision final

(7) Subject to section 14.3, the decision of the Registrar under subsection (5) is final and conclusive.

R.S., 1985, c. 32 (1st Supp.), s. 4.

Appeal

14.3 (1) Within six months after the Registrar renders a decision on a protest under section 14.2,

(a) in the case of a protest in respect of the Band List of a band, the council of the band, the person by whom the protest was made, or the person in respect of whose name the protest was made or that person's representative, or

(b) in the case of a protest in respect of the Indian Register, the person in respect of whose name the protest was made or that person's representative,

may, by notice in writing, appeal the decision to a court referred to in subsection (5).

Protestation relative à la liste de bande

(2) Une protestation peut être formulée en vertu du présent article à l'égard d'une liste de bande par le conseil de cette bande, un membre de celle-ci ou la personne dont le nom fait l'objet de la protestation ou son représentant.

Protestation relative au registre des Indiens

(3) Une protestation peut être formulée en vertu du présent article à l'égard du registre des Indiens par la personne dont le nom fait l'objet de la protestation ou son représentant.

Charge de la preuve

(4) La personne qui formule la protestation prévue au présent article a la charge d'en prouver le bien-fondé.

Le registraire fait tenir une enquête

(5) Lorsqu'une protestation lui est adressée en vertu du présent article, le registraire fait tenir une enquête sur la question et rend une décision.

Preuve

(6) Pour l'application du présent article, le registraire peut recevoir toute preuve présentée sous serment, par affidavit ou autrement, si celui-ci, à son appréciation, l'estime indiquée ou équitable, que cette preuve soit ou non admissible devant les tribunaux.

Décision finale

(7) Sous réserve de l'article 14.3, la décision du registraire visée au paragraphe (5) est définitive et sans appel.

L.R. (1985), ch. 32 (1er suppl.), art. 4.

Appel

14.3 (1) Dans les six mois suivant la date de la décision du registraire sur une protestation prévue à l'article 14.2, peuvent, par avis écrit, en interjeter appel devant le tribunal visé au paragraphe (5) :

a) s'il s'agit d'une protestation formulée à l'égard d'une liste de bande, le conseil de la bande, la personne qui a formulé la protestation ou la personne dont le nom fait l'objet de la protestation ou son représentant;

b) s'il s'agit d'une protestation formulée à l'égard du registre des Indiens, la personne dont le nom a fait l'objet de la protestation ou son représentant.

Copy of notice of appeal to the Registrar

(2) Where an appeal is taken under this section, the person who takes the appeal shall forthwith provide the Registrar with a copy of the notice of appeal.

Material to be filed with the court by Registrar

(3) On receipt of a copy of a notice of appeal under subsection (2), the Registrar shall forthwith file with the court a copy of the decision being appealed together with all documentary evidence considered in arriving at that decision and any recording or transcript of any oral proceedings related thereto that were held before the Registrar.

Decision

(4) The court may, after hearing an appeal under this section,

(a) affirm, vary or reverse the decision of the Registrar; or

(b) refer the subject-matter of the appeal back to the Registrar for reconsideration or further investigation.

Court

(5) An appeal may be heard under this section

(a) in the Province of Quebec, before the Superior Court for the district in which the band is situated or in which the person who made the protest resides, or for such other district as the Minister may designate;

(a.1) in the Province of Ontario, before the Superior Court of Justice;

(b) in the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, before the Court of Queen's Bench;

(c) in the Province of Newfoundland and Labrador, before the Trial Division of the Supreme Court;

(c.1) [Repealed, 1992, c. 51, s. 54]

(d) in the Province of Nova Scotia, British Columbia or Prince Edward Island, in Yukon or in the Northwest Territories, before the Supreme Court; or

(e) in Nunavut, before the Nunavut Court of Justice.

R.S., 1985, c. 32 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 14, c. 17, s. 25; 1992, c. 51, s. 54; 1998, c. 30, s. 14; 1999, c. 3, s. 69; 2002, c. 7, s. 183; 2015, c. 3, s. 118.

Copie de l'avis d'appel au registraire

(2) Lorsqu'il est interjeté appel en vertu du présent article, l'appelant transmet sans délai au registraire une copie de l'avis d'appel.

Documents à déposer par le registraire

(3) Sur réception de la copie de l'avis d'appel prévu au paragraphe (2), le registraire dépose sans délai au tribunal une copie de la décision en appel, toute la preuve documentaire prise en compte pour la décision, ainsi que l'enregistrement ou la transcription des débats devant le registraire.

Décision

(4) Le tribunal peut, à l'issue de l'audition de l'appel prévu au présent article :

a) soit confirmer, modifier ou renverser la décision du registraire;

b) soit renvoyer la question en appel au registraire pour réexamen ou nouvelle enquête.

Tribunal

(5) L'appel prévu au présent article peut être entendu :

a) dans la province de Québec, par la Cour supérieure du district où la bande est située ou dans lequel réside la personne qui a formulé la protestation, ou de tel autre district désigné par le ministre;

a.1) dans la province d'Ontario, par la Cour supérieure de justice;

b) dans la province du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou d'Alberta, par la Cour du Banc de la Reine;

c) dans la province de Terre-Neuve-et-Labrador, par la Section de première instance de la Cour suprême;

c.1) [Abrogé, 1992, ch. 51, art. 54]

d) dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, au Yukon et dans les Territoires du Nord-Ouest, par la Cour suprême;

e) au Nunavut, par la Cour de justice.

L.R. (1985), ch. 32 (1er suppl.), art. 4, ch. 27 (2e suppl.), art. 10; 1990, ch. 16, art. 14, ch. 17, art. 25; 1992, ch. 51, art. 54; 1998, ch. 30, art. 14; 1999, ch. 3, art. 69; 2002, ch. 7, art. 183; 2015, ch. 3, art. 118.

Payments in Respect of Persons Ceasing To Be Band Members

15 (1) to (4) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 5]

Commutation of payments under former Act

(5) Where, prior to September 4, 1951, any woman became entitled, under section 14 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, or any prior provisions to the like effect, to share in the distribution of annuities, interest moneys or rents, the Minister may, in lieu thereof, pay to that woman out of the moneys of the band an amount equal to ten times the average annual amounts of the payments made to her during the ten years last preceding or, if they were paid for less than ten years, during the years they were paid.

R.S., 1985, c. I-5, s. 15; R.S., 1985, c. 32 (1st Supp.), s. 5.

16 (1) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 6]

Transferred member’s interest

(2) A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.

(3) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 6]

R.S., 1985, c. I-5, s. 16; R.S., 1985, c. 32 (1st Supp.), s. 6.

New Bands

Minister may constitute new bands

17 (1) The Minister may, whenever he considers it desirable,

(a) amalgamate bands that, by a vote of a majority of their electors, request to be amalgamated; and

(b) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.

Paiements aux personnes qui cessent d’être membres d’une bande

15 (1) à (4) [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 5]

Commutation de paiements prévus par une loi antérieure

(5) Lorsque, avant le 4 septembre 1951, une femme est devenue admissible, selon l’article 14 de la *Loi des Indiens*, chapitre 98 des Statuts revisés du Canada de 1927, ou selon quelque disposition antérieure ayant le même effet, à participer à la distribution d’annuités, intérêts ou rentes, le ministre peut, en remplacement de ceux-ci, payer à cette femme, sur l’argent de la bande, un montant égal à dix fois les montants annuels moyens de ces paiements qui lui ont été versés au cours des dix années précédentes ou, s’ils l’ont été pendant moins de dix ans, au cours des années pendant lesquelles ils ont été faits.

L.R. (1985), ch. I-5, art. 15; L.R. (1985), ch. 32 (1er suppl.), art. 5.

16 (1) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 6]

Le droit d’un membre transféré

(2) Une personne qui cesse de faire partie d’une bande du fait qu’elle est devenue membre d’une autre bande n’a aucun droit sur les terres ou sommes d’argent détenues par Sa Majesté au nom de la bande dont elle faisait partie, mais elle jouit des mêmes droits en commun, sur les terres et les sommes d’argent détenues par Sa Majesté au nom de l’autre bande, que les membres de cette dernière.

(3) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 6]

L.R. (1985), ch. I-5, art. 16; L.R. (1985), ch. 32 (1er suppl.), art. 6.

Nouvelles bandes

Constitution de nouvelles bandes par le ministre

17 (1) Le ministre peut, lorsqu’il l’estime à propos :

a) fusionner les bandes qui, par un vote majoritaire de leurs électeurs, demandent la fusion;

b) constituer de nouvelles bandes et établir à leur égard des listes de bande à partir des listes de bande existantes, ou du registre des Indiens, s’il lui en est fait la demande par des personnes proposant la constitution de nouvelles bandes.

Division of reserves and funds

(2) Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.

Division des réserves et des fonds

(2) Si, conformément au paragraphe (1), une nouvelle bande a été constituée à même une bande existante ou une partie de cette dernière, la fraction des terres de réserve et des fonds de la bande existante que le ministre détermine est détenue à l'usage et au profit de la nouvelle bande.

No protest

(3) No protest may be made under section 14.2 in respect of the deletion from or the addition to a Band List consequent on the exercise by the Minister of any of the Minister's powers under subsection (1).

R.S., 1985, c. I-5, s. 17; R.S., 1985, c. 32 (1st Supp.), s. 7.

Aucune protestation

(3) Aucune protestation ne peut être formulée en vertu de l'article 14.2 à l'égard d'un retranchement d'une liste de bande ou d'une addition à celle-ci qui découle de l'exercice par le ministre de l'un de ses pouvoirs prévus au paragraphe (1).

L.R. (1985), ch. I-5, art. 17; L.R. (1985), ch. 32 (1er suppl.), art. 7.

Reserves

Reserves to be held for use and benefit of Indians

18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Réserves

Les réserves sont détenues à l'usage et au profit des Indiens

18 (1) Sous réserve des autres dispositions de la présente loi, Sa Majesté détient des réserves à l'usage et au profit des bandes respectives pour lesquelles elles furent mises de côté; sous réserve des autres dispositions de la présente loi et des stipulations de tout traité ou cession, le gouverneur en conseil peut décider si tout objet, pour lequel des terres dans une réserve sont ou doivent être utilisées, se trouve à l'usage et au profit de la bande.

Use of reserves for schools, etc.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.

R.S., c. I-6, s. 18.

Emploi de réserves aux fins des écoles, etc.

(2) Le ministre peut autoriser l'utilisation de terres dans une réserve aux fins des écoles indiennes, de l'administration d'affaires indiennes, de cimetières indiens, de projets relatifs à la santé des Indiens, ou, avec le consentement du conseil de la bande, pour tout autre objet concernant le bien-être général de la bande, et il peut prendre toutes terres dans une réserve, nécessaires à ces fins, mais lorsque, immédiatement avant cette prise, un Indien particulier avait droit à la possession de ces terres, il doit être versé à cet Indien, pour un semblable usage, une indemnité d'un montant dont peuvent convenir l'Indien et le ministre, ou, à défaut d'accord, qui peut être fixé de la manière que détermine ce dernier.

S.R., ch. I-6, art. 18.

Children of band members

18.1 A member of a band who resides on the reserve of the band may reside there with his dependent children or any children of whom the member has custody.

R.S., 1985, c. 32 (1st Supp.), s. 8.

Enfants des membres d'une bande

18.1 Le membre d'une bande qui réside sur la réserve de cette dernière peut y résider avec ses enfants à charge ou tout enfant dont il a la garde.

L.R. (1985), ch. 32 (1er suppl.), art. 8.

Surveys and subdivisions

19 The Minister may

(a) authorize surveys of reserves and the preparation of plans and reports with respect thereto;

(b) divide the whole or any portion of a reserve into lots or other subdivisions; and

(c) determine the location and direct the construction of roads in a reserve.

R.S., c. I-6, s. 19.

Levés et subdivisions

19 Le ministre peut :

a) autoriser des levés de réserves et la préparation de plans et de rapports à cet égard;

b) séparer la totalité ou une partie d'une réserve en lots ou autres subdivisions;

c) décider de l'emplacement des routes dans une réserve et en prescrire la construction.

S.R., ch. I-6, art. 19.

Possession of Lands in Reserves

Possession of lands in a reserve

20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Certificate of Possession

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

Location tickets issued under previous legislation

(3) For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

Temporary possession

(4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

Certificate of Occupation

(5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

Possession de terres dans des réserves

Possession de terres dans une réserve

20 (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

Certificat de possession

(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

Billets de location délivrés en vertu de lois antérieures

(3) Pour l'application de la présente loi, toute personne qui, le 4 septembre 1951, détenait un billet de location valide délivré sous le régime de l'*Acte relatif aux Sauvages, 1880*, ou de toute loi sur le même sujet, est réputée légalement en possession de la terre visée par le billet de location et est censée détenir un certificat de possession à cet égard.

Possession temporaire

(4) Lorsque le conseil de la bande a attribué à un Indien la possession d'une terre dans une réserve, le ministre peut, à sa discrétion, différer son approbation et autoriser l'Indien à occuper la terre temporairement, de même que prescrire les conditions, concernant l'usage et l'établissement, que doit remplir l'Indien avant que le ministre approuve l'attribution.

Certificat d'occupation

(5) Lorsque le ministre diffère son approbation conformément au paragraphe (4), il délivre un certificat d'occupation à l'Indien, et le certificat autorise l'Indien, ou ceux qui réclament possession par legs ou par transmission sous forme d'héritage, à occuper la terre concernant laquelle il est délivré, pendant une période de deux ans, à compter de sa date.

Extension and approval

(6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

(a) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled; or

(b) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.

R.S., c. I-6, s. 20.

Prorogation et approbation

(6) Le ministre peut proroger la durée d'un certificat d'occupation pour une nouvelle période n'excédant pas deux ans et peut, à l'expiration de toute période durant laquelle un certificat d'occupation est en vigueur :

a) soit approuver l'attribution faite par le conseil de la bande et délivrer un certificat de possession si, d'après lui, on a satisfait aux conditions concernant l'usage et l'établissement;

b) soit refuser d'approuver l'attribution faite par le conseil de la bande et déclarer que la terre, à l'égard de laquelle le certificat d'occupation a été délivré, peut être attribuée de nouveau par le conseil de la bande.

S.R., ch. I-6, art. 20.

Register

21 There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

R.S., c. I-6, s. 21.

Registre

21 Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont inscrits les détails concernant les certificats de possession et certificats d'occupation et les autres opérations relatives aux terres situées dans une réserve.

S.R., ch. I-6, art. 21.

Improvements on lands

22 Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.

R.S., c. I-6, s. 22.

Améliorations apportées aux terres

22 Un Indien qui a fait des améliorations à des terres en sa possession avant leur inclusion dans une réserve, est considéré comme étant en possession légale de ces terres au moment de leur inclusion.

S.R., ch. I-6, art. 22.

Compensation for improvements

23 An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

R.S., c. I-6, s. 23.

Indemnité à l'égard des améliorations

23 Un Indien qui est légalement retiré de terres situées dans une réserve et sur lesquelles il a fait des améliorations permanentes peut, si le ministre l'ordonne, recevoir à cet égard une indemnité d'un montant que le ministre détermine, soit de la personne qui entre en possession, soit sur les fonds de la bande, à la discrétion du ministre.

S.R., ch. I-6, art. 23.

Transfer of possession

24 An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

R.S., c. I-6, s. 24.

Transfert de possession

24 Un Indien qui est légalement en possession d'une terre dans une réserve peut transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de la terre, mais aucun transfert ou accord en vue du transfert du droit à la possession de terres dans une réserve n'est valable tant qu'il n'est pas approuvé par le ministre.

S.R., ch. I-6, art. 24.

Indian ceasing to reside on reserve

25 (1) An Indian who ceases to be entitled to reside on a reserve may, within six months or such further period as the Minister may direct, transfer to the band or another member of the band the right to possession of any lands in the reserve of which he was lawfully in possession.

When right of possession reverts

(2) Where an Indian does not dispose of his right of possession in accordance with subsection (1), the right to possession of the land reverts to the band, subject to the payment to the Indian who was lawfully in possession of the land, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

R.S., c. I-6, s. 25.

Correction of Certificate or Location Tickets

26 Whenever a Certificate of Possession or Occupation or a Location Ticket issued under *The Indian Act, 1880*, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.

R.S., c. I-6, s. 26.

Cancellation of Certificates or Location Tickets

27 The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.

R.S., c. I-6, s. 27.

Grants, etc., of reserve lands void

28 (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

Minister may issue permits

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period,

Indien qui cesse de résider sur la réserve

25 (1) Un Indien qui cesse d’avoir droit de résider sur une réserve peut, dans un délai de six mois ou dans tel délai prorogé que prescrit le ministre, transférer à la bande, ou à un autre membre de celle-ci, le droit à la possession de toute terre dans la réserve, dont il était légalement en possession.

Le droit de possession non transféré retourne à la bande

(2) Lorsqu’un Indien ne dispose pas de son droit de possession conformément au paragraphe (1), le droit à la possession de la terre retourne à la bande, sous réserve du paiement, à l’Indien qui était légalement en possession de la terre, sur les fonds de la bande, de telle indemnité pour améliorations permanentes que fixe le ministre.

S.R., ch. I-6, art. 25.

Certificat corrigé; billet de location

26 Lorsqu’un certificat de possession ou d’occupation ou un billet de location délivré sous le régime de l’*Acte relatif aux Sauvages, 1880* ou de toute loi traitant du même sujet, a été, de l’avis du ministre, délivré par erreur à une personne à qui il n’était pas destiné ou au nom d’une telle personne, ou contient une erreur d’écriture ou une fausse appellation, ou une description erronée de quelque fait important, le ministre peut annuler le certificat ou billet de location et délivrer un certificat corrigé pour le remplacer.

S.R., ch. I-6, art. 26.

Certificat annulé; billet de location

27 Le ministre peut, avec le consentement de celui qui en est titulaire, annuler tout certificat de possession ou occupation ou billet de location mentionné à l’article 26, et peut annuler tout certificat de possession ou d’occupation ou billet de location qui, selon lui, a été délivré par fraude ou erreur.

S.R., ch. I-6, art. 27.

Nullité d’octrois, etc. de terre de réserve

28 (1) Sous réserve du paragraphe (2), est nul un acte, bail, contrat, instrument, document ou accord de toute nature, écrit ou oral, par lequel une bande ou un membre d’une bande est censé permettre à une personne, autre qu’un membre de cette bande, d’occuper ou utiliser une réserve ou de résider ou autrement exercer des droits sur une réserve.

Le ministre peut émettre des permis

(2) Le ministre peut, au moyen d’un permis par écrit, autoriser toute personne, pour une période maximale d’un an, ou, avec le consentement du conseil de la bande, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

R.S., c. I-6, s. 28.

pour toute période plus longue, à occuper ou utiliser une réserve, ou à résider ou autrement exercer des droits sur une réserve.

S.R., ch. I-6, art. 28.

Exemption from seizure

29 Reserve lands are not subject to seizure under legal process.

R.S., c. I-6, s. 29.

Insaisissabilité

29 Les terres des réserves ne sont assujetties à aucune saisie sous le régime d'un acte judiciaire.

S.R., ch. I-6, art. 29.

Trespass on Reserves

Violation du droit de propriété dans les réserves

Penalty for trespass

30 A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

R.S., c. I-6, s. 30.

Peine

30 Quiconque pénètre, sans droit ni autorisation, dans une réserve commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinquante dollars et un emprisonnement maximal d'un mois, ou l'une de ces peines.

S.R., ch. I-6, art. 30.

Information by Attorney General

31 (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(a) unlawfully in occupation or possession of,

(b) claiming adversely the right to occupation or possession of, or

(c) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

Dénonciation par le procureur général

31 (1) Sans préjudice de l'article 30, lorsqu'un Indien ou une bande prétend que des personnes autres que des Indiens, selon le cas :

a) occupent ou possèdent illégalement, ou ont occupé ou possédé illégalement, une réserve ou une partie de réserve;

b) réclament ou ont réclamé sous forme d'opposition le droit d'occuper ou de posséder une réserve ou une partie de réserve;

c) pénètrent ou ont pénétré, sans droit ni autorisation, dans une réserve ou une partie de réserve,

le procureur général du Canada peut produire à la Cour fédérale une dénonciation réclamant, au nom de l'Indien ou de la bande, les mesures de redressement désirées.

Information deemed action by Crown

(2) An information exhibited under subsection (1) shall, for all purposes of the *Federal Courts Act*, be deemed to be a proceeding by the Crown within the meaning of that Act.

La dénonciation est réputée une action par la Couronne

(2) Une dénonciation produite sous le régime du paragraphe (1) est réputée, pour l'application de la *Loi sur les Cours fédérales*, une procédure engagée par la Couronne, au sens de cette loi.

Existing remedies preserved

(3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

R.S., 1985, c. I-5, s. 31; 2002, c. 8, s. 182.

Les recours existants subsistent

(3) Le présent article n’a pas pour effet de porter atteinte aux droits ou recours que, en son absence, Sa Majesté, un Indien ou une bande pourrait exercer.

L.R. (1985), ch. I-5, art. 31; 2002, ch. 8, art. 182.

32 [Repealed, 2014, c. 38, s. 5]

32 [Abrogé, 2014, ch. 38, art. 5]

33 [Repealed, 2014, c. 38, s. 5]

33 [Abrogé, 2014, ch. 38, art. 5]

Roads and Bridges

Roads, bridges, etc.

34 (1) A band shall ensure that the roads, bridges, ditches and fences within the reserve occupied by that band are maintained in accordance with instructions issued from time to time by the superintendent.

Idem

(2) Where, in the opinion of the Minister, a band has not carried out the instructions of the superintendent issued under subsection (1), the Minister may cause the instructions to be carried out at the expense of the band or any member thereof and may recover the cost thereof from any amounts that are held by Her Majesty and are payable to the band or member.

R.S., c. I-6, s. 34.

Routes et ponts

Routes, ponts, etc.

34 (1) Une bande doit assurer l’entretien, en conformité avec les instructions du surintendant, des routes, ponts, fossés et clôtures dans la réserve qu’elle occupe.

Idem

(2) Lorsque, de l’avis du ministre, une bande n’a pas exécuté les instructions données par le surintendant en vertu du paragraphe (1), le ministre peut faire exécuter ces instructions aux frais de la bande ou de tout membre de cette dernière et en recouvrer les frais sur tout montant détenu par Sa Majesté et payable à la bande ou à ce membre.

S.R., ch. I-6, art. 34.

Lands Taken for Public Purposes

Taking of lands by local authorities

35 (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

Procedure

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.

Terres prises pour cause d’utilité publique

Les autorités locales peuvent prendre des terres

35 (1) Lorsque, par une loi fédérale ou provinciale, Sa Majesté du chef d’une province, une autorité municipale ou locale, ou une personne morale, a le pouvoir de prendre ou d’utiliser des terres ou tout droit sur celles-ci sans le consentement du propriétaire, ce pouvoir peut, avec le consentement du gouverneur en conseil et aux conditions qu’il peut prescrire, être exercé relativement aux terres dans une réserve ou à tout droit sur celles-ci.

Procédures

(2) À moins que le gouverneur en conseil n’en ordonne autrement, toutes les questions concernant la prise ou l’utilisation obligatoire de terres dans une réserve, aux termes du paragraphe (1), doivent être régies par la loi qui confère les pouvoirs.

Grant in lieu of compulsory taking

(3) Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

Payment

(4) Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

R.S., c. I-6, s. 35.

Special Reserves

36 [Repealed, 2014, c. 38, s. 6]

Special reserves

36.1 Where lands the legal title to which is not vested in Her Majesty had been set apart for the use and benefit of a band before the coming into force of this section, the effect of section 36 of this Act, as it read immediately before the coming into force of this section, continues in respect of those lands and this Act applies as though the lands were a reserve within the meaning of this Act.

2014, c. 38, s. 6.

Surrenders and Designations

Sales

37 (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Other transactions

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

R.S., 1985, c. I-5, s. 37; R.S., 1985, c. 17 (4th Supp.), s. 2; 2012, c. 31, s. 206.

Octroi au lieu d'une prise obligatoire

(3) Lorsque le gouverneur en conseil a consenti à l'exercice des pouvoirs mentionnés au paragraphe (1) par une province, une autorité municipale ou locale ou une personne morale, il peut, au lieu que la province, l'autorité ou la personne morale prenne ou utilise les terres sans le consentement du propriétaire, permettre un transfert ou octroi de ces terres à la province, autorité ou personne morale, sous réserve des conditions qu'il fixe.

Paiement

(4) Tout montant dont il est convenu ou qui est accordé à l'égard de la prise ou de l'utilisation obligatoire de terrains sous le régime du présent article ou qui est payé pour un transfert ou octroi de terre selon le présent article, doit être versé au receveur général à l'usage et au profit de la bande ou à l'usage et au profit de tout Indien qui a droit à l'indemnité ou au paiement du fait de l'exercice des pouvoirs mentionnés au paragraphe (1).

S.R., ch. I-6, art. 35.

Réserves spéciales

36 [Abrogé, 2014, ch. 38, art. 6]

Réserves spéciales

36.1 L'article 36, dans sa version antérieure à la date d'entrée en vigueur du présent article, continue d'avoir effet à l'égard des terres dont Sa Majesté n'est pas propriétaire ayant été mises de côté à l'usage et au profit d'une bande avant l'entrée en vigueur du présent article et la présente loi s'applique à l'égard de ces terres comme si elles étaient une réserve, au sens de la présente loi.

2014, ch. 38, art. 6.

Cession et désignation

Vente

37 (1) Les terres dans une réserve ne peuvent être vendues ou aliénées que si elles sont cédées à titre absolu conformément au paragraphe 38(1) à Sa Majesté par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

Opérations

(2) Sauf disposition contraire de la présente loi, les terres dans une réserve ne peuvent être données à bail ou faire l'objet d'un démembrement que si elles sont désignées en vertu du paragraphe 38(2) par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

L.R. (1985), ch. I-5, art. 37; L.R. (1985), ch. 17 (4e suppl.), art. 2; 2012, ch. 31, art. 206.

Surrender to Her Majesty

38 (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

Designation

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

R.S., 1985, c. I-5, s. 38; R.S., 1985, c. 17 (4th Supp.), s. 2.

Conditions — surrender

39 (1) An absolute surrender is void unless

(a) it is made to Her Majesty;

(b) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender, or

(iii) by a referendum as provided in the regulations; and

(c) it is accepted by the Governor in Council.

Minister may call meeting or referendum

(2) If a majority of the electors of a band did not vote at a meeting or referendum called under subsection (1), the Minister may, if the proposed absolute surrender was assented to by a majority of the electors who did vote, call another meeting by giving 30 days' notice of that other meeting or another referendum as provided in the regulations.

Assent of band

(3) If a meeting or referendum is called under subsection (2) and the proposed absolute surrender is assented to at the meeting or referendum by a majority of the electors voting, the surrender is deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.

Cession à Sa Majesté

38 (1) Une bande peut céder à titre absolu à Sa Majesté, avec ou sans conditions, tous ses droits, et ceux de ses membres, portant sur tout ou partie d'une réserve.

Désignation

(2) Aux fins de les donner à bail ou de les démembrer, une bande peut désigner par voie de cession à Sa Majesté, avec ou sans conditions, autre qu'à titre absolu, tous droits de la bande, et ceux de ses membres, sur tout ou partie d'une réserve.

L.R. (1985), ch. I-5, art. 38; L.R. (1985), ch. 17 (4e suppl.), art. 2.

Conditions de validité : cession

39 (1) La cession à titre absolu n'est valide que si les conditions suivantes sont réunies :

a) elle est faite à Sa Majesté;

b) elle est sanctionnée par une majorité des électeurs de la bande :

(i) soit à une assemblée générale de la bande convoquée par son conseil,

(ii) soit à une assemblée spéciale de la bande convoquée par le ministre en vue d'examiner une proposition de cession à titre absolu,

(iii) soit au moyen d'un référendum comme le prévoient les règlements;

c) elle est acceptée par le gouverneur en conseil.

Assemblée de la bande ou référendum

(2) Lorsqu'une majorité des électeurs d'une bande n'ont pas voté à une assemblée convoquée, ou à un référendum tenu, au titre du paragraphe (1), le ministre peut, si la proposition de cession à titre absolu a reçu l'assentiment de la majorité des électeurs qui ont voté, convoquer une autre assemblée en en donnant un avis de trente jours, ou faire tenir un autre référendum comme le prévoient les règlements.

Assentiment de la bande

(3) Lorsqu'une assemblée est convoquée en vertu du paragraphe (2) ou qu'un référendum est tenu en vertu de ce paragraphe et que la proposition de cession à titre absolu est sanctionnée à l'assemblée ou lors du référendum par la majorité des électeurs votants, la cession est réputée, pour l'application du présent article, avoir été sanctionnée par une majorité des électeurs de la bande.

Secret ballot

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

Officials required

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

R.S., 1985, c. I-5, s. 39; R.S., 1985, c. 17 (4th Supp.), s. 3; 2012, c. 31, s. 207.

Conditions — designation

39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

2012, c. 31, s. 208.

Certification — surrender

40 A proposed absolute surrender that is assented to by the band in accordance with section 39 shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band and then submitted to the Governor in Council for acceptance or refusal.

R.S., 1985, c. I-5, s. 40; R.S., 1985, c. 17 (4th Supp.), s. 4; 2012, c. 31, s. 208.

Certification — designation

40.1 (1) A proposed designation that is assented to in accordance with section 39.1 shall be certified on oath by an officer of the Department and by the chief or a member of the council of the band.

Ministerial decision

(2) On the recommendation of the council of the band, the proposed designation shall be submitted to the Minister who may accept or reject it.

2012, c. 31, s. 208.

Effect of surrenders and designations

41 An absolute surrender or a designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

R.S., 1985, c. I-5, s. 41; R.S., 1985, c. 17 (4th Supp.), s. 4.

Scrutin secret

(4) Le ministre, à la demande du conseil de la bande ou chaque fois qu'il le juge opportun, peut ordonner qu'un vote, à toute assemblée prévue par le présent article, ait lieu au scrutin secret.

La présence de fonctionnaires est requise

(5) Chaque assemblée aux termes du présent article est tenue en présence du surintendant ou d'un autre fonctionnaire du ministère, que désigne le ministre.

L.R. (1985), ch. I-5, art. 39; L.R. (1985), ch. 17 (4^{e} suppl.), art. 3; 2012, ch. 31, art. 207.

Conditions de validité : désignation

39.1 Est valide la désignation faite en faveur de Sa Majesté, sanctionnée par la majorité des électeurs de la bande ayant voté lors d'un référendum tenu conformément aux règlements, recommandée par le conseil de la bande au ministre et acceptée par celui-ci.

2012, ch. 31, art. 208.

Certificat : cession

40 La proposition de cession à titre absolu qui a été sanctionnée par la bande conformément à l'article 39 est attestée sous serment par le surintendant ou l'autre fonctionnaire qui a assisté à l'assemblée et par le chef ou un membre du conseil de la bande; elle est ensuite soumise au gouverneur en conseil pour acceptation ou rejet.

L.R. (1985), ch. I-5, art. 40; L.R. (1985), ch. 17 (4^{e} suppl.), art. 4; 2012, ch. 31, art. 208.

Certificat : désignation

40.1 (1) La proposition de désignation qui a été sanctionnée conformément à l'article 39.1 est attestée sous serment par un fonctionnaire du ministère et par le chef ou un membre du conseil de la bande.

Décision ministérielle

(2) Sur la recommandation du conseil de la bande, la proposition de désignation est soumise au ministre qui peut l'accepter ou la rejeter.

2012, ch. 31, art. 208.

Effet de la cession et de la désignation

41 La cession à titre absolu ou la désignation est censée conférer tous les droits nécessaires pour permettre à Sa Majesté de donner effet aux conditions de la cession ou de la désignation.

L.R. (1985), ch. I-5, art. 41; L.R. (1985), ch. 17 (4^{e} suppl.), art. 4.

Descent of Property

Powers of Minister with respect to property of deceased Indians

42 (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

Regulations

(2) The Governor in Council may make regulations providing that a deceased Indian who at the time of his death was in possession of land in a reserve shall, in such circumstances and for such purposes as the regulations prescribe, be deemed to have been at the time of his death lawfully in possession of that land.

Application of regulations

(3) Regulations made under subsection (2) may be made applicable to estates of Indians who died before, on or after September 4, 1951.

R.S., c. I-6, s. 42.

Particular powers

43 Without restricting the generality of section 42, the Minister may

(a) appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;

(b) authorize executors to carry out the terms of the wills of deceased Indians;

(c) authorize administrators to administer the property of Indians who die intestate;

(d) carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and

(e) make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

R.S., c. I-6, s. 43.

Courts may exercise jurisdiction with consent of Minister

44 (1) The court that would have jurisdiction if a deceased were not an Indian may, with the consent of the Minister, exercise, in accordance with this Act, the

Transmission de biens par droit de succession

Pouvoirs du ministre à l'égard des biens des Indiens décédés

42 (1) Sous réserve des autres dispositions de la présente loi, la compétence sur les questions testamentaires relatives aux Indiens décédés est attribuée exclusivement au ministre; elle est exercée en conformité avec les règlements pris par le gouverneur en conseil.

Règlements

(2) Le gouverneur en conseil peut prendre des règlements stipulant qu'un Indien décédé qui, au moment de son décès, était en possession de terres dans une réserve, sera réputé, en telles circonstances et à telles fins que prescrivent les règlements, avoir été légalement en possession de ces terres au moment de son décès.

Application des règlements

(3) Les règlements prévus par le paragraphe (2) peuvent être rendus applicables aux successions des Indiens morts avant ou après le 4 septembre 1951 ou à cette date.

S.R., ch. I-6, art. 42.

Pouvoirs particuliers

43 Sans que soit limitée la portée générale de l'article 42, le ministre peut :

a) nommer des exécuteurs testamentaires et des administrateurs de successions d'Indiens décédés, révoquer ces exécuteurs et administrateurs et les remplacer;

b) autoriser des exécuteurs à donner suite aux termes des testaments d'Indiens décédés;

c) autoriser des administrateurs à gérer les biens d'Indiens morts intestats;

d) donner effet aux testaments d'Indiens décédés et administrer les biens d'Indiens morts intestats;

e) prendre les arrêtés et donner les directives qu'il juge utiles à l'égard de quelque question mentionnée à l'article 42.

S.R., ch. I-6, art. 43.

Les tribunaux peuvent exercer leur compétence, avec le consentement du ministre

44 (1) Avec le consentement du ministre, le tribunal qui aurait compétence si la personne décédée n'était pas un Indien peut exercer, en conformité avec la présente loi, la jurisdiction and authority conferred on the Minister by this Act in relation to testamentary matters and causes and any other powers, jurisdiction and authority ordinarily vested in that court.

compétence que la présente loi confère au ministre à l'égard des questions testamentaires, ainsi que tous autres pouvoirs et compétence ordinairement dévolus à ce tribunal.

Minister may refer a matter to the court

(2) The Minister may direct in any particular case that an application for the grant of probate of the will or letters of administration of a deceased shall be made to the court that would have jurisdiction if the deceased were not an Indian, and the Minister may refer to that court any question arising out of any will or the administration of any estate.

Le ministre peut déférer des questions au tribunal

(2) Dans tout cas particulier, le ministre peut ordonner qu'une demande en vue d'obtenir l'homologation d'un testament ou l'émission de lettres d'administration soit présentée au tribunal qui aurait compétence si la personne décédée n'était pas un Indien. Il a la faculté de soumettre à ce tribunal toute question que peut faire surgir un testament ou l'administration d'une succession.

Orders relating to lands

(3) A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.

R.S., c. I-6, s. 44.

Ordonnances visant des terres

(3) Un tribunal qui exerce sa compétence sous le régime du présent article ne peut, sans le consentement écrit du ministre, faire exécuter une ordonnance visant des biens immeubles sur une réserve.

S.R., ch. I-6, art. 44.

Wills

Testaments

Indians may make wills

45 (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

Les Indiens peuvent tester

45 (1) La présente loi n'a pas pour effet d'empêcher un Indien, ou de lui interdire, de transmettre ses biens par testament.

Form of will

(2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Forme de testaments

(2) Le ministre peut accepter comme testament tout document écrit signé par un Indien dans lequel celui-ci indique ses désirs ou intentions à l'égard de la disposition de ses biens lors de son décès.

Probate

(3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

R.S., c. I-6, s. 45.

Homologation

(3) Nul testament fait par un Indien n'a d'effet juridique comme disposition de biens tant qu'il n'a pas été approuvé par le ministre ou homologué par un tribunal en conformité avec la présente loi.

S.R., ch. I-6, art. 45.

Minister may declare will void

46 (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

(a) the will was executed under duress or undue influence;

(b) the testator at the time of execution of the will lacked testamentary capacity;

(c) the terms of the will would impose hardship on persons for whom the testator had a responsibility to provide;

Le ministre peut déclarer nul un testament

46 (1) Le ministre peut déclarer nul, en totalité ou en partie, le testament d'un Indien, s'il est convaincu de l'existence de l'une des circonstances suivantes :

a) le testament a été établi sous l'effet de la contrainte ou d'une influence indue;

b) au moment où il a fait ce testament, le testateur n'était pas habile à tester;

(d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

(e) the terms of the will are so vague, uncertain or capricious that proper administration and equitable distribution of the estate of the deceased would be difficult or impossible to carry out in accordance with this Act; or

(f) the terms of the will are against the public interest.

c) les clauses du testament seraient la cause de privations pour des personnes auxquelles le testateur était tenu de pourvoir;

d) le testament vise à disposer d’un terrain, situé dans une réserve, d’une façon contraire aux intérêts de la bande ou aux dispositions de la présente loi;

e) les clauses du testament sont si vagues, si incertaines ou si capricieuses que la bonne administration et la distribution équitable des biens de la personne décédée seraient difficiles ou impossibles à effectuer suivant la présente loi;

f) les clauses du testament sont contraires à l’intérêt public.

Where will declared void

(2) Where a will of an Indian is declared by the Minister or by a court to be wholly void, the person executing the will shall be deemed to have died intestate, and where the will is so declared to be void in part only, any bequest or devise affected thereby, unless a contrary intention appears in the will, shall be deemed to have lapsed.

R.S., c. I-6, s. 46.

Cas de nullité

(2) Lorsque le testament d’un Indien est déclaré entièrement nul par le ministre ou par un tribunal, la personne qui a fait ce testament est censée être morte intestat, et, lorsque le testament est ainsi déclaré nul en partie seulement, sauf indication d’une intention contraire y énoncée, tout legs de biens meubles ou immeubles visé de la sorte est réputé caduc.

S.R., ch. I-6, art. 46.

Appeals

Appeal to Federal Court

47 A decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person affected thereby to the Federal Court, if the amount in controversy in the appeal exceeds five hundred dollars or if the Minister consents to an appeal.

R.S., c. I-6, s. 47; R.S., c. 10(2nd Supp.), ss. 64, 65.

Appels

Appels à la Cour fédérale

47 Une décision rendue par le ministre dans l’exercice de la compétence que lui confère l’article 42, 43 ou 46 peut être portée en appel devant la Cour fédérale dans les deux mois de cette décision, par toute personne y intéressée, si la somme en litige dans l’appel dépasse cinq cents dollars ou si le ministre y consent.

S.R., ch. I-6, art. 47; S.R., ch. 10(2e suppl.), art. 64 et 65.

Distribution of Property on Intestacy

Surviving spouse’s share

48 (1) Where the net value of the estate of an intestate does not, in the opinion of the Minister, exceed seventy-five thousand dollars or such other amount as may be fixed by order of the Governor in Council, the estate shall go to the survivor.

Idem

(2) Where the net value of the estate of an intestate, in the opinion of the Minister, exceeds seventy-five thousand dollars, or such other amount as may be fixed by

Distribution des biens ab intestat

Part du survivant

48 (1) Lorsque, de l’avis du ministre, la valeur nette de la succession d’un intestat n’excède pas soixante-quinze mille dollars ou tout autre montant fixé par décret du gouverneur en conseil, la succession est dévolue au survivant.

Idem

(2) Lorsque la valeur nette de la succession d’un intestat excède, de l’avis du ministre, soixante-quinze mille dollars ou tout autre montant fixé par décret du order of the Governor in Council, seventy-five thousand dollars, or such other amount as may be fixed by order of the Governor in Council, shall go to the survivor, and

(a) if the intestate left no issue, the remainder shall go to the survivor,

(b) if the intestate left one child, one-half of the remainder shall go to the survivor, and

(c) if the intestate left more than one child, one-third of the remainder shall go to the survivor,

and where a child has died leaving issue and that issue is alive at the date of the intestate's death, the survivor shall take the same share of the estate as if the child had been living at that date.

Where children not provided for

(3) Notwithstanding subsections (1) and (2),

(a) where in any particular case the Minister is satisfied that any children of the deceased will not be adequately provided for, he may direct that all or any part of the estate that would otherwise go to the survivor shall go to the children; and

(b) the Minister may direct that the survivor shall have the right to occupy any lands in a reserve that were occupied by the deceased at the time of death.

Distribution to issue

(4) Where an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the survivor, if any, *per stirpes* among such issue.

Distribution to parents

(5) Where an intestate dies leaving no survivor or issue, the estate shall go to the parents of the deceased in equal shares if both are living, but if either of them is dead the estate shall go to the surviving parent.

Distribution to brothers, sisters and their issue

(6) Where an intestate dies leaving no survivor or issue or father or mother, his estate shall be distributed among his brothers and sisters in equal shares, and where any brother or sister is dead the children of the deceased brother or sister shall take the share their parent would have taken if living, but where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

gouverneur en conseil, une somme de soixante-quinze mille dollars ou toute autre somme fixée par décret du gouverneur en conseil est dévolue au survivant et le reste est attribué de la façon suivante :

a) si l'intestat n'a pas laissé de descendant, le solde est dévolu au survivant;

b) si l'intestat a laissé un enfant, la moitié du solde est dévolue au survivant;

c) si l'intestat a laissé plus d'un enfant, le tiers du solde est dévolu au survivant,

et lorsqu'un enfant est décédé laissant des descendants et que ceux-ci sont vivants à la date du décès de l'intestat, le survivant reçoit la même partie de la succession que si l'enfant avait vécu à cette date.

Cas où il n'est pas pourvu aux besoins des enfants

(3) Par dérogation aux paragraphes (1) et (2) :

a) si, dans un cas particulier, le ministre est convaincu qu'il ne sera pas suffisamment pourvu aux besoins de tout enfant du défunt, il peut ordonner que la totalité ou toute partie de la succession qui autrement irait au survivant soit dévolue à l'enfant;

b) le ministre peut ordonner que le survivant ait le droit d'occuper toutes terres situées dans une réserve que la personne décédée occupait au moment de son décès.

Distribution aux descendants

(4) Lorsqu'un intestat laisse à son décès des descendants, sa succession est, sous réserve des droits du survivant, s'il en est, distribuée par souche entre ces descendants.

Distribution aux parents

(5) Lorsqu'un intestat ne laisse à sa mort ni survivant ni descendant, sa succession est dévolue à ses parents en parts égales si tous deux sont vivants, ou au parent survivant si l'un des deux est décédé.

Distribution aux frères, sœurs et descendants de frères et sœurs

(6) Lorsqu'un intestat ne laisse à sa mort ni survivant, ni descendant, ni père, ni mère, sa succession est dévolue à ses frères et sœurs en parts égales, et, si l'un de ses frères ou sœurs est décédé, les enfants du frère ou de la sœur décédé reçoivent la part que leur père ou mère aurait reçue s'il avait été vivant, mais, lorsque les seuls ayants droit sont les enfants de frères et sœurs décédés, les biens leur sont distribués par tête.

Next-of-kin

(7) Where an intestate dies leaving no survivor, issue, father, mother, brother or sister, and no children of any deceased brother or sister, his estate shall go to his next-of-kin.

Distribution among next-of-kin

(8) Where an estate goes to the next-of-kin, it shall be distributed equally among the next-of-kin of equal degree of consanguinity to the intestate and those who legally represent them, but in no case shall representation be admitted after brothers' and sisters' children, and any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

Degrees of kindred

(9) For the purposes of this section, degrees of kindred shall be computed by counting upward from the intestate to the nearest common ancestor and then downward to the relative, and the kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree.

Descendants and relatives born after intestate's death

(10) Descendants and relatives of an intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

Estate not disposed of by will

(11) All such estate as is not disposed of by will shall be distributed as if the testator had died intestate and had left no other estate.

No community of property

(12) There is no community of real or personal property situated in a reserve.

(13) and (14) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

Equal application to men and women

(15) This section applies in respect of an intestate woman as it applies in respect of an intestate man.

(16) [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 9]

R.S., 1985, c. I-5, s. 48; R.S., 1985, c. 32 (1st Supp.), s. 9, c. 48 (4th Supp.), s. 2; 2000, c. 12, ss. 149, 151.

Plus proche parent

(7) Lorsqu'un intestat ne laisse à sa mort ni survivant, ni descendant, ni père, ni mère, ni frère, ni sœur, ni enfant d'un frère décédé ou d'une sœur décédée, la succession est dévolue à son plus proche parent.

Distribution aux plus proches parents

(8) Lorsque la succession est dévolue aux plus proches parents, elle doit être distribuée en parts égales entre tous les plus proches parents à un même degré de consanguinité avec l'intestat et leurs représentants légaux, mais dans aucun cas la représentation ne peut être admise après les enfants des frères et sœurs, et tout droit sur un bien-fonds situé dans une réserve est dévolu à Sa Majesté au bénéfice de la bande si le plus proche parent de l'intestat est plus éloigné qu'un frère ou une sœur.

Degré de parenté

(9) Pour l'application du présent article, les degrés de parenté sont établis en remontant les générations à partir de l'intestat jusqu'au plus proche auteur commun et en redescendant jusqu'au parent en question; les parents d'un seul côté héritent à parts égales avec les parents des deux côtés au même degré.

Descendants et parents nés après la mort de l'intestat

(10) Les descendants et parents de l'intestat engendrés avant la mort de ce dernier mais nés ensuite héritent au même titre que s'ils étaient nés du vivant de l'intestat et lui avaient survécu.

Biens non aliénés par testament

(11) Tous les biens dont il n'est pas disposé par testament sont distribués comme si le testateur était mort intestat et n'avait laissé aucun autre bien.

Absence de communauté de biens

(12) Il n'y a aucune communauté de biens meubles ou immeubles situés dans une réserve.

(13) et (14) [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 9]

Application aux personnes des deux sexes

(15) Le présent article s'applique à l'égard d'une femme intestat de la même manière qu'à l'égard d'un homme intestat.

(16) [Abrogé, L.R. (1985), ch. 32 (1er suppl.), art. 9]

L.R. (1985), ch. I-5, art. 48; L.R. (1985), ch. 32 (1er suppl.), art. 9, ch. 48 (4e suppl.), art. 2; 2000, ch. 12, art. 149 et 151.

Devisee's entitlement

49 A person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be deemed not to be in lawful possession or occupation of those lands until the possession is approved by the Minister.

R.S., c. I-6, s. 49.

Non-resident of reserve

50 (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

Sale by superintendent

(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.

Unsold lands revert to band

(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

Approval required

(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.

R.S., c. I-6, s. 50.

Regulations

50.1 The Governor in Council may make regulations respecting circumstances where more than one person qualifies as a survivor of an intestate under section 48.

2000, c. 12, s. 150.

Droit du légataire

49 Une personne qui prétend avoir droit à la possession ou à l'occupation de terres situées dans une réserve en raison d'un legs ou d'une transmission par droit de succession est censée ne pas en avoir la possession ou l'occupation légitime tant que le ministre n'a pas approuvé cette possession.

S.R., ch. I-6, art. 49.

Non-résident d'une réserve

50 (1) Une personne non autorisée à résider dans une réserve n'acquiert pas, par legs ou transmission sous forme de succession, le droit de posséder ou d'occuper une terre dans cette réserve.

Vente par le surintendant

(2) Lorsqu'un droit à la possession ou à l'occupation de terres dans une réserve est dévolu, par legs ou transmission sous forme de succession, à une personne non autorisée à y résider, ce droit doit être offert en vente par le surintendant au plus haut enchérisseur entre les personnes habiles à résider dans la réserve et le produit de la vente doit être versé au légataire ou au descendant, selon le cas.

Les terres non vendues retournent à la bande

(3) Si, dans les six mois ou tout délai supplémentaire que peut déterminer le ministre, à compter de la mise en vente du droit à la possession ou occupation d'une terre, en vertu du paragraphe (2), il n'est reçu aucune soumission, le droit retourne à la bande, libre de toute réclamation de la part du légataire ou descendant, sous réserve du versement, à la discrétion du ministre, au légataire ou descendant, sur les fonds de la bande, de l'indemnité pour améliorations permanentes que le ministre peut déterminer.

Approbation requise

(4) L'acheteur d'un droit à la possession ou occupation d'une terre sous le régime du paragraphe (2) n'est pas censé avoir la possession ou l'occupation légitime de la terre tant que le ministre n'a pas approuvé la possession.

S.R., ch. I-6, art. 50.

Pouvoir réglementaire

50.1 Le gouverneur en conseil peut, par règlement, régir les cas où il existe plus d'un survivant à l'égard du même intestat visé à l'article 48.

2000, ch. 12, art. 150.

Mentally Incompetent Indians

Powers of Minister generally

51 (1) Subject to this section, all jurisdiction and authority in relation to the property of mentally incompetent Indians is vested exclusively in the Minister.

Particular powers

(2) Without restricting the generality of subsection (1), the Minister may

(a) appoint persons to administer the estates of mentally incompetent Indians;

(b) order that any property of a mentally incompetent Indian shall be sold, leased, alienated, mortgaged, disposed of or otherwise dealt with for the purpose of

(i) paying his debts or engagements,

(ii) discharging encumbrances on his property,

(iii) paying debts or expenses incurred for his maintenance or otherwise for his benefit, or

(iv) paying or providing for the expenses of future maintenance; and

(c) make such orders and give such directions as he considers necessary to secure the satisfactory management of the estates of mentally incompetent Indians.

Property off reserve

(3) The Minister may order that any property situated off a reserve and belonging to a mentally incompetent Indian shall be dealt with under the laws of the province in which the property is situated.

R.S., c. I-6, s. 51.

Guardianship

Property of infant children

52 The Minister may administer or provide for the administration of any property to which infant children of Indians are entitled, and may appoint guardians for that purpose.

R.S., c. I-6, s. 52.

Indiens mentalement incapables

Pouvoirs du ministre, en général

51 (1) Sous réserve des autres dispositions du présent article, la compétence à l’égard des biens des Indiens mentalement incapables est attribuée exclusivement au ministre.

Pouvoirs particuliers

(2) Sans que soit limitée la portée générale du paragraphe (1), le ministre peut :

a) nommer des personnes pour administrer les biens des Indiens mentalement incapables;

b) ordonner que tout bien d’un Indien mentalement incapable soit vendu, loué, aliéné, hypothéqué, qu’il en soit disposé ou que d’autres mesures soient prises à son égard aux fins, selon le cas :

(i) d’acquitter ses dettes ou engagements,

(ii) de dégrever ses biens,

(iii) d’acquitter les dettes ou les dépenses subies pour son entretien ou autrement à son avantage,

(iv) d’acquitter les frais de l’entretien ultérieur ou d’y pourvoir;

c) prendre les arrêtés et donner les instructions qu’il juge nécessaires pour assurer l’administration satisfaisante des biens des Indiens mentalement incapables.

Biens situés en dehors d’une réserve

(3) Le ministre peut ordonner que tout bien situé en dehors d’une réserve et appartenant à un Indien mentalement incapable soit traité selon la législation de la province où le bien est situé.

S.R., ch. I-6, art. 51.

Tutelle

Biens d’enfants mineurs

52 Le ministre peut administrer tous biens auxquels les enfants mineurs d’Indiens ont droit, ou en assurer l’administration, et il peut nommer des tuteurs à cette fin.

S.R., ch. I-6, art. 52.

Money of Infant Children

Distributions of capital

52.1 (1) The council of a band may determine that the payment of not more than three thousand dollars, or such other amount as may be fixed by order of the Governor in Council, in a year of the share of a distribution under paragraph 64(1)(a) that belongs to an infant child who is a member of the band is necessary or proper for the maintenance, advancement or other benefit of the child.

Procedure

(2) Before making a determination under subsection (1), the council of the band must

(a) post in a conspicuous place on the reserve fourteen days before the determination is made a notice that it proposes to make such a determination; and

(b) give the members of the band a reasonable opportunity to be heard at a general meeting of the band held before the determination is made.

Minister's duty

(3) Where the council of the band makes a determination under subsection (1) and notifies the Minister, at the time it gives its consent to the distribution pursuant to paragraph 64(1)(a), that it has made that determination and that, before making it, it complied with subsection (2), the Minister shall make a payment described in subsection (1) for the maintenance, advancement or other benefit of the child to a parent or person who is responsible for the care and custody of the child or, if so requested by the council on giving its consent to that distribution, to the council.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Money of infant children of Indians

52.2 The Minister may, regardless of whether a payment is made under section 52.1, pay all or part of any money administered by the Minister under section 52 that belongs to an infant child of an Indian to a parent or person who is responsible for the care and custody of the child or otherwise apply all or part of that money if

(a) the Minister is requested in writing to do so by the parent or the person responsible; and

(b) in the opinion of the Minister, the payment or application is necessary or proper for the maintenance, advancement or other benefit of the child.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Fonds des mineurs

Versement

52.1 (1) Le conseil d'une bande peut statuer que le versement de la fraction dévolue, à la suite du partage visé à l'alinéa 64(1)a), à un enfant mineur qui est membre de la bande est dans l'intérêt de l'enfant, notamment pour son entretien ou son épanouissement. Ce versement ne peut toutefois excéder trois mille dollars par an ou le montant fixé par décret du gouverneur en conseil.

Procédure

(2) Le cas échéant, le conseil affiche un avis de son intention, en un lieu bien en évidence dans la réserve, quatorze jours avant de prendre sa décision et donne aux membres de la bande la possibilité de présenter leurs observations lors d'une assemblée générale tenue avant la prise de la décision.

Versement obligatoire

(3) Le ministre est tenu d'effectuer le versement mentionné au paragraphe (1) soit à un parent ou au détenteur de l'autorité parentale, soit, s'il le demande, au conseil de la bande lorsque celui-ci a d'une part, statué dans le sens prévu à ce paragraphe et, d'autre part, certifié au ministre, lors de l'acceptation du partage visé à l'alinéa 64(1)a), la conformité de cette décision à la procédure établie.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Fonds des mineurs

52.2 Sur demande écrite d'un parent ou du détenteur de l'autorité parentale, le ministre peut, sans qu'il soit tenu compte de tout versement effectué au titre de l'article 52.1, soit lui verser, en tout ou en partie, les sommes d'argent gérées par lui conformément à l'article 52 et appartenant aux enfants mineurs d'Indiens s'il l'estime être dans leur intérêt, notamment pour leur entretien ou leur épanouissement, soit les verser pour leur compte.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Attaining majority

52.3 (1) Where a child of an Indian attains the age of majority, the Minister shall pay any money administered by the Minister under section 52 to which the child is entitled to that child in one lump sum.

Exception

(2) Notwithstanding subsection (1), where requested in writing to do so before a child of an Indian attains the age of majority by a parent or a person who is responsible for the care and custody of the child or by the council of the band of which the child is a member, the Minister may, instead of paying the money in one lump sum, pay it in instalments during a period beginning on the day the child attains the age of majority and ending not later than the day that is three years after that day.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Relief

52.4 Where, in a proceeding in respect of the share of a distribution under paragraph 64(1)(a) or of money belonging to an infant child that was paid pursuant to section 52.1, 52.2 or 52.3, it appears to the court that the Minister, the band, its council or a member of that council acted honestly and reasonably and ought fairly to be relieved from liability in respect of the payment, the court may relieve the Minister, band, council or member, either in whole or in part, from liability in respect of the payment.

R.S., 1985, c. 48 (4th Supp.), s. 3; 1992, c. 1, s. 144(F).

Effect of payment

52.5 (1) The receipt in writing from a parent or person who is responsible for the care and custody of an infant child for a payment made pursuant to section 52.1 or 52.2

(a) discharges the duty of the Minister, the band, its council and each member of that council to make the payment to the extent of the amount paid; and

(b) discharges the Minister, the band, its council and each member of that council from seeing to its application or being answerable for its loss or misapplication.

Idem

(2) The receipt in writing from the council of the band of which an infant child is a member for a payment made pursuant to section 52.1

(a) discharges the duty of the Minister to make the payment to the extent of the amount paid; and

Paiement à la majorité

52.3 (1) Le ministre est tenu de remettre, en un versement unique, toute somme d'argent gérée au titre de l'article 52 à l'Indien qui y a droit et a atteint sa majorité.

Exception

(2) Sur demande écrite — avant que l'Indien atteigne sa majorité — d'un parent ou du détenteur de l'autorité parentale ou du conseil de la bande dont l'intéressé est membre, le ministre peut toutefois payer la somme en versements échelonnés à compter de la date de la majorité pendant au plus trois ans après celle-ci.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

Libération

52.4 Le tribunal peut, dans toute affaire relative au versement d'une fraction dévolue à un enfant mineur dans le cadre du partage visé à l'alinéa 64(1)a) et effectué en application des articles 52.1, 52.2 ou 52.3, libérer, en tout ou en partie, le ministre, la bande, son conseil ou les membres de celui-ci de toute responsabilité à cet égard lorsqu'il lui apparaît que tel d'entre eux, ayant agi honnêtement et raisonnablement, devrait, en toute justice, l'être.

L.R. (1985), ch. 48 (4e suppl.), art. 3; 1992, ch. 1, art. 144(F).

Effet du versement

52.5 (1) L'accusé de réception transmis par le destinataire — parent ou détenteur de l'autorité parentale — du versement visé à l'article 52.1 ou 52.2 libère le ministre, la bande, son conseil et les membres de celui-ci, à concurrence du montant versé, de son obligation, ainsi que de toute responsabilité à l'égard de celui-ci ou de son éventuel détournement.

Idem

(2) L'accusé de réception transmis par le destinataire — conseil de la bande dont l'enfant est membre — du versement visé à l'article 52.1 libère le ministre, à concurrence du montant versé, de son obligation, ainsi que de toute responsabilité à l'égard de celui-ci ou de son éventuel détournement.

L.R. (1985), ch. 48 (4e suppl.), art. 3.

(b) discharges the Minister from seeing to the application of the amount paid or being answerable for its loss or misapplication.

R.S., 1985, c. 48 (4th Supp.), s. 3.

Management of Reserves and Surrendered and Designated Lands

Transactions re surrendered and designated lands

53 (1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(a) manage or sell absolutely surrendered lands; or

(b) manage, lease or carry out any other transaction affecting designated lands.

Grant where original purchaser dead

(2) Where the original purchaser of surrendered lands is dead and the heir, assignee or devisee of the original purchaser applies for a grant of the lands, the Minister may, on receipt of proof in such manner as he directs and requires in support of any claim for the grant and on being satisfied that the claim has been equitably and justly established, allow the claim and authorize a grant to issue accordingly.

Departmental employees

(3) No person who is appointed pursuant to subsection (1) or who is an officer or a servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly any interest in absolutely surrendered or designated lands.

R.S., 1985, c. I-5, s. 53; R.S., 1985, c. 17 (4th Supp.), s. 5.

Assignments

54 Where absolutely surrendered lands are agreed to be sold and letters patent relating thereto have not issued, or where designated lands are leased or an interest in them granted, the purchaser, lessee or other person who has an interest in the absolutely surrendered or designated lands may, with the approval of the Minister, assign all or part of that interest to any other person.

R.S., 1985, c. I-5, s. 54; R.S., 1985, c. 17 (4th Supp.), s. 6.

Administration des réserves et des terres cédées ou désignées

Opérations concernant les terres cédées ou désignées

53 (1) Le ministre ou son délégué peut, conformément à la présente loi et aux conditions de la cession à titre absolu ou de la désignation :

a) administrer ou vendre les terres cédées à titre absolu;

b) effectuer toute opération à l’égard des terres désignées et notamment les administrer et les donner à bail.

Concession lorsque l’acquéreur initial est décédé

(2) Lorsque l’acquéreur initial de terres cédées est mort et que l’héritier, cessionnaire ou légataire de l’acquéreur initial demande une concession des terres, le ministre peut, sur réception d’une preuve d’après la manière qu’il ordonne et exige à l’appui de toute demande visant cette concession et lorsqu’il est convaincu que la demande a été établie de façon juste et équitable, agréer la demande et autoriser la délivrance d’une concession en conséquence.

Fonctionnaires du ministère

(3) La personne qui est nommée à titre de délégué conformément au paragraphe (1), ou qui est un fonctionnaire ou préposé de Sa Majesté à l’emploi du ministère, ne peut, sauf approbation du gouverneur en conseil, acquérir directement ou indirectement d’intérêts dans des terres cédées à titre absolu ou désignées.

L.R. (1985), ch. I-5, art. 53; L.R. (1985), ch. 17 (4e suppl.), art. 5.

Transfert

54 Lorsqu’il a été convenu de la vente de terres cédées à titre absolu et que des lettres patentes n’ont pas été délivrées à leur égard, ou lorsque des terres désignées ont été données à bail ou ont fait l’objet d’un démembrement, l’acheteur, le locataire ou toute autre personne ayant un droit sur ces terres peut, avec l’approbation du ministre, transférer à toute autre personne tout ou partie de son droit.

L.R. (1985), ch. I-5, art. 54; L.R. (1985), ch. 17 (4e suppl.), art. 6.

Surrendered and Designated Lands Register

55 (1) There shall be maintained in the Department a register, to be known as the Surrendered and Designated Lands Register, in which shall be recorded particulars in connection with any transaction affecting absolutely surrendered or designated lands.

Conditional assignment

(2) A conditional assignment shall not be registered.

Proof of execution

(3) Registration of an assignment may be refused until proof of its execution has been furnished.

Effect of registration

(4) An assignment registered under this section is valid against an unregistered assignment or an assignment subsequently registered.

R.S., 1985, c. I-5, s. 55; R.S., 1985, c. 17 (4th Supp.), s. 7.

Certificate of registration

56 Where an assignment is registered, there shall be endorsed on the original copy thereof a certificate of registration signed by the Minister or by an officer of the Department authorized by the Minister to sign such certificates.

R.S., c. I-6, s. 56.

Regulations

57 The Governor in Council may make regulations

(a) authorizing the Minister to grant licences to cut timber on surrendered lands, or, with the consent of the council of the band, on reserve lands;

(b) imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licences granted under paragraph (a);

(c) providing for the disposition of surrendered mines and minerals underlying lands in a reserve;

(d) prescribing the punishment, not exceeding one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of any regulation made under this section; and

(e) providing for the seizure and forfeiture of any timber or minerals taken in contravention of any regulation made under this section.

R.S., c. I-6, s. 57.

Registre des terres cédées ou désignées

55 (1) Est tenu au ministère un registre, appelé Registre des terres cédées ou désignées, dans lequel sont consignés tous les détails relatifs à toute opération touchant les terres cédées à titre absolu ou désignées.

Transfert conditionnel

(2) Un transfert conditionnel n’est pas enregistré.

Preuve de souscription

(3) L’inscription d’un transfert peut être refusée tant que la preuve de l’établissement de cet acte n’a pas été fournie.

Effet de l’inscription

(4) Un transfert enregistré selon le présent article est valide à l’encontre d’un transfert non enregistré ou d’un transfert enregistré subséquemment.

L.R. (1985), ch. I-5, art. 55; L.R. (1985), ch. 17 (4e suppl.), art. 7.

Certificat d’enregistrement

56 Lorsqu’un transfert est enregistré, on appose sur la copie originale de l’acte un certificat d’enregistrement signé par le ministre ou par un fonctionnaire du ministère que le ministre autorise à signer.

S.R., ch. I-6, art. 56.

Règlements

57 Le gouverneur en conseil peut prendre des règlements :

a) autorisant le ministre à accorder des permis de couper du bois sur des terres cédées ou, avec le consentement du conseil de la bande, sur des terres de réserve;

b) établissant des conditions et des restrictions à l’égard de l’exercice des droits conférés par les permis accordés sous le régime de l’alinéa a);

c) pourvoyant à l’aliénation de mines et minéraux cédés dans le sous-sol d’une réserve;

d) prescrivant l’amende maximale de cent dollars et l’emprisonnement maximal de trois mois, ou l’une de ces peines, qui peuvent être infligés, sur déclaration de culpabilité par procédure sommaire, pour infraction à l’un des règlements prévus au présent article;

e) prévoyant la saisie et la confiscation du bois ou des minéraux pris en violation d'un règlement pris en vertu du présent article.

S.R., ch. I-6, art. 57.

Uncultivated or unused lands

58 (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

(a) improve or cultivate that land and employ persons therefor, and authorize and direct the expenditure of such amount of the capital funds of the band as he considers necessary for that improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;

(b) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and

(c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

Distribution of proceeds

(2) Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.

Lease at request of occupant

(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

Disposition of grass, timber, non-metallic substances, etc.

(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

(a) dispose of wild grass or dead or fallen timber; and

(b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty

Terrains incultes ou inutilisés

58 (1) Lorsque, dans une réserve, un terrain est inculte ou inutilisé, le ministre peut, avec le consentement du conseil de la bande :

a) améliorer ou cultiver le terrain et employer des personnes à cette fin, autoriser et prescrire la dépense de telle partie des fonds en capital de la bande qu'il juge nécessaire à l'amélioration ou à la culture, y compris l'achat du bétail, des machines ou du matériel ou l'emploi de la main-d'œuvre qu'il estime nécessaire;

b) si le terrain est en la possession légitime d'un particulier, accorder la location de ce terrain à des fins de culture ou de pâturage ou à toute fin se trouvant au profit de la personne qui en a la possession;

c) si le terrain n'est pas en la possession légitime d'un particulier, accorder la location du terrain, au profit de la bande, à des fins de culture ou de pâturage.

Distribution du produit

(2) Sur les montants provenant de l'amélioration ou de la culture de terrains selon l'alinéa (1)b), un loyer raisonnable est versé au particulier en possession légitime des terrains ou une partie de ceux-ci, et le solde est porté au crédit de la bande. Toutefois, lorsque des améliorations sont apportées à des terrains occupés par un particulier, le ministre peut déduire, du loyer payable à celui-ci sous le régime du présent paragraphe, la valeur de ces améliorations.

Location à la demande de l'occupant

(3) Le ministre peut louer au profit de tout Indien, à la demande de celui-ci, la terre dont ce dernier est en possession légitime sans que celle-ci soit désignée.

Aliénation d'herbes, de bois et de substances non métalliques, etc.

(4) Nonobstant toute autre disposition de la présente loi, le ministre peut, sans cession à titre absolu ou désignation :

a) disposer des herbes sauvages ou du bois mort sur pied ou du chablis;

b) avec le consentement du conseil de la bande, disposer du sable, du gravier, de la glaise et des autres or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.

substances non métalliques se trouvant sur des terres ou dans le sous-sol d'une réserve, ou lorsque ce consentement ne peut être obtenu sans obstacle ou retard indu, peut délivrer des permis temporaires pour la prise du sable, du gravier, de la glaise et d'autres substances non métalliques sur des terres ou dans le sous-sol d'une réserve, renouvelables avec le consentement du conseil de la bande seulement.

Proceeds

(5) The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

R.S., 1985, c. I-5, s. 58; R.S., 1985, c. 17 (4th Supp.), s. 8.

Produit

(5) Le produit de ces opérations doit être porté au crédit des fonds de bande ou partagé entre la bande et les Indiens particuliers en possession légitime des terres selon les proportions que le ministre peut déterminer.

L.R. (1985), ch. I-5, art. 58; L.R. (1985), ch. 17 (4e suppl.), art. 8.

Adjustment of contracts

59 The Minister may, with the consent of the council of a band,

(a) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; and

(b) reduce or adjust the amount payable to the band by an Indian in respect of a loan made to the Indian from band funds.

R.S., 1985, c. I-5, s. 59; R.S., 1985, c. 17 (4th Supp.), s. 9.

Ajustement de contrats

59 Avec le consentement du conseil d'une bande, le ministre peut :

a) réduire ou ajuster le montant payable à Sa Majesté à l'égard de toute opération touchant des terres cédées à titre absolu, des terres désignées ou toute autre terre située dans une réserve, ou le taux d'intérêt payable à cet égard;

b) réduire ou ajuster le montant qu'un Indien doit payer à la bande pour un prêt consenti à cet Indien sur les fonds de la bande.

L.R. (1985), ch. I-5, art. 59; L.R. (1985), ch. 17 (4e suppl.), art. 9.

Control over lands

60 (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

Contrôle sur des terres

60 (1) À la demande d'une bande, le gouverneur en conseil peut lui accorder le droit d'exercer, sur des terres situées dans une réserve qu'elle occupe, le contrôle et l'administration qu'il estime désirables.

Withdrawal

(2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

R.S., c. I-6, s. 60.

Retrait

(2) Le gouverneur en conseil peut retirer à une bande un droit qui lui a été conféré sous le régime du paragraphe (1).

S.R., ch. I-6, art. 60.

Management of Indian Moneys

Administration de l'argent des indiens

Indian moneys to be held for use and benefit

61 (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any

L'argent des Indiens est détenu pour usage et profit

61 (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

Interest

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

R.S., c. I-6, s. 61.

Intérêts

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

S.R., ch. I-6, art. 61.

Capital and revenue

62 All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

R.S., c. I-6, s. 62.

Capital et revenu

62 L'argent des Indiens qui provient de la vente de terres cédées ou de biens de capital d'une bande est réputé appartenir au compte en capital de la bande; les autres sommes d'argent des Indiens sont réputées appartenir au compte de revenu de la bande.

S.R., ch. I-6, art. 62.

Payments to Indians

63 Notwithstanding the *Financial Administration Act*, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

R.S., c. I-6, s. 63.

Versements aux Indiens

63 Par dérogation à la *Loi sur la gestion des finances publiques*, lorsque des sommes d'argent auxquelles un Indien a droit sont versées à un surintendant en vertu d'un bail ou d'une entente passé sous le régime de la présente loi, le surintendant peut remettre ces sommes à l'Indien.

S.R., ch. I-6, art. 63.

Expenditure of capital moneys with consent

64 (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

- **(a)** to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;
- **(b)** to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;
- **(c)** to construct and maintain outer boundary fences on reserves;
- **(d)** to purchase land for use by the band as a reserve or as an addition to a reserve;
- **(e)** to purchase for the band the interest of a member of the band in lands on a reserve;
- **(f)** to purchase livestock and farm implements, farm equipment or machinery for the band;

Dépense de sommes d'argent au compte en capital avec consentement

64 (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

- **a)** pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;
- **b)** pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;
- **c)** pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;
- **d)** pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;
- **e)** pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;
- **f)** pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants :

(i) les biens meubles appartenant à l'emprunteur,

(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

Expenditure of capital moneys in accordance with by-laws

(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

R.S., 1985, c. I-5, s. 64; R.S., 1985, c. 32 (1st Supp.), s. 10.

Dépenses sur les sommes d'argent au compte de capital

(2) Le ministre peut effectuer des dépenses sur les sommes d'argent au compte de capital d'une bande conformément aux règlements administratifs pris en vertu de l'alinéa 81(1)p.3) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

L.R. (1985), ch. I-5, art. 64; L.R. (1985), ch. 32 (1er suppl.), art. 10.

Expenditure of capital moneys with consent

64.1 (1) A person who has received an amount that exceeds $1,000 under paragraph 15(1)(a), as it read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as that paragraph, by reason of ceasing to be a member of a band in the circumstances set out in paragraph 6(1)(a.1), (d) or (e) is not entitled to receive an amount under paragraph 64(1)(a) until such time as the aggregate of all amounts that the person would, but for this subsection, have received under paragraph 64(1)(a) is equal to the amount by which the amount that the person received under

Dépense de sommes d'argent au compte en capital avec consentement

64.1 (1) Une personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)a), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, du fait qu'elle a cessé d'être membre d'une bande dans les circonstances prévues aux alinéas 6(1)a.1), d) ou e) n'a pas le droit de recevoir de montant en vertu de l'alinéa 64(1)a) jusqu'à ce que le total de tous les montants qu'elle aurait reçus en vertu de l'alinéa 64(1)a), n'eût été le présent paragraphe, soit égal à l'excédent du montant qu'elle a reçu en vertu paragraph 15(1)(a), as it read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as that paragraph, exceeds $1,000, together with any interest.

de l'alinéa 15(1)a), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, sur mille dollars, y compris les intérêts.

Expenditure of capital moneys in accordance with by-laws

(2) If the council of a band makes a by-law under paragraph 81(1)(p.4) bringing this subsection into effect, a person who has received an amount that exceeds $1,000 under paragraph 15(1)(a), as it read immediately before April 17, 1985, or under any former provision of this Act relating to the same subject matter as that paragraph, by reason of ceasing to be a member of the band in the circumstances set out in paragraph 6(1)(a.1), (d) or (e) is not entitled to receive any benefit afforded to members of the band as individuals as a result of the expenditure of Indian moneys under paragraphs 64(1)(b) to (k), subsection 66(1) or subsection 69(1) until the amount by which the amount so received exceeds $1,000, together with any interest, has been repaid to the band.

Dépenses sur les sommes d'argent au compte de capital

(2) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)p.4), des règlements administratifs mettant en vigueur le présent paragraphe, la personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)a) dans sa version antérieure au 17 avril 1985, ou en vertu de toute autre disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, parce qu'elle a cessé d'être membre de la bande dans les circonstances prévues aux alinéas 6(1)a.1), d) ou e) n'a le droit de recevoir aucun des avantages offerts aux membres de la bande à titre individuel résultant de la dépense d'argent des Indiens au titre des alinéas 64(1)b) à k), du paragraphe 66(1) ou du paragraphe 69(1) jusqu'à ce que l'excédent du montant ainsi reçu sur mille dollars, y compris l'intérêt sur celui-ci, ait été remboursé à la bande.

Regulations

(3) The Governor in Council may make regulations prescribing the manner of determining interest for the purpose of subsections (1) and (2).

R.S., 1985, c. 32 (1st Supp.), s. 11; 2017, c. 25, s. 3.2.

Règlements

(3) Le gouverneur en conseil peut prendre des règlements prévoyant la façon de déterminer les intérêts pour l'application des paragraphes (1) et (2).

L.R. (1985), ch. 32 (1er suppl.), art. 11; 2017, ch. 25, art. 3.2.

Expenditure of capital

65 The Minister may pay from capital moneys

- **(a)** compensation to an Indian in an amount that is determined in accordance with this Act to be payable to him in respect of land compulsorily taken from him for band purposes; and
- **(b)** expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

R.S., c. I-6, s. 65.

Dépenses de capital

65 Le ministre peut payer, sur les sommes d'argent au compte en capital :

- **a)** une indemnité à un Indien, au montant déterminé en conformité avec la présente loi comme lui étant payable à l'égard de terres qui lui ont été enlevées obligatoirement pour les fins de la bande;
- **b)** les dépenses subies afin de prévenir ou maîtriser les incendies d'herbes ou de forêts ou pour protéger les biens des Indiens en cas d'urgence.

S.R., ch. I-6, art. 65.

Expenditure of revenue moneys with consent of band

66 (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

Dépense des sommes d'argent du compte de revenu avec le consentement de la bande

66 (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et ordonner la dépense de sommes d'argent du compte de revenu à toute fin qui, d'après lui, favorisera le progrès général et le bien-être de la bande ou d'un de ses membres.

Minister may direct expenditure

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the *Employment Insurance Act* on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

Le ministre peut déterminer les dépenses

(2) Le ministre peut dépenser l'argent du compte de revenu de la bande en vue d'aider les Indiens malades, invalides, âgés ou indigents de la bande et pour pourvoir aux funérailles des membres indigents de celle-ci, de même qu'en vue de pourvoir au versement des contributions sous le régime de la *Loi sur l'assurance-emploi* pour le compte de personnes employées qui sont payées, à l'égard de leur emploi, sur l'argent de la bande.

Idem

(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys.

Idem

(2.1) Le ministre peut effectuer des dépenses sur les sommes d'argent de revenu de la bande conformément aux règlements administratifs visés à l'alinéa 81(1)p.3) en vue d'effectuer des paiements à une personne dont le nom a été retranché de la liste de bande jusqu'à concurrence d'un montant n'excédant pas une part *per capita* de ces sommes.

Expenditure of revenue moneys with authority of Minister

(3) The Minister may authorize the expenditure of revenue moneys of the band for all or any of the following purposes, namely,

- **(a)** for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;
- **(b)** to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;
- **(c)** to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;
- **(d)** to prevent overcrowding of premises on reserves used as dwellings;
- **(e)** to provide for sanitary conditions in private premises on reserves as well as in public places on reserves; and
- **(f)** for the construction and maintenance of boundary fences.

R.S., 1985, c. I-5, s. 66; R.S., 1985, c. 32 (1st Supp.), s. 12; 1996, c. 23, s. 187.

Le ministre peut autoriser la dépense de sommes d'argent du compte de revenu

(3) Le ministre peut autoriser la dépense de sommes d'argent du compte de revenu de la bande pour l'ensemble ou l'un des objets suivants :

- **a)** la destruction des herbes nuisibles et la prévention de la propagation ou de la présence généralisée des insectes, parasites ou maladies susceptibles de ruiner ou d'endommager la végétation dans les réserves indiennes;
- **b)** la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;
- **c)** l'inspection des locaux sur les réserves et la destruction, la modification ou la rénovation de ces locaux;
- **d)** l'adoption de mesures préventives contre le surpeuplement des locaux utilisés comme logements sur les réserves;
- **e)** la salubrité dans les locaux privés comme dans les endroits publics, sur les réserves;
- **f)** la construction et l'entretien de clôtures de délimitation.

L.R. (1985), ch. I-5, art. 66; L.R. (1985), ch. 32 (1er suppl.), art. 12; 1996, ch. 23, art. 187.

Recovery of certain expenses

67 Where money is expended by Her Majesty for the purpose of raising or collecting Indian moneys, the Minister may authorize the recovery of the amount so expended from the moneys of the band.

R.S., c. I-6, s. 67.

Recouvrement de certaines dépenses

67 Lorsqu'une somme d'argent est dépensée par Sa Majesté pour procurer ou percevoir des sommes d'argent destinées aux Indiens, le ministre peut autoriser le recouvrement du montant ainsi dépensé sur l'argent de la bande.

S.R., ch. I-6, art. 67.

Maintenance of dependants

68 Where the Minister is satisfied that an Indian

(a) has deserted his spouse or common-law partner or family without sufficient cause,

(b) has conducted himself in such a manner as to justify the refusal of his spouse or common-law partner or family to live with him, or

(c) has been separated by imprisonment from his spouse or common-law partner and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or common-law partner or family or both the spouse or common-law partner and family of that Indian.

R.S., 1985, c. I-5, s. 68; R.S., 1985, c. 32 (1st Supp.), s. 13; 2000, c. 12, s. 152.

Entretien des personnes à charge

68 Le ministre peut ordonner que les paiements de rentes ou d'intérêts auxquels un Indien a droit soient appliqués au soutien de l'époux ou conjoint de fait ou de la famille de celui-ci, ou des deux, lorsqu'il est convaincu que cet Indien, selon le cas :

a) a abandonné son époux ou conjoint de fait ou sa famille sans raison suffisante;

b) s'est conduit de façon à justifier le refus de son époux ou conjoint de fait ou de sa famille de vivre avec lui;

c) a été séparé de son époux ou conjoint de fait et de sa famille par emprisonnement.

L.R. (1985), ch. I-5, art. 68; L.R. (1985), ch. 32 (1[er] suppl.), art. 13; 2000, ch. 12, art. 152.

Management of revenue moneys by band

69 (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

Administration des sommes d'argent du compte de revenu par la bande

69 (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

Regulations

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

R.S., c. I-6, s. 69.

Règlements

(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

S.R., ch. I-6, art. 69.

Loans to Indians

Loans to Indians

70 (1) The Minister of Finance may authorize advances to the Minister out of the Consolidated Revenue Fund of such sums of money as the Minister may require to enable him

(a) to make loans to bands, groups of Indians or individual Indians for the purchase of farm implements, machinery, livestock, motor vehicles, fishing equipment, seed grain, fencing materials, materials to be used in native handicrafts, any other equipment, and gasoline and other petroleum products, or for the

Prêts aux indiens

Prêts aux Indiens

70 (1) Le ministre des Finances peut autoriser l'avance au ministre, sur le Trésor, des sommes d'argent dont ce dernier a besoin pour être en mesure :

a) soit de consentir des prêts à des bandes ou à des groupes d'Indiens ou à des Indiens individuellement, pour l'achat d'instruments agricoles, de machines, d'animaux de ferme, de véhicules à moteur, d'agrès de pêche, de graines de semence, de matériaux à clôture, de matériaux destinés aux arts et métiers indigènes, de tout autre équipement, d'essence et d'autres making of repairs or the payment of wages, or for the clearing and breaking of land within reserves;

(b) to expend or to lend money for the carrying out of cooperative projects on behalf of Indians; or

(c) to provide for any other matter prescribed by the Governor in Council.

produits du pétrole, ou pour des réparations ou le paiement de salaires, ou pour défricher et déblayer les terres à l'intérieur des réserves;

b) soit de dépenser ou de prêter des fonds en vue de l'exécution de projets coopératifs pour le compte d'Indiens;

c) soit de pourvoir à toute autre question prévue par le gouverneur en conseil.

Regulations

(2) The Governor in Council may make regulations to give effect to subsection (1).

Règlements

(2) Le gouverneur en conseil peut prendre des règlements pour l'application du paragraphe (1).

Accounting

(3) Expenditures that are made under subsection (1) shall be accounted for in the same manner as public moneys.

Comptabilité

(3) Il doit être rendu compte des fonds dépensés sous le régime du paragraphe (1) de la même manière que des deniers publics.

Repayment

(4) The Minister shall pay to the Receiver General all moneys that he receives from bands, groups of Indians or individual Indians by way of repayments of loans made under subsection (1).

Remboursement

(4) Le ministre doit verser au receveur général tout l'argent qu'il reçoit des bandes, groupes d'Indiens ou Indiens pris individuellement, en remboursement des prêts consentis en vertu du paragraphe (1).

Limitation

(5) The total amount of outstanding advances to the Minister under this section shall not at any one time exceed six million and fifty thousand dollars.

Limitation

(5) Le total non remboursé des avances consenties au ministre sous le régime du présent article ne peut dépasser six millions cinquante mille dollars.

Report to Parliament

(6) The Minister shall within fifteen days after the termination of each fiscal year or, if Parliament is not then in session, within fifteen days after the commencement of the next ensuing session, lay before Parliament a report setting out the total number and amount of loans made under subsection (1) during that year.

R.S., c. I-6, s. 70.

Rapport au Parlement

(6) Le ministre doit, dans les quinze jours qui suivent la fin de chaque exercice ou, si le Parlement n'est pas alors en session, dans les quinze premiers jours de la session suivante, présenter au Parlement un rapport indiquant le nombre total et le chiffre global des prêts consentis au cours de l'exercice sous le régime du paragraphe (1).

S.R., ch. I-6, art. 70.

Farms

Fermes

Minister may operate farms

71 (1) The Minister may operate farms on reserves and may employ such persons as he considers necessary to instruct Indians in farming and may purchase and distribute without charge pure seed to Indian farmers.

Le ministre peut exploiter des fermes

71 (1) Le ministre peut exploiter des fermes dans les réserves et employer les personnes qu'il juge nécessaires pour enseigner l'agriculture aux Indiens. Il peut aussi acheter et gratuitement distribuer des semences pures aux cultivateurs indiens.

Application of profits

(2) The Minister may apply any profits that result from the operation of farms pursuant to subsection (1) on reserves to extend farming operations on the reserves or to

Emploi des bénéfices

(2) Le ministre peut employer les bénéfices provenant de l'exploitation de fermes dans les réserves, en conformité avec le paragraphe (1), à l'expansion des exploitations make loans to Indians to enable them to engage in farming or other agricultural operations or he may apply those profits in any way that he considers to be desirable to promote the progress and development of the Indians.

R.S., c. I-6, s. 71.

Treaty Money

Treaty money payable out of C.R.F.

72 Moneys that are payable to Indians or to Indian bands under a treaty between Her Majesty and a band and for the payment of which the Government of Canada is responsible may be paid out of the Consolidated Revenue Fund.

R.S., c. I-6, s. 72.

Regulations

Regulations

73 (1) The Governor in Council may make regulations

(a) for the protection and preservation of fur-bearing animals, fish and other game on reserves;

(b) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(c) for the control of the speed, operation and parking of vehicles on roads within reserves;

(d) for the taxation, control and destruction of dogs and for the protection of sheep on reserves;

(e) for the operation, supervision and control of pool rooms, dance halls and other places of amusement on reserves;

(f) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(g) to provide medical treatment and health services for Indians;

(h) to provide compulsory hospitalization and treatment for infectious diseases among Indians;

agricoles sur ces réserves, ou à effectuer des prêts aux Indiens pour leur permettre de s'adonner à la culture ou à d'autres travaux agricoles, ou de toute manière qu'il croit propre à favoriser le progrès et le développement des Indiens.

S.R., ch. I-6, art. 71.

Sommes payables en vertu d'un traité

Les sommes visées par des traités sont payables sur le Trésor

72 Les sommes payables à des Indiens ou à des bandes d'Indiens en vertu d'un traité entre Sa Majesté et la bande, et dont le paiement incombe au gouvernement du Canada, peuvent être prélevées sur le Trésor.

S.R., ch. I-6, art. 72.

Règlements

Règlements

73 (1) Le gouverneur en conseil peut prendre des règlements concernant :

a) la protection et la conservation des animaux à fourrure, du poisson et du gibier de toute sorte dans les réserves;

b) la destruction des herbes nuisibles et la prévention de la propagation ou de la présence généralisée des insectes, parasites ou maladies susceptibles de ruiner ou d'endommager la végétation dans les réserves indiennes;

c) le contrôle de la vitesse, de la conduite et du stationnement des véhicules sur les routes dans les réserves;

d) la taxation et la surveillance relatives aux chiens et leur destruction, ainsi que la protection des moutons dans les réserves;

e) le fonctionnement, la surveillance et le contrôle des salles de billard, des salles de danse et autres endroits d'amusement dans les réserves;

f) la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;

g) les traitements médicaux et les services d'hygiène destinés aux Indiens;

(i) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(j) to prevent overcrowding of premises on reserves used as dwellings;

(k) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves;

(l) for the construction and maintenance of boundary fences; and

(m) for empowering and authorizing the council of a band to borrow money for band projects or housing purposes and providing for the making of loans out of moneys so borrowed to members of the band for housing purposes.

h) l'hospitalisation et le traitement obligatoires des Indiens atteints de maladies infectieuses;

i) l'inspection des locaux sur les réserves et la destruction, la modification ou la rénovation de ces locaux;

j) l'adoption de mesures préventives contre le surpeuplement des locaux utilisés comme logements sur les réserves;

k) la salubrité dans les locaux privés comme dans les endroits publics, sur les réserves;

l) la construction et l'entretien de clôtures de délimitation;

m) l'octroi, au conseil d'une bande, du pouvoir et de l'autorisation d'emprunter de l'argent pour des entreprises de la bande ou à des fins d'habitation, et prévoyant l'octroi de prêts, sur l'argent ainsi emprunté, aux membres de la bande, à des fins d'habitation.

Punishment

(2) The Governor in Council may prescribe the punishment, not exceeding a fine of one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of a regulation made under subsection (1).

Peine

(2) Le gouverneur en conseil peut prescrire l'amende maximale de cent dollars et l'emprisonnement maximal de trois mois, ou l'une de ces peines, qui peuvent être infligés, sur déclaration de culpabilité par procédure sommaire, pour infraction à un règlement pris sous le régime du paragraphe (1).

Orders and regulations

(3) The Governor in Council may make orders and regulations to carry out the purposes and provisions of this Act.

R.S., c. I-6, s. 73.

Décrets et règlements

(3) Le gouverneur en conseil peut prendre des décrets et règlements en vue de l'application de la présente loi.

S.R., ch. I-6, art. 73.

Elections of Chiefs and Band Councils

Elected councils

74 (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

Composition of council

(2) Unless otherwise ordered by the Minister, the council of a band in respect of which an order has been made under subsection (1) shall consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two

Élection des chefs et des conseils de bande

Conseils élus

74 (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.

Composition du conseil

(2) Sauf si le ministre en ordonne autrement, le conseil d'une bande ayant fait l'objet d'un arrêté prévu par le paragraphe (1) se compose d'un chef, ainsi que d'un conseiller par cent membres de la bande, mais le nombre nor more than twelve and no band shall have more than one chief.

Regulations

(3) The Governor in Council may, for the purposes of giving effect to subsection (1), make orders or regulations to provide

(a) that the chief of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

(ii) a majority of the votes of the elected councillors of the band from among themselves,

but the chief so elected shall remain a councillor; and

(b) that the councillors of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

(ii) a majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band.

Electoral sections

(4) A reserve shall for voting purposes consist of one electoral section, except that where the majority of the electors of a band who were present and voted at a referendum or a special meeting held and called for the purpose in accordance with the regulations have decided that the reserve should for voting purposes be divided into electoral sections and the Minister so recommends, the Governor in Council may make orders or regulations to provide for the division of the reserve for voting purposes into not more than six electoral sections containing as nearly as may be an equal number of Indians eligible to vote and to provide for the manner in which electoral sections so established are to be distinguished or identified.

R.S., c. I-6, s. 74.

Eligibility

75 (1) No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.

Nomination

(2) No person may be a candidate for election as chief or councillor of a band unless his nomination is moved and

des conseillers ne peut être inférieur à deux ni supérieur à douze. Une bande ne peut avoir plus d’un chef.

Règlements

(3) Pour l’application du paragraphe (1), le gouverneur en conseil peut prendre des décrets ou règlements prévoyant :

a) que le chef d’une bande doit être élu :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des conseillers élus de la bande désignant un d’entre eux,

le chef ainsi élu devant cependant demeurer conseiller;

b) que les conseillers d’une bande doivent être élus :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des électeurs de la bande demeurant dans la section électorale que le candidat habite et qu’il projette de représenter au conseil de la bande.

Sections électorales

(4) Aux fins de votation, une réserve se compose d’une section électorale; toutefois, lorsque la majorité des électeurs d’une bande qui étaient présents et ont voté lors d’un référendum ou à une assemblée spéciale tenue et convoquée à cette fin en conformité avec les règlements, a décidé que la réserve devrait, aux fins de votation, être divisée en sections électorales et que le ministre le recommande, le gouverneur en conseil peut prendre des décrets ou règlements stipulant qu’aux fins de votation la réserve doit être divisée en six sections électorales au plus, contenant autant que possible un nombre égal d’Indiens habilités à voter et décrétant comment les sections électorales ainsi établies doivent se distinguer ou s’identifier.

S.R., ch. I-6, art. 74.

Éligibilité

75 (1) Seul un électeur résidant dans une section électorale peut être présenté au poste de conseiller pour représenter cette section au conseil de la bande.

Présentation de candidats

(2) Nul ne peut être candidat à une élection au poste de chef ou de conseiller d’une bande, à moins que sa seconded by persons who are themselves eligible to be nominated.

R.S., c. I-6, s. 75.

Regulations governing elections

76 (1) The Governor in Council may make orders and regulations with respect to band elections and, without restricting the generality of the foregoing, may make regulations with respect to

(a) meetings to nominate candidates;

(b) the appointment and duties of electoral officers;

(c) the manner in which voting is to be carried out;

(d) election appeals; and

(e) the definition of ***residence*** for the purpose of determining the eligibility of voters.

Secrecy of voting

(2) The regulations made under paragraph (1)(c) shall provide for secrecy of voting.

R.S., c. I-6, s. 76.

Eligibility of voters for chief

77 (1) A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councillors.

Councillor

(2) A member of a band who is of the full age of eighteen years and is ordinarily resident in a section that has been established for voting purposes is qualified to vote for a person nominated to be councillor to represent that section.

R.S., 1985, c. I-5, s. 77; R.S., 1985, c. 32 (1st Supp.), s. 14.

Tenure of office

78 (1) Subject to this section, the chief and councillors of a band hold office for two years.

Vacancy

(2) The office of chief or councillor of a band becomes vacant when

(a) the person who holds that office

(i) is convicted of an indictable offence,

candidature ne soit proposée et appuyée par des personnes habiles elles-mêmes à être présentées.

S.R., ch. I-6, art. 75.

Règlements régissant les élections

76 (1) Le gouverneur en conseil peut prendre des décrets et règlements sur les élections au sein des bandes et, notamment, des règlements concernant :

a) les assemblées pour la présentation de candidats;

b) la nomination et les fonctions des préposés aux élections;

c) la manière dont la votation doit avoir lieu;

d) les appels en matière électorale;

e) la définition de ***résidence*** aux fins de déterminer si une personne est habile à voter.

Secret du vote

(2) Les règlements pris sous le régime de l’alinéa (1)c) contiennent des dispositions assurant le secret du vote.

S.R., ch. I-6, art. 76.

Qualités exigées des électeurs au poste de chef

77 (1) Un membre d’une bande, qui a au moins dix-huit ans et réside ordinairement sur la réserve, a qualité pour voter en faveur d’une personne présentée comme candidat au poste de chef de la bande et, lorsque la réserve, aux fins d’élection, ne comprend qu’une section électorale, pour voter en faveur de personnes présentées aux postes de conseillers.

Conseiller

(2) Un membre d’une bande, qui a dix-huit ans et réside ordinairement dans une section électorale établie aux fins d’élection, a qualité pour voter en faveur d’une personne présentée au poste de conseiller pour représenter cette section.

L.R. (1985), ch. I-5, art. 77; L.R. (1985), ch. 32 (1er suppl.), art. 14.

Mandat

78 (1) Sous réserve des autres dispositions du présent article, les chef et conseillers d’une bande occupent leur poste pendant deux années.

Vacance

(2) Le poste de chef ou de conseiller d’une bande devient vacant dans les cas suivants :

a) le titulaire, selon le cas :

(i) est déclaré coupable d’un acte criminel,

(ii) dies or resigns his office, or

(iii) is or becomes ineligible to hold office by virtue of this Act; or

(b) the Minister declares that in his opinion the person who holds that office

(i) is unfit to continue in office by reason of his having been convicted of an offence,

(ii) has been absent from three consecutive meetings of the council without being authorized to do so, or

(iii) was guilty, in connection with an election, of corrupt practice, accepting a bribe, dishonesty or malfeasance.

Disqualification

(3) The Minister may declare a person who ceases to hold office by virtue of subparagraph (2)(b)(iii) to be ineligible to be a candidate for chief or councillor of a band for a period not exceeding six years.

Special election

(4) Where the office of chief or councillor of a band becomes vacant more than three months before the date when another election would ordinarily be held, a special election may be held in accordance with this Act to fill the vacancy.

R.S., c. I-6, s. 78.

Governor in Council may set aside election

79 The Governor in Council may set aside the election of a chief or councillor of a band on the report of the Minister that he is satisfied that

(a) there was corrupt practice in connection with the election;

(b) there was a contravention of this Act that might have affected the result of the election; or

(c) a person nominated to be a candidate in the election was ineligible to be a candidate.

R.S., c. I-6, s. 79.

Regulations respecting band and council meetings

80 The Governor in Council may make regulations with respect to band meetings and council meetings and, without restricting the generality of the foregoing, may make regulations with respect to

(ii) meurt ou démissionne,

(iii) est ou devient inhabile à détenir le poste aux termes de la présente loi;

b) le ministre déclare qu'à son avis le titulaire, selon le cas :

(i) est inapte à demeurer en fonctions parce qu'il a été déclaré coupable d'une infraction,

(ii) a, sans autorisation, manqué les réunions du conseil trois fois consécutives,

(iii) à l'occasion d'une élection, s'est rendu coupable de manœuvres frauduleuses, de malhonnêteté ou de méfaits, ou a accepté des pots-de-vin.

Privation du droit d'être candidat

(3) Le ministre peut déclarer un individu, qui cesse d'occuper ses fonctions en raison du sous-alinéa (2)b)(iii), inhabile à être candidat au poste de chef ou de conseiller d'une bande durant une période maximale de six ans.

Élection spéciale

(4) Lorsque le poste de chef ou de conseiller devient vacant plus de trois mois avant la date de la tenue ordinaire de nouvelles élections, une élection spéciale peut avoir lieu en conformité avec la présente loi afin de remplir cette vacance.

S.R., ch. I-6, art. 78.

Le gouverneur en conseil peut annuler une élection

79 Le gouverneur en conseil peut rejeter l'élection du chef ou d'un des conseillers d'une bande sur le rapport du ministre où ce dernier se dit convaincu, selon le cas :

a) qu'il y a eu des manœuvres frauduleuses à l'égard de cette élection;

b) qu'il s'est produit une infraction à la présente loi pouvant influer sur le résultat de l'élection;

c) qu'une personne présentée comme candidat à l'élection ne possédait pas les qualités requises.

S.R., ch. I-6, art. 79.

Règlements sur les assemblées de la bande et du conseil

80 Le gouverneur en conseil peut prendre des règlements sur les assemblées de la bande et du conseil et, notamment, des règlements concernant :

a) les présidents de ces assemblées;

(a) presiding officers at such meetings;

(b) notice of such meetings;

(c) the duties of any representative of the Minister at such meetings; and

(d) the number of persons required at such meetings to constitute a quorum.

R.S., c. I-6, s. 80.

b) les avis de ces assemblées;

c) les fonctions de tout représentant du ministre à ces assemblées;

d) le nombre de personnes requis à ces assemblées pour constituer un quorum.

S.R., ch. I-6, art. 80.

Powers of the Council

By-laws

81 (1) The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

(a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;

(b) the regulation of traffic;

(c) the observance of law and order;

(d) the prevention of disorderly conduct and nuisances;

(e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the regulation of their duties and the provision for fees and charges for their services;

(f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;

(g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any zone;

(h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;

(i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;

(j) the destruction and control of noxious weeds;

Pouvoirs du conseil

Règlements administratifs

81 (1) Le conseil d’une bande peut prendre des règlements administratifs, non incompatibles avec la présente loi ou avec un règlement pris par le gouverneur en conseil ou par le ministre, pour l’une ou l’ensemble des fins suivantes :

a) l’adoption de mesures relatives à la santé des habitants de la réserve et les précautions à prendre contre la propagation des maladies contagieuses et infectieuses;

b) la réglementation de la circulation;

c) l’observation de la loi et le maintien de l’ordre;

d) la répression de l’inconduite et des incommodités;

e) la protection et les précautions à prendre contre les empiétements des bestiaux et autres animaux domestiques, l’établissement de fourrières, la nomination de gardes-fourrières, la réglementation de leurs fonctions et la constitution de droits et redevances pour leurs services;

f) l’établissement et l’entretien de cours d’eau, routes, ponts, fossés, clôtures et autres ouvrages locaux;

g) la division de la réserve ou d’une de ses parties en zones, et l’interdiction de construire ou d’entretenir une catégorie de bâtiments ou d’exercer une catégorie d’entreprises, de métiers ou de professions dans une telle zone;

h) la réglementation de la construction, de la réparation et de l’usage des bâtiments, qu’ils appartiennent à la bande ou à des membres de la bande pris individuellement;

i) l’arpentage des terres de la réserve et leur répartition entre les membres de la bande, et l’établissement d’un registre de certificats de possession et de certificats d’occupation concernant

(k) the regulation of bee-keeping and poultry raising;

(l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;

(m) the control or prohibition of public games, sports, races, athletic contests and other amusements;

(n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;

(o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;

(p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;

(p.1) the residence of band members and other persons on the reserve;

(p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;

(p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons whose names were deleted from the Band List of the band;

(p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;

(q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and

(r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.

les attributions, et la mise à part de terres de la réserve pour usage commun, si l'autorisation à cet égard a été accordée aux termes de l'article 60;

j) la destruction et le contrôle des herbes nuisibles;

k) la réglementation de l'apiculture et de l'aviculture;

l) l'établissement de puits, citernes et réservoirs publics et autres services d'eau du même genre, ainsi que la réglementation de leur usage;

m) la réglementation ou l'interdiction de jeux, sports, courses et concours athlétiques d'ordre public et autres amusements du même genre;

n) la réglementation de la conduite et des opérations des marchands ambulants, colporteurs ou autres personnes qui pénètrent dans la réserve pour acheter ou vendre des produits ou marchandises, ou en faire un autre commerce;

o) la conservation, la protection et la régie des animaux à fourrure, du poisson et du gibier de toute sorte dans la réserve;

p) l'expulsion et la punition des personnes qui pénètrent sans droit ni autorisation dans la réserve ou la fréquentent pour des fins interdites;

p.1) la résidence des membres de la bande ou des autres personnes sur la réserve;

p.2) l'adoption de mesures relatives aux droits des époux ou conjoints de fait ou des enfants qui résident avec des membres de la bande dans une réserve pour toute matière au sujet de laquelle le conseil peut établir des règlements administratifs à l'égard des membres de la bande;

p.3) l'autorisation du ministre à effectuer des paiements sur des sommes d'argent au compte de capital ou des sommes d'argent de revenu aux personnes dont les noms ont été retranchés de la liste de la bande;

p.4) la mise en vigueur des paragraphes 10(3) ou 64.1(2) à l'égard de la bande;

q) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire;

r) l'imposition, sur déclaration de culpabilité par procédure sommaire, d'une amende maximale de mille dollars et d'un emprisonnement maximal de trente jours, ou de l'une de ces peines, pour violation d’un règlement administratif pris aux termes du présent article.

Power to restrain by order where conviction entered

(2) Where any by-law of a band is contravened and a conviction entered, in addition to any other remedy and to any penalty imposed by the by-law, the court in which the conviction has been entered, and any court of competent jurisdiction thereafter, may make an order prohibiting the continuation or repetition of the offence by the person convicted.

Pouvoir de rendre une ordonnance

(2) Lorsqu’un règlement administratif d’une bande est violé et qu’une déclaration de culpabilité est prononcée, le tribunal ayant prononcé la déclaration de culpabilité et tout tribunal compétent par la suite peuvent, en plus de toute autre réparation et de toute peine imposée par le règlement administratif, rendre une ordonnance interdisant la continuation ou la répétition de l’infraction par la personne déclarée coupable.

Power to restrain by court action

(3) Where any by-law of a band passed is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by court action at the instance of the band council.

R.S., 1985, c. I-5, s. 81; R.S., 1985, c. 32 (1st Supp.), s. 15; 2000, c. 12, s. 152.

Pouvoir d’intenter une action en justice

(3) La violation d’un règlement administratif d’une bande peut, sans préjudice de toute autre réparation et de toute peine imposée par celui-ci, être refrénée par une action en justice à la demande du conseil de bande.

L.R. (1985), ch. I-5, art. 81; L.R. (1985), ch. 32 (1er suppl.), art. 15; 2000, ch. 12, art. 152.

82 [Repealed, 2014, c. 38, s. 7]

82 [Abrogé, 2014, ch. 38, art. 7]

Money by-laws

83 (1) Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

(a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;

(a.1) the licensing of businesses, callings, trades and occupations;

(b) the appropriation and expenditure of moneys of the band to defray band expenses;

(c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);

(d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);

(e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;

(e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section,

Règlements administratifs

83 (1) Sans préjudice des pouvoirs que confère l’article 81, le conseil de la bande peut, sous réserve de l’approbation du ministre, prendre des règlements administratifs dans les domaines suivants :

a) sous réserve des paragraphes (2) et (3), l’imposition de taxes à des fins locales, sur les immeubles situés dans la réserve, ainsi que sur les droits sur ceux-ci, et notamment sur les droits d’occupation, de possession et d’usage;

a.1) la délivrance de permis, de licences ou d’agréments aux entreprises, professions, métiers et occupations;

b) l’affectation et le déboursement de l’argent de la bande pour couvrir les dépenses de cette dernière;

c) la nomination de fonctionnaires chargés de diriger les affaires du conseil, en établissant leurs fonctions et prévoyant leur rétribution sur les fonds prélevés en vertu de l’alinéa a);

d) le versement d’une rémunération, pour le montant que le ministre peut approuver, aux chefs et conseillers, sur les fonds prélevés en vertu de l’alinéa a);

e) les mesures d’exécution forcée visant le recouvrement de tout montant qui peut être perçu en application du présent article, arrérages et intérêts compris;

where those amounts are not paid before they are due, and the calculation of that interest;

(f) the raising of money from band members to support band projects; and

(g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

e.1) l'imposition, pour non-paiement de tout montant qui peut être perçu en application du présent article, d'intérêts et la fixation, par tarif ou autrement, de ces intérêts;

f) la réunion de fonds provenant des membres de la bande et destinés à supporter des entreprises de la bande;

g) toute question qui découle de l'exercice des pouvoirs prévus par le présent article, ou qui y est accessoire.

Restriction on expenditures

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

Restriction

(2) Toute dépense à faire sur les fonds prélevés en application du paragraphe (1) doit l'être sous l'autorité d'un règlement administratif pris par le conseil de la bande.

Appeals

(3) A by-law made under paragraph (1)(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

Précision

(3) Les règlements administratifs pris en application de l'alinéa (1)a) doivent prévoir la procédure de contestation de l'évaluation en matière de taxation.

Minister's approval

(4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

Approbation

(4) Le ministre peut approuver la totalité d'un règlement administratif visé au paragraphe (1) ou une partie seulement de celui-ci.

Regulations re by-laws

(5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

Règlement relatif au pouvoir réglementaire

(5) Le gouverneur en conseil peut, par règlement, régir l'exercice du pouvoir réglementaire de la bande prévu au présent article.

By-laws must be consistent with regulations

(6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

R.S., 1985, c. I-5, s. 83; R.S., 1985, c. 17 (4th Supp.), s. 10.

Maintien des règlements administratifs

(6) Les règlements administratifs pris en application du présent article ne demeurent en vigueur que dans la mesure de leur compatibilité avec les règlements pris en application du paragraphe (5).

L.R. (1985), ch. I-5, art. 83; L.R. (1985), ch. 17 (4e suppl.), art. 10.

Recovery of taxes

84 Where a tax that is imposed on an Indian by or under the authority of a by-law made under section 83 is not paid in accordance with the by-law, the Minister may pay the amount owing together with an amount equal to one-half of one per cent thereof out of moneys payable out of the funds of the band to the Indian.

R.S., c. I-6, s. 84.

Recouvrement d'impôts

84 Lorsqu'un impôt frappant un Indien en vertu ou sous l'autorité d'un règlement administratif pris en vertu de l'article 83 n'est pas acquitté conformément au règlement administratif, le ministre peut payer le montant dû ainsi qu'une somme égale à un demi pour cent dudit montant sur l'argent payable à l'Indien sur les fonds de la bande.

S.R., ch. I-6, art. 84.

85 [Repealed, R.S., 1985, c. 17 (4th Supp.), s. 11]

85 [Abrogé, L.R. (1985), ch. 17 (4e suppl.), art. 11]

By-laws relating to intoxicants

85.1 (1) Subject to subsection (2), the council of a band may make by-laws

(a) prohibiting the sale, barter, supply or manufacture of intoxicants on the reserve of the band;

(b) prohibiting any person from being intoxicated on the reserve;

(c) prohibiting any person from having intoxicants in his possession on the reserve; and

(d) providing for exceptions to any of the prohibitions established pursuant to paragraph (b) or (c).

Consent of electors

(2) A by-law may not be made under this section unless it is first assented to by a majority of the electors of the band who voted at a special meeting of the band called by the council of the band for the purpose of considering the by-law.

(3) [Repealed, 2014, c. 38, s. 8]

Offence

(4) Every person who contravenes a by-law made under this section is guilty of an offence and liable on summary conviction

(a) in the case of a by-law made under paragraph (1)(a), to a fine of not more than one thousand dollars or to imprisonment for a term not exceeding six months or to both; and

(b) in the case of a by-law made under paragraph (1)(b) or (c), to a fine of not more than one hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., 1985, c. 32 (1st Supp.), s. 16; 2014, c. 38, s. 8.

Publication of by-laws

86 (1) The council of a band shall publish a copy of every by-law made by the council under this Act on an Internet site, in the *First Nations Gazette* or in a newspaper that has general circulation on the reserve of the band, whichever the council considers appropriate in the circumstances.

Règlements administratifs sur les boissons alcoolisées

85.1 (1) Sous réserve du paragraphe (2), le conseil d’une bande peut prendre des règlements administratifs en vue :

a) d’interdire la vente, le troc, la fourniture ou la fabrication de boissons alcoolisées sur la réserve de la bande;

b) d’interdire à toute personne d’être en état d’ivresse sur la réserve;

c) d’interdire à toute personne d’avoir en sa possession des boissons alcoolisées sur la réserve;

d) de prévoir des exceptions aux interdictions visées aux alinéas b) ou c).

Consentement des électeurs

(2) Les règlements administratifs prévus au présent article ne peuvent être pris qu’avec le consentement préalable de la majorité des électeurs de la bande ayant voté à l’assemblée spéciale de la bande convoquée par le conseil de cette dernière pour l’étude de ces règlements.

(3) [Abrogé, 2014, ch. 38, art. 8]

Infraction

(4) Quiconque contrevient à un règlement administratif pris en vertu du présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d’un règlement pris en vertu de l’alinéa (1)a), une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l’une de ces peines;

b) dans le cas d’un règlement pris en vertu des alinéas (1)b) ou c), une amende maximale de cent dollars et un emprisonnement maximal de trois mois, ou l’une de ces peines.

L.R. (1985), ch. 32 (1er suppl.), art. 16; 2014, ch. 38, art. 8.

Publication des règlements administratifs

86 (1) Le conseil d’une bande est tenu de publier tout règlement administratif qu’il a pris sous le régime de la présente loi sur un site Internet, dans la *Gazette des premières nations* ou dans un journal largement diffusé sur la réserve de la bande, selon ce qu’il estime approprié dans les circonstances.

Copies of by-laws

(2) The council of a band shall, on request by any person, provide to the person a copy of a by-law made by the council.

For greater certainty

(3) For greater certainty, publishing a by-law on an Internet site in accordance with subsection (1) does not discharge the council of a band from its obligation under subsection (2) to provide a copy of the by-law to any person who requests one.

Coming into force

(4) A by-law made by the council of a band under this Act comes into force on the day on which it is first published under subsection (1) or on any later day specified in the by-law.

Duration of publication — Internet site

(5) A by-law that is published on an Internet site under subsection (1) must remain accessible in that manner for the period during which it is in force.

R.S., 1985, c. I-5, s. 86; 2014, c. 38, s. 9.

Taxation

Property exempt from taxation

87 (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

(a) the interest of an Indian or a band in reserve lands or surrendered lands; and

(b) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian,

Copies des règlements administratifs

(2) Le conseil d'une bande est tenu de fournir à toute personne qui en fait la demande une copie de tout règlement administratif qu'il a pris.

Précision

(3) Il est entendu que le fait de publier un règlement administratif sur un site Internet en conformité avec le paragraphe (1) ne libère pas le conseil de l'obligation prévue au paragraphe (2) de fournir des copies du règlement aux personnes qui en font la demande.

Entrée en vigueur

(4) Les règlements administratifs pris par le conseil d'une bande sous le régime de la présente loi entrent en vigueur à la date de leur publication initiale en application du paragraphe (1) ou à la date ultérieure qu'ils fixent.

Durée de la publication : site Internet

(5) Les règlements administratifs publiés sur un site Internet en application du paragraphe (1) doivent demeurer accessibles sur un tel site jusqu'à ce qu'ils cessent d'être en vigueur.

L.R. (1985), ch. I-5, art. 86; 2014, ch. 38, art. 9.

Taxation

Biens exempts de taxation

87 (1) Nonobstant toute autre loi fédérale ou provinciale, mais sous réserve de l'article 83 et de l'article 5 de la *Loi sur la gestion financière des premières nations*, les biens suivants sont exemptés de taxation :

a) le droit d'un Indien ou d'une bande sur une réserve ou des terres cédées;

b) les biens meubles d'un Indien ou d'une bande situés sur une réserve.

Idem

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)a) ou b) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

R.S., 1985, c. I-5, s. 87; 2005, c. 9, s. 150; 2012, c. 19, s. 677.

et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens.

L.R. (1985), ch. I-5, art. 87; 2005, ch. 9, art. 150; 2012, ch. 19, art. 677.

Legal Rights

General provincial laws applicable to Indians

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

R.S., 1985, c. I-5, s. 88; 2005, c. 9, s. 151; 2012, c. 19, s. 678.

Droits légaux

Lois provinciales d'ordre général applicables aux Indiens

88 Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou la *Loi sur la gestion financière des premières nations* ou quelque arrêté, ordonnance, règle, règlement ou texte législatif d'une bande pris sous leur régime, et sauf dans la mesure où ces lois provinciales contiennent des dispositions sur toute question prévue par la présente loi ou la *Loi sur la gestion financière des premières nations* ou sous leur régime.

L.R. (1985), ch. I-5, art. 88; 2005, ch. 9, art. 151; 2012, ch. 19, art. 678.

Restriction on mortgage, seizure, etc., of property on reserve

89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

Inaliénabilité des biens situés sur une réserve

89 (1) Sous réserve des autres dispositions de la présente loi, les biens d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien ou une bande.

Exception

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

Dérogation

(1.1) Par dérogation au paragraphe (1), les droits découlant d'un bail sur une terre désignée peuvent faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution.

Conditional sales

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

R.S., 1985, c. I-5, s. 89; R.S., 1985, c. 17 (4th Supp.), s. 12.

Ventes conditionnelles

(2) Une personne, qui vend à une bande ou à un membre d'une bande un bien meuble en vertu d'une entente selon laquelle le droit de propriété ou le droit de possession demeure acquis en tout ou en partie au vendeur, peut exercer ses droits aux termes de l'entente, même si le bien meuble est situé sur une réserve.

L.R. (1985), ch. I-5, art. 89; L.R. (1985), ch. 17 (4e suppl.), art. 12.

Property deemed situated on reserve

90 (1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a band under a treaty or agreement between a band and Her Majesty,

shall be deemed always to be situated on a reserve.

Restriction on transfer

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a band or between the band and a member thereof.

Destruction of property

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

R.S., c. I-6, s. 90.

Trading with Indians

Certain property on a reserve may not be acquired

91 (1) No person may, without the written consent of the Minister, acquire title to any of the following property situated on a reserve, namely,

(a) an Indian grave house;

(b) a carved grave pole;

(c) a totem pole;

(d) a carved house post; or

(e) a rock embellished with paintings or carvings.

Saving

(2) Subsection (1) does not apply to chattels referred to therein that are manufactured for sale by Indians.

Biens considérés comme situés sur une réserve

90 (1) Pour l'application des articles 87 et 89, les biens meubles qui ont été :

a) soit achetés par Sa Majesté avec l'argent des Indiens ou des fonds votés par le Parlement à l'usage et au profit d'Indiens ou de bandes;

b) soit donnés aux Indiens ou à une bande en vertu d'un traité ou accord entre une bande et Sa Majesté,

sont toujours réputés situés sur une réserve.

Restriction sur le transfert

(2) Toute opération visant à transférer la propriété d'un bien réputé, en vertu du présent article, situé sur une réserve, ou un droit sur un tel bien, est nulle à moins qu'elle n'ait lieu avec le consentement du ministre ou ne soit conclue entre des membres d'une bande ou entre une bande et l'un de ses membres.

Destruction de biens

(3) Quiconque conclut une opération déclarée nulle par le paragraphe (2) commet une infraction; commet aussi une infraction quiconque détruit, sans le consentement écrit du ministre, un bien meuble réputé, en vertu du présent article, situé sur une réserve.

S.R., ch. I-6, art. 90.

Commerce avec les indiens

Interdiction d'acquérir certains biens situés sur une réserve

91 (1) Nul ne peut, sans le consentement écrit du ministre, acquérir la propriété de l'un des biens suivants, situés sur une réserve :

a) une maison funéraire indienne;

b) un monument funéraire sculpté;

c) un poteau totémique;

d) un poteau sculpté de maison;

e) une roche ornée d'images gravées ou peintes.

Exception

(2) Le paragraphe (1) ne s'applique pas aux biens meubles y mentionnés qui sont fabriqués en vue de la vente par des Indiens.

Removal, destruction, etc.

(3) No person shall remove, take away, mutilate, disfigure, deface or destroy any chattel referred to in subsection (1) without the written consent of the Minister.

Punishment

(4) A person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months.

R.S., c. I-6, s. 91.

92 [Repealed, 2014, c. 38, s. 10]

Removal of Materials from Reserves

Removal of material from reserve

93 A person who, without the written permission of the Minister or his duly authorized representative,

(a) removes or permits anyone to remove from a reserve

(i) minerals, stone, sand, gravel, clay or soil, or

(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or

(b) has in his possession anything removed from a reserve contrary to this section,

is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., c. I-6, s. 93.

Offences, Punishment and Enforcement

94 to 100 [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 17]

Certificate of analysis is evidence

101 In every prosecution under this Act a certificate of analysis furnished by an analyst employed by the Government of Canada or by a province shall be accepted as evidence of the facts stated therein and of the authority of the person giving or issuing the certificate, without

Enlèvement, destruction, etc.

(3) Nul ne peut enlever, emporter, mutiler, défigurer, détériorer ou détruire un bien meuble mentionné au paragraphe (1), sans le consentement écrit du ministre.

Peine

(4) Quiconque contrevient au présent article commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de deux cents dollars ou un emprisonnement maximal de trois mois.

S.R., ch. I-6, art. 91.

92 [Abrogé, 2014, ch. 38, art. 10]

Enlèvement d’objets sur les réserves

Enlèvement d’objets sur la réserve

93 Une personne qui, sans la permission écrite du ministre ou de son représentant dûment autorisé :

a) soit enlève ou permet à quelqu’un d’enlever d’une réserve :

(i) des minéraux, des pierres, du sable, du gravier, de la glaise, ou de la terre,

(ii) des arbres, de jeunes arbres, des arbrisseaux, des broussailles, du bois de service, du bois de corde ou du foin;

b) soit a en sa possession une chose enlevée d’une réserve contrairement au présent article,

commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de cinq cents dollars et un emprisonnement maximal de trois mois, ou l’une de ces peines.

S.R., ch. I-6, art. 93.

Infractions, peines et contrôle d’application

94 à 100 [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 17]

Le certificat de l’analyse constitue une preuve

101 Dans toute poursuite intentée sous le régime de la présente loi, un certificat d’analyse fourni par un analyste à l’emploi du gouvernement du Canada ou d’une province doit être accepté comme preuve des faits qu’il énonce et de l’autorité de la personne qui délivre le proof of the signature of the person appearing to have signed the certificate or his official character, and without further proof thereof.

R.S., c. I-6, s. 101.

Penalty where no other provided

102 Every person who is guilty of an offence against any provision of this Act or any regulation made by the Governor in Council or the Minister for which a penalty is not provided elsewhere in this Act or the regulations is liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding three months or to both.

R.S., c. I-6, s. 102.

Seizure of goods

103 (1) Whenever a peace officer, a superintendent or a person authorized by the Minister believes on reasonable grounds that a by-law made under subsection 81(1) or 85.1(1) has been contravened or an offence against section 90 or 93 has been committed, he may seize all goods and chattels by means of or in relation to which he believes on reasonable grounds the by-law was contravened or the offence was committed.

Detention

(2) All goods and chattels seized pursuant to subsection (1) may be detained for a period of three months following the day of seizure unless during that period proceedings are undertaken under this Act in respect of the offence, in which case the goods and chattels may be further detained until the proceedings are finally concluded.

Forfeiture

(3) Where a person is convicted of an offence against the sections mentioned in subsection (1), the convicting court or judge may order that the goods and chattels by means of or in relation to which the offence was committed, in addition to any penalty imposed, are forfeited to Her Majesty and may be disposed of as the Minister directs.

Search

(4) A justice who is satisfied by information on oath that there is reasonable ground to believe that there are in a reserve or in any building, receptacle or place any goods or chattels by means of or in relation to which an offence against any of the sections mentioned in subsection (1)

certificat, sans qu’il soit nécessaire de prouver l’authenticité de la signature qui y est apposée ou la qualité officielle du signataire et sans autre preuve à cet égard.

S.R., ch. I-6, art. 101.

Peine lorsque la loi n’en établit pas d’autre

102 Toute personne coupable d’une infraction à une disposition de la présente loi ou d’un règlement pris par le gouverneur en conseil ou le ministre, et pour laquelle aucune peine n’est prévue ailleurs dans la présente loi ou les règlements, encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de deux cents dollars et un emprisonnement maximal de trois mois, ou l’une de ces peines.

S.R., ch. I-6, art. 102.

Saisie des marchandises

103 (1) Chaque fois qu’un agent de la paix, un surintendant ou une autre personne autorisée par le ministre a des motifs raisonnables de croire qu’une infraction à un règlement administratif pris en vertu des paragraphes 81(1) ou 85.1(1) ou aux articles 90 ou 93 a été commise, il peut saisir toutes les marchandises et tous les biens meubles au moyen ou à l’égard desquels il a des motifs raisonnables de croire que l’infraction a été commise.

Détention

(2) Toutes les marchandises et tous les biens meubles saisis conformément au paragraphe (1) peuvent être détenus pendant une période de trois mois à compter du jour de la saisie, à moins que, dans cette période, on n’engage des poursuites en vertu de la présente loi à l’égard de cette infraction, auquel cas les marchandises et biens meubles peuvent être détenus jusqu’à la conclusion définitive des poursuites.

Confiscation

(3) Dans le cas où une personne est déclarée coupable d’une infraction aux articles mentionnés au paragraphe (1), le tribunal ou le juge qui la déclare coupable peut ordonner, en sus de toute peine infligée, que les marchandises et les biens meubles au moyen ou à l’égard desquels l’infraction a été commise soient confisqués au profit de Sa Majesté, et qu’il en soit disposé conformément aux instructions du ministre.

Perquisition

(4) Un juge de paix convaincu, après dénonciation sous serment, qu’il existe un motif raisonnable de croire que, sur une réserve ou dans un bâtiment, contenant ou lieu, se trouvent des marchandises ou des biens meubles au moyen ou à l’égard desquels une infraction à l’un des has been, is being or is about to be committed may at any time issue a warrant under his hand authorizing a person named therein or a peace officer at any time to search the reserve, building, receptacle or place for any of those goods or chattels.

R.S., 1985, c. I-5, s. 103; R.S., 1985, c. 32 (1st Supp.), s. 19; 2014, c. 38, s. 11.

Disposition of fines

104 (1) Subject to subsection (2), every fine, penalty or forfeiture imposed under this Act belongs to Her Majesty for the benefit of the band, or of one or more members of the band, with respect to which the offence was committed or to which the offender, if an Indian, belongs.

Exception

(2) The Governor in Council may from time to time direct that a fine, penalty or forfeiture described in subsection (1) shall be paid to a provincial, municipal or local authority that bears in whole or in part the expense of administering the law under which the fine, penalty or forfeiture is imposed, or that the fine, penalty or forfeiture shall be applied in the manner that he considers will best promote the purposes of the law under which the fine, penalty or forfeiture is imposed, or the administration of that law.

Disposition of fines imposed under by-laws

(3) If a fine is imposed under a by-law made by the council of a band under this Act, it belongs to the band and subsections (1) and (2) do not apply.

R.S., 1985, c. I-5, s. 104; 2014, c. 38, s. 12.

105 [Repealed, 2014, c. 38, s. 13]

Jurisdiction of provincial court judges

106 A provincial court judge has, with respect to matters arising under this Act, jurisdiction over the whole county, union of counties or judicial district in which the city, town or other place for which he is appointed or in which he has jurisdiction under provincial laws is situated.

R.S., 1985, c. I-5, s. 106; R.S., 1985, c. 27 (1st Supp.), s. 203.

Appointment of justices

107 The Governor in Council may appoint persons to be, for the purposes of this Act, justices of the peace and those persons have the powers and authority of two justices of the peace with regard to

articles mentionnés au paragraphe (1) a été commise, se commet ou est sur le point de se commettre, peut lancer un mandat sous son seing, autorisant une personne y nommée ou un agent de la paix à faire, en tout temps, une perquisition dans la réserve, le bâtiment, contenant ou lieu, pour rechercher ces marchandises ou biens meubles.

L.R. (1985), ch. I-5, art. 103; L.R. (1985), ch. 32 (1er suppl.), art. 19; 2014, ch. 38, art. 11.

Emploi des amendes

104 (1) Sous réserve du paragraphe (2), toute amende, peine ou confiscation infligée en vertu de la présente loi appartient à Sa Majesté au bénéfice de la bande — ou d'un ou de plusieurs de ses membres — à l'égard de laquelle l'infraction a été commise, ou dont le délinquant, si c'est un Indien, fait partie.

Exception

(2) Le gouverneur en conseil peut ordonner que le montant de l'amende, de la peine ou de la confiscation soit versé à une autorité provinciale, municipale ou locale qui supporte, en totalité ou en partie, les frais d'application de la loi aux termes de laquelle l'amende, la peine ou la confiscation est infligée, ou que l'amende, la peine ou la confiscation soit employée de la manière qui, à son avis, favorisera le mieux les fins de la loi selon laquelle l'amende, la peine ou la confiscation est infligée, ou l'application de cette loi.

Emploi des amendes infligées en vertu des règlements administratifs

(3) Dans le cas où l'amende est infligée en vertu d'un règlement administratif pris par le conseil d'une bande sous le régime de la présente loi, elle appartient à la bande et les paragraphes (1) et (2) ne s'appliquent pas.

L.R. (1985), ch. I-5, art. 104; 2014, ch. 38, art. 12.

105 [Abrogé, 2014, ch. 38, art. 13]

Juridiction des juges de la cour provinciale

106 Un juge de la cour provinciale a compétence, à l'égard de toutes questions découlant de la présente loi, dans tout le comté, tous les comtés unis ou tout le district judiciaire où se trouve la ville ou autre endroit pour lequel il a été nommé ou dans lequel il a compétence aux termes de la législation provinciale.

L.R. (1985), ch. I-5, art. 106; L.R. (1985), ch. 27 (1er suppl.), art. 203.

Nomination de juges de paix

107 Le gouverneur en conseil peut nommer des personnes qui seront chargées, pour l'application de la présente loi, de remplir les fonctions de juge de paix, et ces personnes ont la compétence de deux juges de paix à l'égard :

(a) any offence under this Act; and

(b) any offence under the *Criminal Code* relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or relates to the person or property of an Indian.

R.S., c. I-6, s. 107.

Commissioners for taking oaths

108 For the purposes of this Act or any matter relating to Indian affairs

(a) persons appointed by the Minister for the purpose,

(b) superintendents, and

(c) the Minister and the Deputy Minister of Indigenous Services,

are commissioners for the taking of oaths.

R.S., 1985, c. I-5, s. 108; 2019, c. 29, s. 358.

Enfranchisement

109 to 113 [Repealed, R.S., 1985, c. 32 (1st Supp.), s. 20]

Schools

Agreements with provinces, etc.

114 (1) The Governor in Council may authorize the Minister, in accordance with this Act, to enter into agreements on behalf of Her Majesty for the education in accordance with this Act of Indian children, with

(a) the government of a province;

(b) the Commissioner of Yukon;

(c) the Commissioner of the Northwest Territories;

(c.1) the Commissioner of Nunavut; and

(d) a public or separate school board.

(e) [Repealed, 2014, c. 38, s. 14]

Schools

(2) The Minister may, in accordance with this Act, establish, operate and maintain schools for Indian children.

R.S., 1985, c. I-5, s. 114; 1993, c. 28, s. 78; 2002, c. 7, s. 184; 2014, c. 38, s. 14.

a) des infractions visées par la présente loi;

b) de toute infraction aux dispositions du *Code criminel* sur la cruauté envers les animaux, les voies de fait simples, l'introduction par effraction et le vagabondage, lorsqu'elle est commise par un Indien ou se rattache à la personne ou aux biens d'un Indien.

S.R., ch. I-6, art. 107.

Commissaires aux serments

108 Aux fins de la présente loi ou de toute question concernant les affaires indiennes, les personnes suivantes sont des commissaires aux serments :

a) les personnes nommées à cet effet par le ministre;

b) les surintendants;

c) le ministre et le sous-ministre des Services aux Autochtones.

L.R. (1985), ch. I-5, art. 108; 2019, ch. 29, art. 358.

Émancipation

109 à 113 [Abrogés, L.R. (1985), ch. 32 (1er suppl.), art. 20]

Écoles

Accords avec les provinces, etc.

114 (1) Le gouverneur en conseil peut, en conformité avec la présente loi, autoriser le ministre à conclure, au nom de Sa Majesté et pour l'instruction des enfants indiens conformément à la présente loi, des accords avec :

a) le gouvernement d'une province;

b) le commissaire du Yukon;

c) le commissaire des Territoires du Nord-Ouest;

c.1) le commissaire du territoire du Nunavut;

d) une commission d'écoles publiques ou séparées.

e) [Abrogé, 2014, ch. 38, art. 14]

Écoles

(2) Le ministre peut, en conformité avec la présente loi, établir, diriger et entretenir des écoles pour les enfants indiens.

L.R. (1985), ch. I-5, art. 114; 1993, ch. 28, art. 78; 2002, ch. 7, art. 184; 2014, ch. 38, art. 14.

Regulations

115 The Minister may

(a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools; and

(b) provide for the transportation of children to and from school.

(c) and (d) [Repealed, 2014, c. 38, s. 15]

R.S., 1985, c. I-5, s. 115; 2014, c. 38, s. 15.

Attendance

116 (1) Subject to section 117, every Indian child who has attained the age of seven years shall attend school.

Idem

(2) The Minister may

(a) require an Indian who has attained the age of six years to attend school; and

(b) require an Indian who becomes sixteen years of age during the school term to continue to attend school until the end of that term.

(c) [Repealed, 2014, c. 38, s. 16]

R.S., 1985, c. I-5, s. 116; 2014, c. 38, s. 16.

When attendance not required

117 An Indian child is not required to attend school if the child

(a) is, by reason of sickness or other unavoidable cause that is reported promptly to the principal, unable to attend school; or

(b) is under efficient instruction at home or elsewhere.

R.S., 1985, c. I-5, s. 117; 2014, c. 38, s. 17.

118 [Repealed, 2014, c. 38, s. 17]

119 [Repealed, 2014, c. 38, s. 17]

120 [Repealed, 2014, c. 38, s. 17]

121 [Repealed, 2014, c. 38, s. 17]

Definitions

122 The following definitions apply in sections 114 to 117.

Règlements

115 Le ministre peut :

a) pourvoir à des normes de construction, d’installation, d’enseignement, d’inspection et de discipline relativement aux écoles, et prendre des règlements à cet égard;

b) assurer le transport, aller et retour, des enfants à l’école.

c) et d) [Abrogés, 2014, ch. 38, art. 15]

L.R. (1985), ch. I-5, art. 115; 2014, ch. 38, art. 15.

Fréquentation scolaire

116 (1) Sous réserve de l’article 117, tout enfant indien qui a atteint l’âge de sept ans doit fréquenter l’école.

Idem

(2) Le ministre peut :

a) enjoindre à un Indien qui a atteint l’âge de six ans de fréquenter l’école;

b) exiger qu’un Indien qui atteint l’âge de seize ans pendant une période scolaire continue à fréquenter l’école jusqu’à la fin de cette période.

c) [Abrogé, 2014, ch. 38, art. 16]

L.R. (1985), ch. I-5, art. 116; 2014, ch. 38, art. 16.

Cas où la fréquentation scolaire n’est pas requise

117 Un enfant indien n’est pas tenu de fréquenter l’école dans l’un ou l’autre des cas suivants :

a) il est incapable de le faire par suite de maladie ou pour une autre cause inévitable, qui est promptement signalée au principal;

b) il reçoit une instruction suffisante à la maison ou ailleurs.

L.R. (1985), ch. I-5, art. 117; 2014, ch. 38, art. 17.

118 [Abrogé, 2014, ch. 38, art. 17]

119 [Abrogé, 2014, ch. 38, art. 17]

120 [Abrogé, 2014, ch. 38, art. 17]

121 [Abrogé, 2014, ch. 38, art. 17]

Définitions

122 Les définitions qui suivent s’appliquent aux articles 114 à 117.

agent de surveillance [Abrogée, 2014, ch. 38, art. 18]

child means an Indian who has attained the age of six years but has not attained the age of sixteen years, and a person who is required by the Minister to attend school; (*enfant*)

school includes a day school, technical school and high school. (*école*)

truant officer [Repealed, 2014, c. 38, s. 18]

R.S., 1985, c. I-5, s. 123; 2014, c. 38, s. 18.

école Sont assimilés à une école un externat, une école technique et une école secondaire. (*school*)

enfant Indien qui a atteint l'âge de six ans mais n'a pas atteint l'âge de seize ans, ainsi qu'une personne que le ministre oblige à fréquenter l'école. (*child*)

L.R. (1985), ch. I-5, art. 123; 2014, ch. 38, art. 18.

RELATED PROVISIONS

— R.S., 1985, c. 32 (1st Supp.), s. 22

Saving from liability

22 For greater certainty, no claim lies against Her Majesty in right of Canada, the Minister, any band, council of a band or member of a band or any other person or body in relation to the omission or deletion of the name of a person from the Indian Register in the circumstances set out in paragraph 6(1)(c), (d) or (e) of the *Indian Act*.

— R.S., 1985, c. 32 (1st Supp.), s. 23

Report of Minister to Parliament

23 (1) The Minister shall cause to be laid before each House of Parliament, not later than two years after this Act is assented to, a report on the implementation of the amendments to the *Indian Act*, as enacted by this Act, which report shall include detailed information on

(a) the number of persons who have been registered under section 6 of the *Indian Act*, and the number entered on each Band List under subsection 11(1) of that Act, since April 17, 1985;

(b) the names and number of bands that have assumed control of their own membership under section 10 of the *Indian Act*; and

(c) the impact of the amendments on the lands and resources of Indian bands.

Review by Parliamentary committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and may, in the course of that review, undertake a review of any provision of the *Indian Act* enacted by this Act.

— R.S., 1985, c. 27 (2nd Supp.), s. 11

Transitional: proceedings

11 Proceedings to which any of the provisions amended by the schedule apply that were commenced before the coming into force of section 10 shall be continued in accordance with those amended provisions without any further formality.

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 32 (1er suppl.), art. 22

Aucune réclamation

22 Il demeure entendu qu'il ne peut être présenté aucune réclamation contre Sa Majesté du chef du Canada, le ministre, une bande, un conseil de bande, un membre d'une bande ou autre personne ou organisme relativement à l'omission ou au retranchement du nom d'une personne du registre des Indiens dans les circonstances prévues aux alinéas 6(1)c), d) ou e) de la *Loi sur les Indiens*.

— L.R. (1985), ch. 32 (1er suppl.), art. 23

Rapport du ministre au Parlement

23 (1) Au plus tard deux ans après la date de sanction de la présente loi, le ministre fait déposer devant chaque chambre du Parlement un rapport sur l'application des modifications de la *Loi sur les Indiens* prévues dans la présente loi. Le rapport contient des renseignements détaillés sur :

a) le nombre de personnes inscrites en vertu de l'article 6 de la *Loi sur les Indiens* et le nombre de personnes dont le nom a été consigné dans une liste de bande en vertu du paragraphe 11(1) de cette loi, depuis le 17 avril 1985;

b) les noms et le nombre des bandes qui décident de l'appartenance à leurs effectifs en vertu de l'article 10 de la *Loi sur les Indiens*;

c) l'effet des modifications sur les terres et les ressources des bandes d'Indiens.

Examen par un comité parlementaire

(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai après son dépôt par le ministre le rapport visé au paragraphe (1). Il peut, dans le cadre de cet examen, procéder à la révision de toute disposition de la *Loi sur les Indiens* édictée par la présente loi.

— L.R. (1985), ch. 27 (2e suppl.), art. 11

Disposition transitoire : procédure

11 Les procédures intentées en vertu des dispositions modifiées en annexe avant l'entrée en vigueur de l'article 10 se poursuivent en conformité avec les nouvelles dispositions sans autres formalités.

— R.S., 1985, c. 17 (4th Supp.), s. 7(2)

Transitional

7 (2) The Surrendered Lands Register kept in the Department before the coming into force of this Act constitutes, on the coming into force of this Act, the Surrendered and Designated Lands Register.

— 1990, c. 16, s. 24(1)

Transitional: proceedings

24 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1998, c. 30, s. 10

Transitional — proceedings

10 Every proceeding commenced before the coming into force of this section and in respect of which any provision amended by sections 12 to 16 applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 2005, c. 9, s. 145

Continuation of existing by-laws

145 (1) By-laws made by a first nation under paragraph 83(1)(a), or any of paragraphs 83(1)(d) to (g), of the *Indian Act* that are in force on the day on which the name of the first nation is added to the schedule are deemed to be laws made under section 5 or 9, as the case may be, to the extent that they are not inconsistent with section 5 or 9, and remain in force until they are repealed or replaced.

Amendment of existing by-laws

(2) For greater certainty, subsections 5(2) to (7) apply to amendments of by-laws referred to in subsection (1).

— L.R. (1985), ch. 17 (4^{e} suppl.), par. 7(2)

Disposition transitoire

7 (2) Le registre appelé avant l’entrée en vigueur de la présente loi Registre des terres cédées devient, à compter de celle-ci, le Registre des terres cédées ou désignées.

— 1990, ch. 16, par. 24(1)

Disposition transitoire : procédures

24 (1) Les procédures intentées avant l’entrée en vigueur du présent paragraphe et auxquelles des dispositions visées par la présente loi s’appliquent se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45 (1) Les procédures intentées avant l’entrée en vigueur du présent paragraphe et auxquelles s’appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1998, ch. 30, art. 10

Procédures

10 Les procédures intentées avant l’entrée en vigueur du présent article et auxquelles s’appliquent des dispositions visées par les articles 12 à 16 se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 2005, ch. 9, art. 145

Maintien des règlements administratifs existants

145 (1) Les règlements administratifs pris par une première nation en vertu de l’alinéa 83(1)a), ou de l’un des alinéas 83(1)d) à g), de la *Loi sur les Indiens* et qui sont en vigueur à la date à laquelle le nom de celle-ci est inscrit à l’annexe sont réputés être des textes législatifs pris en vertu des articles 5 ou 9, selon le cas, dans la mesure où ils ne sont pas incompatibles avec ces articles, et demeurent en vigueur tant qu’ils ne sont pas remplacés ou abrogés.

Modification des règlements administratifs existants

(2) Il est entendu que les paragraphes 5(2) à (7) s’appliquent à la modification des règlements administratifs visés au paragraphe (1).

— 2008, c. 32, s. 21

Existing interests — *Indian Act*

21 (1) Despite section 12, if an interest in land in the Former Tsawwassen Reserve was granted or approved under the *Indian Act* and exists on the effective date of the Agreement, the interest continues in effect in accordance with its terms and conditions unless a replacement interest is issued in accordance with Chapter 4 of the Agreement.

Transfer of rights and obligations

(2) On the effective date of the Agreement, the rights and obligations of Her Majesty in right of Canada as grantor in respect of such an interest are transferred to the Tsawwassen First Nation, which assumes those rights and obligations in accordance with the interest's terms and conditions.

— 2008, c. 32, s. 25

Documents in land registries

25 As of the effective date of the Agreement, registrations or records affecting Tsawwassen Lands that are registered or recorded in a land registry under the *Indian Act* or the *First Nations Land Management Act* have no effect.

— 2010, c. 18, s. 3.1

Report

3.1 (1) The Minister of Indian Affairs and Northern Development shall cause to be laid before each House of Parliament, not later than two years after this Act comes into force, a report on the provisions and implementation of this Act.

Review by committee

(2) Such committee of Parliament as may be designated or established for the purposes of this subsection shall, forthwith after the report of the Minister is tabled under subsection (1), review that report and shall, in the course of that review, undertake a review of any provision of this Act.

— 2010, c. 18, s. 4, as amended by 2015, c. 3, s. 98

Definitions

4 In sections 5 to 9, ***band***, ***Band List***, ***council of a band***, ***registered*** and ***Registrar*** have the same meaning as in subsection 2(1) of the *Indian Act*.

— 2008, ch. 32, art. 21

Droits existants : *Loi sur les Indiens*

21 (1) Malgré l'article 12, les droits sur les terres de l'ancienne réserve de Tsawwassen accordés ou approuvés sous le régime de la *Loi sur les Indiens* et existants à la date d'entrée en vigueur de l'accord sont maintenus, ainsi que les conditions dont ils sont assortis, à moins qu'un intérêt de remplacement soit accordé conformément au chapitre 4 de l'accord.

Transfert des droits et obligations

(2) Les droits et obligations qui incombent à Sa Majesté du chef du Canada à l'égard de ces droits sur les terres sont, à la date d'entrée en vigueur de l'accord, transférés à la Première Nation de Tsawwassen qui s'en acquitte conformément aux conditions dont ceux-ci sont assortis.

— 2008, ch. 32, art. 25

Registres des terres

25 À compter de la date d'entrée en vigueur de l'accord, les inscriptions et dossiers relatifs aux terres tsawwassennes figurant dans tout registre des terres en vertu de la *Loi sur les Indiens* ou de la *Loi sur la gestion des terres des premières nations* sont sans effet.

— 2010, ch. 18, art. 3.1

Rapport

3.1 (1) Au plus tard deux ans après la date d'entrée en vigueur de la présente loi, le ministre des Affaires indiennes et du Nord canadien fait déposer devant chaque chambre du Parlement un rapport sur les dispositions de la présente loi et sa mise en œuvre.

Examen par le comité

(2) Le comité parlementaire désigné ou constitué pour l'application du présent paragraphe examine sans délai le rapport visé au paragraphe (1) après son dépôt. Dans le cadre de l'examen, le comité procède à la révision des dispositions de la présente loi.

— 2010, ch. 18, art. 4, modifié par 2015, ch. 3, art. 98

Définitions

4 Aux articles 5 à 9, ***bande***, ***conseil de bande***, ***inscrit***, ***liste de bande*** et ***registraire*** s'entendent au sens du paragraphe 2(1) de la *Loi sur les Indiens*.

— 2010, c. 18, s. 5

Registration continued

5 For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the *Indian Act*, any person who was, immediately before the day on which this Act comes into force, registered and entitled to be registered under paragraph 6(1)(a) or (c) of the *Indian Act* continues to be registered.

— 2010, c. 18, s. 6

Registration entitlements recognized

6 For greater certainty, for the purposes of paragraph 6(1)(f) and subsection 6(2) of the *Indian Act*, the Registrar must recognize any entitlements to be registered that existed under paragraph 6(1)(a) or (c) of that Act immediately before the day on which this Act comes into force.

— 2010, c. 18, s. 7

Membership maintained — paragraphs 6(1)(a) and (c)

7 For greater certainty, subject to any membership rules established by a band, any person who, immediately before the day on which this Act comes into force, was entitled to be registered under paragraph 6(1)(a) or (c) of the *Indian Act* and had the right to have their name entered in the Band List maintained by that band continues to have that right.

— 2010, c. 18, s. 8

Membership maintained — paragraph 6(1)(c.1)

8 For greater certainty, subject to any membership rules established by a band on or after the day on which this Act comes into force, any person who is entitled to be registered under paragraph 6(1)(c.1) of the *Indian Act*, as enacted by subsection 2(3), and who had, immediately before that day, the right to have their name entered in the Band List maintained by that band continues to have that right.

— 2010, c. 18, s. 9

No liability

9 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this Act comes into force; and

— 2010, ch. 18, art. 5

Inscription maintenue

5 Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la *Loi sur les Indiens*, toute personne qui, à l'entrée en vigueur de la présente loi, était inscrite et avait le droit de l'être en vertu des alinéas 6(1)a) ou c) de la *Loi sur les Indiens* le demeure.

— 2010, ch. 18, art. 6

Droit à l'inscription maintenu

6 Il est entendu que, pour l'application de l'alinéa 6(1)f) et du paragraphe 6(2) de la *Loi sur les Indiens*, le registraire est tenu de reconnaître tout droit d'être inscrit qui existait en vertu des alinéas 6(1)a) ou c) de cette loi à l'entrée en vigueur de la présente loi.

— 2010, ch. 18, art. 7

Appartenance maintenue : alinéas 6(1)a) et c)

7 Il est entendu que, sous réserve des règles d'appartenance fixées par la bande, toute personne qui, à l'entrée en vigueur de la présente loi, avait le droit d'être inscrite en vertu des alinéas 6(1)a) ou c) de la *Loi sur les Indiens* et avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

— 2010, ch. 18, art. 8

Appartenance maintenue : alinéa 6(1)c.1)

8 Il est entendu que, sous réserve des règles d'appartenance fixées par la bande à compter de la date d'entrée en vigueur de la présente loi, toute personne qui a le droit d'être inscrite en vertu de l'alinéa 6(1)c.1) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3), et qui, à cette date, avait droit à ce que son nom soit consigné dans la liste de bande tenue par celle-ci conserve le droit à ce que son nom y soit consigné.

— 2010, ch. 18, art. 9

Absence de responsabilité

9 Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à l'entrée en vigueur de la présente loi et que l'un de ses parents a le droit d'être inscrit en vertu de

(b) one of the person’s parents is entitled to be registered under paragraph 6(1)(c.1) of the *Indian Act*, as enacted by subsection 2(3).

— 2017, c. 25, s. 4

Definition of *declaration*

4 (1) In sections 5 to 8 and 15, ***declaration*** means the declaration made on August 3, 2015 by the Superior Court of Quebec in *Descheneaux c. Canada (Procureur général)*, 2015 QCCS 3555, that paragraphs 6(1)(a), (c) and (f) and subsection 6(2) of the *Indian Act* are inoperative.

Same meaning

(2) Words and expressions used in sections 5 to 10.1 have the same meaning as in the *Indian Act*.

— 2017, c. 25, s. 5

Application

5 Sections 6 to 8 apply if the suspension of the declaration expires before the day on which the order referred to in subsection 15(1) is made.

— 2017, c. 25, s. 6

Registration continued

6 For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the *Indian Act*, any person who was, immediately before the suspension of the declaration expires, registered and entitled to be registered under paragraph 6(1)(a), (c) or (f) or subsection 6(2) of that Act continues to be registered.

— 2017, c. 25, s. 7

Registration entitlements recognized

7 For greater certainty, subject to any deletions made by the Registrar under subsection 5(3) of the *Indian Act*, for the purposes of paragraph 6(1)(f) and subsection 6(2) of that Act, the Registrar must, in respect of the period beginning on the day after the day on which the suspension of the declaration expires and ending on the day on which the order referred to in subsection 15(1) is made, recognize any entitlements to be registered that existed under paragraph 6(1)(a), (c) or (f) or subsection 6(2) of the *Indian Act* immediately before the suspension of the declaration expires.

— 2017, c. 25, s. 8

Membership continued

8 For greater certainty, any person whose name appeared immediately before the expiry of the suspension of the declaration on a Band List maintained in the

l’alinéa 6(1)c.1) de la *Loi sur les Indiens*, édicté par le paragraphe 2(3).

— 2017, ch. 25, art. 4

Définition de *déclaration*

4 (1) Aux articles 5 à 8 et 15, ***déclaration*** s’entend de la déclaration d’inopérabilité relative aux alinéas 6(1)a), c) et f) et au paragraphe 6(2) de la *Loi sur les Indiens* rendue le 3 août 2015 par la Cour supérieure du Québec dans l’affaire *Descheneaux c. Canada (Procureur général)*, 2015 QCCS 3555.

Terminologie

(2) Les termes des articles 5 à 10.1 s’entendent au sens de la *Loi sur les Indiens*.

— 2017, ch. 25, art. 5

Application

5 Les articles 6 à 8 s’appliquent si l’expiration de la suspension de la déclaration survient avant la date de la prise du décret visé au paragraphe 15(1).

— 2017, ch. 25, art. 6

Inscription maintenue

6 Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la *Loi sur les Indiens*, toute personne qui, à l’expiration de la suspension de la déclaration, était inscrite et avait le droit de l’être en vertu des alinéas 6(1)a), c) ou f) ou du paragraphe 6(2) de cette loi demeure inscrite.

— 2017, ch. 25, art. 7

Droit à l’inscription reconnu

7 Il est entendu que, sous réserve de tout retranchement effectué par le registraire en vertu du paragraphe 5(3) de la *Loi sur les Indiens*, pour l’application de l’alinéa 6(1)f) et du paragraphe 6(2) de cette loi — et pour la période commençant le lendemain de la date d’expiration de la suspension de la déclaration et se terminant à la date de la prise du décret visé au paragraphe 15(1) — le registraire est tenu de reconnaître tout droit d’être inscrit qui existait, en vertu des alinéas 6(1)a), c) ou f) ou du paragraphe 6(2) de cette loi, à l’expiration de la suspension de la déclaration.

— 2017, ch. 25, art. 8

Appartenance maintenue

8 Il est entendu que la déclaration à elle seule ne peut priver quiconque dont le nom apparaît, à l’expiration de

Department is not deprived of the right to have their name entered on that Band List by reason only of the declaration.

— 2017, c. 25, s. 9

Construction

9 The provisions of the *Indian Act* that are amended by this Act are to be liberally construed and interpreted so as to remedy any disadvantage to a woman, or her descendants, born before April 17, 1985, with respect to registration under the *Indian Act* as it read on April 17, 1985, and to enhance the equal treatment of women and men and their descendants under the *Indian Act*.

— 2017, c. 25, s. 10

No liability

10 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and

(b) one of the person's parents is entitled to be registered under paragraph 6(1)(c.01) or (c.02) or any of paragraphs 6(1)(c.2) to (c.6) of the *Indian Act*.

— 2017, c. 25, s. 10.1

No liability

10.1 For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent of Her Majesty in right of Canada, or a council of a band, for anything done or omitted to be done in good faith in the exercise of their powers or the performance of their duties, only because

(a) a person was not registered, or did not have their name entered in a Band List, immediately before the day on which this section comes into force; and

(b) that person or one of the person's parents, grandparents or other ancestors is entitled to be registered under paragraph 6(1)(a.1), (a.2) or (a.3) of the *Indian Act*.

celle-ci, sur la liste de bande tenue au ministère du droit à ce que son nom y soit consigné.

— 2017, ch. 25, art. 9

Règle d'interprétation

9 Les dispositions de la *Loi sur les Indiens* qui sont modifiées par la présente loi s'interprètent de façon large afin de remédier à tout désavantage qu'ont subi les femmes ou leurs descendants nés avant le 17 avril 1985 en ce qui a trait à l'inscription au titre de la *Loi sur les Indiens* dans sa version du 17 avril 1985 et afin de parvenir à un traitement égal, sous le régime de la *Loi sur les Indiens*, des femmes et des hommes et de leurs descendants.

— 2017, ch. 25, art. 10

Absence de responsabilité

10 Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à la date d'entrée en vigueur du présent article et que l'un de ses parents a le droit d'être inscrit en vertu des alinéas 6(1)c.01), c.02), ou c.2) à c.6) de la *Loi sur les Indiens*.

— 2017, ch. 25, art. 10.1

Absence de responsabilité

10.1 Il est entendu qu'aucune personne ni aucun organisme ne peut réclamer ou recevoir une compensation, des dommages-intérêts ou une indemnité de l'État, de ses préposés ou mandataires ou d'un conseil de bande en ce qui concerne les faits — actes ou omissions — accomplis de bonne foi dans l'exercice de leurs attributions, du seul fait qu'une personne n'était pas inscrite — ou que le nom d'une personne n'était pas consigné dans une liste de bande — à la date d'entrée en vigueur du présent article et que la personne ou l'un de ses parents ou un autre de ses ascendants a le droit d'être inscrit en vertu de l'un des alinéas 6(1)a.1), a.2) ou a.3) de la *Loi sur les Indiens*.

— 2017, c. 25, s. 11

Consultations by Minister

11 (1) The Minister must, within six months after the day on which this Act receives royal assent, initiate consultations with First Nations and other interested parties in order to address, in collaboration with those First Nations and other parties, issues raised by the provisions of the *Indian Act* related to registration and band membership, including consultations on

(a) issues relating to adoption;

(b) the 1951 cut-off date for entitlement to registration;

(c) the second-generation cut-off rule;

(d) unknown or unstated paternity;

(e) enfranchisement;

(f) the continued federal government role in determining Indian status and band membership; and

(g) First Nations' authorities to determine band membership.

Requirement

(2) The Minister, the First Nations and the other interested parties must, during the consultations, consider the impact of the *Canadian Charter of Rights and Freedoms*, of the United Nations Declaration on the Rights of Indigenous Peoples and, if applicable, of the *Canadian Human Rights Act*, in regard to those issues.

Report to Parliament — design of consultation process

(3) The Minister must cause to be laid before each House of Parliament, within five months after the day on which this Act receives royal assent, a report on the design of a process by which the Minister is to carry out the consultations described to in subsection (1).

Report to Parliament — results of consultations

(4) The Minister must cause to be laid before each House of Parliament, within 12 months after the day on which the consultations begin, a report on the progress made as a result of the consultations and collaboration. The report must set out details as to the consultations carried out, including details related to

(a) issues relating to adoption;

(b) the 1951 cut-off date for entitlement to registration;

— 2017, ch. 25, art. 11

Consultations par le ministre

11 (1) Le ministre, dans les six mois suivant la date de la sanction de la présente loi, débute les consultations et la collaboration avec les Premières Nations et les autres parties intéressées en vue d'apporter des solutions aux questions soulevées à l'égard des dispositions de la *Loi sur les Indiens* concernant l'inscription et l'appartenance à une bande, notamment des consultations à l'égard :

a) de questions relatives à l'adoption;

b) de la date limite de 1951 relativement au droit à l'inscription;

c) de l'exclusion après la deuxième génération;

d) de la paternité inconnue ou non déclarée;

e) de l'émancipation;

f) du rôle continu de l'administration fédérale dans la détermination du statut d'Indien et de l'appartenance à une bande;

g) des pouvoirs des Premières Nations en vue de la détermination de l'appartenance à une bande.

Obligation

(2) Le ministre, les Premières Nations et les autres parties intéressées doivent, lors des consultations, tenir compte des effets de la *Charte canadienne des droits et libertés*, de la Déclaration des Nations Unies sur les droits des peuples autochtones et, si elle est applicable, de la *Loi canadienne sur les droits de la personne* relativement aux questions soulevées.

Rapport au Parlement — plan du processus de consultation

(3) Le ministre fait déposer devant chaque chambre du Parlement, dans les cinq mois suivant la date de la sanction de la présente loi, un rapport sur le plan du processus par lequel il procédera aux consultations prévues au paragraphe (1).

Rapport au Parlement — résultats des consultations

(4) Le ministre fait déposer devant chaque chambre du Parlement, dans les douze mois suivant la date du début des consultations, un rapport sur les progrès réalisés à la suite des consultations et de la collaboration. Le rapport contient des détails concernant les consultations qui ont eu lieu, notamment des détails à l'égard :

a) de questions relatives à l'adoption;

b) de la date limite de 1951 relativement au droit à l'inscription;

(c) the second-generation cut-off rule;

(d) unknown or unstated paternity;

(e) enfranchisement;

(f) the continued federal government role in determining Indian status and band membership; and

(g) First Nations' authorities to determine band membership.

Referral to committee

(5) Each report stands referred to any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established to review matters related to Aboriginal affairs.

— 2017, c. 25, s. 12

Report to Parliament

12 (1) The Minister must, within three years after the day on which this Act receives royal assent,

(a) undertake the following reviews:

(i) a review of the provisions of section 6 of the *Indian Act* that are enacted by this Act in order to determine whether all of the sex-based inequities have been eliminated with respect to those provisions, and

(ii) a review of the operation of the provisions of the *Indian Act* that are enacted by this Act; and

(b) cause to be laid before each House of Parliament a report on those reviews that includes, if he or she determines that any sex-based inequities still exist with respect to the provisions of section 6 of the *Indian Act* that are enacted by this Act, a statement of any changes to the *Indian Act* that he or she recommends in order to reduce or eliminate those sex-based inequities.

Referral to committee

(2) The report stands referred to any committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established to review matters related to Aboriginal affairs.

— 2017, c. 25, s. 13

Publication

13 The Minister must publish every report laid before Parliament under sections 11 and 12 on the Department's website immediately after their tabling.

c) de l'exclusion après la deuxième génération;

d) de la paternité inconnue ou non déclarée;

e) de l'émancipation;

f) du rôle continu de l'administration fédérale dans la détermination du statut d'Indien et de l'appartenance à une bande;

g) des pouvoirs des Premières Nations en vue de la détermination de l'appartenance à une bande.

Renvoi en comité

(5) Sont saisis d'office de ces rapports tout comité du Sénat, tout comité de la Chambre des communes et tout comité mixte désignés ou constitués pour étudier les questions relatives aux affaires autochtones.

— 2017, ch. 25, art. 12

Rapport au Parlement

12 (1) Dans les trois ans suivant la date de sanction de la présente loi, le ministre :

a) procède à l'examen :

(i) des dispositions de l'article 6 de la *Loi sur les Indiens* édictées par la présente loi pour déterminer si toutes les iniquités fondées sur le sexe à l'égard de ces dispositions ont été éliminées,

(ii) de l'application des dispositions de la *Loi sur les Indiens* édictées par la présente loi;

(b) fait déposer devant chaque chambre du Parlement un rapport portant sur l'examen visé à l'alinéa a), lequel fait état notamment — s'il conclut qu'il existe toujours des iniquités fondées sur le sexe à l'égard des dispositions de cet article 6 de la *Loi sur les Indiens* édictées par la présente loi — des modifications qu'il recommande d'apporter à la *Loi sur les Indiens* pour réduire ou éliminer ces iniquités.

Renvoi en comité

(2) Sont saisis d'office de ce rapport tout comité du Sénat, tout comité de la Chambre des communes et tout comité mixte désignés ou constitués pour étudier les questions relatives aux affaires autochtones.

— 2017, ch. 25, art. 13

Publication

13 Le ministre publie les rapports déposés au Parlement en application des articles 11 et 12 sur le site Web de son ministère immédiatement après leur dépôt.

— 2017, c. 25, s. 14

Same meaning

14 Words and expressions used in sections 11 to 13 have the same meaning as in the *Indian Act*.

— 2017, ch. 25, art. 14

Terminologie

14 Les termes des articles 11 à 13 s’entendent au sens de la *Loi sur les Indiens*.

Federal Court Cour fédérale

Date: 20170310

Docket: T-1505-15

Citation: 2017 FC 270

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 10, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MAURICE ARIAL
(VETERAN – DECEASED)
MADELEINE ARIAL (ESTATE)
MADELEINE ARIAL (PERSONALLY)
SONIA ARIAL

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA ON BEHALF OF THE DEPARTMENT OF VETERANS AFFAIRS AND THE VETERANS REVIEW AND APPEAL BOARD

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion by which the defendant, Her Majesty the Queen in Right of Canada, on behalf of the Department of Veterans Affairs (the Defendant), is seeking to strike the entire action for damages brought against it by the plaintiffs, without leave to amend. The defendant feels that said action must be struck on the grounds that it reveals no reasonable cause of action and constitutes an abuse of process as defined in Rules 221(1)(a) and 221(1)(f) of the *Federal Court Rules*, SOR/98-106 (the Rules).

[2] This motion, which was first brought before Prothonotary Mireille Tabib under Rule 369 at the same time as a similar request by the other defendant in the action by the plaintiffs, the Veterans Review and Appeal Board (the Board), is the most recent episode in a long saga that opposes the plaintiffs and Canadian authorities responsible for applying the *Pension Act*, RSC (1985), c. P-6 (the Act), a saga that has already resulted in five judgments or orders by this Court and a judgment by the Federal Court of Appeal, the most recent before the action was brought by the plaintiffs. The list is as follows:

a. *Arial v Canada (Attorney General)*, 2010 FC 184 (Tremblay-Lamer J.), application for judicial review allowed;

b. Order by Tremblay-Lamer J., docket T-1739-10, December 16, 2010, application for judicial review allowed on consent;

c. *Arial v Canada (Attorney General)*, 2011 FC 848 (Shore J.) [*Arial 2011*], application for judicial review allowed;

d. *Arial v Canada (Attorney General)*, 2012 FC 353 (Shore J.), motion for directions dismissed;

e. *Arial v Canada (Attorney General)*, 2013 FC 602 (Roy J.) [*Arial 2013*], application for judicial review dismissed; and

f. *Arial v Canada (Attorney General)* 2014 FCA 215 [*Arial FCA*], appeal of the judgment by Roy J. dismissed.

[3] In the simplest terms, the plaintiffs, the late Maurice Arial (Mr. Arial), a veteran who served in the Second World War, Madeleine Arial, his spouse, and their daughter, Sonia Arial (Sonia), who has been defending the interests of her parents almost since the beginning of this saga, are seeking in their action a total of $802,217.72 in compensation for faults allegedly committed against them by officials from the Department of Veterans Affairs (the Department) and the Board, in processing applications for pensions and other benefits filed under the Act by Mr. Arial and by his spouse following his death. They also believe that they are entitled to non-pecuniary and punitive damages, the amount of which they leave to the discretion of the Court.

[4] The source of the plaintiff's recriminations is the treatment of the initial pension application filed by Mr. Arial, in March 1996, for a stomach problem related to his military service, in which officials at the Department allegedly failed in their duty to provide Mr. Arial aid and assistance, as required by the Act, particularly given his age and precarious health when the application was filed and his low level of education.

[5] It is well-established that, to strike an action on the grounds that it reveals no reasonable cause of action within the meaning of Rule 221(1)(a), the Court, assuming the alleged facts are true, must be satisfied that it is plain and obvious that the action commenced, even if interpreted generously, has no reasonable chance of success (*R. v Imperial Tobacco Canada Ltd.*,

2011 SCC 42, at para 17, [2011] 3 SCR 45*; Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 15, [2003] 3 SCR 263; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, at p. 980).

[6] Moreover, when invited to find that a statement of claim must be struck on the grounds that it constitutes an abuse of process within the meaning of Rule 221(1)(f), the Court must be satisfied that allowing the litigation to proceed would "violate principles such as 'judicial economy, consistency, finality and the integrity of the administration of justice' [...]" (*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422, at para 33 [*Figliola*]). The underlying principles in the approach to be followed to detect the "abuse of the decision-making process" were summarized as follows in *Figliola*, at para 34:

> - It is in the interests of the public and the parties that the finality of a decision can be relied on (References omitted).
>
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (Reference omitted).
>
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (References omitted).
>
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (References omitted).
>
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (Reference omitted).

[7] Before determining whether the Defendant's motion meets these requirements, background is needed given the singular nature of this case and what led to the hearing for that motion.

II. Background

A. *The order and directive by Prothonotary Tabib*

[8] As she was the first to hear the motions to strike filed by the Defendant and the Board, it is important, as initial background, to first examine the manner in which Prothonotary Tabib disposed of these two motions on April 25, 2016.

[9] First, in an order, Prothonotary Tabib allowed the Board's motion, thus striking the plaintiffs' action against it, without leave to amend. Prothonotary Tabib found that the plaintiffs' action constituted an abuse of process and was contrary to the immunity afforded the Board and its members.

[10] Regarding the first basis for her decision, Prothonotary Tabib stated that she was of the view that, in that the plaintiffs were seeking to recover the amounts that should have been paid to them if Mr. Arial had been granted the right to the full pension and attendance allowance, retroactive to March 1996, there was an abuse of process, as that claim ultimately aims to recover amounts for which payment was refused to the plaintiffs after they had exhausted all recourse under the Act. In this regard, Prothonotary Tabib stated the following:

[TRANSLATION]

> Regarding the claim for amounts that Maurice Arial, his spouse or his estate could have received as a pension or allowance if the right to those amounts had been granted retroactively to March 7, 1996, instead of the years from 2000 to 2002, it is clear that the action seeks to recover the same amounts as the plaintiffs unsuccessfully tried to recover through the administrative process provided for in the Act. The breaches and faults that the action alleges were committed by the Board or its agents and that apparently unfairly "deprived" the plaintiffs of their right to full retroactivity have already been or should have been raised as grounds that taint the merits, the appropriateness or the fairness of the Board's decisions at all stages of the administrative process and the judicial reviews undertaken. Moreover, the decision by the Federal Court of Appeal in the judicial review of the Board's last decision is absolutely clear: the Board's decision to cite section 85 was reasonable (*Arial v Canada (Attorney General)*, 2014 FCA 215, at para 30), and therefore cannot be wrongful. The Court of Appeal also stated at paragraph 33 of its reasons:
>
>> […] the maximum award paid under the Act cannot, in any event, ever exceed the three-year retroactivity period (subsections 39(1) and 56(1)) and the additional award equivalent to two years' pension (subsections 39(2) and 56(2)). The appellants were indeed granted the maximum amounts under both these headings.
>
> The plaintiffs' action clearly constitutes an attempt to circumvent the decisions that were rendered and that found the final result of the administrative process to be legal and reasonable. It is an obvious abuse of process that merits being struck. (*Toronto (City) v C.U.P.E., Local 79*, [2003] 3 SCR 77, and *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422, 2011 SCC 52).

[11] Regarding the second ground for striking the plaintiffs' action against the Board, Prothonotary Tabib found that, when considered from the perspective of a civil liability action, the plaintiffs' action is contrary to the immunity of the Board, which limits its civil liability and that of its members to acts resembling bad faith:

> [TRANSLATION]

> The Crown's liability for damages or extra-contractual fault must necessarily be based on the failure of one of its employees or agents, for which the employee or agent could be held liable if he or she were pursued personally.
>
> All wrongdoings that the statement alleges by the Board or its members were solely related to how the Board and its members acted in carrying out their duties. However, it is a well-established rule of law that members of administrative tribunals have immunity from any civil liability action for what they do in carrying out their duties, unless there is evidence of bad faith. (See: Henri Brun, Guy Tremblay, *Droit Constitutionnel*, 4th Ed., Cowansville, Édition Yvon Blais Inc., 2002, at pp. 814–815).
>
> The *Federal Court Rules* require that allegations of deliberate wrongdoings, or regarding the state of mind of a person, such as malice or fraudulent intention, similar to bad faith, must be specified (Rule 181). However, the statement does not allege any fats that, if assumed to be true, would make it possible to conclude that the actions of any member or agent of the Board were tainted by bad faith. That gap, by itself, is also fatal and justifies striking the action.

[12] The plaintiffs did not appeal that decision.

[13] Second, in a directive, Prothonotary Tabib ruled that, unlike the Board's motion, in which the issues seemed clear and simple, despite the complex background of the case, and therefore conducive to a decision without an oral hearing, the Defendant's motion could not be adequately dealt with in writing. She felt that that was the case because the Court would benefit from hearing submissions by the parties in light of paragraph 36 of the decision by Roy J. in *Arial 2013*, which, as we read in the directive, [TRANSLATION] "seems to open the door to a civil liability action under the circumstances of this case […]".

[14] Pursuant to the directive from Prothonotary Tabib, additional written submissions were prepared by the Defendant and its motion was debated orally, in a general motions session at Québec City on November 17, 2016.

B. *Outline of the plaintiffs' statement of claim*

[15] As noted by Prothonotary Tabib, the plaintiffs' statement of claim is prolific and the history of the relationship between Mr. Arial, his spouse and the authorities responsible for applying the Act, which spans over 20 years when we consider the various actions taken by the plaintiffs to claim their rights under the Act, is complex and the supporting documentation is lengthy.

[16] However, as also noted by Prothonotary Tabib, this background, set out in paragraphs 10 to 78 of the statement of claim and includes a total of 95, is not only assumed to be true for the purposes of this motion, but is also not disputed.

[17] In their written submissions to the Defendant's and Board's motions, the plaintiffs indicated that their statement of claim "was in fact a copy/paste of the memorandum of facts and law in docket T-250-11 […]", which led to the judgment by Shore J. in *Arial 2011*. Under the circumstances, it is enough for me to reproduce the following passages from the judgment by Roy J. in *Arial 2013*, which was issued in the wake of the judgment by Short J., to provide the main elements of that background:

> [4] The factual background in this case is complex because of the multiplicity of proceedings. I believe that the following summary will suffice for the purposes of this judicial review.

[5] It should be noted that, parallel to the proceedings that are before this Court regarding a disability pension for stomach problems, the plaintiffs brought a series of proceedings with respect to an application for an attendance allowance and an application for a disability pension for hearing loss. The application for an attendance allowance was the subject of an application for judicial review; Madam Justice Danièle Tremblay-Lamer's decision is found at *Arial v Attorney General of Canada*, 2010 FC 184. We are concerned here only with the saga of the disability pension for stomach problems.

[6] The veteran, Maurice Arial, was born on January 8, 1916. He enrolled in the Royal Canadian Navy in June 1940. From July 1940 to July 1945, on different ships, he was responsible for both machinery maintenance and the supply of ammunition located in the holds of the ships. He was demobilized at the end of the war. In his service records, there are two medical reports dated May 7, 1944, and February 19, 1945. Apart from being rather general, they deal with weight loss, nervousness, fatigue and seasickness.

[…]

[8] On March 7, 1996, Mr. Arial filed an application for a disability pension for stomach ulcers. A number of incidents ensued concerning the filing of a medical report required by the authorities at the time and necessary for considering whether to grant such a pension. In the absence of a medical report, Mr. Arial's file was closed on September 27, 1996. The service documents did not reveal any specific problem other than the seasickness Mr. Arial suffered.

[9] On October 13, 1999, Mr. Arial appointed his daughter as his designated representative. That day, she contacted [Veterans Affairs Canada (VAC)] and filed a new application on her father's behalf for a disability pension based on stomach problems. A few days later, a pension officer sent a form to Mr. Arial asking him to submit a recent medical report. On November 18, 1999, Sonia Arial sent the pension officer a cover letter, the pension application form and a statement from one Dr. Lepage indicating the diagnosis of gastroesophageal reflux [GER]. These documents indicate, inter alia, that Mr. Arial had been under doctor's care for stomach problems since returning from the war.

[10] On December 29, 1999, the pension application was denied. An analysis of Mr. Arial's service documents led to the conclusion that they did not reveal [translation] "any impairment

or condition arising from military service or any injury resulting from a service‑ related accident.”

[11] Mr. Arial passed away on September 25, 2005.

[12] On December 19, 2005, Sonia Arial contacted VAC and asked that an official decision be made concerning the disability pension application for various stomach problems that had been submitted in 1999. Additional information was provided at that time.

[13] On August 8, 2006, VAC, by ministerial decision, denied this application on the ground that the medical service documents did not reveal any impairment and that no relevant dispute had been submitted in Mr. Arial’s file for many years following his demobilization. Sonia Arial disputed this decision.

[14] On January 24, 2007, a review panel of the Veterans Review and Appeal Board confirmed the ministerial decision of August 8, 2006. The review panel found that there was no causal connection between Mr. Arial’s stomach problems and his military service. Sonia Arial also disputed that decision.

[15] On October 30, 2007, an appeal panel of the Veterans Review and Appeal Board granted the plaintiffs a pension entitlement for the Second World War service. The appeal panel recognized that Mr. Arial had suffered from a recurring duodenal ulcer since 1940 and that the GER diagnosis was the manifestation of the ulcer. The appeal panel established the effective date of the pension retroactively to November 9, 2005, the date the application was considered to be complete. No additional award was granted.

[16] The issue that gave rise to this application for judicial review concerns the commencement date of the pension that the plaintiffs say they are entitled to. They disputed the date of November 9, 2005.

[17] On June 24, 2008, a reconsideration panel of the Veterans Review and Appeal Board refused to change the effective date of the pension on the ground that the application was not completed until that date under the *Award Regulations*.

[18] This issue was heard again before a second reconsideration panel. On May 14, 2009, this second reconsideration panel agreed that a pension application was made in 1996. It established the effective date as October 30, 2004, the day three years prior to the day on which the pension was awarded, invoking paragraph 56(1)(*a.1*) of the *Pension Act*, RSC 1985, c P-6 (the Act), and

granted an additional award of 24 months under subsection 56(2) of the Act because of delays beyond the plaintiffs' control. [Quote from subsections 56(1) and 56(2) of the Act omitted]

That decision was, in turn, disputed by Sonia Arial.

[19] On December 2, 2010, a third reconsideration panel denied Sonia Arial's application for reconsideration because there were no grounds warranting a new examination under section 32 of the *Veterans Review and Appeal Board Act*, SC 1995, c 18.

[20] That decision was subsequently the subject of an application for judicial review (*Arial Estate*, *supra*). Justice Shore set aside the decision of December 2, 2010, and referred the case back to a differently constituted panel.

[21] As a result of Justice Shore's decision, a new hearing was held before the Board on November 1, 2011. A decision was finally issued on January 4, 2012, the decision that is the subject of this judicial review.

[Heading omitted]

[22] To understand the decision for which judicial review is sought, it is important to first identify the *ratio decidendi* of the Court's judgment by Mr. Justice Shore because that decision for which review is sought was intended to be the follow‑ up ordered by the Court.

[23] On the basis of the minister's duty under subsection 81(3) of the Act to "on request, provide a counselling service to plaintiffs and pensioners with respect to the application of the Act to them; and assist plaintiffs and pensions in the preparation of applications", Justice Shore ordered that the issue of the retroactivity of the pension be examined again. Paragraph 65 of the decision is instructive:

> [65] Moreover, it is not this Court's role to determine if the pension should be retroactive to May 7, 1996, or not; rather, the Court must determine whether the case should be referred back to a new panel so that the facts and law can be reconsidered should an error in fact or in law have been committed. It will be up to this new panel to determine whether the retroactive effect of the award should be extended back to March 7, 1996. <u>Clearly, Parliament does not speak in vain. Since Parliament has provided that VAC pension officers</u>

> owe veterans certain obligations to provide them with the information they seek about pension applications, a breach of these obligations must carry consequences.
>
> [Emphasis in original]

[24] Thus, the Court did not pre-order a conclusion by the reconsideration panel. Pointing to the spirit of the Act , which is intended to be generous and which should be interpreted that way, the Court referred the case back so that the facts and law could be re- examined. Paragraph 76 appears to me to capture the essence of the Court’s decision:

> [76] VAC’s breach of the duty owed to Mr. Arial degraded the quality of life of this veteran. The Court refers the case back to the Veterans Review and Appeal Board so that the Board can review its responsibilities toward the Arial family. It will be up to the Board to determine what a major breach of its duty to inform is worth, in accordance with the legislation and the case law and bearing in mind that fact that it is not merely suggested but is explicitly stated in the PA itself that VAC must provide a counselling service to plaintiffs and pensioners “with respect to the application of this Act to them . . . and . . . assist plaintiffs and pensioners in the preparation of applications” (subsection 81(3) of the PA). The Board has an obligation to stay true to its mandate to respect this statement and not treat it like a superficial public relations ploy.

[25] Faced with this order, the Board reviewed the issue of the date on which the pension should be paid in light of the law and the facts. In its decision, the Board stated that it was unable to do better than the final decision already made. The pension could be paid effective October 30, 2004, three years prior to the date of the decision to award a pension. An additional award of 24 months was granted under subsection 56(2) of the Act.

[26] Essentially, the Board submitted to this Court’s decision and concluded that, in accordance with the clear wording of the Act, it confirmed the previous decision.

[18] The statement of claim refers to the judgment by Roy J., but it must be noted, which it does not clearly do, that Roy J. dismissed the plaintiffs' application for judicial review of the Board's decision, which was pursuant to the judgment by Shore J. in *Arial 2011*. In his judgment, Roy J. first noted the concession by the plaintiffs, correctly in his view, that the Board had awarded them the maximum under the Act for failures by the Department in their regard (*Arial 2013*, at paras 27–28). He then dismissed the plaintiffs' alternate grounds that the Board should have awarded more for the Department's failure to provide them with assistance by referring them to the Minister of Veterans Affairs (the Minister) to exercise its discretion under section 85 of the Act. In this regard, Roy J. found that referring the case to the Minister would not have helped them in any way, as the Minister could not have awarded them damages in addition to what they had already received without contravening the Act. As such, he found, the Board's decision to not refer the case to the Minister was reasonable (*Arial 2013*, at paras 33–36).

[19] For the same reasons, it must also be noted that, in *Arial FCA*, the Federal Court of Appeal dismissed the applicants' appeal of the judgment by Roy J., finding that the latter's refusal "to order that the matter be referred to the Minister is necessarily reasonable because even if he had done so, the appellants could not have been awarded any additional amount" (*Arial FCA*, at para 34).

[20] Once this background is understood, I find that the essence of the action taken by the plaintiffs in this case, which according to paragraph 95 of the statement of claim is based on the extra-contractual liability of the Crown and, at the same time, subsection 24(2) of the *Canadian*

Charter of Rights and Freedoms (the Charter), can be summarized as Prothonotary Tabib did in her order on April 25, 2016:

> [TRANSLATION]
>
> […] Mr. Arial first filed a pension application under the [Act] in March 1996. Eventually, following numerous applications for review, appeals and judicial reviews, Mr. Arial's right to his full pension and an attendance allowance for various conditions was recognized, but only retroactive to the period from June 2000 to October 2002. According to the plaintiffs, were it not for the wrongful and illegal actions of the defendants, Mr. Arial's right to the full pension and allowance would have been recognized retroactive to 1996, and Sonia Arial would not have had to spend more than 6,000 hours and incur costs, including medical costs, to help her father in his efforts.
>
> The action therefore seeks "losses" due to the lack of full retroactivity for Mr. Arial and his spouse, lost wages and medical costs incurred by Sonia Arial as pecuniary damages, and non-pecuniary damages not quantified by the three plaintiffs.

[21] In that regard, it seems important to cite paragraph 94 of the statement of claim, which sets out what the plaintiffs claim they want to show, if there are proceedings, to convince the Court of the merits of their claims:

> [TRANSLATION]
>
> 94. Under Rule 181(1) of the Federal Court Procedures [sic], the plaintiffs seek to show the Federal Court that:
>
> (a) The [Veterans Review and Appeal Board (VRAB)] changed my testimony on two occasions: May 2006 and January 2007;
>
> (b) The [Department of Veterans Affairs (DVA)] has been advised of the unfair situation, in a 1st letter was sent to the Minister in July 2007, a 2nd letter in April 2008 and, finally, a 3rd in July 2010, without any action on their part, total denial.
>
> (c) the DVA and VRAB changed the wording of the claim in a decision regarding the [gastroesophageal reflux (GER)], when it

should have decided regarding the duodenal ulcer including the RGO.

(d) The VRAB put words in the mouth of my counsel, something that he never said or that we had discussed together: “the pension officer must obtain/find the diagnosis”.

(e) Through its lack of actions, during the proceedings, the VRAB compelled my counsel, who had taken the case PRO BONO, to send them a formal notice for Contempt of Court to get them to react. However, there was an order on consent from the Federal Court by Tremblay-Lamer J. between counsel for the family and counsel for the Department of Justice. That took five months to resolve.

(f) The DVA or VRAB ignored the job description for a pension officer, the pension officer manual, finally, they did everything contrary to the Act.

(g) The VRAB ignored subsection 81(2), although in 1976, “The Board considered that an application was not complete if there was no evidence of disability. The Board disagreed and found that a decision was mandatory, whether or not there was a disability.” – All applications = a decision.

(h) The VRAB ignored the letter from Régis Gagnon in December 1999, overwhelming evidence mentioned by HQ at the 1st hearing.

(i) At the hearing on May 14, 2009, the VRAB considered this: “The Board considers that this application was judged with the required expeditiousness, that there were no delays beyond the plaintiff’s control and that the retroactivity for this condition was granted on the application date”. In 2011, Shore J. of the Federal Court contradicted that allegation.

(j) In its decision on June 24, 2008, the VRAB considered that there was “no error in factor in law”. The decision was overturned.

(k) The VRAB prevented me from speaking to them at the hearing on May 14, 2009, despite the decision by Tremblay-Lamer J. in 2001 in Gagné.

(l) In doing so, the VRAB forced me to take a series of steps over four months to obtain the reasons for decision.

(m) The members of the VRAB thus abused their immunity, placing the burden of proof on the appellants.

(n) The VRAB refused to recognize that the applications were split in 2004.

(o) The timelines were not respected, despite numerous requests.

[22] On reading that paragraph of the statement of claim, it must be noted, and I will return to this, that the allegations that make up the basis of the plaintiffs' action are almost all addressed to the Board.

[23] I also feel that it is important here to cite paragraph 2 of the statement of claim, which summarizes well, in my opinion, what underlies this action by the plaintiffs and the importance for it of the judgment by Short J. in *Arial 2011*:

[TRANSLATION]

2. On November 1, 2011, after not disputing or complying with the reasons for judgement and the judgment by the Honourable Mr. Justice Michel Shore, **docket T-250-11**, the Veterans Review and Appeal Board, in its role as an administrative tribunal, increased the damages in a negative decision with different reasons with which the plaintiffs disagree, as they are unfounded. The subsequent decisions by the Federal Courts were negative, so the plaintiffs have no choice but to take the necessary actions to obtain reimbursement for the harm caused by the infringement of their rights.

[24] Finally, it must be noted that Mr. Arial and his spouse, who are the primary individuals concerned with the decisions by authorities responsible for applying the Act in this case, are not the only one seeking compensation. Their daughter, Sonia, is also seeking damages that, incidentally, represent more than 50% ($410,084.33) of the total amount claimed from the

Defendant ($802,217.72). However, as we will see, her legal relationship with the Defendant is not the same, as is therefore the resulting legal analysis regarding the admissibility of her claim.

III. Analysis

[25] In my view, the plaintiffs' action has no more chance of success against the Defendant than it had against the Board and, in its current wording, is just as much an abuse of process. In that regard, paragraph 35 of the judgment by Roy J., which is the source of the hesitation by Prothonotary Tabib in reserving the same outcome for the Defendant's motion as the Board's motion, does not at all change this and is therefore of no use to the plaintiffs.

[26] I note that that paragraph of the judgment by Roy J. is part of the reasons why she dismissed the plaintiffs' argument that the Board should have awarded more for the Department's failure to assist them by referring the matter to the Minister so that he could exercise his discretion under section 85 of the Act in their favour. Roy J. found that that argument was of no use to them, as the Minister could not award them more damages than they had already received without contravening the Act. In other words, Roy J. found, and the Federal Court of Appeal agreed in *Arial FCA*, that the plaintiffs would not hope to receive more from the compensation plan set out in the Act than what they had already been paid. That is what led the Federal Court of Appeal to say that the judgment by Shore J., which led to the Board's decision before Roy J. for judicial review, unfortunately, "did create false hopes" (*Arial FCA*, at para 35).

[27] It is also what led Roy J. to say at the very end of paragraph 35 of his judgment, which clearly seems to have led Prothonotary Tabib to set a hearing in the case, that the alleged wrong

committed by the authorities responsible for applying the Act was one of two things: either “in the range of what is described in subsection 56(2)”, in which case “the Act establishes its own remedy”, or “of a different kind”, in which case “we are then in the area of civil liability where the Board has no jurisdiction.”

[28] I interpret that passage from the judgment by Roy J. as meaning that, if the plaintiffs want to obtain additional compensation beyond what has already been recognized under the Act, including for failure to provide assistance, the right to such compensation must be rooted not in the Act, but in a different legal system, in this case the civil liability of the Crown. However, Roy J. did not rule on the conditions for admissibility of such an action, and much less on the admissibility of an eventual claim by the plaintiffs under the *Crown Liability and Proceedings Act*, RSC (1985), c. C-50 (CLPA), particularly regarding section 9 of that Act, as he was not required to do so and, in any event, was not in a position to do so. Indeed, that was not his role in the judicial review before him and it was not up to him either, as such, to speculate on how an eventual claim of that type by the plaintiffs would be worded.

[29] Section 9 of the CLPA is, in my view, an estoppel to the plaintiffs’ action, as they worded it. That provision reads as follows:

No proceedings lie where pension payable	**Incompatibilité entre recours et droit à une pension ou indemnité**
9 No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds	9 Ni l’État ni ses préposés ne sont susceptibles de poursuites pour toute perte — notamment décès, blessure ou dommage — ouvrant droit au paiement d’une pension ou indemnité sur le Trésor ou sur des fonds

administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.	gérés par un organisme mandataire de l'État

[30] It is well-established that the purpose of that provision is to prevent double recovery of damages for a single event providing entitlement to a pension or allowance from the consolidated revenue fund and that it applies to all damages arising from that event, even if the damages claimed in the legal action "did not match the apparent head of damages compensated for in that pension" (*Sarvanis v Canada*, 2002 SCC 28, at paras 28–29, [2002] 1 SCR 921 [*Sarvanis*]). This is to "ensure that there is no Crown liability under ancillary heads of damages for an event already compensated" (*Sarvanis*, at para 29).

[31] It is also well-established that section 9 of the CLPA applies in a context such as when a pension or indemnity was paid — or is payable — under the Act. In *Dumont v Canada*, 2003 FCA 475 [*Dumont*], the Federal Court of Appeal, citing in particular section 9 of the CLPA, struck the claims of two members of the Canadian Forces who claimed that the Forces were liable for damages associated with post-traumatic stress disorder they said they suffered due to events arising from or related to their military service.

[32] In that case, the plaintiffs placed a great deal of emphasis, in their respective statements of claim, on the incompetence that the Canadian Forces' employees, personnel and agents showed toward them, their negligence in fulfilling their legal obligations, the abuse of authority that they exhibited, the Canadian Forces' failure to fulfill its fiduciary obligation and its breach of section 7 of the Charter (*Dumont*, at para 39). Each claimed to suffer from major depression,

internal stress, serious disturbance of interpersonal relationships, significant feelings of aggression, resulting in serious symptoms of irritability, post-traumatic stress, resulting in major problems at the family level, great difficulty adapting socially and living in an urban setting, intolerance to stress, symptoms of overstimulation, increasing demoralization, and difficulty concentrating (*Dumont*, at paras 28–29). Both had been partially compensated under the Act, in one case for major depression and, in the other, for post-traumatic stress disorder.

[33] The Federal Court of Appeal found that the claims were "prohibited under section 9 of the Act because any loss or damage that is claimed gives entitlement to payment of a pension" and that they should therefore be struck "because it is 'plain and obvious beyond a reasonable doubt' that they cannot succeed" (*Dumont*, at para 73).

[34] In *Sherbanowski v Canada*, 2011 ONSC 177 [*Sherbanowski*], the Ontario Superior Court reached the same conclusion in a case brought under the CLPA by a former member of the Canadian Forces who was seeking to recover losses and damages resulting from his military service. The plaintiff stated that he suffered various forms of harassment during his military service, including after he filed a compensation claim under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, SC 2005, c. 21 (*Veterans Compensation Act*). He also alleged that the Canadian Forces refused his initial pension application and did not implement adequate policies and procedures regarding abuse and harassment. Finally, he sought not only general damages, but also damages for the loss of past and future income that is not compensated under the *Veterans Compensation Act*, and exemplary damages (*Sherbanowski*, at paras 40, 41 and 46).

[35] The Ontario Superior Court found that the plaintiff's action was inadmissible under section 9 of the CLPA because the action was based around the same factual basis as the compensation applied for under the *Veterans Compensation Act*. It added that the fact that the plaintiff was also seeking damages for breach of contract, misrepresentation, breach of fiduciary obligation and breach of Charter rights did not change anything. The Court stated the following in this regard:

> [43] A complete identity exists between the losses asserted by Mr. Sherbanowski in this action in respect of the Events Claims and the losses for which awards of disability benefits have been granted to Mr. Sherbanowski and for which he has received payment or which are payable to him. The factual basis upon which Mr. Sherbanowski rests his claims for damages in this action is the same factual basis upon which he rested his applications for disability awards under section 45 of the Compensation Act – i.e. harassment and abuse prior to his deployment to Bosnia; his possible exposure to uranium in Bosnia; and the harassment and abuse following his return from Bosnia, including the difficulties he claims he encountered in securing medical attention. His Statement of Claim, in essence, reproduces the events Mr. Sherbanowski narrated in the 16-page document attached to his application for PTSD benefits.
>
> [44] Although Mr. Sherbanowski pleads, in addition to his claims sounding in negligence, causes of action framed in breach of fiduciary duty, breach of contract, misrepresentation and breach of Charter rights, they all either arose out of, or are directly connected with, his service in the Forces and they seek compensation for disabilities or injuries resulting from a service-related injury or disease: *Compensation Act*, ss. 2(1) and 45(1). Those additional claims are "claims" within the meaning of section 9 of the CLPA because any loss or damage claimed gives entitlement to payment of a pension or compensation: *Dumont v. Her Majesty the Queen*, 2003 FCA 475 (CanLII), para. 73.
>
> [45] Mr. Sherbanowski has not pleaded a recognizable cause of action in respect of [Veterans Affairs Canada's] initial denial of his applications. The governing statutory scheme afforded Mr. Sherbanowski a right of appeal to the Board, which he utilized, and he was successful on his appeals.

[36] Recently, in *Hardy Estate v Canada (Attorney General)*, 2015 FC 1151 [*Hardy Estate*], Prothonotary Kevin R. Aalto struck the action by a veteran's estate (the Estate) under the CLPA based, among other things, on section 9 of that Act. That case also had similarities to the case at hand. Indeed, the veteran [Mr. Hardy], who was seriously injured during military training in 1943, had taken steps the next year to be compensated under the Act. Those efforts were unsuccessful, according to the Estate, because of the failure of the Department's employees to help him complete the appropriate pension application. In 1975, Mr. Hardy filed a new pension application, which was not processed and for which he again did not receive any assistance from the Department. It was only 1997, following a fourth attempt, that Mr. Hardy was granted a pension. He passed away two years later (*Hardy Estate*, at paras 3 to 9).

[37] In 2010, the Estate appealed the element of that decision regarding the retroactivity of the pension. The estate claimed that the pension should have been paid from the date of the first pension application in 1944 or, alternatively, from the date of the application filed in 1975. The Board ultimately recognized that the pension application filed by Mr. Hardy in 1975 was satisfactory and well-founded and that the Department's failure to respond to that application was attributable to administrative difficulties within the Department that were beyond Mr. Hardy's control, meaning that, under subsection 39(1) of the Act, Mr. Hardy would have been entitled to benefit from the maximum retroactivity period set out in that provision, i.e. three (3) years from the date on which the pension was granted (*Hardy Estate*, at paras 10–11).

[38] The list of remedies sought by the Estate was lengthy. It is worth reproducing here, as it is largely similar to that of the plaintiffs in the case at hand. Prothonotary Aalto gave the following list:

> [14] The Claim seeks a range of remedies. the remedies include the following:
>
> a) A declaration that the Defendant owed a duty of care to the Veteran and breached that duty causing the Veteran and the Plaintiffs directly and indirectly physical and emotional distress, loss of income, and humiliation;
>
> b) The Defendant breached the Plaintiffs' rights pursuant to section 7 of the Charter;
>
> c) Damages pursuant to section 24 one of the Charter;
>
> d) A declaration of the limitation on the ability to correct errors or failures of the Department pursuant to section 39 of the *Pension Act* violates section 7 of the Charter and is therefore of no force in effect;
>
> e) An accounting of shortfalls in payment of pension benefits to the Veteran retroactive to 1994 and restitution of benefits unfairly denied from 1943 to 1994;
>
> f) Damages for negligence including damages for mental suffering and distress;
>
> g) Loss of employment;
>
> h) Reduced capacity for employment;
>
> i) An underpayment of pension benefits;
>
> j) Damages for misfeance [in the exercise of a public office];
>
> k) Damages for vicarious liability for failing to adequately train and/or supervise medical officers and personnel;
>
> l) General damages;
>
> m) Aggravated damages
>
> n) Costs.

[39] Prothonotary Aalto found that section 9 of the CLPA provided a bar to the Estate's claim because, in his view, that claim stemmed from the fact that the conduct of the Department and the Board prevented a proper pension, both in amount and the scope in time, being paid to Mr. Hardy and his spouse and that it was then "an action respecting a 'pension or compensation […] out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown' for, *inter alia*, injury" (*Hardy Estate*, at para 66).

[40] In the case at hand, there is no doubt that the claims by Mr. Arial and his spouse are barred by section 9 of the CLPA. Their daughter Sonia, on their behalf, is claiming pecuniary damages ($245,117.56 for Mr. Arial, and $47,015.83 for his spouse), punitive damages, the amount of which is left to the discretion of the Court, and non-pecuniary damages, the amount of which is also left to the discretion of the Court, for injury to honour and human dignity in both cases, and for [TRANSLATION] "loss of choices" for Mr. Arial, and "increased responsibility" for Ms. Arial.

[41] As was the case in *Hardy Estate*, the claims by Mr. Arial and his spouse all arise from the fact that, were it not for the alleged wrongs by the Department and the Board, they would have been awarded appropriate compensation under the Act, i.e. retroactive to March 1996, the date of Mr. Arial's first pension application. I note that, according to paragraph 2 of the plaintiffs' statement of claim, which I reproduced in paragraph 23 hereof, this action was brought after the plaintiffs failed, before this Court and the Federal Court of Appeal, to have the Board's decision following the decision by Shore J. in *Arial 2011* overturned because the Board allegedly failed, in their view, to comply with that judgment. The plaintiffs feel that they had no choice, at that

time, but to [TRANSLATION] “take the necessary steps to obtain reimbursement for harm caused by the infringement of their right”.

[42] We can but note the concordance between the event for which Mr. Arial and his spouse were paid compensation under the Act and the event that is the basis of this civil liability action, i.e. loss or damage providing entitlement to a pension or allowance from the Consolidated Revenue Fund—in this case, the losses and damages suffered by Mr. Arial during his military service—, which pension or allowance allows for the payment of an additional award when the processing of the pension application is affected by administrative delays or difficulties beyond the control of the person applying for the pension. I note that, in this case, the plaintiffs were not ultimately granted the right to payment of the maximum compensation (*Arial FCA*, at para 35).

[43] That concordance did not escape Prothonotary Tabib, who, as we have seen, found that the action by the plaintiffs was an abuse of process in that the plaintiffs were seeking, for essentially the same reasons, to recover the same amounts that they had unsuccessfully tried to recover through the administrative process set forth in the Act. That finding is just as relevant for the purposes of this motion to strike by the Defendant as it was for the Board’s motion. Where Prothonotary Tabib saw, rightfully in my view, an abuse of process as defined in *Figliola*, above, we must also see, in light of the above, an estoppel under section 9 of the CLPA, regardless of the nature of the head of damages claimed by the plaintiffs in this case, even if those heads of damage are not the same as those compensated by the pension (*Sarvanis*, at para 29).

[44] It must be noted here that the vast majority of the allegations by the plaintiffs against the authorities under the Act are against the Board, as seen in paragraph 94 of their statement of claim. The plaintiffs seem to accuse it, when it had the authority and power, of not having corrected, as they wanted, the "original" error made in 1996 by employees of the Department and of thus having failed to comply with the judgment issued by Shore J. in *Arial 2011*. I note here that the action by the plaintiffs, in that it is directed against the Board, was deemed inadmissible by Prothonotary Tabib.

[45] Apart from that "original" failure, the only allegations against the Department are therefore summarized as (i) having done nothing after being advised three times that the Board had twice changed Sonia's testimony; (ii) having, with the Board, changed the wording of the pension application for the duodenal ulcer, including the problem of gastroesophageal reflux (GER), by issuing a decision solely on the GER; (iii) having ignored the pension officer job description and manual, thus contravening the Act; and (iv) not having respected the deadlines despite numerous requests (see Statement of Claim, at paras 94(a), (b), (c), (f) and (o)).

[46] Once again, these failures are related to the adequate nature of the compensation paid to the plaintiffs under the Act. Most if not all were, or should have been, the subject of an action under the Act. As such, they cannot be dissociated from [TRANSLATION] "an event already compensated" (*Sarvanis*, at para 29). Under section 9 of the CLPA, they therefore cannot constitute a civil liability action against the Defendant.

[47] Having found that the claims by Mr. Arial and his spouse are barred by section 9 of the CLPA, I must now examine the claim by their daughter, Sonia, which is essentially related to her position as representative for her parents. As I have already indicated, this claim ($410,084.33) totals more than half of the damages sought in the action. They include an amount of $300,000.00 for hours worked defending the case and an amount of $100,000.00 for [TRANSLATION] "lost wages, leave and illness for the case". The rest is related to various disbursements (Court costs, photocopies, legal consultation, medical expenses, medication, etc.) related to the defence of the case.

[48] The Defendant claims that the damages sought by Sonia are related to the event for which a pension was paid and therefore fall under section 9 of the CLPA. It also claims that the amounts are in the nature of costs, within the meaning of Rule 400, and that were up to Mr. Arial and his spouse claim, as permitted by the Rules, in the various actions that they launched to claim their rights under the Act.

[49] I agree that the claim by Sonia is related to the event for which a pension was paid in this case to Mr. Arial and that, in essence, it is in fact in the nature of costs, which is an argument in favour of its inadmissibility. However, it seems to me that the claim is inadmissible in another regard. As I already stated, for all practical purposes, Sonia is seeking to be compensated for her representation efforts, which, it must be noted, were considerable. her dedication and tenacity were exemplary. She defended the interests of her parents tooth and nail in a case in which the roadblocks were many and, in some cases, avoidable. The Court can only salute this ongoing effort.

[50] However, is it enough for a decision against the Defendant in favour of Sonia, who essentially acted as the agent for her parents, a mandate that must also be assumed was at no cost, under the terms of article 2133 of the *Civil Code of Quebec*? I do not believe so. In fact, from the moment when she took over for her parents in 1999 in their efforts with authorities responsible for application of the Act, Sonia acted in their behalf. As such, she did not develop any legal ties to the Defendant regarding the implementation of the Act. It was thus essentially for, and on behalf of, her parents that she invested some 6,000 hours that she alleges to have spent on the case. Her dealings with Defendant were always part of her mandate as representative. At no time did Sonia deal with the Defendant on her own behalf.

[51] For a legal relationship to be established between Sonia and the Defendant under the CLPA, at least three elements must be present: a fault, damage and a causal link between the fault and the damage (Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile*, 8th Ed., vol. 1, Cowansville, Éditions Yvon Blais, at p. 115 [*Baudouin and Deslauriers*]). Moreover, for there to be a causal link, the damage must be “direct”, meaning that it must have been the logical and immediate result of the fault. This principle reveals the desire of Quebec courts, as civil law is the suppletive law here under the terms of section 3 of the CLPA, to [TRANSLATION] “only retain as cause the event or events that logically and intellectually are closely tied to the harm claimed by the victim” and thus exclude from the causality “indirect” damage , i.e. “damage resulting from the damage”, or damage “for which the immediate source is not the fault itself, but another harm already caused by the fault” (*Baudouin and Deslauriers*, at pp. 720–721**)**.

[52] In this case, there is no doubt, in my view, that the harm that Sonia feels she suffered is the result of the harm her parents suffered from the actions taken against them by the Defendant, not the actions themselves. Moreover, it is hard to imagine, for example, in a case that proved longer and harder than anticipated because of the other party's actions, how a lawyer could sue that party to cover his or her fees and recover damages suffered in carrying out that mandate. That right is instead the right of the client if he or she is able to show in exercising his or her right to take legal action that the other party acted in an objectionable manner (*Hinse v Canada (Attorney General)*, 2015 CSC 35, at para 170). It is therefore damage suffered by the client, not by the lawyer, i.e. the client's agent.

[53] As currently worded, Sonia's claim is only related to her position as a representative, nothing more, and aims only for "damage resulting from the damage", meaning that, on that basis as well, it has no chance of success.

[54] Does the fact that Sonia's claim, and those of her parents, are alternatively based on subsection 24(1) of the *Charter* rescue the cause? The answer is no, as we saw in *Dumont*, *Sherbanowski* and *Hardy Estate*. Indeed, section 9 of the CLPA refers to <u>all</u> damages related to an event for which compensation has been or could be paid (*Sarvanis*, at para 29). Moreover, the plaintiffs do not allege how, or even under what provision(s), the Defendant in this case is liable under the *Charter*. The statement of claim is totally silent in that regard. Thus, that in itself is a bar to this alternative means. As the Federal Court of Appeal noted again recently in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*], an plaintiff must "plead, in summary form but with sufficient detail, the constituent elements of each cause action or legal

ground raised", failing which the pleading shall be struck". As such, the pleading must be detailed enough to "tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso*, at para 19).

[55] This requirement, set out in Rule 174, applies equally to matters related to the Charter. It is imperative (*Mancuso*, at paras 20–21). However, it is lacking in this case.

[56] Like all my colleagues before me, I sympathize with the plaintiffs and this judgement will certainly not assuage their frustration. However, my role is to assess the situation in light of the law. Here, in my view, the claim by the plaintiffs fails.

[57] It may be that the law is not generous enough when compensating veterans whose cases encounter significant and repeated delays that are beyond their control. However, as noted by Gauthier J., as he then was, in *Cadotte v Canada (Veterans Affairs)*, 2003 FC 1195, at para 22, it is important to recall that, despite its limitations, "the veterans' pension scheme under the Act is a very generous one". It is also important, to put everything in perspective, to recall the reasons behind the limitations to retroactivity in the payment of pensions and allowances granted under the Act. To this end, I quote what the Court said about this in *Leclerc v Canada (Attorney General)*, [1998] FCJ No. 153, 150 FTR 1:

> [18] Just as the provisions of the Act must be interpreted in such a way as to maximize payments for the benefit of pensioners, so subsection 39(1) is clear as to its effects in the context of this case. The purpose of that section is to limit the retroactive effect of any pension awarded to a maximum of three years. The only exception to this limitation is the one set out in subsection 39(2), which allows the Board to make an additional award in an amount not exceeding the cumulative annual value of two years pension.

> [19] The limitation thus imposed on the retroactive payment of pensions is made necessary by the legislative scheme established for the benefit of pensioners. The effect of the scheme is that once a pension is awarded it is always reviewable, and in the course of such reviews the Board may have regard to any new evidence and amend its earlier findings of fact or of law in the event that it considers them to be erroneous. The reason why Parliament instituted a scheme that allows pensioners to present any new fact or legal argument, at any time, that could affect the amount of the pension paid to them, is to maximize the benefit derived from pensions and also to recognize the fact that disabling physical conditions may change over time. From the standpoint of the payer, however, this means that the financial burden associated with the pension scheme is never ascertained with finality, and it is in this context that Parliament deemed it advisable, through subsection 39(1), to put a time limit on the retroactive effect of awarding a pension.
>
> [Footnotes omitted]

[58] Once again, no one could claim that the scheme created by the Act is not generous enough for people who, like Mr. Arial, had to face difficulties — they who made the ultimate sacrifices for their country — to obtain what they were ultimately entitled to under the terms of the Act. However, it is up to Parliament, not the Court, to correct the situation, if it is deemed that correction is needed.

[59] The Respondent's motion shall therefore be allowed, and the plaintiffs' action struck, insofar that it is directed against the Defendant. Like Prothonotary Tabib, I find that the action must be struck without leave to amend, as it includes flaws that cannot be remedied by amendments.

[60] The Defendant was only seeking costs if its motion were challenged. Technically, it would therefore be entitled to costs, as its motion was challenged, and allowed. However,

exercising my discretion under Rule 400, I find that this case does not lend itself to an awarding of costs against the plaintiffs.

[61] Each party shall therefore pay their own costs.

JUDGMENT

THE COURT ORDERS that:

1. The motion is allowed;
2. The action by the plaintiffs, insofar as it is directed against "Her Majesty the Queen in Right of Canada on behalf of the Department of Veterans Affairs" is struck without leave to amend;
3. Without costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1505-15
STYLE OF CAUSE:	MAURICE ARIAL (VETERAN – DECEASED), MADELEINE ARIAL (ESTATE), MADELEINE ARIAL (PERSONALLY), SONIA ARIAL V HER MAJESTY THE QUEEN IN RIGHT OF CANADA ON BEHALF OF THE DEPARTMENT OF VETERANS AFFAIRS AND THE VETERANS REVIEW AND APPEAL BOARD
PLACE OF HEARING:	QUÉBEC CITY, QUEBEC
DATE OF HEARING:	NOVEMBER 16, 2016
ORDER AND REASONS:	LEBLANC J.
DATED:	MARCH 10, 2017

APPEARANCES:

Sonia Arial — FOR THE PLAINTIFFS

Marieke Élodie Bouchard — FOR THE DEFENDANTS

SOLICITORS OF RECORD:

None — FOR THE PLAINTIFFS

William F. Pentney
Deputy Attorney General of Canada
Québec, Quebec — FOR THE DEFENDANTS

Federal Court of Appeal   Cour d'appel fédérale

Date: 20180108

Docket: A-80-17

Citation: 2018 FCA 1

CORAM: **RENNIE J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON and BILCON OF DELAWARE INC.

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 20, 2017.

Judgment delivered at Ottawa, Ontario, on January 8, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

Federal Court of Appeal — Cour d'appel fédérale

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellants appeal an order of the Federal Court (2017 FC 214) *per* Justice McDonald dismissing their appeal of an order of Prothonotary Aalto (2016 FC 1035). The prothonotary had dismissed the appellants' motion to stay an application in the Federal Court by the Attorney General of Canada to set aside a decision of an arbitral panel constituted under the *North*

American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (NAFTA).

[2] The relevant procedural history is set out in detail in the decisions below and need not be repeated, save to say that an arbitral panel was established under the investor-state dispute resolution provisions of Chapter 11 of NAFTA to determine a dispute between the appellants and Canada. The parties agreed to have the jurisdiction and liability issues decided separately from the assessment and quantification of damages and the panel made an order bifurcating the proceeding.

[3] In March 2015, the panel ruled against Canada in its award on jurisdiction and liability: *Bilcon of Delaware et al v. Government of Canada* (2015), CDA-2009-04 (Ch. 11 Panel), online: <http://www.pcacases.com/web/sendAttach/1287>.

[4] Article 1136 of NAFTA gives a disputing party a three-month window to commence proceedings to contest an arbitral award. The *Commercial Arbitration Code* (the Code), set out in Schedule 1 of the *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17 applies to claims submitted to arbitration under article 1116 of NAFTA (*Commercial Arbitration Act*, s. 5(4); the Code, art. 1(1); *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 2(1)). Accordingly, Canada filed an application in the Federal Court to set aside the award under article 34(1) of the Code. In response, the appellants filed a motion under article 34(4) of the Code and under paragraph 50(1)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 seeking an

order staying the set aside application pending the hearing and disposition of the damages proceeding. While the Code refers to an application to "set aside" awards by arbitral tribunals, I will, for ease of reference only, refer to it as an application for judicial review.

[5] The prothonotary found that the arbitration award was final, complete and dispositive of the issues of jurisdiction and liability. He began his consideration, appropriately, with a review of article 34(4) of the Code, which provides:

CHAPTER VII	**CHAPITRE VII**
Recourse Against Award	**Recours contre la sentence**
ARTICLE 34	ARTICLE 34
Application for Setting Aside as Exclusive Recourse against Arbitral Award	La demande d'annulation comme recours exclusif contre la sentence arbitrale
…	[…]
(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.	**4** Lorsqu'il est prié d'annuler une sentence, le tribunal peut, le cas échéant et à la demande d'une partie, suspendre la procédure d'annulation pendant une période dont il fixe la durée afin de donner au tribunal arbitral la possibilité de reprendre la procédure arbitrale ou de prendre toute autre mesure que ce dernier juge susceptible d'éliminer les motifs d'annulation.

[6] After reviewing the text of the Code, he was satisfied that the award on jurisdiction and liability was "an award" within the meaning of 34(4) and that whether to stay the judicial review proceeding was in his discretion. In declining to exercise this discretion, he noted, amongst other considerations, that a stay of the judicial review application would not result in giving the

tribunal the opportunity, in the language of article 34(4), to “eliminate the grounds for setting aside” the arbitral award. The panel had fully and finally decided all matters relevant to jurisdiction and liability. Only the assessment and quantification of damages would be addressed in the next phase of the proceeding.

[7] The prothonotary then reviewed the history of proceedings, the nature of the issues, and the question of delay and the relative inconvenience to the parties should the application for judicial review be stayed. He declined to stay the application. On appeal, the Federal Court sustained the prothonotary’s decision.

[8] Before this Court, the appellants conceded the finality of the award and the right of Canada to seek judicial review in oral submissions, but contended that the Federal Court erred in not exercising its discretion to stay the application.

[9] This concession was appropriate. The plain text of the Code itself does not distinguish between final awards and other awards (with the exception of article 32 “Termination of Proceedings”). Further, the proceedings were governed by the *United Nations Commission on International Trade Law Arbitrational Rules*, GA 31/98 (UNCITRAL Rules), article 32(2) of which expressly permits “the arbitral tribunal … to make interim, interlocutory, or partial awards” and provides that such awards “shall be final and binding on the parties.” I note as well that, in their definitive text, *Redfern and Hunter on International Arbitration*, 5th ed. (New York: Oxford University Press, 2009) at 522, the authors recognize that judicial review can arise when proceedings are bifurcated.

[10] Of note in this regard is the decision of a NAFTA panel in *Methanex Corporation v. United States of America* (2005), online: <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> (*Methanex*) following a request that it reconsider its award on jurisdiction. In rejecting the submission that the tribunal has broad continuing discretion to reconsider or vary a final award that it has made, the panel agreed with the submissions of the Government of the United States that article 32(2) of the UNCITRAL Rules reflects the principle of *res judicata*:

> 31. … A partial award is a final and binding award within Article 32(2) of the UNCITRAL Rules in regard to the matter it decides, although it does not leave the tribunal functus officio. It is presented as an award; and as an award it disposes finally of certain issues in the arbitration proceedings. …
>
> 32. The Tribunal therefore rejects Methanex's contention that the Partial Award is not a final and binding award under Article 32(2) of the UNCITRAL Rules and the contention that Article 32(2) concerns only final awards, not partial awards. That contention runs counter to the ordinary meaning of the Articles 32(1) and (2) as a matter of the English language. In the Tribunal's view, no weight is to be placed on the fact that "award" is not further defined in Article 32(2) expressly to include (inter alia) a partial award. It follows that, where reference is made to an award under Article 32(2), that is intended to include a partial award made under Article 32(1) of the UNCITRAL Rules (*Methanex*, Part II, Chapter E at paras. 31–32).

[11] Article 34(4) of the Code provides that the Court may suspend the judicial review application where, amongst other considerations, it is satisfied that the arbitral panel may take further action which "will eliminate the grounds for setting aside." Here, the appellants conceded that there is no possibility that the findings on liability and jurisdiction, which are the focus of the judicial review application, will disappear as a result of the damages hearing. As such, article 34(4) does not apply.

[12] With this background, I turn to the appellants' core argument. They say that the Federal Court erred in not exercising its discretion to stay the judicial review application. They contend that the damages are "inextricably linked" to the liability finding and that statements made by the tribunal in the damages decision may provide clarity to its reasons underpinning the finding of liability. They also contend that the Court did not afford sufficient deference to the arbitration procedure and the principle that recourse to the courts is not to be taken until other remedies are exhausted. The appellants also say that the prothonotary applied the wrong test in respect of whether the judicial review proceedings should be stayed under paragraph 50(1)(*b*) of the *Federal Courts Act* and erred in concluding the appellants would not suffer serious prejudice.

[13] Since this Court's decision in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 (*Hospira*), a discretionary decision of a prothonotary will only be reversed if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira* at paras. 64-65, 79. The same standard of review applies when this Court reviews the Federal Court motions judge's consideration of the prothonotary's decision: *Hospira* at paras. 83-84.

[14] Decisions on a motion to stay under article 34(4) of the Code and under paragraph 50(1)(*b*) of the *Federal Courts Act* are discretionary and are governed by the *Hospira* standard. Applying *Hospira*, I am not persuaded that the Federal Court made either an error of law or a palpable and overriding error of fact or mixed fact and law which would justify intervention.

[15] I will begin with the issue of deference. The motions judge and the prothonotary acknowledged that deference is afforded to administrative processes generally (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30–32, [2011] 2 F.C.R. 32 (*C.B. Powell*)) and to arbitration tribunals specifically: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 105, [2014] 2 S.C.R. 633. A corollary to this principle is "courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted": *C.B. Powell* at para. 31; see also *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 40, 42, [2015] 2 S.C.R. 713.

[16] The appellants assert that the tribunal may make statements in its damages decision that clarify the basis for the award on jurisdiction and liability, and that these potential reasons might affect the outcome of the judicial review application. How this might be so is unclear.

[17] In support of their argument, the appellants point to two procedural orders rendered by the panel after ruling on jurisdiction and liability: Procedural Orders 19 and 20. In those orders, the panel notes that the award on damages "might provide further context" and that "[i]n any multi-stage process, subsequent decisions may potentially cast light on the reasoning contained in previous decisions". The prothonotary found these orders to be vague and speculative and did not alter the finality of the award on jurisdiction and liability.

[18] I agree. The panel gave lengthy and detailed reasons in its award on jurisdiction and liability, and it was entirely unclear to the prothonotary, and the Federal Court judge, how the findings of jurisdiction and liability would be affected by the quantification of damages phase.

The panel did not elaborate on how the damages phase might “cast light” on the award, and indeed, in suggesting that the parties might want to settle, it reinforced the finality of its conclusion on jurisdiction and liability. Thus, the panel’s work on these issues is done, and the prothonotary rightly gave little weight to these obscure comments. I would add that the appellants could not, and did not, advance any argument before this Court as to how the findings of jurisdiction and liability would be changed or altered by the damage assessment.

[19] The appellants also pointed to the judicial review application and memorials (written submissions) filed by Canada in the damages phase of the arbitration in support of its argument that there is a linkage between liability and the assessment of damages. While not before the Court, Canada accepted, for the purposes of this appeal, the appellants’ characterization of the position taken by it in those pleadings. While liability is a condition precedent for an award of damages, if liability issues were always “inextricably linked” to the assessment of damages in such a way that the damages decision would retroactively affect the liability decision, no judicial review application of a bifurcated proceeding could ever proceed until the damages phase was completed.

[20] No matter how the parties might characterize the award on jurisdiction and liability for the purposes of contesting damages, and no matter what “further context” might be provided regarding the liability award by the panel in delivering its damages award, the fact remains that an award, regardless of what stage it is given in bifurcated proceedings, is a “final and binding” award and is subject to judicial review. There is, therefore, no possibility that Canada may succeed on the jurisdiction and liability issues within the damages phase. For the doctrine of

exhaustion of remedies to justify court non-interference, there must be other “available, effective remedies [that have yet to be] exhausted”: *C.B. Powell* at para. 31.

[21] The motions judge and the prothonotary concluded, correctly, that there was no other avenue of recourse to Canada, and that the doctrine of exhaustion of remedies was entirely irrelevant. Awaiting the possibility of statements that might “cast light” on the liability findings does not constitute a remedy. The only remedy was judicial review, and had Canada not commenced its application to set aside within three months of the award on jurisdiction and liability, as mandated by article 34(3) of the Code, it would have been out of time.

[22] To conclude, Canada stated that it would continue its challenge to the jurisdiction and liability findings “even if the damage award was zero dollars”. The appellants’ arguments blur the fact that a final determination has been made on liability and that nothing that is said in the damages phase can undo that finding.

[23] I turn next to the question of whether the Federal Court erred in refusing to stay the judicial review proceeding under paragraph 50(1)(*b*) of the *Federal Courts Act*.

[24] To begin, it is important to distinguish between “a court staying other bodies’ proceedings pending an appeal or other matter, or for an injunction” and a stay that is, in reality, “a long-term adjournment”: *Epicept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 at para. 14, 425 N.R. 353. Building on this distinction, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167 (*Mylan*), this Court set out an “interest

of justice" test governing whether the Court should stay its own proceedings. In that case, Justice Stratas held, at paragraph 5, that:

> [5] … *This Court deciding not to exercise its jurisdiction until some time later*. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less. (emphasis in original)

[25] While the prothonotary considered the threefold criteria from *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 111 D.L.R. (4th) 385 (*RJR–MacDonald*), as opposed to the "interest of justice" test, it is an error of no consequence.

[26] In considering "the interest of justice", courts may take into account some of the same considerations as in *RJR–MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests. Here, while the prothonotary did not use the precise nomenclature of the "interest of justice" test, he directed himself to considerations relevant to the exercise of discretion under the test.

[27] In the present case, the question of whether to issue a stay under paragraph 50(1)(*b*) of the *Federal Courts Act* devolved to simply one of when it was appropriate for the judicial review

application to be heard. The prothonotary examined this question in detail, considered and weighed the relevant factors, and made no palpable and overriding error in refusing to exercise his discretion to stay the application for judicial review.

[28] The prothonotary assessed the arguments advanced by the appellants of harm or prejudice and found that they were either speculative, compensable in costs, or re-articulations of arguments based on the panel's procedural orders. The prothonotary also considered and gave weight to the question of delay imbedded in any consideration of the interest of justice test. The prothonotary concluded that Canada may "suffer[] prejudice if a stay is granted as there will be at least another two years before a Court would hear this matter if they were to wait for the damages phase to be completed". Further, given that the judicial review application "[could] be heard and disposed of well before then" and that the appellants did not demonstrate prejudice, the prothonotary concluded that "there is no basis for this Court to exercise its discretion to grant a stay". The responsibility of the Court to ensure that proceedings move in an expeditious, timely, and fair manner is a critical consideration when a court is asked to stay its own proceedings.

[29] The prothonotary's concern about delay, the due administration of justice and the right of Canada to pursue an acknowledged right of recourse was reinforced by the fact that it took the tribunal 17 months to render its decision on jurisdiction and liability and that there is no prescribed time frame within which panels are to render their decisions. The prothonotary observed that a stay of the application for judicial review, which was commenced in June 2015,

could mean that Canada's challenge to the decision on jurisdiction and liability might not be heard for four years.

[30] The appellants have conceded that the decision on jurisdiction and liability is final and that the statute contemplates a judicial review application of the award at this time. The appellants also accepted that whether the judicial review should proceed now depends on the facts and circumstances of each case. Those circumstances include the fact that the parties and the panel agreed to bifurcate the proceeding into two distinct phases. The judicial review proceeding is well advanced – it is scheduled to be heard on January 29, 2018. A stay on the eve of the hearing of the judicial review application would result in a further delay and costs thrown away, each of which are inconsistent with the interest of justice. Further, if the award on jurisdiction and liability is set aside, it could render the second phase of the proceeding moot. As both the prothonotary and the judge noted, this also weighed in favour of rejecting the stay.

[31] In sum, I see no error of law warranting interference and no palpable and overriding error in the exercise of the discretion by the prothonotary and I would therefore dismiss the appeal with costs. I would also amend the title of proceedings to properly name as respondent the Attorney General of Canada, as should have been so indicated in the Notice of Appeal.

"Donald J. Rennie"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED FEBRUARY 22, 2017 (2017 FC 214)

DOCKET:	A-80-17
STYLE OF CAUSE:	WILLIAM RALPH CLAYTON et al v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 20, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	JANUARY 8, 2018

APPEARANCES:

John Judge Gregory J. Nash	FOR THE APPELLANTS
Roger Flaim Karen Lovell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nash Johnston LLP Vancouver, British Columbia	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal

Cour d'appel fédérale

Date: 20130530

Docket: A-150-13

Citation: 2013 FCA 143

Present: **STRATAS J.A.**

BETWEEN:

ANTHONY COOTE

Appellant

and

LAWYERS' PROFESSIONAL INDEMNITY COMPANY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 30, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20130530

Docket: A-150-13

Citation: 2013 FCA 143

Present: **STRATAS J.A.**

BETWEEN:

ANTHONY COOTE

Appellant

and

LAWYERS' PROFESSIONAL INDEMNITY COMPANY

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] Currently before the Federal Court is an application (file T-312-13) to declare the appellant a vexatious litigant under section 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The application is to be heard on June 10, 2013.

[2] Before this Court are two appeals from interlocutory orders of the Federal Court made within the vexatious litigant application:

a. An appeal (A-104-13) from an interlocutory order made by the Federal Court on March 18, 2013 (*per* Manson J.);

b. An appeal (A-150-13) from an interlocutory order made by the Federal Court on April 11, 2013 (*per* Boivin J.).

[3] Recently, the Registry, acting under Rule 72, referred the notice of appeal in A-150-13 to me for direction as to whether it should be filed. I directed that it be filed. The Registry also alerted me to the existence of the appeal in A-104-13.

[4] In the course of preparing my direction, I reviewed the two appeal files, A-150-13 and A-104-13. From that review, I decided to invite submissions from the parties on two matters: whether the two appeals should be consolidated and whether the appeals should be stayed pending the Federal Court's determination of the vexatious litigant application.

[5] I have received and considered those submissions. In my view, the two appeals should be consolidated. Further, in my view, the consolidated appeals should be stayed pending the Federal Court's determination of the vexatious litigant application.

A. Consolidation

[6] In my invitation to the parties to provide submissions, I shared certain observations with them. I observed that this Court has the jurisdiction to consolidate separate appeals on its own

motion: *Montana Band v. Canada* (1989), 182 F.T.R. 161 (C.A.). I also observed that, subject to submissions received from the parties, the two appeals are quite related, raised quite similar issues, and related to procedural matters leading up to the vexatious litigant application.

[7] In their submissions, the parties did not take serious issue with these observations. Given the factual and legal similarity of the two appeals, the lack of prejudice to anyone, and the obvious advantages of efficiency and minimization of costs, consolidation is appropriate. Accordingly, under Rule 105, I shall order that the two appeals be consolidated.

B. Staying the consolidated appeals

[8] This Court has jurisdiction to stay the consolidated appeals. That jurisdiction is founded upon section 50 of the *Federal Courts Act*, *supra*, and this Court's plenary jurisdiction to manage and regulate its own proceedings: *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 5; *Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 20. As explained in *RBC Life Insurance Company*, this Court's plenary jurisdiction is indistinguishable from the inherent power of provincial superior courts to manage and regulate their own proceedings.

[9] The appellant submitted that this Court could stay the consolidated appeals only upon satisfaction of the three-fold test in *RJR-MacDonald Inc v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[10] I disagree. In these circumstances the Court need only determine whether a stay is in the interests of justice: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at paragraphs 3-14; *Federal Courts Act*, *supra*, paragraph 50(1)(*b*).

[11] As explained in *Mylan*, there is a difference between this Court issuing a stay to enjoin another body from exercising its jurisdiction and this Court issuing a stay to refrain from exercising its own jurisdiction in a pending appeal. The *RJR-MacDonald* test, a test suitable for injunctive relief, applies to the former. With respect to the latter,

> …we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here.

(*Mylan*, *supra* at paragraph 5.)

[12] Whether this Court will issue a stay to refrain from exercising its own jurisdiction over a pending appeal – *i.e.*, to suspend or delay it – depends on the factual circumstances presented to the Court, guided by certain principles. These principles include securing “the just, most expeditious and least expensive determination of every proceeding on its merits”: *Federal Courts Rules*, SOR/98-106, Rule 3.

[13] Additional principles guide this Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its

discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting resources to one case for no good reason deprives the others for no good reason.

[14] Applying these principles, I find that staying the consolidated appeals pending the Federal Court's determination of the vexatious litigant application does not prejudice the appellant in any way and is in the interests of justice:

a. To the extent the appellant succeeds in defending the vexatious litigant application in the Federal Court, the consolidated appeals, related as they are to the vexatious litigation application, might seen as moot (subject to the receipt of submissions on the point) and, therefore, unnecessary to prosecute.

b. To the extent the appellant fails, the vexatious litigant application is granted, and the appellant is declared a vexatious litigant, he can appeal to this Court. That appeal can then be consolidated with the consolidated appeals, or heard alongside of them. If he prevails in the consolidated appeals in this Court, this Court can consider whether the designation of the appellant as a vexatious litigant can still survive. And, of course, on appeal of that designation to this Court, the appellant can raise any other admissible grounds of appeal.

c. I am not satisfied that it would be unfair or would work a prejudice to the appellant to allow the vexatious litigant application to proceed in the Federal Court as scheduled. Indeed, had a motion been brought in this Court to stay the vexatious litigant application in the Federal Court pending this Court's determination of the consolidated appeals, the *RJR-Macdonald* test would have to be satisfied (see paragraph 11, above). There is nothing before me to suggest any sort of harm or inconvenience to the appellant, let alone the sort of harm or inconvenience necessary for the granting of such a stay.

[15] In his material, the appellant signals that at the hearing of the vexatious litigant application in the Federal Court he will submit that the consolidated appeals in this Court must be heard and determined first. If the appellant advances that submission, the Federal Court should consider it based on the material before it, unencumbered by any of the observations I have made in these reasons. It may be that the Federal Court will be aware of considerations not present in the material before me.

[16] Therefore, I shall issue an order staying the consolidated appeals.

[17] Further, upon the filing of a notice of appeal in this Court from the judgment of the Federal Court in the vexatious litigant application or the expiry of the time for doing so, whichever is earlier, I direct the Registry to return the consolidated appeals files to me so that I may invite the parties to make submissions as to the status of the consolidated appeals. I also direct that, in any event, four

months from now, the Registry should return the consolidated appeals files to me for examination and, if necessary, further direction.

C. Other matters

[18] The appellant has brought a motion to determine the contents of the appeal book and for related relief in the consolidated appeals. Since the consolidated appeals will be stayed, the motion need not be determined at this time.

[19] The appellant is also an appellant in this Court in the consolidated appeals in files A-409-12, A-410-12 and A-411-12. In those consolidated appeals, due to the past conduct of the appellants, I found it necessary to order that the Registry not accept for filing any motions brought by the appellants for reconsideration or variation of orders made by this Court unless the notice of motion states grounds that are expressly listed in Rules 397 and 399. Given the past conduct, I will make the same order here. This is nothing more than an insistence that the appellant comply strictly with the Rules. This helps to prevent motions for reconsideration or variation that have no merit and that undercut the principles set out in paragraphs 12 and 13, above.

[20] I direct the Registry to place a copy of these reasons in both this file and file A-104-13.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-150-13
STYLE OF CAUSE:	Anthony Coote v. Lawyers' Professional Indemnity Company

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	May 30, 2013

WRITTEN REPRESENTATIONS BY:

Anthony Coote	ON HIS OWN BEHALF
Raj Anand Faren H. Bogach	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WeirFoulds LLP Toronto, Ontario	FOR THE RESPONDENT

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 39
Date: September 6, 2019
File No.: T1340/7008

Between:

First Nations Child and Family Caring Society of Canada

- and

-Assembly of First Nations

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Attorney General of Canada
(Representing the Minister of Indigenous and Northern Affairs Canada)

Respondent

- and -

Chiefs of Ontario

- and -

Amnesty International

- and -

Nishnawbe Aski Nation

Interested parties

Ruling

Members: Sophie Marchildon
Edward P. Lustig

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I. Introduction

> We believe that the Creator has entrusted us with the sacred responsibility to raise our families…for we realize healthy families are the foundation of strong and healthy communities. The future of our communities lies with our children, who need to be nurtured within their families and communities. (see 1996 report of the *Royal Commission on Aboriginal Peoples (RCAP), Gathering strength,* vol. 3, p. 10 part of the Tribunal's evidence record).

[1] **The Special Place of Children in Aboriginal Cultures**

> Children hold a special place in Aboriginal cultures (...) They must be protected from harm (…). They bring a purity of vision to the world that can teach their elders. They carry within them the gifts that manifest themselves as they become teachers, mothers, hunters, councillors, artisans and visionaries. They renew the strength of the family, clan and village and make the elders young again with their joyful presence.
>
> Failure to care for these gifts bestowed on the family, and to protect children from the betrayal of others, is perhaps the greatest shame that can befall an Aboriginal family. It is a shame that countless Aboriginal families have experienced, some of them repeatedly over generations. (see *RCAP, Gathering strength* vol. 3, p. 21).

[2] This Panel recognizes the shame and the pain and suffering experienced by children, families and communities who were deprived of this vital right to live in their families and communities as a result of colonization, racism and racial discrimination.

[3] This shame is not for you to bear, it is one for the entire Nation of Canada to bear, in the hope of rebuilding together and achieving reconciliation.

II. Context

[4] In *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2016 CHRT 2 (the Decision), this Panel found the Complainants had substantiated their complaint that First Nations children and families living on reserve and in the Yukon are denied equal child and family services, and/or differentiated adversely in the provision of child and family services, pursuant to section 5 of the Canadian Human Rights Act (the *CHRA*).

[5] The Panel generally ordered Aboriginal Affairs and Northern Development Canada, now Department of Indigenous Services Canada (DISC), to cease its discriminatory practices and reform the First Nations Child and Family Services (FNCFS) Program and the Memorandum of Agreement Respecting Welfare Programs for Indians applicable in Ontario (the 1965 Agreement) to reflect the findings in the Decision. INAC was also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of the principle.

[6] In the 2016 CHRT 2 Decision, at para.485, the Panel wrote:

> Under section 53(2)(e), the Tribunal can order compensation to the victim of discrimination for any pain and suffering that the victim experienced as a result of the discriminatory practice. In addition, section 53(3) provides for the Tribunal to order compensation to the victim if the discriminatory practice was engaged in willfully or recklessly. Awards of compensation under each of those sections cannot exceed $20,000 under the statute.

[7] The Panel had outstanding questions for the parties in regards to compensation and deferred its ruling to a later date after its questions had been answered. Given the complexity and far-reaching effects of these orders, the Panel requested further clarification from the parties on how these orders could best be implemented on a practical, meaningful and effective basis, both in the short and long term. It also requested further clarification with respect to the Complainants' requests for compensation under sections 53(2)(e) and 53(3) of the *CHRA*. The Panel retained jurisdiction to deal with these outstanding issues following further clarification from the parties.

[8] The Panel advised the parties it would address the outstanding questions on remedies in three steps.

> First, the Panel will address requests for immediate reforms to the FNCFS Program, the 1965 Agreement and Jordan's Principle. Other mid to long-term reforms to the FNCFS Program and the 1965 Agreement, along with other requests for training and ongoing monitoring will be dealt with as a second step. Finally, the Panel will address the requests for compensation under ss. 53(2)(e) and 53(3) of the *CHRA*. (see 2016 CHRT 10 at, paras.1-5).

[9] The Panel reiterated its desire to move on to the issue of compensation in a 2018 ruling and wrote as follows:

> The Panel reminds Canada that it can end the process at any time with a settlement on compensation, immediate relief and long-term relief that will address the discrimination identified and explained at length in the Decision. Otherwise, the Panel considers this ruling to close the immediate relief phase unless its orders are not implemented. The Panel can now move on to the issue of compensation and long-term relief. (see 2018 CHRT 4 at, para 385). Parties will be able to make submissions on the process, clarification of the relief sought, duration in time, etc. (see 2018 CHRT 4 at, para. 386).
>
> Moreover, the Panel added that it took years for the First Nations children to get justice. Discrimination was proven. Justice includes meaningful remedies. Surely Canada understands this. The Panel cannot simply make final orders and close the file. The Panel determined that a phased approach to remedies was needed to ensure short term relief was granted first, then long term relief, and reform which takes much longer to implement. The Panel understood that if Canada took 5 years or more to reform the Program, there was a crucial need to address discrimination now in the most meaningful way possible with the evidence available now. (see 2018 CHRT 4 at, para. 387).

[10] The Panel also said:

> Akin to what was done in the *McKinnon* case, it may be necessary to remain seized to ensure the discrimination is eliminated and mindsets are also changed. That case was ultimately settled after ten years. The Panel hopes this will not be the case here. (see 2018 CHRT 4 at, para. 388).

[11] In terms of the impacts of this case on First Nations children and their families the Panel added:

> In any event, any potential procedural unfairness to Canada is outweighed by the prejudice borne by the First Nations' children and their families who suffered and, continue to suffer, unfairness and discrimination. (see 2018 CHRT 4 at, para. 389).

[12] After having addressed other pressing matters in this case, the Panel provided clarification questions to the parties on the issue of compensation. The Panel allowed the parties to answer those questions, to file additional submissions and to make oral

arguments on this issue. The purpose of this ruling is to make a determination on the issue of compensation to victims/survivors of Canada's discriminatory practices.

III. The Panel's summary reasons and views on the issue of compensation

[13] This ruling is dedicated to all the First Nations children, their families and communities who were harmed by the unnecessary removal of children from your homes and your communities. The Panel desires to acknowledge the great suffering that you have endured as victims/survivors of Canada's discriminatory practices. The Panel highlights that our legislation places a cap on the remedies under sections 53 (2) (e) and 53 (3) of the *CHRA* for victims the maximum being $40,000 and that this amount is reserved for the worst cases. The Panel believes that the unnecessary removal of children from your homes, families and communities qualifies as a worst-case scenario which will be discussed further below and, a breach of your fundamental human rights. The Panel stresses the fact that this amount can never be considered as proportional to the pain suffered and accepting the amount for remedies is not an acknowledgment on your part that this is its value. No amount of compensation can ever recover what you have lost, the scars that are left on your souls or the suffering that you have gone through as a result of racism, colonial practices and discrimination. This is the truth. In awarding the maximum amount allowed under our Statute, the Panel recognizes, to the best of its ability and with the tools that it currently has under the *CHRA*, that this case of racial discrimination is one of the worst possible cases warranting the maximum awards. The proposition that a systemic case can only warrant systemic remedies is not supported by the law and jurisprudence. The *CHRA* regime allows for both individual and systemic remedies if supported by the evidence in a particular case. In this case, the evidence supports both individual and systemic remedies. The Tribunal was clear from the beginning of its *Decision* that the Federal First Nations child welfare program is negatively impacting First Nations children and families it undertook to serve and protect. The gaps and adverse effects are a result of a colonial system that elected to base its model on a financial funding model and authorities dividing services into separate programs without proper coordination or funding and was not based on First Nations children and families' real

needs and substantive equality. Systemic orders such as reform and a broad definition of Jordan's Principle are means to address those flaws.

[14] Individual remedies are meant to deter the reoccurrence of the discriminatory practice or of similar ones, and more importantly to validate the victims/survivors' hurtful experience resulting from the discrimination.

[15] When the discriminatory practice was known or ought to have been known, the damages under the wilful and reckless head send a strong message that tolerating such a practice of breaching protected human rights is unacceptable in Canada. The Panel has made numerous findings since the hearing on the merits contained in 10 rulings. Those findings were made after a thorough review of thousands of pages of evidence including testimony transcripts and reports. Those findings stand and form the basis for this ruling. It is impossible for the Panel to discuss the entirety of the evidence before the Tribunal in a decision. However, compelling evidence exists in the record to permit findings of pain and suffering experienced by a specific vulnerable group namely, First Nations children and their families. While the Panel encourages everyone to read the 10 rulings again to better understand the reasons and context for the present orders, some ruling extracts are selected and reproduced in the pain and suffering, Jordan's Principle and Special compensation sections below for ease of reference in elaborating this Panel's reasons. The Panel finds the AGC's position on compensation unreasonable in light of the evidence, findings and applicable law in this case. The Panel's reasons will be further elaborated below.

IV. Parties' positions

[16] The Panel carefully considered all submissions from all the parties and interested parties and in the interest of brevity and conciseness, the parties' submissions will not be reproduced in their entirety.

[17] The Caring Society states that the evidence in this case is overwhelming: Canada knew about, disregarded, ignored or diminished clear, cogent and well researched evidence that demonstrated the FNCFS Program's discriminatory impact on First Nations

children and families. Canada also ignored evidence-informed solutions that could have redressed the discrimination well before the complaint was filed, and certainly in advance of the hearings. Indeed, the Tribunal's findings are clear that Canada was reckless and was often more concerned with its own interests than the best interests of First Nations children and their families.

[18] The Caring Society submits that this case embodies the "worst case" scenario that subsection 53(3) was designed for, and is meant to deter. Multiple experts and sources, including departmental officials, alerted Canada to the severe and adverse effects of its FNCFS Program. Over many years, Canada knowingly failed to redress its discriminatory conduct and thus directly and consciously contributed to the suffering of First Nations children and their families. The egregious conduct is more disturbing given Canada's access to evidence-based solutions that it ignored or implemented in a piece-meal and inadequate fashion.

[19] The Caring Society further argues that the evidence is clear that the maximum amount of $20,000 in special compensation is warranted for every First Nations child affected by Canada's FNCFS Program and taken into out-of-home care since 2006. The Government of Canada willfully and recklessly discriminated against First Nations children under the FNCFS Program and it was not until the Tribunal's decision and subsequent compliance orders (2016 CHRT 10, 2016 CHRT 16, 2017 CHRT 14 (as amended by 2017 CHRT 35), 2018 CHRT 4 and 2019 CHRT 7) that Canada has slowly started to remedy the discrimination.

[20] As such, the Caring Society submits that Canada ought to pay $20,000 for every First Nation child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 through to the point in time when the Panel determines that Canada is in full compliance with the January 26, 2016 *Decision*.

[21] Also, the Caring Society adds that every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care between 2006 and the point when the FNCFS Program is free from perpetuating adverse impacts is entitled to $20,000 in special compensation under subsection 53(3) of the *CHRA*. Canada is keenly aware

that many of the discriminatory aspects of the FNCFS Program remain unchanged and until long-term reform is complete, First Nations children will continue to experience discrimination. Those children deserve to be recognized and acknowledged, and Canada's continuation of this conduct in this program should be denounced, to (in the words of Mandamin J.) "provide a deterrent and discourage those who deliberately discriminate" in order to prevent continuation and recurrence of such discriminatory conduct in future, including generally in other programs.

[22] The Caring Society contends that from the moment that the House of Commons unanimously passed Motion 296, Canada knew that failing to implement Jordan's Principle would cause harm and adverse impacts for First Nations children. Nonetheless, Canada did not take meaningful steps to implement Jordan's Principle for nearly another decade, after this Tribunal's numerous decisions and non-compliance orders requiring it to do so. By failing to implement it and making the informed choice to deny the true meaning of Jordan's Principle, Canada knowingly and recklessly discriminated against First Nations children. The Caring Society submits that the evidence in this case supports an award for special compensation pursuant to subsection 53(3) of the *CHRA* for the victims of Canada's willfully reckless discriminatory conduct in relation to Jordan's Principle from December 2007 to November 2017.

[23] The Caring Society is of the view that the special compensation ordered for (i) each First Nations individual affected by Canada's FNCFS Program who, as a child, was been taken into out-of-home care, since 2006; and (ii) for every for every First Nations individual who, as a child, did not receive an eligible service or product pursuant to Canada's willful and/or reckless discriminatory approach to Jordan's Principle from December 2007 to November 2017, should be paid into a trust for the benefit of those children.

[24] The Caring Society is requesting an order similar to that granted by this Tribunal in 2018 CHRT 4: an order under section 53(2)(a) of the *CHRA* for the Caring Society, the AFN, the Commission, Chiefs of Ontario, Nishnawbe Aski Nation and Canada to consult on the appointment of seven Trustees. If the parties cannot agree on who the trustees should be, the seven trustees of the Trust would be appointed by order of the Tribunal. The mandate of the Trustees will be to develop a trust agreement in accordance with the

Panel’s reasons, outlining among other things: (i) the purpose of the Trust; (ii) who the beneficiaries are; (iii) how a beneficiary qualifies for a distribution; (iv) programs that will be eligible and in keeping with the objective of the Trust; (v) how decisions of the Board of Trustees shall be made; and (vi) how the Trust will be administered.

[25] The Caring Society further requests an order that the parties report back within three months of the Panel’s decision, with respect to the progress of the appointment of the Trustees. The Caring Society believes that an in-trust remedy will provide a meaningful remedy for First Nations children and families impacted by the willfully reckless discriminatory impact of the FNCFS Program and Jordan’s Principle. It enables persons who were victims of Canada’s discriminatory conduct to access services to remediate, in part, the impacts of discrimination.

[26] The Caring Society supports AFN’s request for compensation in relation to both pain and suffering (section 53(2)(e)) and willful and reckless discrimination (section 53(3)) of the *CHRA*. Certainly, the victims in this case have experienced pain and suffering, with some First Nations children losing their families forever and some First Nations children losing their lives. In addition, on a principled basis, the Caring Society agrees with the AFN’s request for individual compensation. We also recognize that an individual compensation process will require special and particular sensitivities regarding the significant issues of consent, eligibility and privacy. Many of the victims of Canada’s discriminatory conduct are children and young adults who are more likely to experience historical disadvantage and trauma.

[27] According to the Caring Society, any process that is put in place will need to adopt a culturally informed child-focused approach that attends to these realities. Such persons may also have their own claims against Canada, whether individually or as part of a representative or class proceeding, and it is not possible for the parties to ascertain the views of all such potential claimants on individual compensation through the Tribunal’s process. The Caring Society is also aware of the significant and complex assessment processes required to administer and deliver individual compensation. Best estimates suggest that an order for individual compensation for those taken into out-of-home care could affect 44,000 to 54,000 people. In terms of Jordan’s Principle, after the Tribunal

issued its May 26, 2017 Order, the number of approvals significantly increased (indeed, over 84,000 products/services were approved in fiscal year 2018-2019), and Canada's witness regarding Jordan's Principle has acknowledged that these requests reflected unmet needs.

[28] Regarding the Panel's question of "who should decide for the victims", the Caring Society respectfully advances that the Tribunal, assisted by all of the parties, is in the best position to decide the financial remedy at this stage of the proceeding. The Tribunal has experience in awarding financial compensation to victims of discrimination and has a sense, through a common-sense approach, of what is and what is not reasonable. Indeed, this Panel is expertly immersed in this case. It understands the FNCFS Program and Jordan's Principle, the impacts experienced by First Nations children and the importance of ensuring long-term reform. It has also demonstrated that the centrality of children's best interests in decision-making which is essential to justly determining how the victims of discrimination in this case ought to be compensated.

[29] The victims' rights belong to the victims. While the Caring Society supports the request made by the AFN, the Caring Society's request for an in-trust remedy does not detract or infringe on victims' rights to directly seek compensation or redress in another forum. It is for this reason that the Caring Society respectfully seeks an order under subsection 53(3) that Canada pay an amount of $20,000 as compensation, plus interest pursuant to s. 53(4) of the *CHRA* and Rule 19(2) of the Canadian Human Rights Tribunal Rules of Procedure, for every First Nations child affected by Canada's FNCFS Program who has been taken into out-of-home care since 2006 until long-term reform is in place and for every for every First Nations child who did not receive an eligible service or product pursuant to Canada's discriminatory approach to Jordan's Principle since December 12, 2007 to November 2017.

[30] The Assembly of First Nations (AFN) is requesting an order for compensation to address the discrimination experienced by vulnerable First Nations children and families in need of child and family support services on reserve.

[31] The AFN submits that the Panel stated in the main decision: “Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Residential Schools system is one of the darkest aspects of Canadian history….the effects of Residential Schools continue to impact First Nations children, families and communities to this day”(see 2016 CHRT 2 at, para 412).

[32] The AFN submits the pain and suffering of the victimized children and families is significant according to the Affidavit of Dr. Mary Ellen Turpel-Lafond affirmed April 3, 2019, and it is also directly linked to the Respondent’s discriminatory practice. Based on the circumstances in this case, the AFN seeks on behalf of individual First Nations children and families the maximum compensation available under s. 53(2)(e) and 53(3) of the *CHRA*, on a per individual basis for any pain and suffering. Given the voluminous evidentiary record before the Tribunal in this matter, and the particular experience to date this Panel has had presiding over this matter, as well as the Panel’s expertise under the *CHRA*, the AFN believes the Tribunal is the appropriate forum to address individual compensation given the unique circumstances of this case and based on an expert panel advisory.

[33] Individuals subjected to the Respondent’s discriminatory practice experienced a great deal of pain and suffering and should receive compensation, in particular those who were apprehended as a result of neglect. The AFN notes that some individuals were apprehended as a result of abuse and access to prevention programs may have prevented such abuse. Thus, in these circumstances a need for a case-by-case approach becomes apparent thereby lending credibility to the AFN’s suggested approach to establishing an expert panel to address individual compensation. With respect to the evidence, the Tribunal is empowered to accept evidence of various forms, including hearsay. Direct evidence from each individual impacted by the Respondent’s discriminatory practice is not necessarily required to issue an award for pain and suffering. Therefore, the Tribunal could find that evidence from some individuals could be used to determine pain and suffering of a group.

[34] The AFN has been mandated by resolution following a vote by Chiefs in Assembly to pursue compensation for First Nations children and youth in care, or other victims of

discrimination, and to request the maximum compensation allowable under the Act based on the fact that the discrimination was wilful and reckless, causing ongoing trauma and harm to children and youth, resulting in a humanitarian crisis (see Assembly of First Nations' resolution: Special Chiefs Assembly, Resolution No. 85/2018, December 4, 5 and 6, 2018 (Ottawa, ON) re Financial Compensation for Victims of Discrimination in the Child Welfare System).

[35] The AFN submits that compensation be awarded to each sibling, parent or grandparent of a child or youth brought into care as a result of neglect or medical placements resulting from the Respondent's discriminatory practice, and that such compensation be the maximum allowable under the *Act*.

[36] The AFN submits no further evidence is required from the AFN or other parties to support and award the maximum compensation to the victims of discrimination as requested, but that the Tribunal can rely on its findings to date.

[37] Both the Caring Society and the AFN submit it would be a cruel process to require children to testify about their pain and suffering. Moreover, requiring each First Nation child to testify before the Tribunal is inefficient and burdensome.

[38] The AFN further submits that the effects of the Respondent's discriminatory practices are real and they are significant. As the Panel found, the needs of First Nations children and families were unmet in the Respondent's provision of child and family services which the AFN submits has caused pain and suffering for which compensation ought to be awarded. The discrimination as found by the Panel was occurring across Canada.

[39] The AFN recognizes that the payment of compensation to the victims of discrimination may be a significant endeavor, considering the large number of individuals and time period. An independent body, such as the Commission, could facilitate the compensation scheme and payments. Whichever body is tasked with issuing the compensation, such body will require timely, accurate and all relevant records from the Respondent. Provisions will need to be adopted to protect the victims from unscrupulous

money lenders and predatory businesses. Finally, a notice plan may facilitate connecting individuals who are entitled to compensation payments.

[40] The AFN's remedial request suggests that an expert panel be established and mandated to address individual compensation to the victims of the Respondent's discriminatory practice as an option. This function can be carried out by the Canadian Human Rights Commission should they elect to take on this task. If so, the Respondent should be ordered to fund their activities.

[41] Additionally, the AFN states that the request for compensation to be paid directly to the victim of the Respondent's discrimination is not unprecedented, and in fact many parallels can be drawn from the Indian Residential School Settlement Agreement (IRSSA). Parallels such as the Common Experience Payment (CEP) and its surrounding processes, as well as the Independent Assessment Process (IAP), provide guidance in how a body issuing payments could be established to address individual compensation with respect to First Nations children and families discriminated against and victimized in this case.

[42] The AFN also submits that its National Chief and Executive Committee work in collaboration with the Caring Society to ensure the administration and disbursement of any payments to victims of discrimination come from funds other than the awards to the victims, so that no portion of the quantum awarded be rolled back or claimed by lawyers or legal representatives for assisting the victims.

[43] Overall, the AFN is interested in establishing a remedial process that may include both monetary and non-monetary remedies under a process overseen by an independent body. Given the potential for conflicts of interest in such a process, there would be a need to ensure matters dealt with in the remedial process are free from the influence of the parties, in particular Canada. In the IRSSA, the IAP process was isolated from the outside litigation amongst the parties for this reason.

[44] The proposed remedial process to be overseen by the requested independent body would be non-adversarial in nature, which is another hallmark from the IRSSA that the AFN submits could be carried over in this case. Also, it could be based on an application process that is designed to be streamlined and efficient.

[45] The AFN advances that it is aware of the proposed class proceeding filed in Federal Court last month. Currently, the class action is in the beginning stages and is uncertified, and the nature of the action is very similar to the case at hand. The AFN questions the accuracy of paragraph 11 of the statement of claim which reads mid-paragraph: “No individual compensation for the victims of these discriminatory practices has resulted or will result from the Tribunal decision”. It would appear the claimant is anticipating that no individual compensation will result in this case before the Tribunal. In response, the AFN and the other parties have planned all along that compensation was a long-term remedy that should be addressed after the interim and mid-term relief was addressed. The parties are currently carrying out that plan. The AFN submits the Panel ignore that particular submission.

[46] The Chiefs of Ontario (COO) did not make written submissions on the issue of compensation. In their oral submissions, the COO advised it is content with the other parties’ requests for compensation.

[47] The Nishnawbe Aski Nation’s (NAN) goal is to ensure First Nations children receive compensation for the discrimination found by this Tribunal. The NAN is in support of the remedies sought by the Caring Society.

[48] The AGC relying on a number of cases makes several arguments that will not be reproduced in their entirety rather given that the Panel considered all of them it is appropriate to summarize them here and for the same above-mentioned reasons.

[49] The Attorney General of Canada (AGC) submits that remedies must be responsive to the nature of the complaint made, and the discrimination found: that means addressing the systemic problems identified, and not awarding monetary as compensation to individuals. Awarding compensation to individuals in this claim would be inconsistent with the nature of the complaint, the evidence, and this Tribunal’s past orders. In a complaint of this nature, responsive remedies are those that order the cessation of discriminatory practices, redress those practices, and prevent their repetition.

[50] Moreover, the AGC states that the C*HRA* does not permit the Tribunal to award compensation to the complainant organizations in their own capacities or in trust for

victims. The complainants are public interest organizations and not victims of the discrimination; they do not satisfy the statutory requirements for compensation under the Act. A class action claim seeking damages for the same matters raised in this complaint, on behalf of a broader class of complainants and covering a broader period of time, has already been filed in Federal Court (see T-402-19).

[51] The AGC submits this is a Complaint of Systemic Discrimination. In its 2014 written submissions, the Caring Society acknowledged that this is a claim of systemic discrimination, with no individual victims as complainants and little evidence about the nature and extent of injuries suffered by individual complainants. The Caring Society stated that it would be an “impossible task” to obtain such evidence. The absence of complainant victims and the assertion that it would be "impossible” to obtain victims' evidence strongly indicate that this is not an appropriate claim in which to award compensation to individuals. The AFN appears to also acknowledge that this is a claim of systemic discrimination: it alleges that the discriminatory practice is a perpetuation of systemic discrimination and historic disadvantage.

[52] Also, the AGC argues, that complaints of systemic discrimination are distinct from complaints alleging discrimination against an individual and they require different remedies. Complaints of systemic discrimination are not a form of class action permitting the aggregation of a large number of individual complaints. They are a distinct form of claim aimed at remedying structural social harms. This complaint is advanced by two organizations, the AFN and the Caring Society who sought systemic changes to remedy discriminatory practices. It is not a complaint by individuals seeking compensation for the harm they suffered as a result of a discriminatory practice. The complainant organizations were not victims of the discrimination and they do not legally represent the victims.

[53] Additionally, the AGC contends the Canadian Human Rights Commission considers this to be a complaint of systemic discrimination. Then Acting-Commissioner, David Langtry, referred to it as such in his December 11, 2014 appearance before the Senate Committee on Human Rights. In discussing how the Commission allocates its resources, he specifically named this complaint as an example of a complaint of systemic discrimination that merited significant involvement on the part of the Commission.

[54] Furthermore, the AGC submits the evidence of the systemic nature of the complaint is found in the identity of the complainants, the language of the complaint, the Statement of Particulars, and the nature of the evidence provided to the Tribunal. The Tribunal's previous orders in this matter, clearly indicate that the Tribunal also regards this claim as a complaint of systemic discrimination.

[55] Likewise, the AGC adds that in their initial complaint to the Canadian Human Rights Commission, the complainants allege systemic discrimination. The framing of the complaint is important. In the Moore case, the Supreme Court of Canada determined that remedies must flow from the claim as framed by the complainants. In the complainants' joint statement of particulars, they also indicated that this is a claim of systemic discrimination.

[56] Besides, the AGC argues that claims by individual victims provide details of the harms they suffered as a result of the discriminatory practice. If this were a claim alleging discrimination against an individual or individuals, there would be evidence of the harm they suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation. No such evidence exists in this case. With respect to child welfare practices, there is very little evidence in the record regarding the impact of the discriminatory funding practice on individuals, particularly regarding causation, that is, evidence of the link between the discriminatory practices and the harms suffered. The AFN acknowledges that awards for pain and suffering require an evidentiary basis outlining the effects of the discriminatory practice on the individual victims.

[57] According to the AGC, this Tribunal has only awarded compensation to individuals in claims of systemic discrimination where they were complainants and where there was evidence of the harm they had suffered. In this claim, the Tribunal lacks the strong evidentiary record required to justify awarding individual remedies. An adjudicator must be able to determine the extent and seriousness of the alleged harm in order to assess the appropriate compensation and the evidence required to do so has not been provided in this claim. The AGC submits further that no case law supports the argument that compensation to individuals can be payable in claims of systemic discrimination without at

least one representative individual complainant providing the evidence needed to properly assess their compensable damages.

[58] Moreover, the AGC advances that neither of the tools available to the Tribunal to address the deficiency in evidence are appropriate in the circumstances. The Tribunal is entitled to require better evidence from the parties, and to extrapolate from the evidence of a group of representative complainants. However, there are no representative individual plaintiffs in this complaint and no evidence regarding their experiences from which to extrapolate on a principled and defensible basis. The Tribunal's ability to compel further evidence is also not helpful as the Caring Society has stated that it would be an impossible task to obtain such evidence, and would be inconsistent with the fundamental nature of the complaint. Compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62).

[59] The AGC adds that the Commission's submissions on compensation indicate that this Tribunal declined to award compensation in claims where it would have been impractical to have thousands of victims testify, acknowledging that it could not award compensation ''en masse''. (*Public Service Alliance of Canada v. Canada Post Corporation*, 2005 CHRT 39 at para. 991 (although other aspects of this decision were judicially reviewed, the Tribunal's refusals to award compensation for pain and suffering, or special compensation for wilful and reckless discrimination, were not).

[60] In making its findings, the Tribunal reproduced passages from another pay equity case that had reached similar conclusions: *Public Service Alliance of Canada v. Canada (Treasury Board),* 1998 CanLII 3995 (C.H.R.T.) at paras. 496-498. The *Canada Post* case involved roughly 2,800 victims. The Treasury Board case involved roughly 50,000 victims).

[61] The AGC further contends that the Complaint is not a Class Action and the remedies claimed by the parties resemble the sort of remedies that may be awarded by a superior court of general jurisdiction rather than a Tribunal with a specific and limited

statutory mandate. A class action claim addressing the subject matter of this complaint has been filed in the Federal Court.

[62] Also, the AGC submits that in *Moore v. British Columbia (Education),* 2012 SCC 61, [Moore]), the B.C. Human Rights Tribunal permitted the complainant to lead evidence regarding systemic issues in a complaint of discrimination against an individual, in that case an individual with dyslexia who claimed discrimination on the basis he was denied access to education. The B.C. Tribunal relied on that evidence to award systemic remedies. However, the Supreme Court of Canada concluded that the systemic remedies are too far removed from the "complaint as framed by the Complainant' [emphasis in original]. The Supreme Court upheld the individual remedies but set aside all of the systemic orders because the remedy must flow from the claim. According to the AGC, while the situation is reversed in this case, the same principle applies. The complainants framed this complaint as one of systemic discrimination and are now bound by that choice. Remedies in this case must be systemic, particularly because there is insufficient evidence to determine appropriate compensation, if any, for individuals. The AGC adds that the lack of evidence of harm suffered by individuals, and the apparent impossibility of obtaining it, clearly indicates that this is not an appropriate claim in which to award individual compensation.

[63] The AGC adds that the *Act* does not permit complaints on behalf of classes of complainants, nor does it permit remedies to be awarded to those same classes. Section 40(1) of the *Act* permits individuals or groups of individuals to file a complaint with the Commission while s.40(2) of the *Act* specifically empowers the Commission to decline to consider complaints, such as this, that are filed without the consent of the actual victims. The lack of an equivalent provision in the *Act* indicates that Parliament chose not to permit class action-style complaints, and it certainly did not grant the Tribunal jurisdiction or provide the tools needed to deal with class complaints.

[64] Furthermore, the AGC adds that given its lack of jurisdiction, the Tribunal should not rely on principles from class action jurisprudence. Québec’s Tribunal des droits de la personne, whose statute is similar to the *Act*, addressed the relationship between class actions and human rights in the civil law context) in *Commission des droits de la personne*

et des droits de la jeunesse c. Québec (Procureur général, 2007 QCTDP 26 (CanLII). The case concerned a settlement agreement reached by Quebec, the Quebec Commission, and the teachers' union. The parties encouraged the Tribunal to rely on class actions principles and to approve the agreement despite opposition from a group of young teachers who felt the deal was disadvantageous to them. The Tribunal declined to do so, noting that a "class action is an extraordinary procedural vehicle that breaks with the principle that no one can argue on behalf of another. That recourse can be exercised only with the prior authorization of the court." The Tribunal rejected the suggestion that class actions principles could apply in the human rights context, noting that in class actions the judge serves an important role in protecting "absent members". Without these procedural protections, the tribunal process should not be used to dispossess victims of their rights in the dispute. The Tribunal also concluded that the procedural mechanism of class actions is legislative, and can only be exercised where statutory conditions are met and therefore cannot, be transplanted into Tribunal proceedings without legislative authority.

[65] The AGC also argues that while not binding on this Tribunal, the Quebec Tribunal's reasoning is compelling. Class action principles do not apply to human rights complaints and should not be injected into them without legislative authority. Where courts are empowered to consider class proceedings, they are equipped with the tools necessary to do so. For example, Rule 334 of the Federal Court Rules, which governs class proceedings in the Federal Court, empowers judges to review and certify class proceedings, dictates the form for a certification order, provides a process for opting out of the class and modifies other processes under the Rules to accommodate class proceedings. The Rule notably requires a class representative, a person who is qualified to act as plaintiff or applicant under the rules. In the absence of such a provision, the Canadian Human Rights Tribunal is not empowered to address class complaints or to treat complaints that purport to be on behalf of unidentified individual complainants like a class claim.

[66] Furthermore, according to the AGC, The Tribunal does not have jurisdiction to award individual compensation in complaints of systemic discrimination, particularly where, as here, there are no individual complainants. The terms of the *Act* and the jurisprudence

of both this Tribunal and the Federal Courts clearly indicate that paying compensation to the complainant organizations or to non-complainant victims would exceed the Tribunal's jurisdiction. Compensation can only be paid where there is evidence of harm suffered by complainant individuals and should only be paid where it advances the goal of ending discriminatory practices and eliminating discrimination.

[67] The AGC contends there is no legal basis for compensating the Complainants. The Tribunal was created by the *Act* and its significant powers to compensate victims of discrimination can only be exercised in accordance with the *Act*. The Tribunal's task is to adjudicate the claim before it. Its inquiry must focus on the complaint and any remedies ordered must flow from the complaint. The requirements of s. 53(2)(e) or 53(3) must be satisfied for the Tribunal to award compensation under the *Act*.

[68] In regards to pain and suffering, the AGC adds that Section 53(2)(e) of the *Act* grants the Tribunal jurisdiction to award up to $20,000 to "the victim" of discrimination for any pain and suffering they experienced as a result of the discriminatory practice. However, the complainant organizations are not victims of the discrimination and did not experience pain and suffering as a result of it. The evidence presented to the Tribunal by the complainants did not speak to "either physical or mental manifestations of stress caused by the hurt feelings or loss of respect as a result of the alleged discriminatory practice." Organizations cannot experience pain and suffering and there is, therefore, no need to "redress the effects of the discriminatory practices'' with regards to the complainants. Redressing the discrimination found was necessary in this case, but the Tribunal's previous orders accomplished this goal.

[69] In regards to pain and suffering, the AGC adds that for discrimination to be found to be willful and reckless, and therefore compensable under s. 53(3) of the *Act,* evidence is required of a measure of intent or of behavior that is devoid of caution or without regard to the consequences of that behavior. Compensation for willful and reckless discrimination is justified where the Tribunal finds that a party has failed to comply with Tribunal orders in previous matters intended to prevent a repetition of similar events from recurring. As with compensation for pain and suffering, compensation for willful and reckless discrimination can only be paid to "victims" of discrimination." The complainant organizations were not

victims of willful and reckless discrimination. Furthermore, there is no evidence of a consistent failure to comply with orders.

[70] The AGC submits this claim raises novel issues. There were no orders requiring the Government to address these issues before the Tribunal's first decision in this matter. The Tribunal's decisions in this matter since 2017 are based on the findings and reasoning of the initial decision and are intended to: "provide additional guidance to the parties". They do not demonstrate that Canada has acted without caution or regard to the consequences of its behavior. Concerns about the adequacy of the Government's response to studies and reports in the past do not provide a basis for awarding compensation under s. 53(3). Canada's funding for child welfare services has consistently changed to address shifts in social work practice and the increasing cost of providing family services. Examples of these changes include the redesign of the funding formula to add an additional funding stream for prevention services and Bill C-92 currently before the House of Commons. Since the AGC's submissions, Bill C-92 received Royal assent.

[71] The AGC argues this Tribunal understands the limitations of its remedial jurisdiction. In its decisions in this matter, the Tribunal has shown a nuanced understanding of both its powers and of the limitations of its remedial jurisdiction. The Tribunal should follow its own guidance in deciding the issue of compensation in this case. In 2016 CHRT 2, the Tribunal concluded that its remedial discretion must be exercised reasonably and on a principled basis considering the link between the discriminatory practice and the loss claimed, the particular circumstances of the case and the evidence presented. In reaching its conclusion, it stated that the goal of issuing an order is to eliminate discrimination and not to punish the government.

[72] Moreover, in 2016 CHRT 16, in declining to order the Government to pay to transfer recordings of the Tribunal hearings into a publicly accessible format at the request of the Aboriginal Persons Television Network (the "APTN"), the Tribunal acknowledged the importance of the link between the discriminatory practice and the loss claimed. The AGC submits that while the Tribunal was respectful of the APTN's mission and recognized the public interest in the recordings, the fact that APTN was neither a party nor a victim meant that the remedial request was not linked to the discrimination and was, therefore, denied.

[73] Also, according to the AGC, the Federal Court of Appeal has recognized that structural and systemic remedies are required in complaints of systemic discrimination. In Re: *C.N.R. and Canadian Human Rights Commission,* 1985 CanLII 3179 (FCA) (*C.N.R.*), the Court found that compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable".

[74] The AGC further submits that remedies in claims of systemic discrimination should seek to prevent the same or similar discriminatory practices from occurring in the future in contrast with remedies for individual victims of discrimination which seek to return the victim to the position they would have been in without the discrimination. As human rights lawyers Brodsky, Day and Kelly state in their article written in support of this complaint: where the breach of a human rights obligation raises structural or systemic issues --- such as longstanding policy practices that discriminate against indigenous women - the underlying violations must be addressed at the structural or systemic level."

[75] The AGC also argues that any compensation must be paid directly to victims of the discrimination. There is no legal basis for the Caring Society's requests that compensation for willful and reckless discrimination be paid into a trust fund that will be used to access services including: language and cultural programs, family reunification programs, counselling, health and wellness programs, and education programs. Compensation is only payable to victims under the term of the Act and paying compensation to an organization on behalf of individual victims could bar that individual from vindicating their own rights before the Tribunal and obtaining compensation. It may also prejudice their recovery in a class action claim as any damages awarded to the victims would be offset against the compensation already awarded to the organization by the Tribunal.

[76] Furthermore, the AGC contends that compensation is inappropriate in claims alleging breaches of Jordan's Principle in light of the fact there is no basis to award compensation under the *Act* to either the complainant organizations or non-complainant individuals for alleged breaches of Jordan's Principle. As the Commission notes in its submissions, where Canada has implemented policies that satisfactorily address the discrimination, no further orders are required.

[77] The AGC submits there is no basis to find that the government discriminated willfully or recklessly in this claim. The Tribunal in the Johnstone decision, relied on by the Caring Society, justified its award of compensation under s. 53(3) of the *Act* by pointing to disregard for a prior Tribunal decision that addressed the same points and the government's reliance arbitrary and unwritten policies, among other things, neither of which are the case here.

[78] According to the AGC, the Tribunal has asked whether the expert panel proposed by the AFN is feasible and legal or whether it would be more appropriate for the parties to form a committee (potentially including COO and NAN) to refer individual victims to the Tribunal for compensation. The AGC submits neither of these proposals is feasible or legal. The Tribunal cannot delegate its authority to order remedies to an expert panel and it would not be appropriate to ignore the nature of the complaint by awarding compensation to victims who are not complainants in a claim of systemic discrimination. There are no individual complainants in this claim and little evidence of the harm suffered by victims from which the Tribunal can extrapolate. It would also offend the general objection against awarding compensation to non-complainants in human rights matters.

[79] The Caring Society requests that compensation be paid in to an independent trust similar to the ones established under the IRSSA and the AFN is requesting payment of compensation directly to victims and their families. The AGC says the Tribunal should not, and is not permitted in law, to take either of the approaches proposed by the complainants. As the Tribunal question notes, the Indian Residential Schools settlement is the result of agreement between the parties in settling a class action and the independent trust was not imposed by a Court or tribunal.

[80] Finally, according to the AGC, compensation cannot be paid to victims or their families through this process because there are no victims or family-member complainants in this claim.

[81] The Commission while not making submissions on the remedies sought made helpful legal arguments on the issue of compensation and in response to the AGC's legal position on this issue which will be summarized here. The Commission agrees that any

award of financial compensation to victims must be supported by evidence. However, it is important to remember that s. 50(3)(c) of the *CHRA* expressly allows the Tribunal to "receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be available in a court of law." As a result, in making decisions under the *CHRA*, it is open to the Tribunal to rely on hearsay or other information, alongside any direct testimony from the parties, victims or other witnesses (emphasis ours).

[82] The Commission further submits that awards for pain and suffering under the *CHRA* are compensation for the loss of one's right to be free from discrimination, and for the experience of victimization. The award rightly includes compensation for harm to a victim's dignity interests. The specific amounts to be ordered turn in large part on the seriousness of the psychological impacts that the discriminatory practices have had upon the victim. Medical evidence is not needed in order to claim compensation for pain and suffering, although such evidence may be helpful in determining the amount, where it exists.

[83] Furthermore, the Commission submits the Tribunal has held that a complainant's young age and vulnerability are relevant considerations when deciding the quantum of an award for pain and suffering, at least in the context of sexual harassment. The Commission agrees, and submits that vulnerability of the victim should be a relevant consideration in any context, especially where children are involved. Such a finding would be consistent with (i) approaches taken by human rights decision-makers interpreting analogous remedial provisions in other jurisdictions, and (ii) Supreme Court of Canada case law recognizing that children are a highly vulnerable group.

[84] According to the Commission, the Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA*.

[85] Like all remedies under the *CHRA*, awards for pain and suffering must be tied to the evidence, be proportionate to the nature of the infringement, and respect the wording of the statute. Among other things, this requires that awards for pain and suffering fit

within the $20,000 cap set out in s. 53(2)(e) of the *CHRA*. At the same time, as the Ontario Court of Appeal has cautioned in the context of equivalent head of compensation under the Ontario Human Rights Code, "… Human Rights Tribunals must ensure that the quantum of general damages is not set too low, since doing so would trivialize the social importance of the [Code] by effectively setting a 'licence fee' to discriminate''.

[86] The Commission adds that the Court of Appeal noted in *Lemire v. Canadian Human Rights Commission,* 2014 FCA 18, (*Lemire*), the wording of s. 53(3) of the *CHRA* does not require proof of loss by a victim. In the context of the former hate speech prohibition under the *CHRA*, awards of special compensation for wilful or reckless conduct were said to compensate individuals identified in the hate speech for the damage "presumptively caused" to their sense of human dignity and belonging to the community at large.

[87] Additionally, the Commission argues that Sections 53(2)(e) and 53(3) of the *CHRA* each allow the Tribunal to order that a respondent pay financial compensation to the "victim of the discriminatory practice."

[88] Also, the Commission advances the argument that in most human rights proceedings, there is one complainant who is also the alleged victim of the discriminatory practice. However, this is not always the case. The *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[89] In light of this potential under the *CHRA*, the Commission submits that it is within the discretion of the Tribunal to award financial remedies to victims of discriminatory practices, and to determine who those victims are – always having regard to the evidence before it. For example, if the specific identities of victims are known to the Tribunal, it might order payments directly to those victims. If the Tribunal does not have evidence of the specific identities of the victims, but has enough evidence to believe that the parties

would be capable of identifying them, it might make orders that (i) describe the class of victims, (ii) give the parties time to collaborate to identify the victims, and (iii) retain the Tribunal's jurisdiction to oversee the process.

[90] The Commission further submits that in *Walden et al. v. Attorney General of Canada* (2010), the Federal Court (i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[91] The Commission notes that in questions posed to the parties regarding compensation, the Panel Chair appears to have raised concerns about having the Tribunal order the creation of a panel that would effectively be making decisions about appropriate remedies under the *CHRA*. With the greatest of respect to the AFN, the Commission shares those concerns. Parliament has assigned the responsibility of deciding compensation to the specialized Tribunal, created under the *CHRA*. Nothing in the statute authorizes the Tribunal to sub-delegate that responsibility to another body. Without statutory authority, any sub-delegation of this kind would likely be contrary to principles of administrative law.

[92] The Commission further notes that in her questions, the Panel Chair asked if it might instead be preferable to have an expert panel do the preliminary work of identifying victims, and present their circumstances to the Tribunal for determination. If the Tribunal is inclined to go in this direction, the Commission simply observes that the Tribunal's remedial powers only allow it to make orders against the person who infringed the *CHRA* here, Canada. As a result, any order regarding an expert panel should not purport to bind the Commission or any other non-respondent to participate on an expert panel.

[93] Speaking only for itself, the Commission has concerns that it would not have sufficient resources to allow for timely and effective participation in an expert panel procedure of the kind under discussion. An order that allows for the Commission's

participation, but does not require it, would allow the Commission to consider the resource implications of any process that may be put in place, and advise at that time of its ability to participate.

V. The Tribunal's authority under the Act and the nature of the claim

[94] The Tribunal's authority to award remedies such as compensation for pain and suffering and special damages for wilful and reckless conduct is found in the *CHRA* characterized by the Supreme Court of Canada on numerous occasions, to be quasi-constitutional legislation (see for *example Robichaud v. Canada (Treasury Board),* 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at pp. 89-90 [*Robichaud];* Canada (House of Commons) v. Vaid, 2005 SCC 30 (CanLII) at para. 81; and Canada (*Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53 (CanLII) at para. 62 [Mowat]).

[95] The principle that the *CHRA* is paramount was first enunciated in the *Insurance Corporation of British Columbia v. Heerspink* 1982 CanLII 27 (SCC), [1982] 2 S.C.R. 145, 158, and further articulated by the *Supreme Court of Canada in Winnipeg School Division No. 1 v. Craton* 1985 CanLII 48 (SCC), [1985] 2 S.C.R. 150, at p. 156 where the court stated:

[96] Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such a nature that it may not be altered, amended or appealed, nor may exceptions be created to its provisions save by clear legislative pronouncement. (at p. 577) (see also 2018 CHRT 4 at, para. 29).

> It is through the lens of the *CHRA* and Parliament's intent that remedies must be considered (…) (see 2018 CHRT 4 at, para. 30).

[97] It is also important to reiterate that the *CHRA* gives rise to rights of vital importance. Those rights must be given full recognition and effect through the *Act*. In crafting remedies under the *CHRA*, the Tribunal's powers under section 53(2) must be given such fair, large and liberal interpretation as will best ensure the objects of the *Act* are obtained. Applying a

purposive approach, remedies under the *CHRA* should be effective in promoting the right being protected and meaningful in vindicating the rights and freedoms of the victim of discrimination (see *CN v. Canada (Canadian Human Rights Commission),* 1987 CanLII 109 (SCC), [1987] 1 SCR 1114 at p. 1134; and, in *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at, paras. 25 and 55), (see also 2016 CHRT 2 at, para.469).

[98] Moreover, the Tribunal's broad remedial discretion is to be exercised on a principled and reasonable basis, taking into account the circumstances of the case, the link between the discriminatory practices and the losses claimed, and the evidence presented. (see *Tanner v. Gambler First Nation,* 2015 CHRT 19 at para. 161 (citing *Chopra v. Canada (Attorney General),* 2007 FCA 268 (CanLII), at para. 37; and *Hughes v. Elections Canada,* 2010 CHRT 4 at para. 50).

[99] When the Tribunal analyzes the claim, it reviews the complaint and also the elements contained in the Statement of Particulars in accordance with rule 6(1)d) of the Tribunal's rules of procedure (see *Lindor c. Travaux publics et Services gouvernementaux Canada*, 2012 TCDP 14 at para.4, Translation).

[100] In fact, when the Tribunal examines the complaint, it does so in light of the principles above mentioned and in a flexible and non-formalistic manner:

> ''Complaint forms are not to be perused in the same manner as criminal indictments''. (*Translation, see Canada (Procureur général) c. Robinson,* [1994] 3 CF 228 (CA) cited in *Lindor* 2012 TCDP 14 at para.22).
>
> « Les formules de plainte ne doivent pas être scrutées de la même façon qu'un acte d'accusation en matière criminelle. »

[101] Furthermore, this Tribunal has determined that the complaint is but one element of the claim, a first step therefore, the Tribunal must look beyond the complaint form to determine the nature of the claim:

> Pursuant to Rule 6(1) of the Tribunal's Rules of Procedure (03-05-04) (the "Rules"), each party is to serve and file a Statement of Particulars ("SOP") setting out, among other things,

> (a) the material facts that the party seeks to prove in support of its case; (b) its position on the legal issues raised by the case (...) (see *Kanagasabapathy v. Air Canada* 2013 CHRT 7, at para.3).

[102] It is important to remember that the original complaint does not serve the purposes of a pleading (*Casler v. Canadian National Railway, 2017 CHRT 6 at para. 9 [Casler]; see also Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 at para. 10 [*Gaucher*]). Moreover, as explained in *Casler*:

> . . [I]t must be kept in mind that filing a complaint is the first step in the complaint resolution process under the *Act*. As the Tribunal stated in *Gaucher*, at paragraph 11, "[i]t is inevitable that new facts and circumstances will often come to light in the course of the investigation. It follows that complaints are open to refinement". As explained in *Gaucher* and *Casler*, cited above, the complaint filed with the Commission only provides a synopsis; it will essentially become clearer during the course of the process. The conditions for the hearing are defined in the Statement of Particulars. (see also *Polhill v. Keeseekoowenin,* see also, *First Nation* 2017 CHRT 34 at, paras. 34 and 36).

[103] It is useful to look at the claim in this case which in this case includes the complaint, the Statement of Particulars and the specific facts of the case to respond to the AGC's argument that this is a systemic claim and not suited for awards of individual remedies.

[104] The complaint form in this case alleges that: ''the formula drastically underfunds primary, secondary and tertiary child maltreatment intervention services, including least disruptive measures''. These services are vital to ensuring the First Nations children have the same chance to stay safely at home with support services as other children in Canada (see Complaint form at, pages 2-3).

[105] The Panel already found in past rulings that it is the First Nations children who suffer and are adversely impacted by the underfunding of prevention services within the federal funding formula. The Panel considered the claim including the complaint, Statement of Particulars as well as the entire evidentiary record, arguments, etc. to arrive at its findings. As exemplified by the wording above, the complaint specifically identifies First Nations children and the AFN and the Caring Society advanced the complaint on their behalf.

[106] Furthermore, the Statement of Particulars of the Caring Society and the AFN of January 29, 2013: “request pain and suffering and special compensation remedies under section 53(2) (e) of the *CHRA* and f…’’ (see page 7 at para.21 reproduced below):

Relief requested:

> Pursuant to sections 53(2)(d), (e) and (f), requiring compensation and special compensation in the form of payment of one hundred and twelve million dollars into a trust fund to be administered by FNCFCS and to be used to: (a) As compensation, subject to the limits provided in sections 53(3)(e) and (f) for each First Nation person who was removed from his or her home since 1989 and thereby experienced pain and suffering;

[107] In this case, the fact that there is no section 53 (2) (f) in the *CHRA* but rather a paragraph 3 is a small error that does not change the nature of the requested remedies. Moreover, this error was later corrected in the Caring Society’s final submissions.

[108] It is clear from reviewing the Complainants’ Statement of Particulars that they were seeking compensation from the beginning and also before the start of the hearing on the merits. The Tribunal requests parties to prepare statements of particulars in order to detail the claim given that the complaint form is short and cannot possibly contain all the elements of the claim. It also is a fairness and natural justice instrument permitting parties to know their opponents’ theory of the cause in advance in order to prepare their case. Sometimes, parties also present motions seeking to have allegations contained in the Statement of Particulars quashed in order to prevent the other party from presenting evidence on the issue.

[109] The AGC responded to these compensation allegations and requests both in its updated Statement of Particulars of February 15, 2013 demonstrating it was well aware that the complainants the Caring Society and the AFN were seeking remedies for pain and suffering and for special compensation for individual children as part of their claim.

[110] As shown by the AGC’s position on the relief requested by the Complainants:

> With respect to the relief sought in paragraphs 21(2), 21(3) (insofar as the relief requested in 21(3) seeks the establishment of a trust fund to provide compensation to certain unnamed First Nations persons for pain and suffering and for certain services and 21(5) of the Complainants Statement

of particulars, the requested relief is beyond the jurisdiction of the Tribunal (...) No compensation should be awarded under section 53(2)(e) of *Canadian Human Rights Act* as neither Complainant meet the definition of victim within the section. In the alternative, any compensation awarded under s.53(2)(e) should be limited to a maximum of $40,000 (calculated as follows: the maximum available, $20,000, multiplied by the number of Complainants, two, equals $40,000). (See AGC particulars at page 15, para. 64 and 66).

[111] The Panel finds this demonstrates that the AGC was fully aware that compensation remedy for victims/survivors who were not the Complainants was part of the Complainants' claim before the Tribunal. Moreover, it admitted that compensation was an issue to be determined by the Tribunal in a Consultation Protocol signed in these proceedings by all parties and by Minister Jane Philpott, as she then was, on behalf of Canada:

WHEREAS, the Tribunal retained jurisdiction to ensure the implementation of its Decision, and subsequently directed that implementation be done in three steps, namely: (1) immediate relief; (2) mid to long term relief; and (3) compensation, and has reserved its ruling regarding the Complainants' motion for an award against Canada in relation to the costs of its obstruction of the Tribunal's process in relation to document disclosure and production (see Consultation Protocol, signed March 2, 2018 at page. 2)

The Tribunal has directed that the implementation of its *Decision* be done in three steps, namely: (1) immediate relief, (2) mid to long term relief and (3) compensation. Canada commits to consult in good faith with the Complainants, the Commission and Interested Parties on all the three steps, to the extent of their respective interests and mandates. (see Consultation Protocol, signed March 2, 2018 at, para.4, page. 7)

VI. Victims under the CHRA

[112] Nothing in the *Act* suggests that the Tribunal lacks jurisdiction and cannot order remedies benefitting victims who are not Complainants. The Panel disagrees with the AGC's argument and interpretation including of section 40 paras. (1) and (2) summarized above. Section 40 (1) and (2) is reproduced here:

40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is

> engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.
>
> Consent of victim
>
> (2) If a complaint is made by someone other than the individual who is alleged to be the victim of the discriminatory practice to which the complaint relates, the Commission may refuse to deal with the complaint unless the alleged victim consents thereto.

[113] This wording suggests that complaints on behalf of victims made by representatives can occur and the Commission has the discretion to refuse to deal with the complaint if the victim does not consent.

[114] In this case, the Commission referred the complaint to the Tribunal and does not oppose the remedy sought on behalf of victims.

[115] Consequently, the Panel agrees with the Commission that the *CHRA* clearly contemplates that a complaint may be filed by someone who does not claim to have been a victim of the discriminatory practice alleged in the complaint. In such circumstances, s. 40(2) expressly gives the Commission a discretion to refuse to deal with the complaint, unless the alleged victim consents. The existence of this discretion shows Parliament's understanding that "victims" and "complainants" may be different persons.

[116] Additionally, the Federal Court of Appeal's decision in *Singh (Re),* [1989] 1 F.C. 430 at 442, discussed the meaning of the term victim where the Court stated:

> The question as to who is the "victim" of an alleged discriminatory practice is almost wholly one of fact. Human rights legislation does not look so much to the intent of discriminatory practices as to their effect. That effect is by no means limited to the alleged "target" of the discrimination and it is entirely conceivable that a discriminatory practice may have consequences that are sufficiently direct and immediate to justify qualifying as a "victim" thereof persons who were never within the contemplation or intent of its author.

[117] The Tribunal has already distinguished complainants from victims who are not complainants within the *CHRA* framework:

> On the third ground, I am satisfied that the proceeding will have an impact on the interests of PIPSC's members. PIPSC is the bargaining agent for the Complainants and non-complainant Medical Adjudicators who may be

> deemed as “victims” under the *CHRA* and entitled to compensation. On this basis alone, I find that PIPSC has an interest in this phase of the proceeding. (see *Walden et al. v. Attorney General of Canada (representing the Treasury Board of Canada and Human Resources and Skills Development Canada),* 2011 CHRT 19 at, para.25).

[118] This speaks against the AGC’s argument that the Tribunal cannot make awards to individuals that are not complainants and to the other AGC’s argument that the Tribunal has no jurisdiction to award remedies for a “group” of victims represented by an organization.

[119] In *Walden,* both the Tribunal’s liability and remedy decisions were judicially reviewed, unsuccessfully in the case of the former and successfully in the latter. The remedy matter was referred back on two issues to be resolved: one involving compensation for pain and suffering; and the other, involving compensation for wage loss including benefit. The parties have negotiated a settlement on the pain and suffering component and have asked the Tribunal for a Consent Order disposing of this issue (see [*Walden v. Canada (Social Development),* 2007 CHRT 56 (CanLII), at para.3).

[120] While the end result in that case was a consent order on pain and suffering remedies, the Tribunal could not make orders that would fall outside its jurisdiction under the *Act*.

[121] The AGC relies also on a Federal Court case to support its position that compensating victims in this claim when they are not complainants would also be contrary to the general objection to awarding compensation to non-complainants in human rights complaints, as recognized by the Federal Court in Canada (*Secretary of State for External Affairs) v. Menghani*, [1994] 2 FC 102 at para. 62.

[122] The Panel disagrees with the AGC’s interpretation and application of the Federal Court decision to our case. The analysis, the factual matrix and the findings from the Federal Court are different from the case at hand. The Panel finds it does not support the AGC’s position to bar the Tribunal from awarding compensation to non-complainant victims in this case.

[123] This case was always about children as exemplified by the claim written in the complaint and in the Statement of Particulars and the Tribunal's decisions. Moreover, the AGC is aware that the Tribunal views this case is about children. What is more, the Panel agrees that AFN and the Caring Society filed the complaint on behalf of a representative group who are identifiable by specific characteristics if not by name. Furthermore, the Panel believes it is important to consider the nature of this case where the victims/survivors are part of a group composed of vulnerable First Nations children.

[124] While there are other forums available for filing representative actions, the AFN stated that Tribunal was carefully chosen in this case due to the nature of the claim, but, also due to the means of redress available under the *CHRA* for members of a vulnerable group on whose behalf the AFN has advanced a case of discrimination contrary to the *Act*.

VII. Pain and suffering analysis

[125] Once it is established that discrimination or a loss has been suffered, the Tribunal must consider whether an order is appropriate (see s. 53(2) of the *CHRA*. In this regard, the Tribunal has the duty to assess the need for orders on the material before it; or, it can refer the issue back to the parties to prepare better evidence on what an appropriate order should be (see *Canadian Human Rights Commission v. Canada (Attorney General),* 2010 FC 1135 (CanLII) at paras. 61 and 67, aff'd 2011 FCA 202 (CanLII) ["*Walden"]).* In determining the present motions, this is the situation in which the Panel finds itself. (see 2017 CHRT 14 (CanLII) at para. 27), (see 2019 CHRT 7 at, para.47). Therefore, in the presence of sufficient evidence and a remedy that flows from the claim, the Tribunal may make the orders it finds appropriate.

[126] In a recent Tribunal decision, *Lafrenière v. Via Rail Canada Inc.,* 2019 CHRT 16, at para.193 Member Perreault wrote about the pain and suffering award under section. 53(2)(e) of the *CHRA*:

> However, $20,000 is the maximum that may be awarded under the legislation and it is usually awarded by the Tribunal in more serious cases, i.e. when the scope and duration of the Complainant's suffering from the discriminatory practice justify the full amount.

[127] The Federal Court of Appeal has confirmed that where the Tribunal finds evidence that a discriminatory practice caused pain and suffering, compensation should follow under s. 53(2)(e) of the *CHRA (see Jane Doe v. Canada (Attorney General),* 2018 FCA 183 (*Jane Doe*), at para. 29, citing (among others): *Grant v. Manitoba Telecom Services Inc., 2012 CHRT 10 at para. 115); and Alizadeh-Ebadi v. Manitoba Telecom Services Inc*., 2017 CHRT 36 at para. 213).

[128] Furthermore, when someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination (…) varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self-worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made. However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances (see *Grant v. Manitoba Telecom Services Inc*., 2012 CHRT 10 at, para.115 recently cited in *Jane Doe,* at, para.29).

[129] The pain and suffering remedy sought as part of this ruling is found at para. 53 (2) (e) of the *CHRA*. Section 53 (2) reads as follows:

> Complaint substantiated
>
> (2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
>
> (a) that the person cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future, including
>
> (i) the adoption of a special program, plan or arrangement referred to in subsection 16(1), or

> (ii) making an application for approval and implementing a plan under section 17;
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;
>
> (c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;
>
> (d) that the person compensate the victim for any or all additional costs of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice; and
>
> (e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

[130] Section 53 imposes a logical requirement for any award of remedies that is, the remedy should flow from a finding that the complaint is substantiated. If this is the case, an array of remedies is available to the victim of the discriminatory practice. The wording of section 53(2) is unambiguous and allows the victim of the discriminatory practice to obtain any remedies listed in section 53 as the member or panel finds appropriate: ‘’(..) and include in the order any of the following terms that the member or panel considers appropriate’’. It is clear that the language of the *CHRA* does not prevent awards of multiple remedies even if systemic remedies have been ordered.

[131] The AGC’s argument that systemic discrimination requires systemic remedies is correct. However, the AGC’s argument that it precludes other awards of remedies as the Panel deems appropriate in light of the facts and the evidence before the Tribunal is incorrect.

[132] The way to determine the issue is to look at the Statute first:

> The basic rule of statutory interpretation is that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; see also *Rizzo & Rizzo Shoes Ltd*.

> (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27, at para. 21, see also *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 at, para.12).

[133] The special nature of human rights legislation is also taken into account in its interpretation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the *Act* must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained. *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (see *CN v. Canada (Canadian Human Rights Commission), 1987 CanLII 109 (SCC),* [1987] 1 SCR 1114, at, p. 1134) cited in 2015 CHRT 14 at, para.13).

[134] Consequently, analyzing the specific facts of the case and weighing the accepted evidence in the Tribunal record is of paramount importance.

> Indeed, the Federal Court of Appeal recently described the exercise of statutory interpretation:
>
> To discern the meaning of “compensate”, the Board is therefore required to conduct an exercise in statutory interpretation. For the interpretation to be reasonable, the Board is obliged to ascertain the intent of Parliament by reading paragraph 53(2)(e) in its entire context, according to the grammatical and ordinary meaning of its text, understood harmoniously with the object and scheme of the *Act*. The Board must also be mindful that human rights legislation is to be construed liberally and purposively so that protected rights are given full recognition and effect. (see *Jane Doe v. Canada (Attorney General),* 2018 FCA 183 at, paras.23).

[135] The proper legal analysis is fair, large and liberal and must advance the *Act*'s objective and account for the need to uphold the human rights it seeks to protect. As mentioned above, one should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[136] The AGC relies on the *Moore* case to support its assertion that individual remedies cannot be awarded in a systemic case. However, the Panel disagrees with the AGC's interpretation of this case.

[137] The Supreme Court decision in *Moore* did not say that both systemic and individual remedies cannot be awarded to victims of discriminatory practices rather it emphasizes the need for the remedy to be connected to the claim and the need for an evidentiary basis to make orders. The case of Jeffery Moore was a complaint of individual discrimination where the Tribunal went beyond the claim and made findings of systemic discrimination. This is the issue discussed by the Supreme Court which described the case as follows:

> This case is about the education of Jeffrey Moore, a child with a severe learning disability who claims that he was discriminated against because the intense remedial instruction he needed in his early school years for his dyslexia was not available in the public-school system. Based on the recommendation of a school psychologist, Jeffrey's parents enrolled him in specialized private schools in Grade 4 and paid the necessary tuition. The remedial instruction he received was successful and his reading ability improved significantly.

[138] Jeffrey's father, Frederick Moore, filed a human rights complaint against the School District and the British Columbia Ministry of Education alleging that Jeffrey had been discriminated against because of his disability and had been denied a "service (…) customarily available to the public", contrary to s. 8 of the Human Rights Code, R.S.B.C. 1996, c. 210 ("Code"). (see *Moore* at paras. 1-2).

[139] Additionally, the Supreme Court discussed the remedy as follows: ''But the remedy must flow from the claim. In this case, the claim was made on behalf of Jeffrey, and the evidence giving concrete support to the claim all centered on him. While the Tribunal was certainly entitled to consider systemic evidence in order to determine whether Jeffrey had suffered discrimination, it was unnecessary for it to hold an extensive inquiry into the precise format of the provincial funding mechanism or the entire provincial administration of special education in order to determine whether Jeffrey was discriminated against. The Tribunal, with great respect, is an adjudicator of the particular claim that is before it, not a Royal Commission''. (see *Moore* at paras.64).

[140] The case at hand on the contrary, is one of systemic racial discrimination as admitted by Canada in its oral and written submissions on compensation and, also a case where the Tribunal found that the system caused adverse impacts on First Nations children and their families.

[141] It is worth mentioning that the *Decision* on the merits begins with this important finding: **This decision concerns children. More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities.** (see 2016 CHRT 2, at para.1).

[142] In claiming there is no evidence in the record to support compensation to individual victims who are not complainant in this case, the Panel finds that the AGC does not consider section 50 (3)c of the *CHRA*: ‘’(c) subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law’’. The only limitation in relation to evidence is found at section 50 (4) of the *CHRA*, the member or panel may not admit or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.

[143] The word “may” suggests that this limitation is imposed or not at the discretion of the Member or Panel.

[144] The Panel finds it is unreasonable to require vulnerable children to testify about the harms done to them as a result of the systemic racial discrimination especially when reliable hearsay evidence such as expert reports, reliable affidavits and testimonies of adults speaking on behalf of children and official government documents supports it. The AGC in making its submissions does not consider the Tribunal’s findings in 2016 accepting numerous findings in reliable reports as its own. The AGC omits to consider the Tribunal’s findings of the children's suffering in past and unchallenged decisions in this case.

[145] In *Canada (Social Development) v. Canada (Human Rights Commission*), 2011 FCA 202 at para.73 (“*Walden* FCA’’), as mentioned by the Commission, the Federal Court

(i) took note of this broad discretion with respect to the admissibility of evidence, and (ii) held that the Tribunal does not necessarily need to hear testimony from all alleged victims of discrimination in order to compensate them for pain and suffering. Instead, the Court noted that it could be open to the Tribunal in an appropriate case to rely on hearsay evidence from some individuals to determine the pain and suffering of a group.

[146] The Panel does not accept that a systemic case can only prompt systemic remedies. As mentioned above, nothing in the *CHRA* prohibits the Tribunal's discretion to order systemic remedies along with individual remedies if the complaint is substantiated and the evidence supports it.

[147] The children who were unnecessarily removed from their homes, will not be vindicated by a system reform nor will their parents. Even the children who are reunified with their families cannot recover the time they lost with their families. The loss of opportunity to remain in their homes, their families and communities as a result of the racial discrimination is one of the most egregious forms of discrimination leading to serious and well documented consequences including harm and suffering found in the evidence in this case.

[148] As it will be discussed below, the evidence is sufficient to make a finding that each child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation.

[149] The use of the ''words unnecessarily removed'' account for a distinction between two categories of children those who did not need to be removed from the home and those who did. If the children are abused sexually, physically or psychologically those children have suffered at the hands of their parents/caregivers and needed to be removed from their homes. However, the children should have been placed in kinship care with a family member or within a trustworthy family within the community. Those First Nations children suffered egregious and compound harm as a result of the discrimination by being removed from their extended families and communities when they should have been comforted by safe persons that they knew. This is a good example of violation of substantive equality.

[150] The Panel believes that in those situations only the children should be compensated and not the abusers. The Panel understands that some of the abusers have themselves been abused in residential or boarding schools or otherwise and that these unacceptable crimes of abuse are condemnable. The suffering of First Nations Peoples was recognized by the Panel in the *Decision*. However, not all abused children became abusers even without the benefit of therapy or other services. The Panel believes it is important for the children victims/survivors of abuse to feel vindicated and not witness financial compensation paid to their abusers regardless of the abusers' intent and history.

[151] Additionally, the Panel also recognizes that the suffering can continue for life for First Nations children and their families even when families are reunited given the gravity of the adverse impacts of breaking families and communities.

[152] Besides, there is sufficient evidence before the Tribunal to make findings of pain and suffering experienced by victims/survivors who are the First Nations children and their families.

[153] Throughout all the *Decision* and rulings, references were made to First Nations children and their families. The Panel did not focus on the complainants when analyzing the adverse impacts. The Panel analyzed the <u>effects/impacts</u> of the discriminatory practices on First Nations children and clearly expressed this. The findings focused on the agencies' abilities to deliver services and most importantly, the First Nations children, their families and their communities who are the victims/survivors of the discriminatory practices. First Nations children and families are referenced continuously throughout the *Decision*. The *Decision* starts with: ''**This decision concerns children.** More precisely, it is about how the past and current child welfare practices in First Nations communities on reserves, across Canada, have impacted and continue to impact First Nations children, their families and their communities''.

[154] Furthermore, an analysis of the Tribunal's findings makes it clear that the Tribunal's orders are aimed at improving the lives of First Nations children and that the First Nations children and Families are the ones who suffer from the discrimination. The Tribunal made findings of systemic racial discrimination and agrees this case is a case of systemic racial

discrimination. The Panel also made numerous findings of adverse impacts toward First Nation children and families, adverse impacts that cause serious harm and suffering to children the two are interconnected. While a finding of discrimination and of adverse impacts may not always lead to findings of pain and suffering, in these proceedings it clearly is the case. A review of the 2016 CHRT 2 and subsequent rulings demonstrates this. There is no reason not to accept that both coexist in this case. The individual rights that were infringed upon by systemic racial discrimination warrant remedies alongside systemic reform already ordered by the Tribunal (see 2016 CHRT 2, 10, 16 and 2017 CHRT 7, 14, 35 and 2018 CHRT 4).

[155] Also, the Tribunal has already made numerous findings relating to First Nations children and their families' adverse impacts and suffering in past rulings. Some of these findings can be found in the compilation of citations below:

> The FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements only apply to First Nations people living on-reserve and in the Yukon. It is only because of their race and/or national or ethnic origin that they suffer the adverse impacts outlined above in the provision of child and family services. Furthermore, these adverse impacts **perpetuate the historical disadvantage and <u>trauma suffered</u> by Aboriginal people,** in particular as a result of the Residential Schools system (see 2016 CHRT 2 at, para.459). (…)
>
> **The Panel acknowledges the suffering of those First Nations children and families who are or have been denied an equitable opportunity to remain together or to be reunited in a timely manner. We also recognize those First Nations children and families who are or have been adversely impacted by the Government of Canada's past and current child welfare practices on reserves** (see 2016 CHRT 2 at, para.467).
>
> Overall, AANDC's method of providing funding to ensure the safety and well-being of First Nations children on reserve and in the Yukon, by supporting the delivery of culturally appropriate child and family services that are in accordance with provincial/territorial legislation and standards and provided in a reasonably comparable manner to those provided off reserve in similar circumstances, falls far short of its objective**. In fact, the evidence demonstrates adverse effects for many First Nations children and families living on reserve and in the Yukon**, including a denial of adequate child and family services, by the application of AANDC's FNCFS

Program, funding formulas and other related provincial/territorial agreements (see 2016 CHRT 2 at, para. 393).

As will be seen in the next section, **the adverse effects generated by the FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements perpetuate disadvantages historically suffered by First Nations people.** (see 2016 CHRT 2 at, para.394).

The evidence in this case not only indicates various adverse effects on First Nations children and families by the application of AANDC's FNCFS Program, corresponding funding formulas and other related provincial/territorial agreements, but also that **these adverse effects perpetuate historical disadvantages suffered by Aboriginal peoples, mainly as a result of the Residential Schools system.**

The legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today. (see 2016 CHRT 2 at, para. 404).

[…] To the approximately 80,000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this (...) (see 2016 CHRT 2 at, para.411).

In the spirit of reconciliation, the Panel also acknowledges the suffering caused by Residential Schools. Rooted in racist and neocolonialist attitudes, the individual and collective trauma imposed on Aboriginal people by the Resident Schools system is one of the darkest aspects of Canadian history. As will be explained in the following section, the effects of Residential Schools continue to impact First Nations children, families and communities to this day (see 2016 CHRT 2 at, para.412).

Even with this guiding principle, if funding is restricted to provide such services, then the principle is rendered meaningless (…) With unrealistic funding, how are some First Nations communities expected to address the effects of Residential Schools? It will be difficult if not impossible to do, resulting in more kids ending up in care and perpetuating the cycle of control that outside forces have exerted over Aboriginal culture and identity (see 2016 CHRT 2 at, para. 425).

Similar to the Residential Schools era, today, the fate and future of many First Nations children is still being determined by the government, whether it is through the application of restrictive and inadequate funding formulas or through bilateral agreements with the provinces. The purpose of having a First Nation community deliver child and family services, and to be involved through a Band Representative, is to ensure services are culturally appropriate and reflect the needs of the community. This in turn may help legitimize the child and family services in the eyes of the community, increasing their effectiveness, and ultimately help rebuild individuals, families and communities that have been heavily affected by the Residential Schools system and other historical trauma. (see 2016 CHRT 2 at, para. 426).

(…) On that point, the Panel would like **to stress how important it is to address the issue of mass removal of children today.** While Indigenous communities may have different views on child welfare, there is no evidence that they oppose actions to stop removing the children from their Nations. Indeed, it would be somewhat surprising if they did as it would amount to a colonial mindset. In any event, assertions from Canada on this point do not constitute evidence and do not assist us in our findings. Moreover, Indigenous communities have obligations to their children such as keeping them safe in their homes whenever possible. While there may be different views from one Nation to another, surely the need to keep the children in their communities as much as possible is the same (see 2018 CHRT 4 at, para.62).

This being said, the Panel fully supports Parliament's intent to establish a Nation-to-Nation relationship and that reconciliation is Parliament's goal (see *Daniels v. Canada (Indian Affairs and Northern Development*, [2016] 1 SCR 99), and commends it for adopting this approach. The Panel ordered that the specific needs of communities be addressed and this involves consulting the communities. However, the Panel did not intend this order to delay addressing urgent needs. It foresaw that while agencies would have more resources to stop the mass removal of children, best practices and needs would be identified to improve the services while the program is reformed, and ultimately child welfare would reflect what communities need and want, and the best interest of children principle would be upheld. It is not one or the other; it is one plus the other. (see 2018 CHRT 4 at, para.66).

This is a striking example of a system built on colonial views perpetuating historical harm against Indigenous peoples, and all justified under policy. While the necessity to account for public funds is certainly legitimate it becomes troubling when used as an argument to justify the mass removal of children rather than preventing it.

There is a need to shift this right now to cease discrimination. The Panel finds the seriousness and emergency of the issue is not grasped with some

> of Canada's actions and responses. This is a clear example of a policy that was found discriminatory and that is still perpetuating discrimination. Consequently, the Panel finds it has to intervene by way of additional orders. In further support of the Panel's finding, compelling evidence was brought in the context of the motions' proceedings (see 2018 CHRT 4 at, para. 121).
>
> Ms. Lang's evidence, over a year after the *Decision*, establishes the fact that aside from discussions, no data or short-term plan was presented to address this matter. **The focus is on financial considerations and not the best interests of children nor addressing liability and preventing mass removals of children** (see 2018 CHRT 2 at, para.132).
>
> The Panel finds (…) There is a real need to make further orders on this crucial issue to **stop the mass removal of Indigenous children, and to assist Nations to keep their children safe within their own communities** (…) (see 2018 CHRT 4 at, para. 133).
>
> It is important to remind ourselves that this is about children experiencing **significant negative impacts on their lives**. It is also urgent to address the underlying causes that promote removal rather than least disruptive measures (see the *Decision* at paras.341-347), (see also 2018 CHRT 4 at, para.166).
>
> Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings. **It incentivizes the removal of children** rather than assisting communities to stay together. (see 2018 CHRT 4 at, para. 230).
>
> It is important to look at this case in terms of bringing Justice and not simply the Law, especially with reconciliation as a goal. **This country needs healing and reconciliation and the starting point is the children and respecting their rights.** If this is not understood in a meaningful way, in the sense that it leads to real and measurable change, then, the TRC and this Panel's work is trivialized and unfortunately t**he suffering is born by vulnerable children** (see 2018 CHRT 4 at, para. 451).

VIII. The Evidence in the Tribunal record

[156] In order to respond to the AGC's argument that there is a lack of evidence in the record to support a pain and suffering remedy, a review of some relevant elements of the evidence before this Tribunal follows:

> Mr. Dufresne: Why did you file the complaint?
>
> DR. BLACKSTOCK: I filed the complaint as a last resort. I -- I'm one of those people that believes that you have to try and work towards solutions first. And we did that not only once but we did that twice over a period of many years. We got to the place of documenting the inequality. In my view there was consensus that that inequality existed. We talked about and I believe with the respondent agreed with the harms to children that were a result of not taking action, that being there growing numbers of children in care and hardships for families, and the unequal access of services or the denial of services to children.
>
> We developed solutions to that, first in the National Policy Review and secondly in the Wen:de reports. We even in the Wen:de reports took the time to present those results to central authorities in October of 2005, and nothing had changed remarkably at the level of the child. We felt that there was no other alternative than to bring a human rights complaint. And even as we brought it, I was very hopeful that that would be incentive enough for the respondent to take the action needed on behalf of the children, but we find ourselves here today. (See Testimony of Dr. Cindy Blackstock, StenoTran transcripts February 28, 2013, page 3, lines 17-25 and page 4, lines 1-19 vol 4) (emphasis added).

[157] Dr. Blackstock testified before the Tribunal and the Panel finds her testimony to be reliable and to speak to the issue of harm suffered by First Nations children as a result of the discrimination.

[158] Mr. Dubois is the Executive Director Touchwood agency and has a Bachelor of Social Work degree from the University of Calgary and also testified before the Tribunal:

> (…) MR. DUBOIS: I raised the issue with Indian Affairs.
>
> MR. POULIN: Why?
>
> MR. DUBOIS: Because I wanted to get away from just being limited to having to -- it was a situation where you kind of -- **you had to break up a family under Directive 20-1 before you could provide the services. It's only when you took a child into care that you could start to rebuild the family.** I wanted to be proactive. And this goes back to our history as a First Nations people, including my history where, you know, having to endure boarding school, like my dad, my late father was in boarding school, and the damage it did to us or the interference that back then that the church had on our family systems, so I wanted to **get away from that. Like having lived that experience, we don't need more interference. We don't need more -- for lack of a better word, wreaking havoc on our families. I come with**

> **the frame of mind that our families need healing and I, as a trained professional, and others out there in Saskatchewan and the other agencies, you know, like there has to be a different way to do child welfare other than breaking families up. We want to heal. We need to heal.** We have to do things differently, which is why when I referenced the SDM it was really appealing to me because it focuses on our strengths, you know, it builds on what we are and what we have. (see Testimony of Derald Richard Dubois, April, 8, 2013, StenoTran transcript a, pp. 60-61 lines 7-24; 1-11, vol 9). See also testimony of Mr. Derald Richard Dubois, StenoTran transcripts April 8, 2013, page lines and page 4 lines vol 9).

[159] Mr. Dubois who is a child welfare professional refers to the Federal funding formula Directive 20-1 that was found discriminatory by this Panel causing significant adverse impacts to First Nations children and their families. What is more, he testifies of one of the worst of those adverse impacts being the unnecessary removal of children from their homes, families and communities.

[160] This is a reliable and powerful testimony that exemplifies the pain and suffering and harm done to First Nations children, families and communities as a result of the racial and systemic discrimination that is perpetuating historical wrongs.

[161] The Panel finds that unnecessarily removing a child from its family and community is a serious harm causing great suffering to that child, the family and the community.

[162] There is also evidence of harm/suffering to First Nations children and families in several reports forming part of the evidentiary record already considered and relied upon by the Panel in arriving to its findings of adverse impacts in the 2016 *Decision*. The Wen:de we are coming to the light of day, 2005 report (WEN DE) was filed into evidence before the Tribunal. The AGC had the opportunity to make submissions on this report and the Panel made findings on the reliability of this report. Moreover, the Tribunal accepted the findings in WEN DE as its own findings (See *Decision* 2016 CHRT 2 at, para.257): ''The Panel finds the NPR and WEN DE reports to be highly relevant and reliable evidence in this case. They are studies of the FNCFS Program commissioned jointly by AANDC and the AFN''. They employed a rigorous methodology, in depth analysis of Directive 20-1, and consultations with various stakeholders. The Panel accepts the findings in these reports. There is no indication that AANDC questioned the findings of these reports prior to this

Complaint. On the contrary, there are indications that AANDC, in fact, relied on these reports in amending the FNCFS Program in a piece meal fashion.

[163] Additionally, Canada was part of this study and fully aware of its findings and impact of its practices on First Nations children which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in the 2005 year of the report which will also be revisited in the wilful and reckless section below. The Panel had reviewed all the WEN DE reports before accepting it as its own and included some references of those findings in the *Decision*. The following additional findings support the issue of compensation for pain and suffering of children and their families and inform the Panel in drafting its orders:

> Secondary analysis of the Aboriginal data in CIS-98 revealed that although Aboriginal children were less likely to be reported to child welfare authorities for physical or sexual violence they were twice as likely to experience neglect (Blackstock, Trocme & Bennett, 2004). When researchers unpacked neglect by controlling for various care giver functioning and socio-demographic factors – they determined that the **key drivers of neglect for First Nations children were poverty, poor housing, and substance misuse** (Trocme, Knoke & Blackstock, 2004). It is important to note that two of these three factors are arguably outside of the domain of parental influence – poverty and poor housing. As they are outside of the locus of control of parents is unlikely that parents will be able to redress these risks in the absence of social investments targeted to poverty reduction and housing improvement. **The limited ability for parents to influence the risk factors can mean that their children are more likely to stay in care for prolonged periods of time. This is particularly a concern in regions where statutory limits on the length of time a child is being put in care are being introduced. If parents alone cannot influence the risk and there are inadequate social investments to reduce the risk – children can be removed permanently.** The **third factor, substance misuse, is within the personal domain for change but requires access to services.** Overall, CIS- 98 results suggest **that targeted and sustained investments in neglect focused services that specifically consider substance misuse, poverty and poor housing would likely have a positive impact on the safety and well-being of these children.** (emphasis ours).

[164] The Panel finds that First Nations children and families are harmed and penalized for being poor and for lacking housing. Those are circumstances that are most of the time beyond the parents' control.

[165] The WEN De report goes on to say that:

> (...) providing an adequate range of neglect focused services is likely more complicated on reserve than off reserve due to existing service deficits within the government and voluntary sector. A study conducted by the First Nations Child and Family Caring Society in 2003 found that First Nations children and families receive very limited benefit from the over 90 billion dollars in voluntary sector services provided to other Canadians annually. Moreover, there are far fewer provincial or municipal government services than off reserve. This means that First Nations families are less able to access child and family support services including addictions services than their non-Aboriginal counterparts (Nadjiwan & Blackstock, 2003). Deficits in support services funding were also found in the federal government allotment for First Nations child and family services (MacDonald & Ladd, 2000.) **This report found that the federal government funding for least disruptive measures (a range of services intended to safely keep First Nations children who are experiencing or at risk of experiencing child maltreatment safely at home) is inadequately funded. When one considers the key drivers resulting in First Nations children entering care (substance misuse, poverty and poor housing) and couples that with the dearth in support services, unfavorable conditions to support First Nations families to care for their children emerges** (see WEN DE at, pp.13-14) (emphasis ours).
>
> Although there has been no longitudinal studies exploring the experiences of Aboriginal children in care throughout the care continuum (from report to continuing custody), data suggests that Aboriginal children are much more likely to be admitted into care, stay in care and become continuing custody wards. It is possible that the over representation of Aboriginal children in child welfare care is a result of the structural risk factors (poverty, poor housing and substance misuse) not being adequately addressed through the provision of targeted least disruptive measures at both the level of the family and community. The lack of service provision may result in minimal changes to home conditions over the period of time the child remains in care and thus it is more likely the child will not return home (see WEN DE pp.13-14).
>
> **The lack of services, opportunities and deplorable living conditions characterizing many of Canada's reserves has led to mass urbanization of Aboriginal peoples** (…)
>
> Funding First Nations have made a direct connection between the state of children's health and the colonization and attempted assimilation of Aboriginal peoples: The legacy of dependency, cultural and language impotence, dispossession and helplessness created by residential schools and **poorly thought out federal policies continue to have a lasting**

> **effect.** - **Substandard infrastructure and services have been made worse by federal-provincial disagreements over responsibility.**
>
> The most profound impact of the lack of clarity relating to jurisdiction results in what **many commentators have suggested are gaps in services and funding –resulting in the suffering of First Nations children.** As articulated by McDonald and Ladd in their comprehensive Joint Policy Review (prepared for the Assembly of First Nations and DIAND): First Nations agencies are expected through their delegation of authority from the provinces, the expectation of their communities, and by DIAND, to provide a comparable range of services on reserve with the funding they receive through Directive 20.1. The formula, however, provides the same level of funding to agencies regardless of how broad, intense or costly, the range of services is (see WEN DE at, pp.90-91).
>
> The issues raised by FNCFS providers demonstrate the tangible effects of funding limitations on the ability of agencies to address the needs of children. **Without funding for provision of preventative services many children are not given the service they require or are unnecessarily removed from their homes and families.** In some provinces the option of removal is even more drastic as children are not funded if placed in the care of family members. The limitations placed on agencies quite clearly jeopardize the well-being of their clients, Aboriginal children and families. As a society we have become increasingly aware of the social devastation of First Nations communities and have discussed at length the importance of healing and cultural revitalization. **Despite this knowledge, however, we maintain policies which perpetuate the suffering of First Nations communities and greatly disadvantage the ability of the next generation to effect the necessary change.** (see WEN DE at, p.93).

[166] The Supreme Court of Canada found that the removal of a child from a parent's custody affects the individual dignity of that parent:

> In *Godbout v. Longueuil,* La Forest J. held that: …the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to **enjoy individual dignity and independence**… choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.
> Although the liberty to choose where one resides is clearly not an inalienable right, it may be considered **a strong argument that children should only be forced to leave their family homes in the most extreme circumstances. This is not the case here as Aboriginal children are removed from their homes in far greater numbers than non-Aboriginal children for the purposes of receiving services.**

> **Alternatively, it may be argued that placement of children in care, due to lack of services, amounts to an infringement of the parent's right to security of the person, under s.7.** (see WEN DE at, pp.96-97) (emphasis ours).

[167] According to the Supreme Court of Canada, the removal of a child from a parent's custody adversely impacts the psychological integrity of that parent causing distress, in *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46.

> The Supreme Court of Canada found the right to security of the person encompasses psychological integrity and may be infringed by state action which causes significant emotional distress:
> Moreover, it was held that the **loss of a child constitutes the kind of psychological harm** which may found a claim for breach of s.7. Lamer J., for the majority, held: **I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent**…As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.
>
> The Court went on to state that there are circumstances where loss of a child will not found a prima facie breach of s.7, including when a child is sent to prison or conscripted into the army. Clearly, these circumstances can be distinguished from the removal of a child from his/her home due to the government's failure to provide adequate funding and services (see WEN DE at, pp.96-97) (emphasis ours).
>
> **The federal funding formula, directive 20-1, impacts a very vulnerable segment of our society, Aboriginal children.** The protection of these children from state action, infringing on their most fundamental rights and freedoms, is clearly in line with the spirit of ss.7 and 15 of the Charter. Research conducted on the issue of child welfare plainly shows differentiation in the quality of services provided on and off reserve and to aboriginal and non-aboriginal children. This type of differentiation is unacceptable in a society that prides itself on protection of the vulnerable. (WEN DE at, pp.96-97) (emphasis ours).

[168] Furthermore, compelling evidence in other reports filed in evidence also discuss the psychological damage, pain and suffering endured by First Nations children and their families:

> WE BEGIN OUR DISCUSSION of social policy with a focus on the family because it is our conviction that much of the failure of responsibility that contributes to the current imbalance and distress in Aboriginal life centres around the family. Let us clarify at the outset that the failure of responsibility that we seek to understand and correct is not a failure of Aboriginal families. Rather, it is a failure of public policy to recognize and respect Aboriginal culture and family systems and to ensure a just distribution of the wealth and power of this land so that Aboriginal nations, communities and families can provide for themselves and determine how best to pursue a good life. (see RCAP, vol. 3, at, p. 8).
>
> **Many experts in the child welfare field are coming to believe that the removal of any child from his/her parents is inherently damaging, in and of itself…. The effects of apprehension on an individual Native child will often be much more traumatic than for his non-Native counterpart.** Frequently, when the Native child is taken from his parents, he is also removed from a tightly knit community of extended family members and neighbours, who may have provided some support. In addition, he is removed from a unique, distinctive and familiar culture. The Native child is placed in a position of triple jeopardy (see RCAP, Gathering strength, vol. 3, at, pp. 23-24).

[169] The Panel finds there is absolutely no doubt that the removal of children from their families and communities is traumatic and causes great pain and suffering to them:

> At our hearings in Kenora, Josephine Sandy, who chairs Ojibway Tribal Family Services, explained what moved her and others to mobilize for change:
>
> Over the years, I watched the pain and suffering that resulted as non-Indian law came to control more and more of our lives and our traditional lands. I have watched my people struggle to survive in the face of this foreign law.
>
> **Nowhere has this pain been more difficult to experience than in the area of family life**. I and all other Anishnabe people of my generation have seen the pain and humiliation created by non-Indian child welfare agencies in removing hundreds of children from our communities in the fifties, sixties and the seventies. My people were suffering immensely as we had our way of life in our lands suppressed by the white man's law.
>
> **This suffering was only made worse as we endured the heartbreak of having our families torn apart by non-Indian organizations created under this same white man's law.**
>
> **People like myself vowed that we would do something about this. We had to take control of healing the wounds inflicted on us in this tragedy.**

> Josephine Sandy Chair, Ojibway Tribal Family Services Kenora, Ontario, 28 October 1992,
>
> (see RCAP, Gathering strength, vol. 3, at, p. 25) (emphasis ours).

[170] Another report filed in evidence supports the existence of pain and suffering of First Nations children and their families. Several experiences of massive loss have disrupted First Nations families and have resulted in identity problems and difficulties in functioning. In 1996, more than 10% of Aboriginal children (age 0-14) were not living with their parents. see p. 7 Joint National policy review (NPR) exhibit filed into evidence. Akin to the WEN DE report, the Tribunal accepted the findings in the NPR as its own findings (See 2016 CHRT at, para.257) Additionally, Canada was part of this study and fully aware of its findings which in fact exacerbates Canada's wilful and reckless conduct in not correcting the discriminatory practice identified in 2000, year of the report. This will also be discussed later.

[171] More Recently, the Panel made findings that support the findings for pain and suffering of First Nations children and their families when the families are torn apart:

> Ms. Marie Wilson, one of the three Commissioners for the TRC mandated to facilitate truth-telling about the residential school experience and lead the country in a process of ongoing healing and reconciliation, swore an affidavit that was filed into evidence in the motions' proceedings. **She affirms that she personally bore witness to fifteen hundred statements made to the TRC. Many were from those who grew up as children in the foster care system as it currently exists. She also heard from hundreds of parents with children taken into care. Over and over again, she states the Commissioners heard that the worst part of the Residential schools was not the sexual abuse but rather the rupture from the family and home and everything and everyone familiar and cherished. This was the worst aspect and the most universal amongst the voices they heard.** (see 2018 CHRT 4 at, para.122).
>
> Ms. Wilson notes in her affidavit that children removed from their parents to be placed in foster care shared similar experiences to those who went to residential schools. **The day they remember most vividly was the day they were taken from their home**. She mentions, as the Commissioners have said in their report, that child welfare may be considered a continuation of or, a replacement for the residential school system. (see 2018 CHRT 4 at, para.123).

> Ms. Wilson affirms that they, (the TRC), intentionally centered their 5 first calls to Action specifically on child welfare. This was to shed a focused and prominent light on the fact that **the harms of residential schools happened to children, that the greatest perceived damage to them was their removal from their home and family; and that the legacy of residential schools is not only continuing but getting worse, with increasing numbers of child apprehensions through the child welfare system**. (see 2018 CHRT 4 at, para.124).
>
> In addition to the Legacy calls to action pertaining to child welfare, she explains that they also articulated child welfare goals in the subsequent Reconciliation section. Call to Action 55 underscores the importance of creating and tracking honest measurements of the numbers of Indigenous children still apprehended and why, and the support being provided for them, based on comparative spending in prevention and care. (see 2018 CHRT 4 at, para.125).
>
> According to Ms. Wilson, it is imperative that the child welfare system, which is driving Indigenous children into foster care at disproportionate rates, be immediately addressed. **She has learned firsthand that children who are severed from their families will forever carry with them a lasting and detrimental sense of loss, along with other negative issues that may change the course of their lives.** (see 2018 CHRT 4 at, para.126).
>
> The Panel has made findings on this issue in the *Decision* and we echo Ms. Wilson's call to action to immediately address the causes that drive Indigenous children into foster care. (see 2018 CHRT 4 at, para.127).

[172] The Panel received Ms. Wilson's evidence in 2017-2018 and has relied upon it in its ruling. The ruling was accepted by Canada in its submissions following receipt of an advanced confidential copy of the ruling and the Panel included Canada's submissions and the Panel's comments in the ruling:

> Finally, on the same day, the AGC (…) indicated that Canada is fully committed to implement all the orders in this ruling and understands that its funding approach needs to change, which includes providing agencies the funding they need to meet the best interests and needs of First Nations children and families.
>
> The Panel is delighted to read Canada's commitment and openness. This is very encouraging and fosters hope to a higher degree (see 2018 CHRT 4 at, paras.449-450).

[173] This was reiterated later on, as part of a consultation protocol with all parties in this case and signed by Minister Jane Philpott as she then was (see Consultation Protocol signed March 2, 2018).

[174] Moreover, Canada has accepted the TRC's report authored by the 3 Commissioners including Ms. Wilson, and undertook to implement all 94 calls to action (see 2018 CHRT 4 at, para.61). It is unlikely that Canada would accept the recommendations yet not the findings that led to those recommendations.

[175] What is more, the Panel believes that the highly credible TRC Commissioner like other adults referred to above speak on behalf of children and voice the harm and suffering endured by First Nation children who are vulnerable and need not to testify before this Tribunal for the Panel to make a determination of their suffering of being unnecessarily removed from their homes and the harms caused as a result of the systemic and racial discrimination.

[176] Furthermore, as mentioned above, the Tribunal has already recognized the need and importance for First Nations children, communities and Nations for urgent action to eliminate the removal of First Nations children from their families and communities as a result of the discrimination and Canada's part in remedying it in the March 2, 2018 Consultation protocol signed by Minister Philpott:

> To address what the Tribunal in paragraph 47 of the February 1st Ruling refers to as the "mass removal of children". As the Tribunal states: "There is urgency to act and prioritize the elimination of the removal of children from their families and communities". (Consultation protocol signed March 2, 2018 at, section d, page 5)
>
> To promote substantive equality for First Nations children, families and communities on reserves and in the Yukon in the delivery of child and family services, particularly in light of their higher level of needs because of historical disadvantages suffered by First Nations families, children and communities as a result of the legacy of colonialism and Indian Residential Schools. (Consultation protocol at, section g, page 5).

[177] Also, to the question what if the child was unnecessarily removed as a result of multiple factors and not solely because of Canada's actions? The Panel answers that while the Panel acknowledges that child welfare issues are multifaceted and may involve

the interplay of numerous underlying factors (see for example, 2016 CHRT 2 *Decision* at, para. 187) this does not alleviate Canada's responsibility in the suffering of First Nations children and their families who bore the adverse impacts of Canada's control over the provision of child and family services on First Nations reserves and in the Yukon by the application of the funding formulas under the FNCFS Program.

[178] Moreover, the Panel found that in this case we are in a unique constitutional context namely, Parliament's exclusive legislative authority over "Indians, and lands reserved for Indians" by virtue of section 91(24) of the *Constitution Act*, 1867. Furthermore, Canada, is in a fiduciary relationship with Aboriginal Peoples. What is more, Canada has undertaken to improve outcomes for First Nations children and families in the provision of child and family services. On this basis, the Panel found that more has to be done by Canada to ensure that the provision of child and family services on First Nations reserves is meeting the best interest of those communities and, in the particular context of this case, the best interest of First Nations children (see 2016 CHRT 2 *Decision* at, para. 427).

[179] This also corresponds to Canada's international commitments recognizing the special status of children and Indigenous peoples. Also, the Panel found that Canada provides a service through the FNCFS Program and other related provincial/territorial agreements and method of funding the FNCFS Program and related provincial/territorial agreements significantly controls the provision of First Nations children and family services on reserve and in the Yukon to the detriment of First Nations children and families.

[180] Those formulas are structured in such a way that they promote negative outcomes for First Nations children and families, namely the incentive to take children into care. The result is many First Nations children and families are denied the opportunity to remain together or be reunited in a timely manner (see 2016 CHRT 2 *Decision* at, paras. 111; 113; 349).

[181] The Panel already found the link between the removal of children and Canada's responsibility in numerous findings including the following: ''Yet, this funding formula continues. As the Auditor General puts it, "Quite frankly, one has to ask why a program goes on for 20 years, the world changes around it, and yet the formula stays the same,

preventative services aren't funded, and all these children are being put into care." (See 2016 CHRT 2 *Decision* at, para.197).

[182] The pain and suffering caused by the unnecessary removal of First Nations children and their families and Canada's role is at least reasonably quantifiable to $20,000. While it is the maximum compensation allowed under section 53 (2) (e) of the *CHRA,* it is not much in comparison to the egregious harm suffered by the First Nations children and their families as a result of the racial discrimination and adverse impacts found in this case. Other pain and suffering caused by other actors could potentially be sought in other forums. The Panel's role is to quantify as best as possible the appropriate remedy to compensate victims/survivors as part of these proceedings with the evidence available.

[183] Furthermore, the AGC relies also on the *Public Service Alliance of Canada v. Canada Post Corporation case* (see 2005 CHRT 39 at para. 991) to suggest that the Tribunal cannot award remedies for pain and suffering to the non-complainant victims "en masse". The *Canada Post* case made a finding that there was a lack of evidence before the Tribunal and that there was no systemic case. This is different from this case where there is sufficient evidence to support findings of systemic discrimination and findings of suffering borne by the victims/survivors in this case, the First Nations children and their families.

[184] The evidence is ample and sufficient to make a finding that each First Nation child who was unnecessarily removed from its home, family and community has suffered. Any child who was removed and later reunited with its family has suffered during the time of separation and from the lasting effects of trauma from the time of separation.

[185] The evidence is ample and sufficient to make a finding that each parent or grand-parent who had one or more child under her or his care who was unnecessarily removed from its home, family and community has suffered. Any parent or grand-parent if the parents were not caring for the child who had one or more child removed from them and later reunited with them has suffered during the time of separation. The Panel intends to compensate one or both parents who had their children removed from them and, if the parents were absent and the children were in the care of one or more grand-parents, the

grand-parents caring for the children should be compensated. While the Panel does not want to diminish the pain experienced by other family members such as other grand-parents not caring for the child, siblings, aunts and uncles and the community, the Panel decided in light of the record before it to limit compensation to First Nations children and their parents or if there are no parents caring for the child or children, their grand-parents.

[186] The Panel also recognizes that the suffering can continue even when families are reunited given the gravity of the adverse impacts of breaking apart families and communities.

[187] The Panel addressed the adverse impacts to children throughout the *Decision*. The Panel found a connection between the systemic racial discrimination and the adverse impacts and that those adverse impacts are harmful to First Nations children and their families. All are connected and supported by the evidence. The Panel acknowledged this suffering in its unchallenged *Decision*. It did not have individual children who testified to the adverse impacts that they have experienced nevertheless the Panel found that they did suffer those adverse impacts and found systemic racial discrimination based on sufficient evidence before it. The adverse impacts identified in the *Decision* and suffered by children and their families were found to be the result of the systemic racial discrimination in Canada's FNCFCS Program, funding formulas, authorities and practices.

[188] The Panel need not to hear from every First Nation child to assess that being forcibly removed from their homes, families and communities can cause great harm and pain. The expert evidence has already established that. The *CHRA* regime is different than that of a Court where a class action may be filed. The *CHRA* model is based on a human rights approach that is purposive and liberal and that is aimed at vindicating the victims of discriminatory practices whether considered systemic or not see section 50 (3) (c) of the *CHRA.* We are talking about the mass removal of children from their respective Nations. (see 2018 CHRT 4 at, paras. 47,62,66,121,133). The Tribunal's mandate is within a quasi-constitutional statute with a special legislative regime to remedy discrimination. This is the first process to employ when deciding issues before it. If the *CHRA* and the human rights case law are silent, it may be useful to look to other regimes when appropriate. In the present case, the *CHRA* and human rights case law voice a possible way forward. The

novelty and unchartered territory found in a case should not intimidate human rights decision-makers to pioneer a right and just path forward for victims/survivors if supported by the evidence and the Statute. As argued by the Commission, sufficiency of evidence is a material consideration.

[189] Furthermore, the impracticalities and the risk of revictimizing children outweigh the difficulty of establishing a process to compensate all the victims/survivors and the need for the evidence presented of having a child testify on how it felt to be separated from its family and community.

[190] The Panel rejects the AGC's argument that there is no evidence of harm the victims suffered as a result of the discrimination to demonstrate that the victims meet the statutory requirements for compensation.

[191] The evidence is sufficient to establish a connection between the systemic racial discrimination and the First Nations children who did not receive services or did receive services that were inadequate and harmful. This was all explained in the *Decision* and it is now too late to challenge those findings. The children should not be penalized because the Panel had outstanding questions concerning compensation which prompted further submissions from the parties.

[192] Finally, on this point, the Panel rejects the assertion made by the AGC that there is no evidence permitting the Panel to determine the extent and seriousness of the harm in order to assess the appropriate compensation for the individual victims. Furthermore, the AGC's argument that there is no evidence of pain and suffering from children and families as a result of the discrimination is simply not true. This is a similar assertion that Canada has made on the evidence to prove the complaint on its merits. In fact, such a conclusion by Canada is concerning to say the least. It also raises questions from this Panel. The harm done to First Nations children who are vulnerable and to families and communities is precisely why the Panel issued numerous rulings requesting immediate action. This Panel recognizes, as described by the Caring Society, the rights of the child are human rights that recognize childhood as an important period of development with special

circumstances. This is also recognized by all levels of Courts in Canada and was discussed in this Panel's *Decision* on the merits 2016 CHRT at, para.346:

> A focus on prevention services and least disruptive measures in the provincial statutes mentioned above is inextricably linked to the concept of the best interest of the child: a legal principle of paramount importance in both Canadian and international law (see Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 (CanLII) at para. 9; and, Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para. 75 [Baker]). As explained by Professor Nicholas Bala:
>
> [L]eading Canadian precedents, federal and provincial statutes and international treaties are all premised on the principle that decisions about children should be based on an assessment of their best interests. This is a central concept for those who are involved making decisions about children, not only for judges and lawyers, but for also assessors and mediators (see 2016 CHRT 2 at, para.346).
>
> Child welfare services, or child and family services, are services designed to protect children and encourage family stability. Hence the best interest of the child is a paramount principle in the provision of these services and is a principle recognized in international and Canadian law. This principle is meant to guide and inform decisions that impact all children, including First Nations children (2016 CHRT 2 at, para.3).

[193] This is where the urgency of remedying systemic racial discrimination comes from. It is clearly expressed in the Panel's rulings. Removing children from their homes, families, communities and Nations destroys the Nations' social fabric leading to immense consequences, it is the opposite of building Nations. That is trauma and harm to the highest degree causing pain and suffering.

[194] The Panel's urging Canada to act on a number of occasions was not expressed without a reason. It was for the reason that this case is about children and there is urgency to act and the Panel understood it.

[195] In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para. 239 [Baker] an appeal against deportation based on the position of Baker's Canadian born children, the Supreme Court held procedural fairness required the decision-maker to consider international law and conventions, including the United Nations' *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the UNCRC). The

Court held the Minister's decision should follow the values found in international human rights law.

[196] The AGC should not be allowed to avoid this principle in Canada, a country who professes to uphold the best interest of the child and who signed and ratified the *Convention on the Rights of the Child* (see 2016 CHRT 2 at, para.448). Also, the *CHRA* is a result of the implementation of international human rights principles in domestic law (see the Decision at paras 437-439).

[197] The Panel agrees that remedies **under section 53 (2) (e) of the *Act*** are not to punish the Respondent however, they serve the purpose to deter the authors of discriminatory practices to continue or to repeat the same patterns. They are also some form of vindication for the victims/survivors reminding society that there is also a price to fostering inequalities which is a strong component of justice leading to some measure of healing for victims/survivors.

IX. Organizations cannot receive compensation and do not represent victims' argument

[198] The individuals affected by the *Decision* and subsequent orders, and who are looking for an opportunity equal to other individuals to make for themselves the lives that they are able and wish to have, are First Nations children (see 2017 CHRT 14 at, para.116).

[199] The Panel sees no merit in accepting the AGC's argument that if the Tribunal finds it has jurisdiction to award remedies under section 53 (2) (e) the AFN and the Caring Society should be awarded the remedies and not the First Nations children. This contradicts the AGC's own argument that acknowledges that the AFN and the Caring Society are organizations not victims (see para.110 above).

[200] In a previous ruling, the Panel discussed the AFN and the Caring Society's roles in representing First Nations children's rights:

> To ensure Aboriginal rights and the best interests of First Nations children are respected in this case, the Panel believes the governance organizations

> representing those rights and interests, representing those children and families affected by the *Decision* and who are professionals in the area of First Nations child welfare, such as the Complainants and the Interested Parties, should be consulted on how best to educate the public, especially First Nations peoples, about Jordan's Principle. This consultation will also ensure a level of cultural appropriateness to the education plan and materials (see 2017 CHRT 14 at, para.118).

[201] However, it is true that the Complainants do not have a legal representation mandate given by each FN child and parent living on reserve to seek remedy on their behalf at the Tribunal. What they do have is a resolution from the Chiefs in Assembly of the AFN mandating the AFN to seek remedies for Members of First Nations who are represented by their elected First Nations Chiefs. Some First Nations Peoples may disagree to have the AFN or others to advocate on their behalf and request individual remedies in front of the Tribunal, this is their right and the Panel believes they should be able to opt-out. The opting-out possibility will form part of the compensation process discussed below.

[202] This being said, for those who would accept, the Panel finds that the AFN mandated by resolution by Chiefs of First Nations should be able to speak on behalf of their children and voice their needs and seek redress for compensation which should go directly to victims/survivors following a culturally safe and independent process, protecting sensitive information and privacy with the option to opt-out. The Panel believes also that the COO and the NAN should be able to speak on behalf of their children and voice their needs and seek redress for compensation. Also, the Caring Society directed by Dr. Cindy Blackstock has worked tirelessly for numerous years to represent the best interest of children with an Indigenous lens and has invaluable expertise to assist the Panel and the parties in this process.

[203] This being said the Panel does not believe that it has jurisdiction to create another Tribunal to delegate its responsibilities under the *CHRA* to it. The compensation process will be discussed below.

X. The right to exercise individual rights, class action and victims' identification

[204] The Panel believes that individuals have the right to exercise their individual rights and for those who chose to do so, they should be able to opt-out from receiving the compensation ordered in this ruling.

[205] The Panel also notes that the class action has not yet been certified by the Federal Court. Moreover, the possibility of a future certified class action and, if successful, orders made for punitive damages remedies under the Charter amongst other things being offset by the capped remedies orders under the *CHRA made b*y this Tribunal is not a convincing argument to refrain from awarding compensation in these proceedings. Additionally, the Tribunal's orders below do not cover years 1991 to 2005. The Tribunal's orders below also cover First Nations children and First Nations parents or grandparents.

[206] The fact that a class action has been filed does not change the Tribunal's obligations under the *Act* to remedy the discrimination and if applicable as it is here, to provide a deterrent and discourage those who discriminate, to provide meaningful systemic and individual remedies to a group of vulnerable First Nations children and their families who are victims/survivors in this case.

[207] In regards to identification of victims/survivors, as explained by the Caring Society, some of the children can be identified by the Indian Registry and following a process agreed upon by the parties who wish to participate. Therefore, their identities are not impossible to obtain and are readily available contrary to the situation in the *C.N.R*. case from the Federal Court of Appeal that the AGC relies upon. The AGC argues the Court concluded that compensation for individuals is not an appropriate remedy in complaints of systemic discrimination. The AGC added the Court found that compensation is limited to victims which made it "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination" where, as here "by the nature of things individual victims are not always readily identifiable". Again, this is not the case here.

[208] The Panel finds this is a case where it is appropriate to compensate victims/survivors since the systemic racial discrimination and the adverse impacts found by

the Panel in its *Decision* subsequent rulings and this ruling, caused serious harm to victims/survivors. While the task to identify all the individuals is a complex one, it is not impossible given the Indian Registry and the Jordan's Principle process and records.

XI. Class actions and representative of the victims

[209] On one hand, the AGC contends the Tribunal is not the right forum to deal with class actions and on another hand it uses some of the class action criteria to support its position that there is no representative of the group of victims before the Tribunal. With respect, the AGC cannot have it both ways. Accepting the proposition that the Tribunal is not the right forum for class actions in light of its statute requires one to look at what can be done under the statute and not impose the class action criteria to the Tribunal process. While it can be useful to look at class action requirements, the rules of statutory interpretation require the Tribunal to first look at the *CHRA* given that its jurisdiction is derived from it. In addition, the *CHRA* is quasi-constitutional in nature which would supersede any law conflicting with the *CHRA*. If the *CHRA* is silent on an issue, the Tribunal can then use a number of useful tools at its disposition.

[210] In any event, even proof by presumption of facts subject to being provided that such presumptions are sufficiently serious, precise and concordant, applies to class actions (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, para.132). More so in front of a Human Rights Tribunal allowed to receive any type of evidence under the *Act.*

XII. Jordan's Principle remedies

[211] There is no doubt that Jordan's Principle has always been part of the claim from the complaint to the Statement of Particulars to the presentation of evidence and the Tribunal's findings and orders. This question was answered and cannot be revisited.

[212] In sum, in honor and memory of Jordan River Anderson, Jordan's Principle is a child-first principle that applies equally to all First Nations children, whether resident on or off reserve. It is not limited to First Nations children with disabilities, or those with discrete

short-term issues creating critical needs for health and social supports or affecting their activities of daily living (see 2017 CHRT 35 at, para.19, i).

[213] Jordan’s Principle addresses the needs of First Nations children by ensuring there are no gaps in government services to them. It can address, for example, but is not limited to, gaps in such services as mental health, special education, dental, physical therapy, speech therapy, medical equipment and physiotherapy. (see 2017 CHRT 35 at, para.19, ii).

[214] What is more, the Panel rejects the AGC’s argument that compensation is inappropriate in Jordan’s Principle cases since the Tribunal already ordered Canada to retroactively review the cases that were denied. The retroactive review of cases ensures the child receives the service if not too late and eliminate discrimination. It does not account for the suffering borne by children and their parents while they did not receive the service.

[215] On the issue of there being no basis in the *Act* to award compensation to complainant organizations or non-complainant individuals under Jordan’s Principle, the Panel applies the same reasoning outlined above. On the argument advanced by Canada that when it has implemented policies that satisfactorily address discrimination no further orders are required, the Panel also relies on its reasons above where it says that systemic and individual remedies can co-exist if the evidence in the specific case supports it and is deemed appropriate by the Panel.

[216] Also, the Panel ordered the use of a broad definition of Jordan’s Principle that applies to all First Nations services across all services. It is worth mentioning that many Jordan’s Principle cases involve vulnerable children who experience mental and/or physical disabilities. We will return to this right after a review of the purpose of the *CHRA* below:

> The purpose of the *CHRA* is to give effect to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as

> members of society, without being hindered in or prevented from doing so by discriminatory practices.
>
> (Section 2 of the *CHRA*).

[217] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities,* adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person. (see *Grant* at paras.103-104). Moreover, article 1 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at. 71 (1948), which provides that all human beings are born free and equal in dignity and in rights.

[218] The concept of objective appreciation of dignity when vulnerable mentally disabled persons who are not always in a position to appreciate their own self-dignity or breach there of as been recognized by the Supreme Court of Canada:

> Having regard to the manner in which the concept of personal “dignity” has been defined, and to the principles of large and liberal construction that apply to legislation concerning human rights and freedoms, I believe that s. 4 of the *Charter* addresses interferences with the fundamental attributes of a human being which violate the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself. In the case before us, it appears to me that the majority of the Court of Appeal properly pointed out that, in considering the situation of the mentally disabled, the nature of the care that is normally provided to them is of fundamental importance. We cannot ignore the fact that the general objective of the services provided at the Hospital goes beyond meeting the patients’ primary needs (see *Commission des droits de la personne v. Coutu*, 1995 CanLII 2537 (QC TDP), [1995] R.J.Q. 1628 (H.R.T.), at pp. 1652‑53). This is apparent from, inter alia, the legislator’s intention (see An Act respecting health services and social services, R.S.Q., c. S‑4.2) and the fact that there is a certain level of social consensus concerning what sort of support services are required in order for the needs of these people to be met.

[219] This being said, the fact that some patients have a low level of awareness of their environment because of their mental condition may undoubtedly influence their own conception of dignity. As Fish J.A. observed:

‘’ (…) however, when we are dealing with a document of the nature of the Charter, it is more important that we turn our attention to an objective appreciation of dignity and what that requires in terms of the necessary care and services. In the case at bar, I believe that the trial judge’s findings of fact indicate, beyond a shadow of a doubt, that, although the discomfort suffered by the patients of the Hospital was transient, it constituted interference with the safeguard of their dignity, a right guaranteed by s. 4 of the Charter, despite the fact that, as the trial judge noted, these patients might have had no sense of modesty’’. (*Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand,* [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 105 and 106-108), (Public Curator).

[220] Furthermore, the Supreme Court found that disrupting services was an interference of the service recipients’ dignity and causing them a moral prejudice under rules of civil liability and under the Charter:

Moreover, the pressure that the appellants wanted to bring to bear on the employer inevitably involved disrupting the services and care normally provided to the patients of the Hospital, and necessarily involved intentional interference with their dignity (Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 SCR 211, 1996 CanLII 172 (SCC) at, paras. 109 and 124) *(Public Curator).*

[221] While this is not a class action or a civil liability or Charter case, the principle can be applied here to support the finding that the disruption of services offered to a vulnerable group of peoples, in this case First Nations children and families, amounts to a breach of their dignity applying the objective appreciation of dignity principle. Under the *CHRA* this would be covered under section 53 (2) (e). This reasoning also apply to First Nations children and families in the case of the removal of a child from the home, family and community.

[222] What is more, the Tribunal has already made findings in past rulings in regards to gaps, delays and denials of essential services to First Nations children under Jordan’s Principle and also its connection to child welfare, some of them are reproduced here:

Despite Jordan’s Principle being an effective means by which to immediately address some of the shortcomings in the provision of child and family services to First Nations identified in the *Decision* while a comprehensive reform is undertaken, Canada’s approach to the principle risks perpetuating the discrimination and service gaps identified in the *Decision*, especially with respect to allocating

dedicated funds and resources to address some of these issues (see Decision at para. 356) (…) (see 2017 CHRT 14, at para.78).

The work of the two departments on Jordan's Principle has highlighted what all of us knew from years of experience: **that there are differences of opinion, authorities and resources between the two departments that appear to cause gaps in service to children and families resident on reserve.** The main programs at issue include INAC's Income Assistance program and the Child and Family Services program; for Health Canada, it is Non-Insured Health Benefits program (see 2016 CHRT 2 at, para.369).

Another medical related expenditure identified as a **concern is mental health services. Health Canada's funding for mental health services is for short term mental health crises, whereas children in care often require ongoing mental health needs and those services are not always available on reserve. Therefore, children in care are not accessing mental health services due to service delays, limited funding and time limits on the service. To exacerbate the situation for some children, if they cannot get necessary mental health services, they are unable to access school-based programs for children with special needs that require an assessment/diagnosis from a psychologist** (see Gaps in Service Delivery to First Nation Children and Families in BC Region at pp. 2-3). (see 2016 CHRT 2 at, para.372).

In the Panel's view, **it is Health Canada's and AANDC's narrow interpretation of Jordan's Principle that results in there being no cases meeting the criteria for Jordan's Principle. This interpretation does not cover the extent to which jurisdictional gaps may occur in the provision of many federal services that support the health, safety and well-being of First Nations children and families.** Such an approach defeats the purpose of Jordan's Principle and results in **service gaps, delays and denials** for First Nations children on reserve. Coordination amongst all federal departments and programs, especially AANDC and Health Canada programs, would help avoid these gaps in services to First Nations children in need (see 2016 CHRT 2 at, para.381).

More importantly, Jordan's Principle is meant to apply to all First Nations children. There are many other First Nations children without multiple disabilities who require services, including child and family services. Having to put a child in care in order to access those services, when those services are available to all other Canadians is one of the main reasons this Complaint was made (see 2016 CHRT 2 at, para.381).

AANDC's design, management and control of the FNCFS Program, along with its corresponding funding formulas and the other related provincial/territorial agreements **have resulted in denials of services and created various adverse impacts for many First Nations children and**

families living on reserves. Non-exhaustively, the **main adverse impacts** found by the Panel are: (…) **The narrow definition and inadequate implementation of Jordan's Principle, resulting in service gaps, delays and denials for First Nations children** (see 2016 CHRT 2 at, para.458).

In January 2017, two twelve-year-old children tragically took their own lives in Wapekeka First Nation ("Wapekeka"), a NAN community. Before the loss of these children, Wapekeka had alerted the federal government, through Health Canada, to concerns about a suicide pact amongst a group of young children and youth. This information was contained in a July 2016 detailed proposal aimed at seeking funding for an in-community mental health team as a preventative measure.

The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle'' (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16). The Panel acknowledges how inappropriate this response is in such circumstances and the additional suffering it must have caused (See 2017 CHRT 7 para. 9).

Tragically, in February 2017, two other youths aged 11 and 21 took their own lives in NAN communities of Deer Lake and Kitchenuhmaykoosib Inninuwug (see affidavit of Sol Mamakwa, February 13, 2017, at para. 5) (See 2017 CHRT 7 para. 10).

The Panel would like to acknowledge and extend our condolences to the families and communities of these youths and to all those who have lost children in similar tragic circumstances (See 2017 CHRT 7 para. 11).

The loss of our children by suicide in Nishnawbe Aski Nation (NAN) has created untold pain and despair for families, communities and all of our people. Health Canada's commitment "to establish a Choose Life Working Group with NAN aimed at establishing a concrete, simplified process for communities to apply for Child First Initiative funding" establishes an important route for our communities in crisis to access Jordan's Principle funds (See 2017 CHRT 7 Annex A letter Re: Choose Life Pilot Working Group, dated March 22, 2017 from Nishnawbe Aski Nation Grand Chief Alvin Fiddler to Dr. Valerie Gideon, Assistant Deputy Minister Regional Operations First Nations and Inuit Health Branch Health Canada).

At the October 30-31, 2019 hearing (October hearing), Canada' witness, Dr. Valerie Gideon, Senior Assistant Deputy Minister of the First Nations and Inuit Health Branch at the Department of Indigenous Services Canada, admitted in her testimony that the Tribunal's May 2017 CHRT 14 ruling and orders on **Jordan's Principle definition and publicity measures caused a large jump in cases for First Nations children**. In fact, from July 2016 to March 2017 there were approximately 5,000 Jordan's Principle approved services. **After the Panel's ruling, this number jumped to just under 77,000 Jordan's Principle approved services in 2017/2018. This number continues to increase. At the time of the October hearing, over 165 000 Jordan's Principle approved services have now been approved under Jordan's Principle as ordered by this Tribunal. This is confirmed by Dr. Gideon's testimony and it is not disputed by the Caring Society. Furthermore, it is also part of the new documentary evidence presented during the October hearing and now forms part of the Tribunal's evidentiary record. Those services were gaps in services that First Nations children would not have received but for the Jordan's Principle broad definition as ordered by the Panel.**

In response to Panel Chair Sophie Marchildon's questions, Dr. Gideon also testified that **Jordan's Principle is not a program, it is considered a legal rule by Canada.** This is also confirmed in a document attached as an exhibit to Dr. Gideon's affidavit. Dr. Gideon testified that she wrote this document (see Affidavit of Dr. Valerie Gideon, dated, May 24, 2018 at exhibit 4, at page 2). This document named, Jordan's Principle Implementation-Ontario Region, under the title, Our Commitment states as follows:

No sun-setting of Jordan's Principle. Jordan's Principle is a legal requirement not a program and thus there will be no sun-setting of Jordan's Principle (…) There cannot be any break in Canada's response to the full implementation of Jordan's Principle (see 2019 CHRT 7 at, para. 25).

The Panel is delighted to hear that **thousands of services have been approved since it issued its orders. It is now proven, that this substantive equality remedy has generated significant change for First Nations children and is efficient and measurable. While there is still room for improvement, it also fosters hope.** We would like to honor Jordan River Anderson and his family for their legacy. We also acknowledge the Caring Society, the AFN and the Canadian Human Rights Commission for bringing this issue before the Tribunal and for the Caring Society, the AFN, the COO, the NAN, and the Canadian Human Rights Commission for their tireless efforts. We also honor the Truth and Reconciliation Commission for its findings and recommendations. Finally, the Panel recognizes that while there is more work to do to eliminate discrimination in the long term, Canada has made substantial efforts to provide services to First Nations children under Jordan's Principle especially since November 2017. Those efforts are made by people such as Dr. Gideon and the Jordan's Principle team and the Panel believes it is noteworthy. This is also recognized by the

> Caring Society in an April 17, 2018 letter filed in the evidence (see Dr. Valerie Gideon's affidavit, dated December 21st, 2018, at Exhibit A). This is not to convey the message that a colonial system which generated racial discrimination across the country is to be praised for starting to correct it. Rather, it is recognizing the decision-makers and the public servants' efforts to implement the Tribunal's rulings hence, truly impacting the lives of children. (see 2019 CHRT 7 at, para. 26).
>
> The Panel finds the outcome of S.J.'s case is unreasonable. The coverage under Jordan's Principle was denied because S.J.'s mother registered under 6(2) of the Indian Act and could not transmit status to her in light of the second-generation cut-off rule. This is the main reason why S.J.'s travel costs were refused. The second reason is that it was not deemed urgent by Canada when in fact the situation was not assessed appropriately. Finally, no one seems to have turned their minds to the needs of the child and her best interests. There is no indication that a substantive equality analysis has been employed here. Rather a bureaucratic approach was applied for denying coverage for a child of just over 18 months (Canada's team described the child has being 1 year and a half old, see affidavit of Dr. Valerie Gideon, dated December 21st, 2018, email chain at Exhibit F), who has been waiting for this scan from birth. This type of bureaucratic approach in Programs was linked to discrimination in the *Decision* (see at, paras. 365-382 and 391) (see 2019 CHRT 7 at, para.73).

[223] All the above findings support a finding that First Nations children and their families experienced pain and suffering and a breach of their dignity as a result of gaps, delays and denials of essential services.

[224] Other evidence in the record further exemplifies that delays, gaps and denials cause real harm and suffering to the Frist Nations children and their families:

> In another case, a child with Batten Disease, a fatal inherited disorder of the nervous system, had to wait sixteen months to obtain a hospital bed that could incline at 30 degrees in order to alleviate the respiratory distress that resulted from her condition. AANDC, Jordan's Principle Chart Documenting Cases, October 6, 2013 (see HR, Vol 15, tab 422, p 2).
>
> MR. WUTTKE: All right. So I see that the initial contact took place in 2007 and that bed was actually delivered in 2008. So it took approximately one year for the child to actually get a bed; is that correct?
>
> MS BAGGLEY: Well, it said the summer of 2008.
>
> MR. WUTTKE: Okay.

MS BAGGLEY: “Tomatoe/tomato”.

MR. WUTTKE: Between half a year and three quarters of a year?

MS BAGGLEY: Yes, yes.

MR. WUTTKE: My question regarding this matter, considering it's a child that has respiratory and could face respiratory failure distress, how is this length of time between six months to a year to provide a child a bed reasonable in any circumstances?

MS BAGGLEY: Well, from my perspective, no, that's not reasonable, but there’s not enough information here to determine what were the reasons. (see Corinne Baggley Cross Examination, May 1, 2014 (Vol 58, p 117-118, lines 16-25, 1-12).

[225] The Panel finds there is sufficient evidence in the record as demonstrated above to justify findings that pain and suffering of the worst kind warranting the maximum compensation under section 53 (2) (e) of the *CHRA* is experienced by First Nations children and families as a result of Canada’s approach to Jordan’s Principle that led to the Tribunals’ rulings in this case.

[226] First Nations Children are denied essential services. The Tribunal heard extensive evidence that demonstrates that First Nations children were denied essential services after a significant and detrimental delay causing real harm to those children and their parents or grandparents caring for them. The Supreme Court of Canada discussed the objective component to dignity to mentally disabled people in the *Public Curator* case above mentioned and the Panel believes this principle is applicable to vulnerable children in determining their suffering of being denied essential services. Moreover, as demonstrated by examples above, some children and families have also experienced serious mental and physical pain as a result of delays in services.

XIII. Special compensation wilful and reckless

[227] The special compensation remedy sought as part of this ruling is found at para. 53 (3) of the *CHRA*:

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand

> dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[228] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

> The Tribunal in *Duverger v. 2553-4330 Québec Inc. (Aéropro),* 2019 CHRT 18 (CanLII), recently reiterated this Panel's legal reasons on the special compensation, member Gaudreault wrote:
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> In the decision rendered in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) [Family Caring Society], at paragraph 21, members Sophie Marchildon, Réjean Bélanger and Edwards P. Lustig addressed the special compensation provided under subsection 53(3) of the CHRA:
>
> The Federal Court has interpreted this section as being a ". . .punitive provision intended to provide a deterrent and discourage those who deliberately discriminate" (*Canada (Attorney General) v. Johnstone,* 2013 FC 113 (CanLII), at para. 155, aff'd 2014 FCA 110 (CanLII) [*Johnstone* FC]). A finding of wilfulness requires "(…) the discriminatory act and the infringement of the person's rights under the *Act* is intentional" (*Johnstone* FC, at para. 155). Recklessness involves ". . .acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly" (Johnstone FC, at para. 155), (see *Duverger* at para.293).

[229] The objective of the *CHRA* is to remedy discrimination (*Robichaud* at para.13). As opposed to remedies under section 53 (2) (e) which are not meant to punish the author of the discrimination, as mentioned above, the Federal Court in *Johnstone* found that section 53 (3) of the *CHRA* is a punitive provision.

[230] In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168 (CanLII), at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases. (see *Grant* at, para.119).

[231] The Panel finds that Canada's conduct was devoid of caution with little to no regard to the consequences of its behavior towards First Nations children and their families both in regard to the child welfare program and Jordan's Principle. Canada was aware of the discrimination and of some of its serious consequences on the First Nations children and their families. Canada was made aware by the NPR in 2000 and even more so in 2005 from its participation and knowledge of the WEN DE report. Canada did not take sufficient steps to remedy the discrimination until after the Tribunal's orders. As the Panel already found in previous rulings, Canada focused on financial considerations rather than on the best interest of First Nations children and respecting their human rights.

[232] When looking at the issue of wilful and reckless discriminatory practice, the context of the claim is important. In this case we are in a context of repeated violations of human rights of vulnerable First Nations children over a very long period of time by Canada who has international, constitutional and human rights obligations towards First Nations children and families. Moreover, the Crown must act honourably in all its dealings with Aboriginal Peoples:

> First Nations children and families on reserves are in a fiduciary relationship with AANDC. In the provision of the FNCFS Program, its corresponding funding formulas and the other related provincial/territorial agreements, "the degree of economic, social and proprietary control and discretion asserted by the Crown" leaves First Nations children and families "…vulnerable to the risks of government misconduct or ineptitude" (Wewaykum at para. 80). This fiduciary relationship must form part of the context of the Panel's analysis, along with the corollary principle that in all its dealings with Aboriginal peoples, the honour of the Crown is always at stake. As affirmed by the Supreme Court in Haida Nation, at paragraph 17:
> Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31, (see *Decision* 2016 CHRT 2 at, para. 95).

[233] In light of Canada's obligations above mentioned, the fact that the systemic racial discrimination adversely impacts children and causes them harm, pain and suffering is an aggravating factor than cannot be overlooked.

[234] The Panel finds it has sufficient evidence to find that Canada's conduct was wilful and reckless resulting in what we have referred to as a worst-case scenario under our *Act*.

[235] What is more, many federal government representatives of different levels were aware of the adverse impacts that the Federal FNCFS Program had on First Nations children and families and some of those admissions form part of the evidence and were referred to in the Panel's findings. A review of the Panel's findings contained in the *Decision* and rulings supports this.

[236] The Panel rejects Canada's position that the reports in the evidentiary record and findings cannot lead to a finding of wilful and reckless conduct by this Tribunal's findings because they were improving the services over time. WEN DE specifically cautioned against a piece meal implementation of the recommendations and that is precisely what Canada did. This was also explained in the *Decision.*

[237] In addition, the Tribunal already made findings about Canada's conduct and awareness of the adverse impacts to First Nations children and their families in past rulings although too numerous to reproduce them entirely in this ruling, some are above mentioned and some will be mentioned here and those findings cannot be challenged now:

> In another presentation, AANDC describes Directive 20-1 as "broken":
>
> **The current system is BROKEN, i.e. piecemeal and fragmented**
>
> **The current system contributes to dysfunctional relationships, i.e. jurisdictional issues (at federal and provincial levels), lack of coordination, working at cross purposes, silo mentality**
>
> […]
>
> **The current program focus is on protection (taking children into care) rather than prevention (supporting the family)**
>
> […]
>
> **Early intervention/prevention has become standard practice in the provinces/territories, numerous U.S. states, and New Zealand**
>
> **INAC CFS has been unable to keep up with the provincial changes**
>
> **Where prevention supports are common practice, results have demonstrated that rates of children in care and costs are stabilized and/or reduced**

(Annex, ex. 35 at pp. 2-3 [Putting Children and Families First in Alberta presentation]) (see 2016 CHRT 2 at, para.270).

Putting Children and Families First in Alberta presentation touts prevention as the ideal option to address these problems at page 4:

Early prevention and child-centered outcomes are the missing pieces of the puzzle for FN children and families living on reserve

Early prevention supports the agenda for improving quality of life for children and families thereby leading to improved outcomes in the areas of early childhood development, education, and health (see 2016 CHRT 2 at, para.271).

Finally, the Putting Children and Families First in Alberta presentation states at page 5:

The facts are clear:

Wen:De Report - Early intervention/prevention is KEY

[…]

[238] The above citations were presentations prepared by staff in the Federal Government supporting the fact that they were well aware of what needed to be done to stop the systemic racial discrimination and that prevention is a key component. This being said, while Canada increased prevention funds, it applied an insufficient and piece meal approach and the Panel also found this in the *Decision.*

[239] First Nation agencies have been lobbying Canada since 1998 to change the system (see 2016 CHRT 2 at, para.272). Ten years later, in a 2018 CHRT 4 ruling, the Tribunal had to order Canada to fund prevention services:

Canada currently funds payments of actual costs for maintenance expenses when children are apprehended and removed from their homes and families and has developed a methodology to pay for these expenses. **Proceeding this way and not doing the same for prevention, perpetuates the historical disadvantage and the legacy of residential schools already explained in the Decision and rulings**. **It incentivizes the removal of children rather than assisting communities to stay together** (see 2018 CHRT at, para. 230). All this time Canada knew the benefit of prevention services to keep children safe within their homes and families yet it did not sufficiently fund and reform the system to foster this shift. This is contrary to the Tribunal’s order to provide services based on need, which requires

Canada to obtain each First Nation agency and First Nation's specific needs. Finally, allowing those agencies that confirm they lack capacity to keep the budget funds from year to year instead of returning them could potentially assist in addressing the issue. As far as other agencies that do have capacity are concerned, **Canada is unilaterally deciding for them and delaying prevention services and least disruptive measures under a false premise. Proceeding in this fashion is harming children** (see 2018 CHRT 4 at para.143). [161] The Panel has always recognized that there may be some children in need of protection who need to be removed from their homes. However, in the *Decision*, the findings highlighted the fact that too many children were removed unnecessarily, when they could have had the opportunity to remain at home with prevention services. (see 2018 CHRT 4 at, para.161).

The Panel finds it problematic that again, Canada's rationale is based on the funding cycle not the best interests of children, and not on being found liable under the *CHRA*. Moreover, there is a major problem with Budget 2016 being rolled out over 5 years. The Panel did not foresee it would take that long to address immediate relief. Leaving the highest investments for years 4 and 5, the Panel finds it does not fully address immediate relief (see 2018 CHRT 4 at para.146).

This being said, the Panel is encouraged by the steps made by Canada so far on the issue of immediate relief and the items that needed to be addressed immediately, However, we also find Canada not in full-compliance of this Panel's previous orders for least disruptive measures/prevention, small agencies, intake and investigations and legal costs. Additionally, at this time, the Panel finds there is a need to make further orders in the best interest of children (see 2018 CHRT 4 at para.195).

[240] The Panel made numerous findings on the need for prevention services to reverse the removal of First Nations children from their homes, families and communities:

Furthermore, several jurisdictional issues were identified as challenging the effectiveness of service delivery, notably the availability and access to supportive services for prevention. In this regard, the evaluation noted that a common implementation challenge for FNCFS Agencies was the need for specialized services at the community level (for example, Fetal Alcohol Spectrum Disorder assessments, therapy, counselling and addictions support). **Moreover, the evaluation found of key importance the availability and access to supportive services for prevention. According to the evaluation, these services are not available through AANDC funding, though they are provided by other government departments and programs either on reserve or off reserve** (see AANDC Evaluation of the Implementation of the EPFA in Alberta at pp. 16-18, 21-24) (see 2016 CHRT at, para.286).

Difficulties based on remoteness were also identified as a main challenge in Saskatchewan and Nova Scotia. One third of agencies reported high cost and time commitments required to travel to different reserves, along with the related risks associated with not reaching high-risk cases in a timely manner. In Nova Scotia, where there is only one FNCFS Agency with two offices throughout the province, the evaluation noted it can take two to three hours to reach a child in the southwestern part of the province. On the other hand, the provincial model is structured so that its agencies are no more than a half-hour away from a child in urgent need. In extreme cases, the Nova Scotia FNCFS Agency has had to rely on the provincial agencies for assistance. According to the evaluation, because of these issues the province of Nova Scotia has recommended that AANDC provide funding to support a third office in the southwestern part of the province (see AANDC Evaluation of the Implementation of the EPFA in Saskatchewan and Nova Scotia at pp. 35-36) (see 2016 CHRT 2 at, para.291).

AANDC's Departmental Audit and Evaluation Branch also performed its own evaluation of the FNCFS Program in 2007 (see Annex, ex. 14 [2007 Evaluation of the FNCFS Program]). The findings and recommendations of the 2007 Evaluation of the FNCFS Program reflect those of the NPR and Wen:De reports. Of note, at page ii, the 2007 Evaluation of the FNCFS Program makes the following findings:

Although the program has met an increasing demand for services, it is not possible to say that is has achieved its objective of creating a more secure and stable environment for children on reserve, nor has it kept pace with a trend, both nationally and internationally, towards greater emphasis on early intervention and prevention.

The program's funding formula, Directive 20-1, has likely been a factor in increases in the number of children in care and Program expenditures because it has had the effect of steering agencies towards in-care options - foster care, group homes and institutional care because only these agency costs are fully reimbursed (see 2016 CHRT 2 at, para.273).

(…) correct the weakness in the First Nations Child and Family Services Program's funding formula, which encourages out-of-home placements for children when least disruptive measures (in-home measures) would be more appropriate. Well-being and safety of children must be agencies' primary considerations in placement decisions (see 2016 CHRT 2 at, para.274).

In a September 11, 2009 response to questions raised by the Standing Committee on Aboriginal Affairs and Northern Development, Deputy Minister Michael Wernick described the EPFA as an "…approach that will result in better outcomes for First Nation children" (Annex, ex. 36). Mr. Wernick's response indicates AANDC's awareness of the impacts that the structure

> and funding for the FNCFS Program under Directive 20-1 has on the outcomes for First Nations children (see 2016 CHRT 2 at, para.276).
>
> However, as the 2008 Report of the Auditor General of Canada, the 2009 Report of the Standing Committee on Public Accounts, the 2011 Status Report of the Auditor General of Canada, and the 2012 Report of the Standing Committee on Public Accounts pointed out, while the EPFA is an improvement on Directive 20-1, it still relies on the problematic assumptions regarding children in care, families in need, and population levels to determine funding. Furthermore, many provinces and the Yukon remain under Directive 20-1 despite AANDC's commitment to transition those jurisdictions to the EPFA (see 2016 CHRT 2 at, para.278).
>
> Despite being aware of the adverse impacts resulting from the FNCFS Program for many years, AANDC has not significantly modified the program since its inception in 1990. Nor have the schedules of the 1965 Agreement in Ontario been updated since 1998. Notwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, AANDC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still fall short of addressing the service gaps, denials and adverse impacts outlined above and, ultimately, fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve (see 2016 CHRT 2 at, para. 461).

[241] One of the most tragic and worst-case scenarios in this case and in the Jordan's Principle context is one of unreasonable delays in providing prevention and mental health services as exemplified in the situation in the Nation of Wapekeka. This delay was intentional and justified by Canada according to financial and administrative considerations. It was devoid of caution and without regard for the serious consequences on the children and their families. Some extracts of the Panel's findings are reproduced here:

> The Wapekeka proposal was left unaddressed by Canada for several months with a reactive response coming only after the two youths committed suicide. The media response from Health Canada was that it acknowledged it had received the July 2016 proposal in September 2016; however, it came at an "awkward time in the federal funding cycle" (see affidavit of Dr. Michael Kirlew, January 27, 2017, at para. 16) (see 2017 CHRT 14 at, para. 89).

While Canada provided assistance once the Wapekeka suicides occurred, the flaws in the Jordan's Principle process left any chance of preventing the Wapekeka tragedy unaddressed and the tragic events only triggered a reactive response to then provide services. On a positive note, as mentioned above, Health Canada has since committed to establishing a Choose Life Working Group with the NAN, aimed at establishing a concrete, simplified process for communities to apply for Child-First Initiative (Jordan's Principle) funding. Nevertheless, the tragic events in Wapekeka highlight the need for a shift in process coordination around Jordan's Principle (see 2017 CHRT 14 at, para. 90).

Ms. Buckland acknowledged that the Wapekeka proposal identified a gap in services and that Jordan's Principle funds could have been allocated to address that gap. Despite this, and the fact that it was a life or death situation, Ms. Buckland indicated that because it was a group request, it would be processed like any other group request and go forward for the Assistant Deputy Minister's signature. In the end, she suggested it would have likely taken a period of two weeks to address the Wapekeka proposal (see Transcript of Cross-Examination of Ms. Buckland at p. 174, lines 19-21; p. 175, lines 1-4; p. 180, lines 1-9; and, p. 182, lines 11-16). (see 2017 CHRT 14 at, para. 91).

If a proposal such as Wapekeka's cannot be dealt with expeditiously, how are other requests being addressed? While Canada has provided detailed timelines for how it is addressing Jordan's Principle requests, the evidence shows these processes were newly created shortly after Ms. Buckland's cross-examination. There is no indication that these timelines existed prior to February 2017. Rather, the evidence suggests a built-in delay was part of the process, as there was no clarity surrounding what the process actually was [see "Jordan's Principle, ADM Executive Oversight Committee, Record of Decisions", September 2, 2016 (Affidavit of Robin Buckland, January 25, 2017, Exhibit F, at p. 3); see also Transcript of Cross-Examination of Ms. Buckland at p. 82, lines 1-12] (see 2017 CHRT 14 at, para. 92).

More significantly, Ms. Buckland's comments suggest the focus of Canada's Jordan's Principle processing remains on Canada's administrative needs rather than the seriousness of the requests, the need to act expeditiously and, most importantly, the needs and best interest of children. It is clear that the arm of the federal government first contacted still does not address the matter directly by funding the service and, thereafter, seeking reimbursement as is required by Jordan's Principle. The Panel finds Canada's new Jordan's Principle process to be very similar to the old one, except for a few additions. In developing this new process, there does not appear to have been much consideration given to the shortcomings of the previous process. (see 2017 CHRT 14 at, para. 93).

> The timelines imposed on First Nations children and families in attempting to access Jordan's Principle funding give the government time to navigate between its own services and programs similar to what the Panel found to be problematic in the Decision (see 2017 CHRT 14 at, para. 94).

[242] The evidence and findings above support the finding that Canada was aware of the discrimination adversely impacting First Nations children and families in the contexts of child welfare and/or Jordan's Principle and therefore, Canada's conduct was devoid of caution and without regard for the consequences on First Nations children and their parents or grand-parents which amounts to a reckless conduct compensable under section 53 (3) of the *CHRA*. The Panel finds that Canada's conduct amounts to a worst-case scenario warranting the maximum compensation of $20,000 under the *Act*.

[243] The AFN filed affidavit evidence on the Indian Residential School Settlement Agreement (IRSSA) as part of these proceedings and the Panel opted to adopt a similar approach in determining the remedies to victims/survivors in this case so as to avoid the burdensome and potentially harmful task of scaling the suffering per individual in remedies that are capped at a $20,000$ under the *CHRA*. The dispositions of the IRSSA found in Mr. Jeremy Kolodziej's affidavit affirmed on April 4, 2019 and reproduced below illustrate the rationale behind the lump sum payment to those victims/survivors who attended Residential School:

> "CEP" and "Common Experience Payment" mean a lump sum payment made to an Eligible CEP Recipient in the manner set out in Article Five (5) of this Agreement;
>
> 5.02 Amount of CEP
>
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
>
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; and (3) less the amount of any advance payment on the CEP received
>
> Recommendations

> 1.0 To ensure that the full range of harms are redressed, we recommend that a lump sum award be granted to any person who attended an Indian Residential School, irrespective of whether they suffered separate harms generated by acts of sexual, physical or severe emotional abuse.
>
> The Indian Residential School Policy was based on racial identity. It forced students to attend designated schools and removed them from their families and communities. The Policy has been criticized extensively. The consequences of this policy were devastating to individuals and communities alike, and they have been well documented. The distinctive and unique forms of harm that were a direct consequence of this government policy include reduced self-esteem, isolation from family, loss of language, loss of culture, spiritual harm, loss of a reasonable quality of education, and loss of kinship, community and traditional ways. These symptoms are now commonly understood to be "Residential School Syndrome." Everyone who attended residential schools can be assumed to have suffered such direct harms and is entitled to a lump sum payment based upon the following:
>
> 1.1 A global award of sufficient significance to each person who attended Indian Residential Schools such that it will provide solace for the above losses and would signify and compensate for the seriousness of the injuries inflicted and the life-long harms caused.
>
> 1.2 An additional amount per each additional year or part of a year of attendance at an Indian Residential School to recognize the duration and accumulation of harms, including the denial of affection, loss of family life and parental guidance, neglect, depersonalization, denial of a proper education, forced labour, inferior nutrition and health care, and growing up in a climate of fear, apprehension, and ascribed inferiority.
>
> **As attendance at residential school is the basis for recovery, a simple administrative process of verification is all that is required to make the payments as the government is in possession of the relevant documentation. (emphasis ours).**

[244] The Panel believes that the above rationale is applicable in this case. As for the process, it needs to be discussed further as it will be explained in the next section.

XIV. Orders

All the following orders will find application once the compensation process referred to below has been agreed to by the Parties or ordered by the Tribunal.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child in the child welfare system

[245] The Panel finds there is sufficient evidence and other information (see section 50 (3) (c) of the *CHRA*), in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse were unnecessarily apprehended and placed in care outside of their homes, families and communities and especially in regards to substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their homes, families and communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA.* Canada is ordered to pay $ 20,000 to each First Nation child removed from its home, family and Community between **January 1, 2006** (date following the last WEN DE report as explained above) until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

[246] The Panel believes there is sufficient evidence and other information to find that even if a First Nation child has been apprehended and then reunited with the immediate or extended family at a later date, the child and family have suffered during the time of separation and that the trauma outlasts the time of separation.

[247] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's Decisions 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living

on reserve and in the Yukon Territory who, as a result of poverty, lack of housing or deemed appropriate housing, neglect and substance abuse had their child unnecessarily apprehended and placed in care outside of their homes, families and communities and, especially in regards to of substance abuse, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to keep their child safely in their homes, families and communities. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*.

[248] Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent of a First Nation child removed from its home, family and Community between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below. This order applies for each child removed from the home, family and community as a result of the above-mentioned discrimination. For clarity, if a parent or grand-parent lost 3 children in those circumstances, it should get $60,000, the maximum amount of $20,000 for each child apprehended.

Compensation for First Nations children in cases of necessary removal of a child in the child welfare system

[249] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2016 CHRT 10, 2016 CHRT 16, 2018 CHRT 4, resulted in harming First Nations children living on reserve and in the Yukon Territory who, as a result of abuse were necessarily apprehended from their homes but placed in care outside of their extended families and communities and therefore, did not benefit from prevention services in the form of least disruptive measures or other prevention services permitting them to remain safely in their extended families and

communities. Those children experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $20,000 to each First Nation child removed from its home, family and Community from **January 1, 2006** until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order. Also, following the process discussed below.

Compensation for First Nations children and their parents or grand-parents in cases of unnecessary removal of a child to obtain essential services and/or experienced gaps, delays and denials of services that would have been available under Jordan's Principle

[250] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations children living on reserve or off-reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services and placed in care outside of their homes, families and communities in order to receive those services or without being placed in out of home care were denied services and therefore did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35 (for example, mental health and suicide preventions services, special education, dental etc.). Finally, children who received services upon reconsideration ordered by this Tribunal and children who received services with unreasonable delays have also suffered during the time of the delays and denials. All those children above mentioned experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the *CHRA*. Canada is ordered to pay $ 20,000 to each First Nation child removed from its home and placed in care in order to access services and for each First Nations child who

was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[251] The Panel finds there is sufficient evidence and other information in this case to establish, on a balance of probabilities, that Canada's systemic racial discrimination found in the Tribunal's *Decision* 2016 CHRT 2 and subsequent rulings: 2017 CHRT 7, 2017 CHRT 14, 2017 CHRT 35 and 2018 CHRT 4, resulted in harming First Nations parents or grand-parents living on reserve or off reserve who, as a result of a gap, delay and/or denial of services were deprived of essential services for their child and had their child placed in care outside of their homes, families and communities in order to receive those services and therefore, did not benefit from services covered under Jordan's Principle as defined in 2017 CHRT 14 and 35. Those parents or grand-parents experienced pain and suffering of the worst kind warranting the maximum award of remedy of $20,000 under section 53 (2)(e) of the CHRA. Canada is ordered to pay $ 20,000 to each First Nation parent or grand-parent who had their child removed and placed in out-of-home care in order to access services and for each First Nations parent or grand-parent who's child was not removed from the home and was denied services or received services after an unreasonable delay or upon reconsideration ordered by this Tribunal, between **December 12, 2007** (date of the adoption in the House of Commons of the Jordan's Principle) and **November 2, 2017** (date of the Tribunal's 2017 CHRT 35 ruling on Jordan's Principle), following the process discussed below.

[252] It should be understood that the pain and suffering compensation for a First Nation child, parent or grand-parent covered under the Jordan's Principle orders cannot be combined with the other orders for compensation for removal of a home, a family and a community rather, the removal of a child from a home is included in the Jordan's Principle orders.

[253] The Panel finds as explained above there is sufficient evidence and other information in this case to establish on a balance of probabilities that Canada was aware

of the discriminatory practices of its child welfare Program offered to First Nations children and families and also of the lack of access to services under Jordan's Principle for First Nations children and families. Canada's conduct was devoid of caution and without regard for the consequences experienced by First Nations children and their families warranting the maximum award for remedy under section 53(3) of the *CHRA* for each First Nation child and parent or grand-parent identified in the orders above.

[254] Canada is ordered to pay $ 20,000 to each First Nation child and parent or grand-parent identified in the orders above for the period between **January 1, 2006** and until the earliest of the following options occur: the Panel informed by the parties and the evidence makes a determination that the unnecessary removal of First Nations children from their homes, families and communities as a result of the discrimination found in this case has ceased and effective and meaningful long term relief is implemented; the parties agreed on a settlement agreement for effective and meaningful long term relief; the Panel ceases to retain jurisdiction and beforehand amends this order for all orders above except Jordan's Principle orders given that the Jordan's Principle orders are for the period between **December 12, 2007** and **November 2, 2017** as explained above and, following the process discussed below.

[255] The term parent or grand-parent recognizes that some children may not have parents and were in the care of their grand-parents when they were removed from the home or experienced delays, gaps and denials in services. The Panel orders compensation for each parent or grand-parent caring for the child in the home. If the child is cared for by two parents, each parent is entitled to compensation as described above. If two grand-parents are caring for the child, both grand-parents are entitled to compensation as described above.

[256] For clarity, parents or grand-parents who sexually, physically or psychologically abused their children are entitled to no compensation under this process. The reasons were provided earlier in this ruling.

[257] A parent or grand-parent entitled to compensation under section 53 (2) (e) of the *CHRA* above and, who had more than one child unnecessarily apprehended is to be

compensated $20,000 under section 53 (3) of the *CHRA* per child who was unnecessarily apprehended or denied essential services.

XV. Process for compensation

[258] The Panel in considering access to justice, efficiency and expeditiousness has opted for the above orders to avoid a case-by-case assessment of degrees of pain and suffering for each child, parent or grand-parent referred to in the orders above. As stated by the NAN, there is no perfect solution on this issue, the Panel agrees. The difficulty of the task at hand does not justify denying compensation to victims/survivors. In recognizing that the maximum of $20,000 is warranted for any of the situations described above, the case-by-case analysis of pain and suffering is avoided and it is attributed to a vulnerable group of victims/survivors who as exemplified by the evidence in this case have suffered as a result of the systemic racial discrimination. Some children and parents or grand-parents may have suffered more than others however, the compensation remedies are capped under the *CHRA* and the Panel cannot award more than the maximum allowed even if it is a small amount in comparison to the degree of harm and of racial discrimination experienced by the First Nations children and their families. The maximum compensation awarded is considered justifiable for any child or adult being part of the groups identified in the orders above.

[259] This type of approach to compensation is similar to the Common Experience Payment compensation in the IRSSA outlined above. The Common experience payment recognized that the experience of living at an Indian Residential School had impacted all students who attended these institutions. The CEP compensated all former students who attended for the emotional abuse suffered, the loss of family life, the loss of language culture, etc. (see Affidavit of Mr. Jeremy Kolodziej's dated April 4 2019 at, para.10).

[260] The Panel prefers AFN's request that compensation be paid to victims directly following an appropriate process instead of being paid in a fund where First Nations children and families could access services and healing activities to alleviate some of the effects of the discrimination they experienced. The Panel is not objecting to a trust fund

per se, rather it objects that the compensation be paid in a trust fund to finance services and healing activities in lieu of financial compensation as suggested by the Caring Society. Such meaningful activities should be offered by Canada however, not in replacement of financial compensation to victims/survivors. Financial Compensation belongs to the victims/survivors who are the ones who should be empowered to decide for themselves on how best to use this financial compensation.

[261] However, the Panel also acknowledges the Caring Society's argument that it is not appropriate to pay $40,000 to a 3-year-old. Therefore, there is a need to establish a process where the children who are under 18 or 21 years old have the compensation paid to them secured in a fund that would be accessible upon reaching majority.

[262] In terms of Jordan's Principle, many children who were denied services and who are still living with their parents could have the compensation funds administered by their parents or grand-parents until the age of majority.

[263] For all the other children who have no parents, grand-parents or responsible adult family members and who are underage, a trust fund could be an option amongst others that should be part of the discussions referred to below.

[264] Special protections for mentally disabled children and parents or grand-parents who abuse substances that may affect their judgment should be considered in the process.

[265] It would be preferable that the Social benefits of victims/survivors not be affected by compensation remedies. This can form part of the process for compensation discussions.

[266] The possibility for individual victims/survivors to opt-out should form part of this compensation process.

[267] Given that the parties and interested parties in this case are all First Nations except the Commission and the AGC and, that they all have different views on the appropriate definition of a First Nation child in this case, it is paramount that this form part of the discussions on the process for compensation. The Panel reiterates that it recognizes the First Nations human rights and Indigenous rights of self-determination and self-governance.

[268] If a trust fund and/or committee is proposed, it may be valuable to also include non-political members on the trust fund and/or committee such as adult victims/survivors, Indigenous women, elders, grandmothers, etc.

[269] Additionally, the Panel recognizes the need for a culturally safe process to locate the victims/survivors identified above namely, First Nations children and their parents or grand-parents. The process needs to respect their rights and their privacy. The Indian registry and Jordan's Principle process and record are tools amongst other possible tools to assist in locating victims/survivors. There is also a need to establish an independent process for distributing the compensation to the victims/survivors. The AFN and the Caring Society have both expressed an interest to assist in that regard. Therefore, Canada shall enter into discussions with the AFN and the Caring Society on this issue. The Commission and the interested parties should be consulted in this process however, they are not ordered to participate if they decide not to. The Panel is not making a final determination on the process here rather, it will allow parties to discuss possible options and return to the Tribunal with propositions if any, no later than **December 10, 2019**. The Panel will then consider those propositions and make a determination on the appropriate process to locate victims/survivors and to distribute compensation.

[270] As part of the compensation process consultation, the Panel welcomes any comment/suggestion and request for clarification from any party in regards to moving forward with the compensation process and/or the wording and/or content of the orders. For example, if categories of victims/survivors should be further detailed and new categories added.

XVI. Interest

[271] Pursuant to section 53(4) of the *Act*, the Complainants seek interest on any award of compensation made by the Tribunal.

[272] Section 53(4) allows for the Tribunal to award interest at a rate and for a period it considers appropriate:

> (4) Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[273] The language of the *Act* reproduced above refers to the term victim rather than complainant. As mentioned previously, the wording of the *CHRA* allows for the distinction between a complainant who is victim of the discriminatory practice and a victim of a discriminatory practice who is not a complainant.

[274] Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[275] As such, the Panel grants interest on the compensation awarded, at the current Bank of Canada rate, as follows:

[276] The compensation for pain and suffering and special compensation includes an award of interest for the same periods covered in the above orders. This approach was used by the Tribunal in the past see for example, *Grant v. Manitoba Telecom Services Inc.,* 2012 CHRT 20 at, para.21).

XVII. Retention of jurisdiction

[277] The Panel retains jurisdiction until the issue of the process for compensation has been resolved by consent order or otherwise and will then revisit the need for further retention of jurisdiction on the issue of compensation. This does not affect the Panel's retention of jurisdiction on other issues in this case.

Signed by

Sophie Marchildon
Edward P. Lustig
Tribunal Members

Ottawa, Ontario
September 6, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1340/7008

Style of Cause: First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)

Ruling of the Tribunal Dated: September 6, 2019

Date and Place of Hearing: April 25 and 26, 2019
Gatineau, Québec

Appearances:

David Taylor and Sarah Clarke, counsel for the First Nations Child and Family Caring Society of Canada, the Complainant

Stuart Wuttke and Thomas Milne, counsel for Assembly of First Nations, the Complainant

Brian Smith and Jessica Walsh, counsel for the Canadian Human Rights Commission

Robert Frater, Q.C. and Max Binnie, counsel for the Respondent

Maggie Wente, counsel for the Chiefs of Ontario, Interested Party

Akosua Matthews and Molly Churchill, counsel for the Nishnawbe Aski Nation, Interested Party

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: STRATAS J.A.

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on October 5, 2012.

Order delivered at Ottawa, Ontario, on October 9, 2012.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal — Cour d'appel fédérale

Date: 20121009

Docket: A-357-12

Citation: 2012 FCA 255

Present: **STRATAS J.A.**

BETWEEN:

GLOOSCAP HERITAGE SOCIETY

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] The applicant, Glooscap Heritage Society, is a registered charity under the *Income Tax Act*. The Minister has notified Glooscap that he will exercise his authority under the Act and revoke Glooscap's registration as a charity. Glooscap intends to challenge the revocation.

[2] Under the Act the revocation can take place before Glooscap can challenge it. This will be explained in more detail below.

[3] In this application, Glooscap seeks an order delaying the revocation until this Court hears its challenge.

[4] In order to delay the revocation, Glooscap must satisfy the Court that it has met the normal test for the granting of stays and injunctions: *International Charity Association Network v. Minister of National Revenue*, 2008 FCA 114 at paragraph 5. Glooscap must show it has an arguable case against the revocation, it will suffer irreparable harm if the revocation is allowed to happen, and the balance of convenience lies in its favour: *RJR-MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

[5] For the reasons set out below, Glooscap has not satisfied this test. Therefore, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity, with costs.

A. Preliminary matter

[6] Initially, Her Majesty the Queen was named as the respondent to this application. The parties agree that the correct respondent is the Minister of National Revenue. I agree and will so order. The style of cause on these reasons and my order dismissing Glooscap's application shall reflect this change.

B. Facts

(1) The legislative scheme

[7] When the Minister concludes that a charity's registration should be revoked, he issues a notice of intention to revoke it: *Income Tax Act*, subsection 168(1). The revocation only takes effect when notice of it is published in the *Canada Gazette*.

[8] Where the charity has not requested the revocation, the publication of the notice is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172.

[9] Any time before the Court determines the appeal, the Court may extend the 30 day period for non-publication of the notice of revocation. Before the appeal is brought, the extension may be granted on the basis of an application brought under Rule 300(*b*) of the *Federal Courts Rules*. After the appeal is brought, an extension may be granted by way of notice of motion within the appeal. See *International Charity Association Network (ICAN) v. Minister of National Revenue*, 2008 FCA 62 at paragraph 7.

(2) The basic facts of this case

[10] Since May 2005, Glooscap has been a registered charity under the Act.

[11] At that time, broadly stated, its objects were to research, study, exhibit, and publicize artifacts and evidence relating to the history of the Mi'kmaq First Nation in central Nova Scotia. In conjunction with the Central Nova Tourist Association, Glooscap operates the Glooscap Heritage Centre and Mi'kmaw Museum. The museum is located on the Millbrook First National reserve on the outskirts of Truro, Nova Scotia.

[12] Some of artifacts and exhibits in the museum come from charitable donations. But the bulk of the museum's artifacts and exhibits – some 80% – are on loan from another museum.

[13] The evidence filed before the Court suggests that the relationship between the tourist association and Glooscap – an aboriginal/non-aboriginal partnership in a tourism endeavour – is special and rare, and formed only after overcoming initial resistance. Putting aside Glooscap's involvement with the tax shelter, described below, the evidence filed before the Court demonstrates that Glooscap's activities are socially worthy and important to the community.

[14] But in this application, Glooscap's involvement with the tax shelter is central.

[15] The Minister alleges that from 2006 to 2011, Glooscap issued donation receipts in the following approximate totals: $166,000 (2006), $0 (2007), $11,590,000 (2008), $13,312,000

(2009), $37,131,000 (2010), $54,985,000 (2011). This shows a massive increase in donations since 2006 – ranging from 6,880% to over 33,000%.

[16] The Minister says this increase was due to Glooscap's involvement, starting in 2008, with an illegitimate tax shelter known as the Global Learning Gifting Initiative.

[17] In this regard, the Minister makes several allegations, largely on the basis of an audit it has conducted. On this application, it is not the role of the Court to determine whether these allegations are true. The Minister's allegations, to the extent they have a *prima facie* basis, are primarily relevant to the assessment of the public interest under the balance of convenience branch of the *RJR-Macdonald* test.

[18] The Minister's alleges that the illegitimate tax shelter worked in the following way:

- Each participant made a cash payment to Glooscap.

- Each participant then applied to become a capital beneficiary of the Global Learning Trust.

- The trust provided each participant with free courseware.

- Each participant donated the courseware to a registered charity that was participating in the tax shelter. In 2009 and 2010, participants donated the courseware to Glooscap.

- Each participant received an official donation receipt for the cash payment and the donated courseware.

- Although each participant purportedly donated the courseware at fair market value, Glooscap issued receipts for the courseware that were typically at least three times the amount of the cash payment the participant had made to Glooscap.

- Under this arrangement, Glooscap kept very little of the cash payments from participants. For example, in 2009, Glooscap retained 11.6% of the payments, with the promoter of the scheme receiving 88.4% of the payments.

[19] Following an audit, the Canada Revenue Agency concluded, among other things, that:

- Glooscap was not operating exclusively for charitable purposes as required under the Act, and instead was operating for the primary purpose of activities benefiting the tax shelter.

- Glooscap improperly issued receipts for cash and courseware that were not valid gifts under the Act.

[20] In an administrative fairness letter, the Canada Revenue Agency notified Glooscap of its concerns and invited Glooscap to respond. In a responding letter, Glooscap defended itself, urged that its registration as a charity not be revoked, and advised that it had terminated its relationship with the tax shelter.

[21] After some months, on July 17, 2012, the Canada Revenue Agency issued a Notice of Intention to revoke Glooscap's registration as a charity under the Act. Further, the Minister has told participants in the tax shelter their deductions arising from the scheme will be disallowed, and they will be reassessed for back taxes, interest and penalties.

[22] In the oral hearing of this application, Glooscap advised the Court that it has just filed an objection to the Minister's Notice of Intention.

[23] Assuming that the Canada Revenue Agency maintains its position, Glooscap will soon be able to challenge in this Court the Minister's planned – or, by then, actual – revocation of its registration as a charity. In the meantime, Glooscap wants this Court to stop the Minister from revoking its registration.

C. Analysis

(1) Arguable case

[24] On the first branch of the threefold test for a stay, Glooscap must establish that there will be a serious question to be tried when it challenges the Minister's position in this Court. Although it has not filed its objection to the Minister's Notice of Intention, it has filed its responding letter to the Minister's administrative fairness letter.

[25] The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald, supra* at page 337; *143471 Canada Inc. v. Quebec (Attorney General)*, [1994] 2 S.C.R. 339 at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). Glooscap need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald, supra* at page 337.

[26] Given the low threshold for "arguable case," the Minister has conceded that Glooscap has met this branch of the *RJR-Macdonald* test.

(2) Irreparable harm

[27] Glooscap submits that if its registration as a charity is revoked, it will suffer irreparable harm. It points to reputational effects upon itself, the First Nation with which it is associated, the First Nation's business relationships, and business collaborations between aboriginal and non-aboriginal communities. It also says that potential donors to the museum will donate to other museums that can provide a donation receipt, and they will not lightly come back.

[28] Glooscap adds that under the irreparable harm branch of the test, the Court is to look at the nature of the harm – whether it can be remedied later – and not the quantity of harm.

[29] The Minister submits that the irreparable harm must be that of the moving party, here Glooscap. Harm to third parties may be considered under the balance of convenience branch of the test, but not under the irreparable harm branch of the test. The Minister also points to the general, unparticularized nature of the harm and the absence of proof of a real likelihood of harm.

[30] On the law governing irreparable harm and on the record before the Court, the Minister's submissions carry some force.

[31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*,

2010 FCA 232 at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[32] The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[33] Finally, only harm suffered by the moving party qualifies under this branch of the test. As was said in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at page 128, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm." It is "the applicants' own interests" that fall to be considered under this branch of the test, not that of third parties: *RJR-MacDonald*, *supra* at page 341.

[34] In cases such as this, a modest modification of this principle has been made. The interests of those who are dependent on the registered charity may also be considered under this branch of the test: *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265 at paragraph 17.

[35] Glooscap has adduced evidence from very well-placed deponents: the executive director of the tourist association with which Glooscap is partnered, a multi-decade councillor with the Millbrook First Nation reserve, and the general manager of the museum. However, much of the evidence of harm given by these deponents consists of sweeping, unparticularized assertions and declarations that difficulties would arise that *might* result in actual harm.

[36] Without a better understanding of Glooscap's overall financial situation and fundraising ability, I cannot conclude that a loss of donations would result in any irreparable harm to it or its activities.

[37] Glooscap submits that revocation of its registration as a charity will cause harm to its relationships, particularly with non-aboriginal organizations, and these injuries are not capable of later remediation. However, its evidence goes no higher than to identify "jeopardy" or a risk to those relationships: see paragraphs 11 and 13 of the Mingo Affidavit.

[38] The Court does accept that Glooscap will suffer some reputational harm. However, as explained below, much of the reputational harm, especially in the donor community, will be caused not by the revocation of Glooscap's registration as a charity, but rather by the reassessment of the donors to the tax shelter.

[39] Ultimately fatal to Glooscap`s application is the requirement that it establish irreparable harm that is *unavoidable*, *i.e.*, irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could

have avoided, but deliberately chose to accept: *Dywidag Systems International*, *supra* at paragraphs 14 and 16.

[40] In *Dywidag Systems International*, the irreparable harm was said to be the disclosure of confidential documents. Often the release of confidential documents causes irreparable harm. But in Dywidag, this irreparable harm was avoidable: months earlier, Dywidag was invited to agree upon a confidentiality order protecting the documents, but it did nothing.

[41] In this case, Glooscap knew about the sizeable advantages of registered charitable status: exemption from income tax and the ability to issue receipts for donations received. It was warned at an early stage that it might lose its advantageous charitable status if it associated with this tax shelter. Part of that risk is the very thing that has now materialized – the revocation of its charitable status before it can challenge the revocation in this Court. Warnings about involvement with this tax shelter came from the Canada Revenue Agency (two emails and a meeting), Glooscap's own lawyer (two letters) and its own auditor. Glooscap's auditor resigned, at least in part over the issue. There were also warnings that involvement in the tax shelter would require an amendment to Glooscap's objects and the approval of the Canada Revenue Agency. Yet, knowing of the risks, Glooscap chose to continue its association with the tax shelter, and in fact renewed its association in 2009.

[42] Glooscap submits that it exercised good faith throughout. In support of that submission, among other things, Glooscap points to confirmatory testimony given on cross-examination of a representative of the Canada Revenue Agency. That may be so, but the fact remains that at an early

stage Glooscap knew of the risk of the very harm that has eventuated here and it chose to run that risk.

[43] If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(3) Balance of convenience

[44] Were it necessary to proceed to this branch of the test, this Court would have found that the balance of convenience lies against the granting of relief to Glooscap.

[45] This Court recognizes the high significance and importance of the aboriginal/non-aboriginal partnership in this case between Glooscap and the tourist association, especially when viewed against the regrettable, often abysmal, sometimes unspeakable events surrounding Canada's history of aboriginal/non-aboriginal relations: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward,* vol. 1 (Ottawa: Canada Communication Group Publishing, 1996).

[46] As mentioned in paragraph 37 above, the evidence offered by Glooscap falls short of establishing a real likelihood that this partnership will fail or that the broader aboriginal/non-aboriginal relationship will suffer if Glooscap's charitable status is revoked. That being said, the evidence does describe a risk – albeit undefined, abstract and perhaps speculative – of that happening.

[47] The Court also accepts that if Glooscap's registration as a charity is revoked, the reputations of it and perhaps those associated with it will suffer, with possible, undefined, perhaps speculative detrimental effects on their businesses and activities.

[48] However, one would expect that the Minister's reassessment of all of Glooscap's donors who participated in the tax shelter will cause negative news to spread through all of the donor community, if not the wider community. This will happen regardless of whether the Court grants Glooscap the relief it seeks in this application.

[49] Glooscap's evidence falls short of establishing that the museum will fail, or that its educational mission will be detrimentally affected. No financial information has been given that would allow such a finding to be made.

[50] Putting aside the donations involving the tax shelter, Glooscap has received only $19,775 in total donations during 2007-2011, and no evidence has been provided suggesting that the loss of this level of donation will cause any significant harm.

[51] On the Minister's side, is the public interest in enforcement – a matter deserving of significant weight in this case. The Minister's allegations in support of revocation of Glooscap`s registration as a charity are supported, on a *prima facie* basis, by the conclusions of the audit that appears in the record before the Court. Therefore, the public interest in enforcement, as contemplated by the Act, is in play.

[52] Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 at paragraph 9; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 12.

[53] The weight to be accorded to that public interest, already significant, is driven upward by the sizeable amounts said to be in issue in this case: $116,999,482 given in receipts to participants in the tax shelter in 2008-2011, in circumstances where valid non-tax shelter donations over the same period totalled only $19,775. It is also driven up by Glooscap's decision to involve itself in the tax shelter despite the clear warnings it received.

[54] In assessing and weighing the public interest considerations in this case against the considerations offered by Glooscap, I can do no better than to adopt the words of my colleague, Sharlow J.A., in *International Charity Association Network*, *supra* at paragraph 12 (2008 FCA 62):

> The Minister takes the position, properly in my view, that the public has a legitimate interest in the integrity of the charitable sector. It is reasonable for the Minister to attempt to safeguard that integrity by carefully scrutinizing tax shelter schemes involving charitable donations of property and, where there are reasonable grounds to believe that the property has been overvalued, by taking appropriate corrective action. In the circumstances of this case, the Minister's factual allegations, while untested, are sufficiently serious to outweigh any advantage [the charity] might derive from an order deferring the revocation of its registration as a charity.

D. Disposition

[55] For the foregoing reasons, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity. The Minister shall have his costs of the application.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-12
STYLE OF CAUSE:	Glooscap Heritage Society v. The Minister of National Revenue
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 5, 2012
REASONS FOR ORDER BY:	Stratas J.A.
DATED:	October 9, 2012

APPEARANCES:

Bruce S. Russell, Q.C.	FOR THE APPLICANT
Rosemary Fincham April Tate	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McInnes Cooper Halifax, Nova Scotia	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT

Date: 20071115

Docket: T-2066-03

Citation: 2007 FC 1184

Ottawa, Ontario, November 15, 2007

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] On September 18, 2007, I dismissed the plaintiffs' action. The issue of costs was reserved.

In my reasons, I stated:

> While success has been somewhat divided, the defendant has prevailed on most issues. Counsel are encouraged to resolve the issue of costs by agreement. The defendant should recall that Ms. Haj Khalil is a recipient of legal aid. Absent resolution on the issue of costs, counsel are to serve and file written submissions, not to exceed five pages double-spaced, within 35 days of the date of judgment. Responses to those submissions are to be served and filed within 10 days of service of the first submissions, or within 45 days of the date of judgment, at the election of counsel. I remain seized of this matter with respect to the determination of costs.

[2] No agreement was reached. I have received, reviewed and considered the submissions of the parties and the responsive submissions of the defendant. The plaintiffs did not file responsive submissions.

[3] The fundamental principle is that an award of costs represents a compromise between compensating a successful party and not unduly burdening an unsuccessful party: *Apotex Inc. v. Wellcome Foundation Ltd*. (1988), 159 F.T.R. 233 (T.D.) aff'd. (2001), 199 F.T.R. 320 (C.A.). The general rule is that costs follow the event and absent exceptional circumstances should be awarded to the successful litigant on a party-and-party basis. However, it remains the case that costs are within the discretion of the Court: *Federal Court Rules*, SOR/98-106. The non-exhaustive factors that may be considered in awarding costs are delineated in Rule 400(3) including "any other matter that [the Court] considers relevant": Rule 400(3)(g).

[4] The defendant seeks party-and-party costs for two counsel per day in court with double costs (exclusive of disbursements) from March 16, 2007, the date upon which the defendant served a formal offer to settle.

[5] The plaintiffs seek costs against the defendant based on the "strong factual findings on delay", the test-case nature of the action and the access to justice issues arising from the fact that the plaintiffs' second counsel acted, in part, on a *pro bono* basis. Alternatively, they seek an order that no costs be awarded to any party.

[6] As noted earlier, the defendant prevailed on most issues. The plaintiffs succeeded only in relation to a partial finding of delay (from July of 2002). Their claims were dismissed in their entirety. More specifically, the claims for more than $3,000,000 in damages (arising from alleged negligence and breach of Charter rights) and the request for a declaration that paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is unconstitutional were dismissed. I do not view this as a case of divided success.

[7] It is common ground that the proceeding involved a great deal of work for both sides. The trial encompassed 36 days. The plaintiffs assert that the issues were novel and complex while the defendant maintains that similar issues had been adjudicated previously. Further, the plaintiffs submit that the action was funded by legal aid as a test case. They insist that this was the first case to address the issue of the "government's liability in tort" to Convention refugee applicants for permanent residence as well as the first trial with respect to the "issue of refugees' section 7 Charter rights when their applications for permanent residence are severely delayed".

[8] I agree that the issues were novel in the context of an action. However, as I opined in my reasons, administrative law remedies were available to address the matter of delay. The plaintiffs' Charter arguments could have been advanced on an application for judicial review. As for legal aid funding, there is no information before me as to the criteria for funding or the basis upon which funding was approved.

[9] The plaintiffs characterize their action as public interest litigation because there is a "clear public interest in deciding the issues of tort liability and issues of Charter rights". The defendant

describes the matter as a private action in which the plaintiffs sought more than $3,000,000 in damages. From the Crown's perspective, the mere fact that the action involved a public authority is insufficient to transform the "nature of this negligence/personal injury litigation". I agree with the defendant in this respect.

[10] There is strong authority for the proposition that it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation: *Odhavji Estate v. Wood house,* [2003] 3 S.C.R. 263. Moreover, where issues of public importance exist, the bringing of such issues to the courts does not automatically entitle a litigant to preferential treatment with respect to costs: *Little Sister Book and Emporium v. Canada*, [2007] 1 S.C.R. 38 at para. 35.

[11] Notably, the plaintiffs' submissions are silent with respect to their request for a declaration of constitutional invalidity regarding paragraph 34(1)(f) of the IRPA, a matter that had been determined by the Supreme Court of Canada: *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3.

[12] The plaintiffs suggest that this action raises an "access to justice" issue. The underlying rationale is that junior counsel was funded for only two weeks of trial. In this respect, they rely on the comments of the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.) wherein the Court stated that the availability of costs orders in favour of *pro bono* counsel is a tool to potentially reduce the necessary financial sacrifice associated

with taking on *pro bono* work and to increase the willingness and number of counsel to accept *pro bono* work. I do not disagree with that proposition. However, I do not interpret it to mean that a successful litigant should be denied costs because an unsuccessful litigant was represented by *pro bono* counsel. In the noted case, the litigant represented by *pro bono* counsel was successful.

[13] It is well-established that the Crown is entitled to its costs, if successful: *R. v. James Lorimer & Co.*, [1984] 1 F.C. 1065 (C.A.); *Canada (A.G.) v. Georgian College of Applied Arts and Technology*, [2003] 4 F.C. 525 (C.A.). Moreover, in deciding whether costs should be awarded, neither the ability to pay nor the difficulty of collection should be a deciding factor. The awarding or refusal of costs should be based on the merits of the case: *Soloski v. The Queen*, [1977] 1 F.C. 663 (T.D.) aff'd., [1978] 2 F.C. 632 (C.A.).

[14] All of which is to say that I see no reason to depart from the normal rule that costs should follow the event. The defendant submitted its bill of costs based on the mid-range of Column III of Tariff B. The plaintiffs chose not to file responsive submissions and have taken no issue with the defendant's bill of costs. The bill of costs appears to be in order and to be reasonable. In the absence of any representations that it is not in order or that it is not reasonable, I am prepared to assess costs on the basis of those put forward.

[15] That said, there are disbursements (item 5 of the "expert fees" and items 1 and 3 of "travel for counsel") for which the appropriateness and reasonableness have not been established. Also, with respect to Rule 400(3)(i), the defendant's position in relation to earlier orders of the court and

its request that I "revisit" those orders and its rigorous and unyielding position on the issue of delay will result in some reduction to counsel fees.

[16] Recognizing that an award of costs is not an exact science and considering the submissions and the factors to which I have referred, in the exercise of my discretion, I fix costs on a lump sum basis in the amount of $125,000 and disbursements in the amount of $180,000 for a total amount of $305,000 to be paid by the plaintiffs to the defendant.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED THAT costs are fixed on a lump sum basis in the amount of $125,000 with disbursements in the amount of $180,000 for a total amount of $305,000 to be paid by the plaintiffs to the defendant.

"Carolyn Layden-Stevenson"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2066-03

STYLE OF CAUSE: NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL
and Her Majesty The Queen

PLACE OF HEARING: Toronto, Ontario

DATES OF HEARING: April 16-19, 23-27, 30, 2007
May 1-4, 7-11, 14, 18, 22-24, 28-30, 2007
June 5-8, 13, 14, 27-29, 2007
Further submissions: July 31, 2007
August 9, 24, 31, 2007
Costs submissions: October 23, November 2, 2007

REASONS FOR JUDGMENT AND JUDGMENT: Layden-Stevenson J.

DATED: November 15, 2007

APPEARANCES:

Ms. Barbara Jackman
Ms. Leigh Salsberg FOR THE PLAINTIFFS

Mr. John Loncar
Ms. Lois Knepflar
Ms. Marina Stefanovic
Ms. Amy Lambiris
Mr. Tamrat Gebeyehu
Ms. Janet Chisholm
Ms. Ladan Shahrooz FOR THE DEFENDANT

SOLICITORS OF RECORD:

Jackman & Associates FOR THE PLAINTIFFS
Barristers and Solicitors
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John H. Sims, Q.C. FOR THE DEFENDANT
Deputy Attorney General of Canada

COURT OF APPEAL FOR ONTARIO

CITATION: Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc., 2012 ONCA 756
DATE: 20121106
DOCKET: M41692 (C55916)

Blair J.A. (In Chambers)

BETWEEN

Korea Data Systems (USA), Inc.

Plaintiff (Appellant/Moving Party)

and

Aamazing Technologies Inc. carrying on business as Ajay Amazing Technologies Inc., Jay Chiang, aka Jay Tien Chiang aka Tienchieh Chiang, Julius Chiang and Christina Chiang aka Christian Chiang aka Suh Mei Tasi, aka Suh Mei Tsai aka Christina Suh Mei Tsai, aka Suh Mei Tasi Chiang, aka Christina Suh-Mei Chiang aka Suh-Mei Chiang, and Dong Liang aka Tung Liang

Defendants (Respondent in Appeal)

AND BETWEEN

Mendlowitz & Associates Inc., in its capacity as Trustee in Bankruptcy of Jay Tien Chiang, and Korea Data Systems (USA) Inc.

Plaintiffs (Appellants/Moving Parties)

and

Jay Tien Chiang, aka Jay Chiang, aka Tienchieh Chiang, Christina Chiang, also known as Suh Mei Tasi, aka Christian Chiang aka Suh Mei Tsai, aka Christina Suh Mei Tsai, aka Suh Mei Tasi Chiang, aka Christina Suh-Mei Chiang aka Suh-Mei Chiang, Chun Chun Wu, Jie Chu Wu, Chen Cheng-Yueh Tsai, Yu Chang Chiang also knows as Y.C. Chiang, En Fu Chiang, Brenda Chang, Samson Chang, David Cheng, Everview Inc., 961266 Ontario Inc.,1204360 Ontario Inc., 1243723 Ontario Inc., Aamazing Technologies Inc., Wen Wang Chiang aka Wen Chiang aka Wen Wang, Crystalview Technology Corp., E.C. Holdings Ltd., Telepower International (Canada), Inc., Best Buy Electronics Inc., Su Feng Tsai aka Tsai Su Feng, Tsai Zheng Li, Tsai Zheng Ying, Asia Pacific Gateway (H.K.) Ltd., Century Group Holdings Ltd., Albany Investments Ltd., Mei Huang, Winner International Group Limited, Huang Chi Lung, Min Huang, Wainwright Ventures Ltd., New Global Investment Limited and Floratino Limited

Defendants (Respondents in Appeal)

Aaron Blumenfeld and Alessandra Nosko, for the appellants, Korea Data Systems (USA), Inc. and Mendlowitz & Associates Inc., Trustee in Bankruptcy of Jay Tien Chiang

Hilary Book, for the respondent Christina Chiang

Rebecca Huang, for the respondents Winner International Group Limited and Mei Huang

John O'Sullivan, for the respondents Su Feng Tsai, Tsai Zheng Li, Tsai Zheng Ying, Huang Chi Lung and Chen Cheng-Yueh Tsai

Brent Arnold, for the respondents Brenda Chang and Samson Chang

Heard: October 23, 2012

Motion to stay the appeal from the judgement of Justice Frank N. Marrocco of the Superior Court of Justice dated July 9, 2012.

[1] The issues on this motion are the following: (1) Was there a final judgment at trial that can form the subject matter of an appeal, given the outstanding matters left to be determined, and (2) if there is, should the appeal be stayed pending the determination of those outstanding matters?

Background

[2] The trial was long and complex, and involved many parties. It dealt with two actions together.

[3] The plaintiff in the first action – Korea Data Systems (USA), Inc. ("KDS") – is a significant judgment creditor of the defendant, Jay Chiang, pursuant to a multi-million dollar judgment obtained against him in the California Superior Court. Shortly after the judgment was rendered, Mr. Chiang made an assignment in bankruptcy in Ontario. KDS nonetheless sued to enforce the California judgment in Ontario, arguing that the judgment represented the kind of debt that survives a bankruptcy.

[4] In the second action, KDS and Mr. Chiang's Trustee in Bankruptcy, Mendlowitz & Associates Ltd., sued Mr. Chiang and numerous companies and related family members claiming damages, different forms of declaratory relief and an equitable tracing order. They alleged fraudulent conveyance of property, conspiracy, spoliation and unjust enrichment. In substance, though, the claim was that Mr. Chiang, in conspiracy with the other defendants, was hiding and spiriting away assets from his creditors and his Trustee in Bankruptcy.

[5] Justice Marrocco presided over the trial. After 10 weeks of evidence plus lengthy written submissions, he found that Jay Chiang had indeed engaged in a conspiracy to defeat the plaintiffs' collection efforts and that he had used nominees for that purpose and to hide his assets. But the parties to the conspiracy were not Mr. Chiang and these respondents. They were Mr. Chiang and his father and a brother (the latter two are no longer parties to the proceedings). The conspiracy and related claims were dismissed against these

respondents for varying reasons, but essentially because, although their actions may have assisted Mr. Chiang's efforts, they were not part of a conspiracy agreement to defeat, hinder, delay or defraud his creditors.

[6] With respect to the respondents, Winner International Group and Mei Huang, the issue was somewhat different. Winner is the holder of an approximately $10 million fund that KDS and Mendlowitz allege belongs to the bankrupt, Jay Chiang. Mei Huang is the registered owner of all of the shares of Winner, but the trial judge found that she holds a 50% interest in trust for Mr. Chiang. On appeal, KDS and Mendlowitz will argue that the trial judge erred and should have found that 100% of the shares are held in trust for Mr. Chiang.

[7] KDS and the Trustee wish to appeal the dismissal of the actions against the other respondents and some of the findings respecting Mr. Chiang, including the one just mentioned above. They have filed a Notice of Appeal solely to protect their position. They maintain that there is as yet no need to appeal because the trial judge left a number of issues open for subsequent determination and there is no final judgment at this point that can be the subject of an appeal. The parties differ over this interpretation as well as over whether, if there is a final judgment, any appeal should be stayed at this point pending the finalization of the outstanding issues by the trial judge.

[8] That dispute has given rise to this motion.

[9] KDS and Mendlowitz seek an order staying the appeal pending the disposition of the issues left to be determined by the trial judge. The remaining respondents oppose, arguing that those issues relate only to Jay Chiang – who takes no position on the motion – and that the issues respecting them are discrete and finalized, and should proceed.

Analysis

[10] The issues still to be determined by the trial judge (the “Outstanding Issues”) may be summarized as follows:

a) Post-judgment interest on the California judgment;

b) The nature of the damages, if any, that KDS is entitled to recover from Mr. Chiang;

c) The terms of a *Mareva* injunction in aid of execution, to which the trial judge held KDS and Mendlowitz were entitled;

d) The specifics of an equitable tracing order against Mr. Chiang, to which the trial judge held KDS and Mendlowitz were entitled, should they consider it advisable to apply for a specific order (the trial judge held it was not an appropriate case for “a general imprecise tracing order”);

e) An accounting with respect to the sum of $2 million transferred from the respondent, Floratino Limited, to Winner; and

f) Costs.

[11] On behalf of the appellants, Mr. Blumenfeld argues that the Outstanding Issues are substantial matters affecting the rights of the parties still remaining to

be determined by the trial judge and, accordingly, that there is as yet no final judgment that “disposes of [the] action on its merits”: *Byers (Litigation Guardian of) v. Pentex Print Masters Industries Inc.,* (2003), 62 O.R. (3d) 647, at paras. 19 and 41; see also the definition of “judgement” in Rule 1.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It follows, he says, that the time for appealing under Rule 61.04(1) has not yet begun to run, although the appellants have nonetheless filed a Notice of Appeal out of an abundance of caution.

[12] The respondents do not quarrel with the *Byers* test, but submit that the Outstanding Issues do not relate to the dismissal of the claims against them. Those issues are discrete, finally disposed of, and readily subject to determination on appeal without determination of the Outstanding Issues, they argue. The one exception may be the issue respecting the accounting for monies transferred to Winner, but the broader issue of whether the shares in Winner are held in a constructive trust for Mr. Chiang is one that is ripe for determination on appeal now. The respondents contend that considerations of finality militate in favour of their issues being determined in a timely fashion on appeal, after more than a decade of litigation with, amongst other things, the restraints of a *Mareva* injunction hanging over their heads.

[13] Unfortunately, the procedural choice is not so simple.

[14] While I find Mr. Blumenfeld's argument that there is not yet a final order to appeal from somewhat attractive, it faces both practical and procedural impediments as a result of the way in which the proceedings have evolved. First, a Notice of Appeal *has* been filed, and therefore there is an appeal in existence. Secondly, the order the appellant's seek in this regard would be tantamount to an order quashing the appeal, something I as a single judge have no authority to do. Motions to quash must be determined by a panel of judges: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 7(3). Thirdly, no one is asking me to quash the appeal. The respondents, who might have an argument for doing so if they brought a motion to that effect, do not want the appeal quashed; they want it to proceed as quickly as possible. The appellants are hardly seeking to have their own appeal quashed.

[15] It seems to me, then, that the motion must be determined on the basis that there is an appeal in place and a decision to be made whether that appeal should be stayed either for a limited period of time or until the Outstanding Issues have been dealt with by the trial judge. In that exercise, the "final order" debate remains relevant, in my view.

[16] What the appellants request here is not a stay of an order or judgment under appeal, pending the disposition of the appeal. Nor is it a stay of another body's proceedings (e.g. an arbitration proceeding or a trial) pending some other matter, or an injunction. In those types of situations it is clear that the three-step

exercise set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, applies. That is, the court must ask itself (i) whether there is a serious issue to be determined, (ii) whether the applicant will suffer irreparable harm if the stay is not granted, and (iii) whether the balance of convenience favours the applicant or the respondent, and exercise its discretion based upon the answers to those questions.

[17] Instead, the appellants ask this Court *to stay the appeal itself*, pending the decision of another body (the trial court). In effect, they wish to have the Court adjourn the exercise of its own jurisdiction to proceed with the appeal until sometime later, pending the other body's decision. In those circumstances, the Federal Court has adopted a policy that the principles of *RJR-Macdonald* do not apply; rather, it is a matter of the court exercising its discretion and determining "whether, in all the circumstances, the interests of justice support the appeal being delayed": *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., 2011 FCA 312, 426 N.R. 167, at paras. 3, 5, 6 and 14, *per* Stratas J.A.; see also *EpiCept Corp. v. Canada (Minister of Health)*, 2011 FCA 209, 425 N.R. 353.

[18] The Federal Court's rationale is rooted in the wording of s. 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 – its statutory power to grant a stay – which empowers the court to stay proceedings where "it is in the interest of justice that the proceedings be stayed." That is the core tenet underlying any court's power to impose a stay of proceedings, in my view, and applies equally to

the exercise of this Court's jurisdiction to stay an appeal pending the disposition of another body.

[19] I prefer the broader "interests of justice" test to the three-stage *RJR-Macdonald* test in such circumstances because I think it responds more flexibly to the somewhat different considerations that are in play when a party seeks to have the appeal itself stayed as opposed to an order or judgment appealed from. In the former circumstances, broader considerations regarding the administration of justice are also in play. Factors demonstrating irreparable harm or an imbalance of convenience are undoubtedly relevant when a court is contemplating delaying its proceedings until a later time, (considerations respecting the merits of the appeal, perhaps less so). However, the court must also take into account other factors such as the public interest in the fair, well-ordered and timely disposition of litigation, and the effective use of scarce public resources.

[20] Taking into account all of those considerations, I am satisfied that a relatively short, and time-limited, stay of the appeal ought to be ordered in the circumstances here but subject to one condition: that the appellants be required to order the transcript needed for purposes of the appeal involving the respondents now.

[21] As I read the trial judge's reasons, resolution of the Outstanding Issues does not involve any further evidence. He has called for submissions. I see no reason why those submissions cannot be made and dealt with within a reasonable period of time.

[22] The one exception to the call for submissions may be the trial judge's direction that the plaintiffs "can apply for" a specific equitable tracing order "when they consider it desirable to do so." It is not clear whether he contemplated additions to the evidentiary record in that regard. Even if he did, however, I am not persuaded that the trial judgment would not be final and appealable until that determination is made, or that the appeal should be stayed indefinitely for that eventuality. I am inclined to read the trial judge's reasons as making a final order that the plaintiffs "are entitled to an equitable tracing order against Jay Chiang," and granting them leave to apply later, if so advised, for a specific form of tracing order.

[23] The procedural framework in Ontario does not generally contemplate the disposition of appeals in multi-party, multi-issue cases on a party by party basis. There is one judgment following a trial. This approach avoids a multiplicity of proceedings and the potential of inconsistent results. While there are no doubt exceptions to this general policy, this is not such a case. The trial here was not a bifurcated trial and evidence was led, and arguments made, on all issues respecting all defendants, including the Outstanding Issues. Ordinarily, one

appeal dealing with all of those issues is the most effective and fair use of both the public and private resources involved.

[24] At the same time, I have some sympathy for the position in which the responding parties find themselves. They have been successful, for the most part, after a decade of pre-trial proceedings and a lengthy, complex, and expensive trial. If there is to be an appeal, they quite understandably and justifiably would like to have the appeal disposed of as soon as the *Rules of Civil Procedure* permit. The allegations against them – and to this point, resolved in their favour – are serious (conspiracy and fraud). There appears to be some merit in their view that the issues relating to them on appeal are separate and discrete from those remaining to be determined in the Outstanding Issues. There is little prejudice to the appellants, except in terms of costs, if the appeal moves forward without finalization of the Outstanding Issues.

[25] That said, the overall interests of justice favour the granting of a short stay, in my view, to enable the Outstanding Issues to be determined. As the Divisional Court noted in *Rosenhek v. Windsor Regional Hospital*, [2010] O.J. No. 2893, at para. 50, citing *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.,* 2007 ONCA 605, 87 O.R. (3d) 660, at para. 34:

> The *Rules of Civil Procedure* must be interpreted in a manner that recognizes that expeditious justice is only one value to be weighed against others and that delay

> may be excused where necessary to ensure complete justice.

[26] In the result, I grant a stay of the appeal for a period of 120 days from the date of this decision or until the Outstanding Issues have been finalized by the trial judge, whichever is the earlier. Notwithstanding the stay of the appeal, however, the appellants are to proceed to order the transcripts necessary for the appeal as if the *Rules* respecting the ordering of transcripts were in effect.

[27] I do not think this is an appropriate motion for an award of costs, and I make no order in that regard.

"R.A. Blair J.A."

Citation: 2018 CHRT 5
Date: February 6, 2018
File No(s).: T2230/5217

Between:

[ENGLISH TRANSLATION]

Laurent Duverger

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

2553-4330 Québec Inc.

Respondent

Ruling

Member: Gabriel Gaudreault

Table of Contents

I. Background

[1] This decision deals with the respondent's motion to stay the proceedings pending the Federal Court's disposition of an application for judicial review in a related matter. First, I believe it is necessary to review the case history in order to fully understand the respondent's request and the essence of the Canadian Human Rights Tribunal (the Tribunal)'s decision.

[2] On November 28, 2013, Laurent Duverger (the complainant) filed a complaint with the Canadian Human Rights Commission (the Commission) under sections 7 and 14 of the *Canadian Human Rights Act*, RSC (1985), c. H-6 (the *Act* or *CHRA*), alleging that he suffered adverse differential treatment in the course of his employment and was subjected to harassment by his employer, the respondent company, identified by the enterprise number 2553-4330 Québec Inc. (also known as Aéropro). More specifically, the complainant alleges (1) that he suffered differences in wages because of his national or ethnic origin and his disability; and (2) based on the same prohibited grounds of discrimination, that he was subjected to harassment following the termination of his employment at the respondent company.

[3] The Tribunal understands that the Commission dealt with Mr. Duverger's complaint and rendered an initial decision on October 29, 2014: at the time, it decided not to treat the complaint filed by the complainant, regarding it to be vexatious. Mr. Duverger filed an application for judicial review with the Federal Court challenging the merits of the Commission's decision not to deal with the complaint. The Federal Court allowed the complainant's application for judicial review, set aside the Commission's decision and referred the file back to the Commission so that it could re-examine the complaint anew (see *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2015 FC 1071 (CanLII).

[4] On March 30, 2016, the Commission decided Mr. Duverger's complaint again. The respondent filed an application with the Federal Court for the judicial review of the Commission's decision to consider the differences in wages issue based on the aforementioned prohibited grounds of discrimination, and the admissibility of such allegations, given that more than three years had elapsed between the date on which Mr.

Duverger filed his complaint and the end of his employment. This judicial review did not concern the Commission’s decision to deal with the allegations of harassment. On February 2, 2017, the Federal Court dismissed the respondent’s application for judicial review (see *2553-4330 Québec inc. v. Duverger*, 2017 FC 128 (CanLII)).

[5] On September 14, 2017, the Tribunal received a request from the Commission asking it to institute an inquiry into Laurent Duverger’s complaint under paragraph 44(3)(*a*) of the *Act*. On September 25, 2017, the Commission sent another letter to the Tribunal stating that an administrative error had been made in the correspondence dated September 12, 2017, and clarified that the investigation of the complaint referred to the Tribunal only concerned the allegation of harassment under section 14 of the *Act*. The Commission indicated that it was not requesting an inquiry into the complaint under section 7 of the *Act*.

[6] Following the Commission’s decision to refer the harassment part of the complaint under section 14 of the *Act* for an inquiry before the Tribunal, the respondent filed an application for judicial review with the Federal Court on September 19, 2017. In this application, the respondent challenges the merits of the Commission’s decision to refer this portion of the complaint to the Tribunal and requests that the Commission‘s decision be set aside.

[7] On October 31, 2017, the respondent filed a motion for a stay of proceedings with the Tribunal. This is what is at issue in this decision. In short, Aéropro is asking the Tribunal to stay its own proceedings pending the Federal Court’s disposition of the application for judicial review. The Commission and the complainant have also filed written submissions with the Tribunal and oppose the respondent’s motion. On January 8, 2017, David L. Thomas, the Chairperson of the Tribunal, assigned this case file to the undersigned so that I may institute an inquiry into the complaint. It is in this context that I must decide the stay of proceedings.

[8] At issue is whether I should stay the Tribunal proceedings pending the Federal Court’s disposition of the application for judicial review filed by the respondent. I have had an opportunity to review the written submissions of the parties as well as the

documentation and case law attached to those submissions. For the reasons that follow, I am dismissing the respondent's motion to stay the proceedings.

II. Position of the Parties

[9] For the sake of brevity, the position of the parties can be summarized as follows.

A. The Respondent's Motion

[10] The respondent presented several arguments in support of its motion filed with the Tribunal. On the one hand, the respondent submits that staying the proceedings would avoid the possibility of having conflicting judgments delivered by the Tribunal and the Federal Court. For example, a contradiction may arise if the Tribunal determines that there was discrimination, but the Federal Court subsequently determines, on the contrary, that the complaint should never have been referred by the Commission.

[11] Moreover, the respondent alleges that my hearing of the case prior to the Federal Court's disposition of the judicial review would result in a denial of natural justice and procedural fairness. Notably, the respondent argues that:

- It may be found guilty by the Tribunal, resulting in an award of compensation to the complainant, which, if the Federal Court allows the judicial review, should not have been awarded. The respondent would therefore run the risk of having to institute further legal proceedings to recover the amounts paid to the complainant;
- It would incur substantial legal fees if the proceeding before the Tribunal continues, which, if the Federal Court allows the judicial review, it would not have been required to spend;
- It would not subsequently be compensated for the time, energy, stress and costs related to its defence before the Tribunal;

- It plans on calling several witnesses to testify during the Tribunal hearing, necessitating the disbursement of costs, in addition to inconveniences caused to the respondent and the witnesses;
- The case before the Federal Court is at an advanced stage and the complainant will therefore not suffer any harm other than having to wait another few months before an inquiry into his complaint is instituted. According to the respondent, having to wait a few additional months does not constitute harm, in of itself;
- It would suffer the most harm if the proceedings in this case are not stayed.

[12] Aéropro relies on the tripartite test applied in *Pankiw v. Canada (Canadian Human Rights Commission)*, 2006 FC 601 (CanLII) [*Pankiw*] to determine whether it is appropriate for a tribunal to stay proceedings pending judicial review. To ensure a proper understanding of the respondent's arguments, the Tribunal will take the opportunity, at this point, to quote paragraphs 8 and 9 of the *Pankiw* decision :

> [8] The general framework for determining whether or not to stay a proceeding pending judicial review is a tripartite one. (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311)
>
> [9] The test is composed of three branches:
> (a) A serious issue of fact and/or law to be tried;
> (b) Irreparable harm; and
> (c) A balance of convenience.

[13] One branch of this test is that a serious issue of fact and/or law needs to be tried. With respect to this branch, the respondent claims that the Federal Court has to decide a serious question, namely, [translation] ". . . to determine if there is harassment 'in matters related to employment' when the harassment occurred over two years after the termination of the complainant's employment". It therefore maintains that the motion is neither frivolous nor abusive.

[14] With respect to the second branch of the test established in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 [*Metropolitan Stores*] and *RJR-MacDonald*

Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 [*RJR-MacDonald*], the respondent also claims that it would suffer irreparable harm if the Tribunal did not stay the proceedings. In support of this allegation, the respondent contends, among other things, that if the proceedings are not stayed, it would be required to defend itself before the Tribunal, whereas if the application for judicial review is allowed by the Federal Court, it would not be required to do so. This situation would cause it to suffer a great deal of harm related to the time, energy, stress and costs associated with its defence. The respondent alleges that it could never be compensated for all these harms, even if the Federal Court rules in its favour.

[15] The respondent also submits that it runs the risk of having the Tribunal render a decision against it for allegations that should never have been referred to the Tribunal. Moreover, these allegations would become public and could damage its reputation. It also reiterates that it could be required to compensate the complainant. In that case, and if the Federal Court allows the application for judicial review, it would have to initiate further legal action in order to recover the amounts disbursed, not to mention the time and costs related to those proceedings. It also submits that having to unnecessarily resort to a myriad of judicial resources is counter to the public interest.

[16] Lastly, Aéropro believes that the balance of convenience is in its favour: it would suffer the most harm if the Tribunal does not stay the proceedings. It submits that the only harm suffered by the complainant would be a few months delay of the current proceeding.

B. Complainant's Response

[17] The complainant opposes the motion for the stay of proceedings filed by the respondent. Without going into too much detail, the Tribunal can summarize his position as follows:

- According to the complainant, the question raised by the respondent regarding the interpretation of the expression "in matters related to employment" in section 14 of the *Act* has already been settled in the past. Consequently, he argues that Aéropro's application for judicial review is unnecessary;

- The complainant alleges that he might suffer harm if the motion for the stay of proceedings is allowed, most notably with respect to the possible deterioration of evidence. He mentions two specific elements:

    - The complainant is not sure that he will be able to testify at the hearing after April 1, 2018;

    - Raymond Dallaire, a potentially key witness, is elderly;

- The complainant asserts that his complaint was filed in August 2013 and that a hearing after April 1, 2018, would be excessively late and prejudicial;

- The complainant argues that the motion to stay the proceedings is contrary to the purpose set out in subsection 1(1) of the *Tribunal Rules of Procedure* (03-05-04) (*Rules*);

- The complainant indicates that he agrees with the Commission's submissions concerning the motion for a stay of proceedings;

- The complainant submits that contrary to the respondent's claims, the application for judicial review before the Federal Court is not at a very advanced stage;

- The complainant argues that Aéropro has filed several unnecessary applications for judicial review, leading to a waste of judicial resources.

[18] Lastly, the complainant ends his written submissions by making a request of the Tribunal in the event that the respondent's motion for a stay of proceedings, pending the Federal Court's decision on the application for judicial review, is allowed. He specifically requests [translation] "that the Tribunal base all its decisions solely on the written evidence, without holding a hearing, in order to be fair to all parties".

C. The Commission's Response

[19] The Commission's submissions can be summarized as follows:

- The Commission finds that the respondent has not discharged its burden of proof of establishing that it would be subjected to a denial of natural justice if the Tribunal does not stay the proceedings;
- The Commission indicates that a stay of the Tribunal's proceedings constitutes an exceptional circumstance and that the Tribunal has an obligation to proceed informally and expeditiously (subsection 48.9(1) of the *Act*);
- It affirms that the Tribunal is the master of its own procedure, that it has the discretionary power to grant an adjournment, and that this power should be exercised in accordance with the principles of natural justice, procedural fairness, and the scheme of the *Act*;
- The Commission alleges that, generally speaking, the Tribunal only grants requests for adjournments in cases where the principles of natural justice and procedural fairness have been breached, which, in and of itself, is an exceptional circumstance. Examples include the unavailability of evidence, the need to obtain legal counsel or late disclosure by the opposing party;
- The Commission also contends that in many situations similar to the circumstances in this case, the Tribunal has always decided to still hold a hearing despite the existence of related proceedings; it cites a number of examples;

- The Commission submits that the test in *RJR-MacDonald Inc.* does not apply in this case. Indeed, it notes that in *Léger v. Canadian National Railways Company,* 1999 CanLII 19862 (CHRT) [*Léger*], the Tribunal refused to apply the test formulated in *Metropolitan Stores* and *RJR-MacDonald Inc.*, in establishing a distinction between the powers of an administrative tribunal and the powers of a supervisory court. The Tribunal, in *Malec et al v. Conseil des Montagnais de Natashquan*, 2012 CHRT 8 (CanLII) [*Malec*], applied the same reasoning as in *Léger*.

- Finally, it concludes that considering the purpose of the *Act* and the fact that it does not contain an explicit power to adjourn, the Tribunal should only be guided by the principles of natural justice and procedural fairness.

D. The Respondent's Reply

[20] The respondent filed a reply in which it essentially reiterates most of the arguments it previously made in its initial motion. The Tribunal will not go over all the elements discussed earlier, and will only go over a few elements it deems important.

[21] The respondent reiterates that the Tribunal could refer to the test set out in *RJR-MacDonald Inc.* In this regard, it cites paragraph 33 of the decision rendered in *Malec*. It affirms that the circumstances surrounding the motion justify the motion for a stay of proceedings and that the complainant would not suffer any harm if such a motion is allowed. Moreover, it claims that the complainant does not allege any harm in his written submissions.

[22] The respondent notes that the main principle that should guide the Tribunal is the balance of convenience between the various interests, as set out in *Pankiw*. It cites the decision rendered in *Bailie et al v. Air Canada and Air Canada Pilots Association*, 2012 CHRT 6 (CanLII) [*Bailie*], in which the Tribunal attentively considered the parties' various interests in order to determine whether or not it was appropriate to stay its proceedings. Finally, the respondent claims that this case is similar to that of *Renaud, Sutton and Morigeau v. Aboriginal Affairs and Northern Development Canada*, 2013 CHRT 30

(CanLII), a case in which the Tribunal granted a stay of proceedings because it found that a number of similar questions were the subject of a judicial review at the Federal Court.

III. Law and Analysis

A. Preliminary Remarks

[23] Following a review of the parties' written submissions, the Tribunal notes that they do not use the same language in the context of this motion. I therefore believe it necessary to clarify this aspect of the file first.

[24] Under Rule 3 of the *Rules*, the respondent filed a [translation] "motion to stay the proceedings". In its written submissions, the respondent sometimes uses the term [translation] "stay", and sometimes, [translation] "stay/adjourn". In its reply, the respondent slightly changed the title of its motion to [translation] "motion to stay/adjourn the proceedings".

[25] The Commission filed [translation] "The Canadian Human Rights Commission's response to the respondent's motion for a stay of proceedings". However, in its written submissions, the Commission uses the term [translation] "adjournment" rather than [translation] "stay". The complainant uses the term [translation] "stay" in both his submissions dated October 25, 2017, and his submissions dated November 5, 2017.

[26] Generally, an adjournment is an order by the Tribunal to postpone a hearing to a later date (see *Halsbury's Laws of Canada - Civil Procedure*, 2017 Reissue, LexisNexis, HCV-224 Nature of adjournment) [*Halsbury*]. However, a stay of proceedings generally leads to the temporary suspension of the inquiry (*Halsbury*, HCV-288 Meaning and purpose of stays).

[27] Despite their using different terms, it appears clear to me that the parties are all referring to the same concept, that of temporarily interrupting or suspending the Tribunal proceedings, pending the Federal Court's decision on the application for judicial review. In this specific context and while analyzing the parties' submissions, the use of the terms "stay" and "adjournment" must therefore be given the same literal interpretation.

[28] In this case, since the inquiry into the complaint has not yet started and because no date has been set for the hearing, I will use the term “stay” of proceedings.

[29] That said, regardless of whether we are speaking of a stay of proceedings or an adjournment of the proceedings pending a decision by the Federal Court on the application for judicial review, the outcome would be exactly the same, that is, the inquiry would temporarily stop pending the Federal Court’s decision. Consequently, it is my opinion that when the Tribunal “stays” or “adjourns” its own proceedings pending a decision by the Federal Court, the applicable test should remain the same.

[30] Moreover, for the following reasons, it is the Tribunal’s opinion that the principles that will guide the Tribunal are those which apply when a party requests the temporary suspension of proceedings before the Tribunal pending the Federal Court’s decision on an application for judicial review (see notably, *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd*., 1994 CanLII 3152 (CT), reasons rendered by the Honourable Justice Marshall E. Rothstein when he was serving as a member of the Competition Tribunal).

[31] However, I recognize that there may be circumstances in which, the terms “stay” and “adjournment” may have different meanings and may give rise to other principles or relevant factors for consideration.

[32] Finally, it is important to note that the parties do not agree on the test applicable in this case. I will analyze this issue in a later section.

B. Jurisdiction

[33] The parties recognize that the Tribunal is the master of its own procedure and has the authority to determine a motion to stay or adjourn its own proceedings. The Supreme Court, in 1989, explained this principle in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 [*Prassad*], in writing as follows:

> […] We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be <u>masters in their own house</u>. <u>In the absence of specific rules laid down by</u>

> statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice. Adjournment of their proceedings is very much in their discretion.
>
> [Emphasis added]

[34] I will take this opportunity to reiterate that the Tribunal is a quasi-judicial, specialized and statutory administrative tribunal: the Tribunal, its jurisdiction and its powers are derived from the *CHRA*. Consequently, the Tribunal is notably guided by the parameters contained in its enabling legislation.

Subsection 48.9(1) of the *Act* reads as follows:

> Proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirements of natural justice and the rules of procedure allow.
>
> [Emphasis added]

Subsection 50(2) and paragraph 50(3)(*e*) of the *Act* provide as follows:

> 50 (2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.
> . . .
>
> 50(3) In relation to a hearing of the inquiry, the member or panel may
> . . .
>
> (*e*) decide any procedural or evidentiary question arising during the hearing.

Moreover, Rules 1(1) and 1(6) of the *Rules* provide as follows:

> **1 (1)** These Rules are enacted to ensure that
>
> (*a*) all parties to an inquiry have the full and ample opportunity to be heard;
> (*b*) arguments and evidence be disclosed and presented in a timely and efficient manner; and

> (*c*) all proceedings before the Tribunal be conducted as <u>informally and expeditiously as possible</u>.
>
> [Emphasis added]
>
> . . .
>
> **1 (6)** The Panel retains the jurisdiction to decide any matter of procedure not provided for by these Rules.

[35] It goes without saying that the Tribunal will be guided by the general principles of common law as expressed in *Prassad*.

[36] Previously, a certain line of authority in the Tribunal's case law suggested that the appropriate forum for presenting a motion to stay the Tribunal's proceedings was the Federal Court (see for example *Baltruweit v. Canada (Canadian Security Intelligence Service)*, 2004 CHRT 14 (CanLII) [*Baltruweit*]). Indeed, the Federal Court has the power to stay proceedings before our Tribunal in virtue of its broad powers of supervision conferred to it by the *Federal Courts Act*, R.S.C. (1985), c. F-7, and the *Federal Courts Rules*, SOR/98-106.

[37] However, the Federal Court of Appeal recently stated, in the context of a motion to stay proceedings before the Canadian Transportation Agency (CTA), that the use of this power should only be pursued in extraordinary circumstances or in the case of unusual urgency justifying its intervention. More specifically, the Honourable Justice Stratas wrote the following in his decision rendered in *Canadian National Railway Company v. BNSF Railway Company*, 2016 FCA 284 (CanLII):

> [8] Section 50 of the *Federal Courts Act* sets out circumstances where stays can be granted. Relevant here is paragraph 50(1)(*b*) of the *Federal Courts Act*. It allows the Court to <u>grant stays of "proceedings in any cause or matter…where for any other reason it is in the interests of justice that the proceedings be stayed</u>." In my view, this wording, read literally, is broad enough to include <u>stays of administrative proceedings</u>.
>
> [9] That literal reading is supported by other sections in the *Federal Courts Act* and its overall purposes. The Act vests in the Federal Courts <u>broad powers of supervision of the actions of federal boards, commissions and other tribunals</u>: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385; *Canada*

> *(National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50 (CanLII), 443 N.R. 378. The power to stay administrative proceedings is one that a supervisory court would need on occasion to discharge its mandate. The literal wording of paragraph 50(1)(*b*) sets out exactly that power.
>
> […]
>
> [14] [. . .] Where, as here, a party is seeking to stay an administrative decision-maker's proceedings, the party is actually seeking prohibition of those proceedings. It is requesting an order that the administrative decision-maker stop its proceedings. In circumstances such as these, the standards governing the grant of a section 50 stay of an administrative decision-maker's proceedings must mirror those for the grant of prohibition.
>
> [15] Just as prohibition is an administrative law remedy that should not be pursued where there is adequate alternative recourse or a lack of extraordinary circumstances or unusual urgency (see *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 (CanLII), [2011] 2 F.C.R. 332), the same is true for an application for a stay of the sort brought here. The rationales preventing early or premature access to a reviewing court canvassed in *C.B. Powell* at para. 32 apply equally here too.
>
> [16] This is not just judge-made doctrine. It falls out of the scheme of the *Canada Transportation Act*, a law binding upon this Court. Under the *Canada Transportation Act* Parliament has given the Agency full power over proceedings before it, including determining whether the Agency should adjourn or suspend proceedings before it. Allowing parties to bypass the Agency and go directly to court to suspend the Agency's proceedings would offend that statutory scheme. It would not be in accordance with or pursuant to the *Canada Transportation Act*.
>
> [Emphasis added]

Even though this decision concerns the CTA, the Federal Court of Appeal specifies, in paragraph 9, that its broad powers of supervision extends to federal boards, commissions and other tribunals, which inevitably includes our Tribunal. In paragraph 16, the Federal Court of Appeal notes that Parliament has given the CTA full power over proceedings before it, which necessarily includes the power to determine whether the CTA should suspend or adjourn proceedings before it. The Federal Court of Appeal further adds that allowing parties to go directly to court and bypass the CTA would offend the statutory scheme put in place.

[38] In another decision by the Federal Court, *Canada (Attorney General) v. Sam Lévy et Associés Inc.*, 2005 FC 208, affirmed on appeal (2005 FCA 318), the Honourable Justice Beaudry expressed the opinion that the parameters of paragraph 14.02(2)(*c*) of the *Bankruptcy and Insolvability Act* gave the delegate of the Superintendent of Bankruptcy the necessary authority to stay the proceedings. This paragraph reads as follows:

> At a hearing referred to in subsection (1), the Superintendent […] shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit.

[39] It is therefore clear to me that our Tribunal is vested with the necessary powers to determine a motion to stay our own proceedings pursuant to subsection 50(2) and paragraph 50(3)(*e*) of the *Act*, our *Rules*, and the common law rule according to which administrative tribunals are masters of their own procedures.

C. Applicable Test: "the interest of justice"

[40] As I mentioned earlier, the parties do not agree on the test applicable to motions to stay proceedings when an application for judicial review is pending before the Federal Court. I will address this issue in the following paragraphs.

[41] The respondent advocates for the approach used in *Pankiw,* which ultimately reiterates the principles established in *RJR-MacDonald and Metropolitan Stores*. In these decisions, the test established by the Supreme Court is composed of three branches: (a) a serious issue of fact and/or law to be tried; b) irreparable harm; and c) a balance of convenience. The respondent believes that the Tribunal should use these criteria as a guide in order to decide the present motion.

[42] The Commission, for its part, refers to the principles previously articulated by the Tribunal and bases its position on a number of decisions, including the decisions rendered in *Léger*, *Baltruweit* and *Malec*. In these decisions, the Tribunal elaborates on *RJR-MacDonald* and *Metropolitan Stores* and distanced itself from the criteria established in those decisions. The Tribunal based its position on the fact that the Federal Court has broad supervisory powers over federal boards, commissions and tribunals. Therefore,

since the criteria are used in the context of court supervision of federal boards, commissions or tribunals, they would not apply to our Tribunal, which is required to decide if it should stay its own proceedings. Consequently, the Tribunal relied on the parameters provided in its enabling legislation.

[43] The test generally applied by our Tribunal is explained in the *Léger* decision, in which Member Sinclair wrote the following:

> The R.J.R. MacDonald tests apply to a different situation, namely, where a supervisory court is asked, pursuant to its statutory authority or its inherent jurisdiction, for interim injunctive relief. In my opinion, the exercise of the Tribunal's discretion is subject to the rules of procedural fairness and natural justice, and the regime of the Act.
>
> The Act requires the Tribunal to institute an inquiry into the complaint when requested by the Commission. The Act also requires that the Tribunal give the parties a full and ample opportunity to present their case and make representations. Section 2 of the Act expresses an overriding public interest in the elimination of discrimination. As a response to section 2, numerous court decisions have established that allegations of discrimination are to be dealt with expeditiously and in a timely fashion. It is against this backdrop that CN's adjournment request must be measured.

[44] In *Marshall v. Cerescop Co*., 2011 CHRT 5 (CanLII) [*Marshall*], Member Lustig again succinctly summarized the test the Tribunal tends to apply in matters involving a motion to stay or adjourn its proceedings:

> [11] According to section 48.9 (1) of the *Canadian Human Rights Act*, proceedings before the Tribunal are to be conducted as informally and, of particular relevance to this motion, as expeditiously as the requirements of natural justice and the rules of procedure allow. However, as master of its own procedure, the Tribunal may, nonetheless, adjourn its proceedings where appropriate in its discretion (See *Léger v. Canadian National Railways* [1999] C.H.R.D. No. 6 (CHRT), at para. 4; *Baltruweit v. Canadian Security Intelligence Service*, 2004 CHRT 14 at para. 15. The Tribunal must exercise this discretion having regard to principles of natural justice (*Baltruweit*, at para 17). Some examples of natural justice concerns to which the Tribunal could respond would include the unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party.

[45] The Tribunal generally seems to follow this interpretation (see *Blain v. Royal Canadian Mounted Police*, 2012 CHRT 13 (CanLII) at para. 15, *Brooks v. Canada*

(Fisheries and Oceans), 2007 CHRT 4 (CanLII) at para. 6, *Emmett v. Canada Revenue Agency*, 2012 CHRT 3 (CanLII) at para. 3; *Malec* at para. 34, to name but a few).

[46] Now that I have outlined the position expressed by the Commission and the respondent, I must determine the test that is applicable when the Tribunal is seized with a motion to stay its own proceedings.

[47] In my view, the Commission and the respondent are neither completely wrong nor completely right about the principles that apply in this situation. I believe that it is necessary to clarify the situation.

[48] Despite the trend in the case law and opinions previously held by the Tribunal, I believe that the Federal Court of Appeal has clarified the situation in the past few years. In *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc*., 2011 FCA 312 (CanLII) [*Mylan*], the Honourable Justice Stratas made the following distinction between a court enjoining another body from exercising its jurisdiction on the one hand and a court deciding not to hear a case before it until a later date. He wrote as follows:

> [5] […] *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in *RJR-MacDonald Inc.*, this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: *Stoney First Nation v. Shotclose*,2011 FCA 232 (CanLII) at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 (CanLII) at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: *RJR-MacDonald Inc.*, *supra* at pages 343-347.
>
> *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a

> result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.
>
> [6] The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354 (CanLII); *Epicept Corporation v. Minister of Health*, 2011 FCA 209 (CanLII).
>
> [Emphasis added]

[49] More recently, the Federal Court of Appeal applied the same reasoning in *Clayton v. Canada (Attorney General)*, 2018 FCA 1 [*Clayton*]. Once again, it clearly differentiated between two situations: (1) a court staying another body's proceedings pending an appeal or other matter, or for an injunction and (2), as in the case before us, a court which must decide a motion to stay its own proceedings, which is in fact analogous to a request for a long-term adjournment. In this decision, the Federal Court of Appeal stated as follows:

> [24] To begin, it is important to distinguish between "a court staying other bodies' proceedings pending an appeal or other matter, or for an injunction" and a stay that is, in reality, "a long-term adjournment": *Epicept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 at para. 14, 425 N.R. 353. Building on this distinction, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167 (*Mylan*), this Court set out an "interest of justice" test governing whether the Court should stay its own proceedings.
>
> […]
>
> [26] In considering "the interest of justice", courts may take into account some of the same considerations as in *RJR–MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests. Here, while the prothonotary did not use the precise nomenclature of the "interest of justice" test, he directed himself to considerations relevant to the exercise of discretion under the test.
>
> [Emphasis added]

[50] As expressed by our Tribunal in various decisions, deciding a motion to stay proceedings falls within the Tribunal's discretion. It goes without saying that this discretionary power must be applied in accordance with the principles of natural justice and procedural fairness. As explained in paragraph 11 of *Marshall*, in order to dispose of a motion to stay proceedings, the Tribunal may consider certain natural justice concerns such as the unavailability of evidence, the need to adjourn to obtain counsel, or late disclosure by an opposite party. Indeed, this list is not exhaustive (see *Bailie* at para. 21).

[51] However, it is my view that the Tribunal should not limit its analysis solely to questions related to principles of natural justice and procedural fairness. In my opinion, the assessment should be broader, more flexible and most importantly, the decision itself must be reasonable (*Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 at para. 28). In other words, the Tribunal cannot ignore relevant factors when deciding matters before it: *Conway (Re)*, 2016 ONCA 918 (CanLII) at para. 25).

[52] To that end, I am adopting the principles developed by the Federal Court of Appeal in *Mylan*, *Clayton* and *Epicept Corp* (above). In my view, the "interest of justice" test is more appropriate when deciding motions to stay proceedings.

[53] Notably, the Court of Appeal for Ontario adopted the same approach in *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc*., 2012 ONCA 756 [*Korea Data Systems*]:

> [16] What the appellants request here is not a stay of an order or judgment under appeal, pending the disposition of the appeal. Nor is it a stay of another body's proceedings (e.g. an arbitration proceeding or a trial) pending some other matter, or an injunction. In those types of situations it is clear that the three-step exercise set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, applies. That is, the court must ask itself (i) whether there is a serious issue to be determined, (ii) whether the applicant will suffer irreparable harm if the stay is not granted, and (iii) whether the balance of convenience favours the applicant or the respondent, and exercise its discretion based upon the answers to those questions.
>
> [17] Instead, the appellants ask this Court *to stay the appeal itself*, pending the decision of another body (the trial court). In effect, they wish to have the Court adjourn the exercise of its own jurisdiction to proceed with the appeal

> until sometime later, pending the other body's decision. In those circumstances, the Federal Court has adopted a policy that the principles of *RJR-Macdonald* do not apply; rather, it is a matter of the court exercising its discretion and determining "whether, in all the circumstances, the interests of justice support the appeal being delayed": *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc*., 2011 FCA 312 (CanLII), 426 N.R. 167, at paras. 3, 5, 6 and 14, per Stratas J.A.; see also *EpiCept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 (CanLII), 425 N.R. 353.
>
> [18] The Federal Court's rationale is rooted in the wording of s. 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 – its statutory power to grant a stay – which empowers the court to stay proceedings where "it is in the interest of justice that the proceedings be stayed." That is the core tenet underlying any court's power to impose a stay of proceedings, in my view, and applies equally to the exercise of this Court's jurisdiction to stay an appeal pending the disposition of another body.
>
> [Emphasis added]

[54] Even though, as explained by the Court of Appeal for Ontario in *Korea Data Systems*, at paragraph 18, section 50 of the *Federal Courts Act* specifically provides for the interest of justice test, the interest of justice is the core tenet underlying any court's power to impose a stay of proceedings.

[55] In *Commissioner of Competition v. Toronto Real Estate Board*, 2014 CACT 10, the Competition Tribunal, under the pen of the Honourable Justice Simpson, wrote that the tribunal can apply the interest of justice test in deciding a stay of its own proceedings:

> [19] In my view, although the Federal Court of Appeal indicated in *Mylan* that the Tribunal has the discretion to handle adjournments/stays of its own proceedings pending appeal using whatever test or factors it considers appropriate, including the tripartite test, it also appears that it is open to the Tribunal to follow the Court's lead and consider the interests of justice.
>
> [Emphasis added]

[56] Moreover, just as was recently mentioned by the Supreme Court of Canada, in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (CanLII), I believe that the Tribunal, when exercising the discretionary powers conferred onto it by its enabling legislation and the common law, may apply and adapt tests developed in civil proceedings, while respecting its legislative scheme.

[57] This discretionary power can be applied in several different ways. As such, it is my opinion that several factors can be analyzed by the Tribunal.

[58] In my opinion, the interest of justice allows for a broader assessment of factors relevant to a motion to stay proceedings, which would **include** the principles of natural justice, procedural fairness and expeditiousness provided under subsection 48.9(1) of the *Act*. Moreover, as articulated by the Federal Court of Appeal at paragraph 26 of *Clayton*, the Tribunal may also consider certain factors developed in *RJR-MacDonald* (a serious issue of fact and/or law to be tried, irreparable harm and a balance of convenience).

[59] It goes without saying that the interest of justice includes the interest of all the parties. It also includes the public interest. It is important to recall that complaints filed before the Tribunal concern individuals who believe that their human rights have been violated. These allegations are serious and require the Tribunal to act expeditiously. Every time allegations of discrimination are made under the *CHRA* the public interest is obviously involved (see *Federation of Women Teachers' Associations of Ontario v. Ontario (Human Rights Commission)* (Ont. Div. Ct.), 1988 CanLII 4794 (ON SC)). There is no question that public interest notably demands that complaints related to discrimination be dealt with expeditiously (see *Bell Canada v. Communication, Energy and Paperworkers Union of Canada* (1997), 127 FTR 44, 1997 CanLII 4851 (FC), [*Bell Canada*], see also subsection 48.9(1) of the *CHRA*).

[60] In short, I recognize that the factors and interests to be taken into consideration by the Tribunal may vary depending on the circumstances. For example, considerations to be analyzed in the context of a motion for adjournment to retain the services of a lawyer that is filed a few days before a previously scheduled hearing may differ from the factors to be considered in the context of a motion to stay proceedings filed at the very beginning of a quasi-judicial process, when an application for judicial review is pending before the Federal Court.

D. Application of the Test in This Case

[61] I have reviewed the parties' submissions and the considerations included therein, as well as the case law submitted to me. My decision will be based on the interest of justice.

[62] I note that when a request or motion is made before the Tribunal, the burden of proof rests on the moving party. I am sensitive to the respondent's position; however, I do not believe that the respondent demonstrated that it is in the interest of justice for the Tribunal's proceedings to be stayed pending the Federal Court's decision on the application for judicial review.

[63] First of all, I recognize that the question which the respondent referred to the Federal Court can be described as serious. I recall that the threshold for this element is not very high. That said, and without wishing to interfere with the application for judicial review filed before the Federal Court and the powers vested in that court, it is my view that the serious question raised by the respondent appears to be premature and that it is well established that the Tribunal is best placed to interpret its own enabling legislation (see, for example, *Halifax Regional Municipality v. Nova Scotia,* 2012 SCC 10 at paras. 23-41).

[64] Second, several factors submitted by the respondent are hypothetical or speculative. The respondent seems to be basing its position on the premise that the Federal Court will allow its application for judicial review, however, nothing is certain at this time. If I stay the proceedings and the Federal Court dismisses the application, the proceedings will have to be resumed at an unknown point in time and a lot of time will have elapsed in vain. Moreover, no hearing dates have been set by the Tribunal, and it is not clear whether the Federal Court has scheduled a hearing date for the application for judicial review. It is therefore highly possible that the file before the Federal Court will proceed before ours. If the Tribunal's hearings were to take place before the Federal Court renders its decision, I do not believe that anything precludes me from reserving my decision concerning whether or not there was discrimination and the appropriate remedies pending the Federal Court's decision.

[65] Third, I do not believe that a waste of financial resources, including, most notably, legal fees, witness expenses and other costs related to the preparation of the file, and the

impossibly of recovering these costs, would constitute irreparable harm for the parties in all cases. As reiterated by the Federal Court in the decision rendered in *Bell Canada*:

> [40] . . . I do not stay [sic] that the inability to recover costs may never constitute irreparable harm, but only that such inability has not been considered sufficient to meet the irreparable harm test where costs are incurred in the ordinary course of litigation.
>
> (see also *Brocklebank v. Canada (Minister of National Defence)* (1994), 86 FTR 23 at para. 11)
>
> [Emphasis added]

[66] I would say that this would also be true about the argument that it would be impossible to compensate time, energy, stress and anxiety. These factors may be taken into consideration by the Tribunal, depending on the particular circumstances of the case. That said, since the respondent did not file any evidence to support its claims, I do not find that it has discharged its burden of proof in this regard. It is not enough, in my opinion, to simply allege such factors in order to have a motion to stay proceedings granted by the Tribunal. The party arguing such factors must still discharge its burden on a balance of probabilities.

[67] The respondent also alleges that if the Tribunal's findings reveal discrimination and the Tribunal orders remedies, including financial compensation for the complainant, but the Federal Court concludes that the file should not have been referred by the Commission, it will have to institute legal proceedings to recover the abovementioned sums. Once again, the respondent's position is based on assumptions. At this point, it is impossible to determine what the Federal Court will decide. By the same token, we cannot predict the Tribunal's decision. In order for remedies to be ordered, the complainant must first discharge its burden of proof on a balance of probabilities. The respondent will also be entitled to present a defence. The outcome of the complaint remains uncertain, and if the Tribunal makes a finding of discrimination, a case must also be made for the requested remedies. These remedies are not automatically financial or monetary in nature: it would be premature to conclude that the Tribunal will order compensation. Thus, the respondent has failed to persuade me on this aspect of its argument.

[68] Aéropro asserts that the complainant would not suffer any harm other than having to wait a few more months for the Tribunal to institute an inquiry into the complaint, if this is the case. I find that this argument is without merit. The complaints that are referred to us concern individuals who believe that their human rights have been violated. The complaints are sensitive and involve issues of human dignity. Time is an important factor for these individuals, who have sometimes filed their complaints several years earlier. In Mr. Duverger's case, his complaint was filed with the Commission on November 28, 2013; that is already over four years ago. As I mentioned earlier, public interest considerations must also be taken into account. It is necessarily in the public interest that discrimination complaints are dealt with expeditiously. It is important to remember that when " . . . the Tribunal finds that a party has violated the CHRA and engaged in a discriminatory practice, the Act provides for remedies that may be ordered to correct the situation. Without relief, the purpose of the Act cannot be achieved" (*Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 (CanLII) at para. 37). Given the foregoing, the *Act* is also remedial in nature. The complainant is also waiting for his case to be dealt with by the Tribunal and, if the Tribunal rules in his favour, he is also waiting to receive reparations for harm suffered as a result of discrimination. Lastly, it is my view that it is not only in the public interest but also in the interest of the parties to avoid unnecessarily delaying the inquiry in order to ensure the preservation of evidence, including the memories and recollections of witnesses.

[69] I also cannot subscribe to the respondent's argument concerning the potential damage to its reputation if the Tribunal's findings revealed discrimination and that these allegations become public. The outcome of the complaint is uncertain and the Tribunal may, on the contrary, determine that the respondent acted appropriately and that its actions were not discriminatory. It is not enough to allege potential damage to reputation: once again, the respondent did not provide any evidence in this regard.

[70] When balancing the conveniences against the various interests (of the complainant, the respondent and the public), I do not find, as claimed by the respondent, that the respondent would suffer the most inconvenience if the proceedings are not stayed. Stress, anxiety, costs, time, energy, etc., are factors borne by all parties. I recognize that these

inconveniences are inherent to the participation in judicial and quasi-judicial proceedings. Nevertheless, these inconveniences do not automatically cause irreparable harm. With respect to the question of the balance of convenience, given the lack of evidence I cannot conclude that the respondent would suffer the most. I do not believe that a stay of proceedings is in anyone's interest in this case.

[71] Finally, I agree with Member Garfield's comments at paragraph 22 of the *Bailie* decision that motions to stay proceedings should only be allowed in exceptional circumstances. It is not rare for the Federal Court to be called upon to consider an application for judicial review of the Commission's decision to refer a complaint to the Tribunal. I do not believe that it is in the interest of justice for motions of stay of proceedings to be regularly allowed in this type of situation. Doing so would frustrate our legislative scheme and our Tribunal's quasi-judicial process.

IV. Decision

[72] Considering that I find that the respondent, who bears the burden of proof, has failed to demonstrate on a balance of probabilities that it is in the interest of justice that I the Tribunal's proceedings be stayed, I am dismissing this motion. As such, the Tribunal's proceedings shall follow their due course. The Registrar will contact the parties shortly in order to inform them of the next steps.

Signed by

Gabriel Gaudreault
Member of the Tribunal

Ottawa, Ontario
February 6, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2230/5217

Style of Cause: Laurent Duverger v. 2553-4330 Québec Inc. (Aéropro)

Ruling of the Tribunal Dated: February 6, 2018

Motion dealt with in writing without appearance of parties

Written submissions by:

Laurent Duverger, for himself

Daniel Poulin, for the Canadian Human Rights Commission

Steven Côté, for the Respondent

Date: 20151223

Docket: A-542-15

Citation: 2015 FCA 295

CORAM: **NOËL C.J.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Appellant

and

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Respondent

Heard at Ottawa, Ontario, on December 22, 2015.

Judgment delivered at Ottawa, Ontario, on December 23, 2015.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: BOIVIN J.A.
RENNIE J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20151223

Docket: A-542-15

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CORAM: **NOËL C.J.**
BOIVIN J.A.
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BETWEEN:

LAURENTIAN PILOTAGE AUTHORITY

Appellant

and

CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.

Respondent

<u>REASONS FOR JUDGMENT</u>

<u>NOËL C.J.</u>

[1] This is an appeal from a decision of Justice Locke of the Federal Court (the Federal Court judge), dated December 14, 2015, (2015 CF 1382) dismissing the motion for an interlocutory injunction filed by the Laurentian Pilotage Authority (the LPA). The motion was to compel the Corporation des pilotes du Saint-Laurent Central Inc. (the Corporation) to add to the Work Schedule of licensed pilots in District No 1, the required complement of pilots for the period

from December 22, 2015, to January 4, 2016, according to the terms of a new service contract ratified by both parties on October 15, 2015.

[2] In light of the tight timelines, the deadlines specified under the *Federal Courts Rules*, SOR/98-106, were abridged and the appeal was expeditiously heard in a one-hour hearing at Ottawa. The brief reasons that follow were issued the next day.

[3] The Federal Court judge conducted his analysis on the basis of the tri-partite test established by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311 [*RJR-MacDonald*]. He found that the LPA had succeeded in establishing the existence of a serious issue and irreparable harm, but that the balance of convenience did not favour issuing an interlocutory injunction. He therefore dismissed the LPA's motion.

[4] Before us, the LPA submits that the Federal Court judge erred in law in concluding that the balance of convenience favoured the Corporation. For its part, the Corporation is asking that we uphold the Federal Court judge's decision in this regard. It adds that the Federal Court judge was wrong to conclude that the LPA had suffered irreparable harm, with the result that the injunction sought be the LPA could not have been granted in any event.

[5] The decision to grant or dismiss a motion for an interlocutory injunction is a discretionary one. A review of the lawfulness of a discretionary decision ought to be conducted within the general appellate framework set out in *Housen v. Nikolaisen*, 2002 SCC 33, depending on whether it is a question of law, of fact, or a question of mixed fact and law (*Jamieson*

Laboratories Ltd. v. Reckitt Benckiser LLC, 2015 FCA 104, para. 21, citing *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, paras. 18 and 19).

<ins>1st branch: serious issue</ins>

[6] The existence of a serious issue is not in question in this appeal. In addressing this question, the Federal Court judge explained that his decision was, for all intents and purposes, equivalent to a final decision, given the time constraints he was under. Thus, he allowed himself to make a more definitive finding than he otherwise would have, had an arbitrator been afforded enough time to properly dispose of the matter (Reasons, para. 19).

[7] The Federal Court judge dismissed the Corporation's position according to which the customs and usage in the context meant that the pilot's Assignment Schedule initially established for 2015 (the 2015 Schedule) was unaffected by the signing of the new service contract during the year (Reasons, para. 22). Despite the fact that it had been entered into on October 15, 2015, the contract took effect on July 1, 2015 (Exhibit P-2 of the LPA Record).

[8] As for the moment the Assignment Schedule was to be changed, the Federal Court judge pointed out that under the terms of the contract, [TRANSLATION] "[n]othing indicates that these [the new assignment] requirements will not apply immediately", namely, upon the contract's coming into force (Reasons, para. 24). He then dismissed the Corporation's contention that it was not possible to change the Assignment Schedule during the year, determining that the evidence submitted in this regard by the Corporation was insufficient (Reasons, para. 25).

[9] According to the Federal Court judge, the LPA had succeeded in establishing that the Corporation had an obligation to comply with the new assignment requirements immediately upon signature of the contract (Reasons, para. 27). The issue raised by the LPA in support of the issuing of the injunction was therefore not only a serious one but was likely to lead to a decision favourable to the LPA on the balance of the evidence presented before the judge.

2nd branch: irreparable harm

[10] Under the irreparable harm branch, the Federal Court judge also dismissed the Corporation's position as follows (Reasons, para. 32):

> [TRANSLATION]
>
> [32] The Corporation maintains that the LPA's argument that there will be delays during the holiday period this year is hypothetical. I disagree. After seeing the statistics for 2008 to 2014, it seems likely that there will be delays caused by the unavailability of pilots during the holiday period this year. It is difficult to estimate the number of delays, but I expect that there will be some.

[11] He further added the following (Reasons, para. 33):

> [TRANSLATION]
>
> [33] Although the problem of delays of this type is not very serious and the resulting harm is minor, I agree that harm of this type is irreparable. It is understandable that preventable delays harm the LPA's reputation, which is an irreparable outcome: *RJR-Macdonald* at p. 341. For example, the LPA's clients affected by the delays caused by the unavailability of pilots may choose other options to ship their products in the future. Even though there is no proof that an LPA client has done this in the past, I think it is likely to have happened considering the number of delays in past years.

[12] The Corporation takes issue with that last passage, arguing that it contains a number of errors. Despite the fact that this aspect of the analysis is not as complete and solid as it might have been, I am unable to detect an error that would allow me to set aside the Federal Court judge's conclusion.

[13] In this regard, suffice it to say that the judge's inference to the effect that the delays harm the LPA's reputation is not speculative. Rather, it is a logical inference made on the basis of the evidence. I would add that the Federal Court judge's finding that the damage to the LPA's reputation is difficult to quantify appears to be consistent with what the Supreme Court set out in the passage from *RJR-MacDonald* referred to by the Federal Court judge. Moreover, contrary to the Corporation's assertion, I am of the view that there was sufficient evidence before the Federal Court judge for him to conclude that such harm did exist.

<u>3rd branch: balance of convenience</u>

[14] The Federal Court judge then turned his attention to the balance of convenience branch. After having indicated that the public interest favoured compliance with the contract signed on October 15, 2015 (Reasons, para. 39), he noted that [TRANSLATION] "the pilots likely made their arrangements for the 2015-2016 holiday period…a long time ago" (*ibidem*).

[15] With regard to any inconveniences experienced by the LPA, the Federal Court judge downplayed these while acknowledging their existence. Beyond the fact [TRANSLATION] "[t]hat there is a public interest in ensuring compliance with contracts" (Reasons, para. 38), the

Corporation’s refusal to comply with its contractual obligations would cause delays, although those delays would be fewer than anticipated (Reasons, para. 40).

[16] Ultimately, it was maintaining what the Federal Court judge perceived to be the *status quo* that appears to have tipped the scale in the Corporation’s favour (Reasons, para. 41):

> [TRANSLATION]
>
> [41] Each of the parties argues that the principle of maintaining the status quo goes in its favour. The Corporation maintains that the status quo means keeping the 2015 schedule, whereas the LPA contends that the status quo requires compliance with the new contract between the parties. I agree with the Corporation. The LPA asks that the Corporation be ordered to modify the 2015 schedule. <u>The status quo requires that I not impose such an order.</u> (Emphasis added.)

[17] In reaching this conclusion, the Federal Court judge erred with regard to the applicable legal rule. In order for the 2015 Schedule to represent the *status quo*, it would have required the Federal Court judge to have reached the opposite conclusion than the one he made with regard to the existence of a serious issue. Indeed, his conclusion was that the Corporation had been aware of the new requirements since June 2015 and that it had an obligation to meet those requirements from the moment the contract was signed, despite the 2015 Schedule. Therefore, the 2015 Schedule did not represent the *status quo* as the *status quo* was based on the requirements set out in the contract signed in October 2015.

[18] It follows that the only ground that favours the Corporation under the balance of convenience branch is that it would be [TRANSLATION] “inconvenient for pilots to have to change their arrangements…” for the 2015-2016 holiday period (Reasons, para. 39). This is no doubt true. However, the only reason this unfortunate situation exists, according to the Federal Court

judge's finding, is that the Corporation failed to draw up a new schedule on the basis of the new requirements as it should have under the terms of the contract it had signed. In raising this frustration, the Corporation is doing nothing more than making a claim based on its own turpitude.

[19] Given that this is the sole "inconvenience" selected by the Federal Court judge to tilt the balance against the LPA, it follows that the third branch also favours issuing the injunction sought.

[20] I therefore find that the appeal should be allowed, the order issued by the Federal Court judge set aside, and the order that he should have issued be issued according to the terms proposed by the LPA, subject to the date marking the start of the period covered by the interlocutory injunction being extended to December 26, 2015, in order to provide the Corporation with a suitable opportunity to comply. I am awarding the LPA its costs before this Court and before the Federal Court.

"Marc Noël"
Chief Justice

"I concur.
Richard Boivin, J.A."

"I concur.
Donald J. Rennie, J.A."

Translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-542-15
STYLE OF CAUSE:	LAURENTIAN PILOTAGE AUTHORITY v. CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 22, 2015
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	BOIVIN J.A. RENNIE J.A.
DATED:	DECEMBER 23, 2015

APPEARANCES:

Patrice Gladu	FOR THE APPELLANT
Jean Lortie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dunton Rainville LLP Montréal, Quebec	FOR THE APPELLANT
McCarthy Tétrault LLP Montréal, Quebec	FOR THE RESPONDENT

Little Sisters Book and Art Emporium *Appellant*

v.

Commissioner of Customs and Revenue and Minister of National Revenue *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Bar Association, Egale Canada Inc., Sierra Legal Defence Fund and Environmental Law Centre *Interveners*

Indexed as: Little Sisters Book and Art Emporium *v.* Canada (Commissioner of Customs and Revenue)

Neutral citation: 2007 SCC 2.

File No.: 30894.

2006: April 19; 2007: January 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil procedure — Costs — Advance costs — Whether requirements to award advance costs met.

L is a small corporation that operates a bookstore catering to the lesbian and gay community. Book sales represent 30 to 40 percent of its business. L, which still struggles to make a profit, is engaged in litigation to gain the release of four books prohibited by Customs on the basis that they were obscene. Frustrated after years of court battles with Customs over similar issues, L chose to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. When this litigation began, L had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"), where it held that Customs' practices at the time infringed ss. 2(*b*) and 15 of the *Canadian Charter of Rights and Freedoms*. L

Little Sisters Book and Art Emporium *Appelante*

c.

Commissaire des Douanes et du Revenu et ministre du Revenu national *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association du Barreau canadien, Egale Canada Inc., Sierra Legal Defence Fund et Environmental Law Centre *Intervenants*

Répertorié : Little Sisters Book and Art Emporium *c.* Canada (Commissaire des Douanes et du Revenu)

Référence neutre : 2007 CSC 2.

N° du greffe : 30894.

2006 : 19 avril; 2007 : 19 janvier.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Procédure civile — Dépens — Provisions pour frais — Les conditions requises pour accorder une provision pour frais sont-elles remplies?

L est une petite société qui exploite une librairie desservant la communauté gaie et lesbienne. Les ventes de livres représentent 30 à 40 pour 100 de ses activités. L, qui parvient encore mal à réaliser un bénéfice, a engagé des procédures pour obtenir le dédouanement de quatre livres que les Douanes ont interdits pour le motif qu'ils étaient obscènes. Irritée après avoir passé des années à affronter les Douanes devant les tribunaux relativement à des questions similaires, L a décidé d'élargir la portée du litige et de procéder à une vaste enquête sur les pratiques des Douanes. Lorsque le présent litige a pris naissance, L avait déjà livré aux Douanes une longue bataille judiciaire qui a abouti à l'arrêt *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69 (« *Little Sisters n° 1* »), dans lequel notre Cour a décidé que les now seeks to have Customs bear the financial burden of its fresh complaint. It applied for advance costs to cover the four books appeal as well as a systemic review of Customs' practices. In its appeal, L asks for a reversal of Customs' obscenity determinations and a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. The chambers judge granted an advance costs order for the appeal and the systemic review, concluding that the three requirements of the *Okanagan* test were satisfied. The Court of Appeal set aside the order.

Held (Binnie and Fish JJ. dissenting): The appeal should be dismissed.

Per Bastarache, LeBel, Deschamps, Abella and Rothstein JJ.: Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential costs treatment. Public interest advance costs orders must be granted with caution, as a last resort, in circumstances where their necessity is clearly established. The standard is a high one: only the "rare and exceptional" case is special enough to warrant an advance costs award. Accordingly, when applying the three requirements set out in *Okanagan*, a 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. The injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. Since an advance costs award is an exceptional measure, the applicant must explore all other possible funding options, including costs immunities. If the applicant cannot afford the litigation as a whole, but is not completely impecunious, the applicant must commit to making a contribution to the litigation. No injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. If advance costs are granted, the litigant must relinquish some manner of control over how the litigation proceeds. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed. Accordingly, courts should set limits on the rates and hours of legal work chargeable and cap advance costs awards at an appropriate global amount. The possibility of setting the advance costs award off against damages actually

pratiques des Douanes à l'époque contrevenaient à l'al. 2*b*) et à l'art 15 de la *Charte canadienne des droits et libertés*. L cherche maintenant à faire supporter par les Douanes le fardeau financier de sa nouvelle plainte. Elle a demandé une provision pour frais qui couvrirait l'appel concernant les quatre livres ainsi qu'une révision systémique des pratiques des Douanes. Dans son appel, L sollicite l'infirmation des décisions en matière d'obscénité rendues par les Douanes, ainsi qu'un jugement déclarant que les Douanes ont interprété et appliqué d'une manière inconstitutionnelle les dispositions législatives pertinentes. La juge en chambre a ordonné le versement d'une provision pour frais pour l'appel et la révision systémique, après avoir conclu que les trois volets du critère de l'arrêt *Okanagan* étaient respectés. La Cour d'appel a annulé cette ordonnance.

Arrêt (les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté.

Les juges Bastarache, LeBel, Deschamps, Abella et Rothstein : Le fait de saisir les tribunaux d'une question d'importance pour le public ne signifie pas que le plaideur a automatiquement droit à un traitement préférentiel en matière de dépens. Les ordonnances accordant une provision pour frais pour des raisons d'intérêt public doivent être rendues avec circonspection, en dernier recours et dans des circonstances où leur nécessité est clairement établie. La norme est élevée : seule l'affaire « rare et exceptionnelle », qui est suffisamment particulière, peut justifier l'attribution d'une provision pour frais. Par conséquent, en appliquant les trois conditions énoncées dans l'arrêt *Okanagan*, un tribunal doit décider, eu égard à toutes les circonstances, si l'affaire est si particulière qu'il serait contraire aux intérêts de la justice de rejeter la demande de provision pour frais. L'injustice qui découlerait du rejet de la demande doit concerner à la fois le demandeur personnellement et le public en général. Étant donné que la provision pour frais est une mesure exceptionnelle, le demandeur doit étudier toutes les autres possibilités de financement, y compris l'exemption de dépens. Le demandeur qui n'a pas les moyens de payer tous les frais du litige, mais qui n'est pas totalement dépourvu de ressources, doit s'engager à fournir une contribution. Aucune injustice ne sera créée s'il est possible de régler l'affaire en cause ou de tenir compte de l'intérêt public sans accorder une provision pour frais. De même, les tribunaux devraient vérifier si une autre affaire visant les mêmes fins est en instance et peut se dérouler sans qu'il soit nécessaire de rendre une ordonnance accordant une provision pour frais. Dans le cas où une provision pour frais est accordée, le plaideur doit renoncer à exercer un certain contrôle sur la façon dont se déroule l'instance. La provision pour frais vise à fournir l'aide collected at the end of the trial should also be contemplated. [35-43]

minimale nécessaire pour que l'affaire suive son cours. En conséquence, les tribunaux devraient limiter les tarifs et les heures de travail juridique pouvant être facturés et plafonner la provision pour frais à un montant global convenable. Ils devraient aussi envisager la possibilité de déduire le montant de la provision pour frais des dommages-intérêts obtenus à l'issue du procès. [35-43]

L's claim is insufficient to support a finding that the requirement of special circumstances is met. The context in which merit is considered is conditioned by the need to show that the case is exceptional. The four books appeal, in which L alleges a discriminatory attitude on the part of Customs to some of its merchandise, is extremely limited in scope. L has advanced no evidence suggesting that these four books are integral, or even important, to its operations. In this context, it is impossible to conclude that L is in the extraordinary position that would justify an award of advance costs. With the systemic review, L is essentially attempting to expand the scope of the litigation in the hope of bolstering its legal rights in individual cases. This approach does not bring the case within the scope of the advance costs remedy. Specifically, the systemic review is not necessarily based on the prohibition, detention, or even delay of any books belonging to L. [51-53]

La demande de L est insuffisante pour autoriser la conclusion que l'exigence des circonstances particulières est remplie. Le contexte dans lequel le bien-fondé est examiné est coloré par la nécessité d'établir le caractère exceptionnel de l'affaire. L'appel concernant les quatre livres, dans lequel L allègue que les Douanes adoptent une attitude discriminatoire à l'égard d'une partie de ses marchandises, conserve une portée extrêmement limitée. L n'a présenté aucun élément de preuve indiquant que ces quatre livres font partie intégrante de ses activités ou même qu'ils sont importants pour celles-ci. Dans ce contexte, il est impossible de conclure que L se trouve dans la situation extraordinaire qui justifierait l'attribution d'une provision pour frais. Essentiellement, L recourt à la révision systémique pour tenter d'élargir la portée du litige de manière à renforcer les droits que lui reconnaît la loi dans chaque cas particulier. Cette démarche ne justifie pas, en l'espèce, l'attribution d'une réparation consistant en une provision pour frais. Plus précisément, la révision systémique n'est pas nécessairement fondée sur le fait que des livres appartenant à L sont interdits, retenus ou tardent même à lui parvenir. [51-53]

While L's constitutional rights should not be understated, it has not provided *prima facie* evidence that it remains the victim of unfair targeting. The fact that Customs continues to detain large quantities of imported material, including high proportions of gay and lesbian material, is not, in itself, *prima facie* evidence that Customs officials are performing their task improperly, much less unconstitutionally. With respect to the systemic review, the efficacy of Customs' changes to its practices in the wake of *Little Sisters No. 1* cannot be determined to be insufficient on the basis of the number of decisions that have been unfavourable to L. [54-56]

Bien qu'il ne faille pas sous-estimer les droits constitutionnels de L, cette dernière n'a présenté aucune preuve *prima facie* qu'elle continue d'être injustement ciblée. Le fait que les Douanes continuent de retenir une grande quantité de matériel importé, dont une grande part de matériel gai et lesbien, ne constitue pas en soi une preuve *prima facie* que les fonctionnaires des Douanes s'acquittent de leur tâche de manière irrégulière et encore moins de manière inconstitutionnelle. En ce qui concerne la révision systémique, l'efficacité des changements que les Douanes ont apportés à leurs pratiques à la suite de l'arrêt *Little Sisters n^{o} 1* ne peut pas être qualifiée d'insuffisante en raison du nombre de décisions défavorables à L. [54-56]

The history of L's relations with Customs should not be understated either, but it does not justify the advance costs application. This history cannot be used to establish that an injustice will result if insufficient funds preclude L from arguing the systemic review. The battle L seeks to fight through the systemic review is, strictly speaking, unnecessary. It is the four books appeal that lies at the heart of L's claim against Customs; the systemic review is simply an attempt by L to investigate

Bien qu'ils ne doivent pas être sous-estimés non plus, les rapports antérieurs de L avec les Douanes ne justifient pas sa demande de provision pour frais. Ces rapports antérieurs ne peuvent pas être invoqués pour établir qu'une injustice résultera si L ne peut pas débattre la question de la révision systémique parce qu'elle dispose de fonds insuffisants. La bataille que L veut livrer au moyen de la révision systémique est, à proprement parler, inutile. C'est l'appel concernant les quatre livres qui se situe au

Customs' practices independently of this context. [57-58]

In the present case, the issues raised do not transcend the litigant's individual interests. Because L has chosen to investigate Customs' general operations under the systemic review, the four books appeal concerns no interest beyond that of L itself and, as a consequence, is not special enough to justify an award of advance costs. The legal issues being raised by L in the four books appeal were already considered, and ruled upon, in *Little Sisters No. 1*. At most, the four books appeal deals with the application of *Little Sisters No. 1* to a specific set of facts. Moreover, the constitutional issues underlying L's claim do not satisfy the public importance criterion. The four books appeal does not address the issue of whether Customs is, in general, correctly applying the legal test for obscenity; rather, it is limited to the question of whether Customs reached the right result in prohibiting four specific titles. While evidence about Customs' general practices may arise incidentally in the course of the four books appeal, the broader issues raised by L are being considered separately, as part of the systemic review. Under the systemic review, L has sought to demonstrate the far-reaching importance of this litigation by arguing that proof that Customs has disobeyed a court order would have great ramifications. However, short of imputing bad faith to Customs, a finding that its present practices do not meet this Court's dictates would not impugn the integrity of the government at large. Such a finding does not rise to the level of general public importance simply because it concerns a public body. Finally, not all *Charter* litigation is of exceptional public importance, even if it involves allegations of infringements of freedom of expression. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest. Where, as here, only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met. It is in general only when the public importance of a case can be established regardless of the ultimate holding on the merits that a court should consider the public importance requirement satisfied. [60-66]

cœur de l'action que L a intentée contre les Douanes; la révision systémique ne représente qu'une simple tentative de L d'enquêter sur les pratiques des Douanes indépendamment du présent contexte. [57-58]

En l'espèce, les questions soulevées ne dépassent pas le cadre des intérêts du plaideur. Du fait que L a choisi d'enquêter sur les activités générales des Douanes dans le cadre de la révision systémique, l'appel concernant les quatre livres ne vise aucun autre intérêt que celui de L elle-même et n'est donc pas suffisamment particulier pour justifier l'attribution d'une provision pour frais. Les questions juridiques que L soulève dans le cadre de l'appel concernant les quatre livres ont déjà été examinées et tranchées dans l'arrêt *Little Sisters n^o 1*. Au mieux, l'appel concernant les quatre livres porte sur l'application de l'arrêt *Little Sisters nº 1* à un ensemble particulier de faits. De plus, les questions constitutionnelles qui sous-tendent la demande de L ne satisfont pas au critère de l'importance pour le public. L'appel concernant les quatre livres ne porte pas sur la question de savoir si, en général, les Douanes appliquent correctement le critère juridique d'obscénité; il se limite plutôt à la question de savoir si les Douanes sont arrivées au bon résultat en interdisant quatre titres particuliers. Même si des éléments de preuve sur les pratiques générales des Douanes peuvent surgir de manière incidente dans le cadre de l'appel concernant les quatre livres, les questions générales soulevées par L sont examinées séparément dans le cadre de la révision systémique. Dans le cadre de la révision systémique, L a tenté de démontrer que la présente instance revêt une importance considérable, en soutenant que la preuve que les Douanes ne se sont pas conformées à une ordonnance judiciaire aurait des répercussions majeures. Toutefois, sans aller jusqu'à imputer de la mauvaise foi aux Douanes, conclure que leurs pratiques actuelles ne respectent pas les prescriptions de notre Cour ne compromettrait pas l'intégrité du gouvernement en général. Une telle conclusion ne revêt pas une importance générale pour le public du seul fait qu'elle vise un organisme public. Enfin, les poursuites fondées sur la *Charte* ne revêtent pas toutes une importance exceptionnelle pour le public, même dans le cas où elles comportent des allégations d'atteinte à la liberté d'expression. Il faut prouver qu'il est dans l'intérêt public de déterminer si l'allégation de violation de la *Charte* est fondée. Dans le cas où, comme en l'espèce, un seul des résultats possibles quant au fond pourrait rendre l'affaire importante pour le public, le tribunal ne devrait pas conclure que l'exigence de l'importance pour le public est remplie. En général, un tribunal devrait considérer que cette exigence est remplie uniquement dans le cas où l'importance d'une affaire pour le public peut être établie sans égard à la décision qui sera rendue en définitive sur le fond. [60-66]

Absent exceptional circumstances, it is not necessary to address L's impecuniosity. Had the three parts of the *Okanagan* test been met, the court would still have to exercise its discretion to decide whether advance costs ought to be awarded or whether another type of order is justified. In exercising its discretion, the court must remain sensitive to any concerns that did not arise in its analysis of the test. In the case at bar, these concerns would have prompted the chambers judge to exercise her discretion against an advance costs award in respect of the systemic review since the possibility of hearing the four books appeal before conducting the systemic review was an alternative to her advance costs award. [67] [72] [75]

À défaut de circonstances exceptionnelles, il n'est pas nécessaire d'aborder la question du manque de ressources de L. Si les trois volets du critère de l'arrêt *Okanagan* avaient été respectés, le tribunal devrait encore exercer son pouvoir discrétionnaire de décider s'il convient d'accorder une provision pour frais ou de rendre un autre type d'ordonnance. Dans l'exercice de son pouvoir discrétionnaire, le tribunal doit demeurer attentif à toute préoccupation qui n'a pas été soulevée dans son analyse du critère. En l'espèce, ces préoccupations auraient incité la juge en chambre à exercer son pouvoir discrétionnaire de refuser la provision pour frais à l'égard de la révision systémique, étant donné que la possibilité d'entendre l'appel concernant les quatre livres avant de passer à la révision systémique était une solution de rechange à la provision pour frais qu'elle a consentie. [67] [72] [75]

Per McLachlin C.J. and Charron J.: In certain cases raising special circumstances, judges, invoking their equitable jurisdiction, may order one party to pay the other's interim costs where it is necessary to avoid unfairness or injustice. When interim costs are ordered in public interest cases, the issues raised must transcend the individual interests of the particular litigant and have special interest for the broader community. However, even in public interest litigation, the common law requirement for special circumstances must still be established as a pre-condition of interim costs. The three criteria for an order for advance costs therefore are: (1) impecuniosity; (2) a meritorious case; and (3) special circumstances making this extraordinary exercise of the court's power appropriate. The order is in the court's discretion, provided the conditions are made out. [83] [86-88]

La juge en chef McLachlin et la juge Charron : Dans certaines affaires qui présentent des circonstances particulières, un juge peut invoquer sa compétence d'equity pour ordonner à une partie de verser à l'autre partie une provision pour frais si c'est nécessaire pour éviter une iniquité ou injustice. Lorsqu'une provision pour frais est ordonnée dans une affaire d'intérêt public, les questions soulevées doivent dépasser le cadre des intérêts du plaideur et présenter un intérêt spécial pour la collectivité en général. Cependant, même dans le cadre d'une instance d'intérêt public, il faut tout de même établir que la condition de common law des circonstances particulières est remplie pour que la provision pour frais puisse être ordonnée. Les trois conditions qui doivent être réunies pour qu'une ordonnance accordant une provision pour frais soit rendue sont donc les suivantes : (1) le manque de ressources, (2) l'affaire vaut d'être instruite et (3) l'existence de circonstances particulières justifiant l'exercice exceptionnel de ce pouvoir judiciaire. Cette ordonnance relève du pouvoir discrétionnaire du tribunal, qui peut la rendre seulement s'il est établi que les conditions sont remplies. [83] [86-88]

Here, the chambers judge failed to consider whether the case displayed special circumstances and the Court of Appeal correctly set aside the interim costs order. While the chambers judge's findings concerning L's inability to finance the litigation and the merit of the case should not be disturbed, the third pre-condition for an order of interim costs is not met, not because the case entirely lacks public interest, but because it does not rise to the level of the special circumstances required to give the court jurisdiction to make the order. At stake in this case is the prospect of not learning how Customs proceeded on the four books appeal. The possible insight into Customs' practices and the limited potential remedy do not rise to the level of compelling

En l'espèce, la juge en chambre ne s'est pas demandé si l'affaire présentait des circonstances particulières, et la Cour d'appel a annulé à juste titre l'ordonnance accordant une provision pour frais. Bien qu'il n'y ait pas lieu de modifier les conclusions de la juge en chambre relatives à l'incapacité de L de financer l'instance et au bien-fondé de l'affaire, la troisième condition préalable de l'ordonnance accordant une provision pour frais n'est pas remplie, non pas en raison de l'absence totale d'intérêt public, mais parce que l'affaire ne présente pas les circonstances particulières requises pour qu'un tribunal soit fondé à rendre cette ordonnance. En l'espèce, l'enjeu est le risque qu'on n'apprenne pas comment les Douanes ont agi relativement à l'appel concernant les public importance or demonstrate systemic injustice. This case does not fall into the narrow class of cases where one party may be ordered to pay the interim costs of the other party. [89-90] [94] [99] [101] [109]

Per Binnie and Fish JJ. (dissenting): The ramifications of *Little Sisters No. 1* go to the heart and soul of L's present application. Systemic discrimination by Customs officials and unlawful interference with free expression were clearly established in the earlier case, and numerous *Charter* violations and systemic problems in the administration of Customs legislation were found. In its application for advance costs in this case, L contended that the systemic abuses established in the earlier litigation have continued, and that Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination. The question of public importance is this: was the Minister as good as his word in 2000 when his counsel assured the Court that the appropriate reforms had been implemented? The chambers judge, from whose decision the present appeal has been taken, concluded that L had established a *prima facie* case that the promised reforms had not been implemented. Having listened to evidence and argument, she ordered interim funding subject to a stringent costs control order, the terms of which have now been agreed to. The present proceeding is not the beginning of a litigation journey. It is 12 years into it. [114] [116] [120]

If shown to be true, L's allegations mean that it has suffered special damage as a result of a systemic failure of Customs to respect the constitutional rights of readers and writers as well as importers. The public has an interest in whether its government respects the law and operates in relation to its citizens in a non-discriminatory fashion. That is where the interest of this litigation transcends L's private interest. [130]

In this case, the pre-conditions set out in *Okanagan* for an order of advance costs are satisfied. First, as found by the chambers judge, and as accepted by the Chief Justice, the impecuniosity requirement is met. Alternate sources of funding were explored, and a finding of impecuniosity should not depend on the existence of other parties able to bring a similar claim. Second, as the Chief Justice also agrees, the claim to be adjudicated is *prima facie* meritorious. Third, the issues raised are

quatre livres. Les indications possibles sur les pratiques des Douanes et la réparation limitée qui pourrait résulter n'atteignent pas un niveau déterminant d'importance pour le public et ne démontrent pas non plus l'existence d'une injustice systémique. La présente affaire n'entre pas dans la catégorie restreinte des cas où une partie peut se voir ordonner de payer une provision pour frais à l'autre partie. [89-90] [94] [99] [101] [109]

Les juges Binnie et Fish (dissidents) : Les ramifications de l'arrêt *Little Sisters n^o^ 1* sont cruciales en ce qui concerne la présente demande de L. L'existence de discrimination systémique de la part des fonctionnaires des douanes et d'atteinte illégale à la liberté d'expression a été clairement établie dans l'instance antérieure, et de nombreuses violations de la *Charte* et des problèmes systémiques d'application de la législation douanière ont été constatés. Dans la demande de provision pour frais qu'elle présente en l'espèce, L soutient que les abus systémiques dont l'existence a été établie dans l'instance antérieure se sont poursuivis et que les Douanes ne se sont pas montrées disposées à appliquer la législation douanière de manière équitable et non discriminatoire. La question d'importance pour le public est la suivante : le ministre donnait-il l'heure juste en 2000 lorsque son avocat a assuré la Cour que les réformes appropriées avaient été mises en œuvre? La juge en chambre, dont la décision est à l'origine du présent pourvoi, a conclu que L avait établi une preuve *prima facie* que les réformes promises n'avaient pas été mises en œuvre. Après avoir entendu la preuve et l'argumentation, la juge en chambre a accordé une provision pour frais sous réserve d'une ordonnance prescrivant un contrôle rigoureux des coûts, dont les modalités sont maintenant l'objet d'un commun accord. La présente affaire ne fait pas que débuter, elle dure depuis 12 ans. [114] [116] [120]

Si elles s'avèrent, les allégations de L signifieront que le défaut systémique des Douanes de respecter les droits constitutionnels des lecteurs, des écrivains et des importateurs lui a causé un préjudice particulier. La population a le droit de savoir si son gouvernement respecte la loi et traite ses citoyens d'une manière non-discriminatoire. C'est là que l'intérêt du présent litige dépasse le cadre des intérêts de L. [130]

En l'espèce, les conditions qui, selon l'arrêt *Okanagan*, doivent être réunies pour qu'une provision pour frais soit accordée sont remplies. Premièrement, comme l'a conclu la juge en chambre et l'a accepté la Juge en chef, la condition du manque de ressources est remplie. D'autres possibilités de financement ont été examinées et une conclusion d'impécuniosité ne devrait pas dépendre du fait que d'autres parties sont en mesure d'intenter une action semblable. Deuxièmement, comme en convient of public importance and transcend individual interests. Given that 70 percent of Customs detentions are of gay and lesbian material, there is unfinished business of high public importance left over from *Little Sisters No. 1*. While the proposed systemic review would be an impermissible expansion of the four books appeal, the four books appeal permits L to explore, within a limited context, the process under which the importation of these books was banned, and to that extent provides an opportunity for the systemic issues to be canvassed. Whether the chambers judge's discretion is formulated in terms of "rare and exceptional" circumstances (as held in *Okanagan*), or the "special circumstances" formulated by the Chief Justice in this case, the test is satisfied. Although the chambers judge erred in principle in ordering advance costs for the so-called systemic review (because there is no such action pending), she properly exercised her discretion in awarding advance costs with respect to the four books appeal. There is no basis on which to interfere with the exercise of her discretion that this is an exceptional case of special public importance that should not be defeated by L's lack of funds. [131] [133] [141] [145] [148] [153] [156-158]

It is appropriate to cap the maximum potential public contribution to the four books appeal at $300,000, subject to further order of the case management judge. To the extent that L can make a contribution to the costs, it should also be required to do so. If L is successful and substantial damages are awarded, it should be obligated to repay the entire amount of the advance costs plus interest at the usual prejudgment rate as a first charge on any such award of damages. [159-161]

Cases Cited

By Bastarache and LeBel JJ.

Applied: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71; **referred to:** *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Office and Professional Employees'*

également la Juge en chef, la demande vaut *prima facie* d'être instruite. Troisièmement, les questions soulevées revêtent une importance pour le public et dépassent le cadre d'intérêts individuels. Étant donné que 70 pour 100 des retenues effectuées par les Douanes portent sur du matériel gai et lesbien, l'arrêt *Little Sisters n^o 1* n'a pas tout réglé et il reste à trancher un aspect d'une grande importance pour le public. La révision systémique proposée élargirait de manière inacceptable la portée de l'appel concernant les quatre livres, mais cet appel donne à L la possibilité d'étudier, dans un contexte limité, le processus en vertu duquel l'importation de ces livres a été interdite et permet, dans cette mesure, d'examiner les questions systémiques. Peu importe que le pouvoir discrétionnaire de la juge en chambre soit formulé sous l'angle des circonstances « rares et exceptionnelles » (comme dans l'arrêt *Okanagan*) ou sous celui des « circonstances spéciales ou particulières » mentionnées par la Juge en chef en l'espèce, le critère est respecté. Bien qu'elle ait commis une erreur de principe en ordonnant le versement d'une provision pour frais pour la soi-disant révision systémique (du fait qu'aucune action de cette nature n'est en cours), la juge en chambre a exercé correctement son pouvoir discrétionnaire en accordant une provision pour frais relativement à l'appel concernant les quatre livres. Il n'y a aucune raison de modifier sa décision, prise dans l'exercice de son pouvoir discrétionnaire, selon laquelle il s'agit d'un cas exceptionnel d'une importance particulière pour le public où L ne devrait pas se voir forcée de renoncer à agir en justice à cause d'un manque de fonds. [131] [133] [141] [145] [148] [153] [156-158]

Il convient de plafonner à 300 000 $ la contribution publique à l'appel concernant les quatre livres, sous réserve d'une autre ordonnance de la juge responsable de la gestion de l'instance. Dans la mesure où L peut contribuer aux coûts, elle devrait être tenue de le faire. Si elle a gain de cause et obtient des dommages-intérêts substantiels, L devrait être tenue de rembourser en priorité sur ceux-ci le montant total de la provision pour frais, majoré des intérêts au taux habituel des intérêts avant jugement. [159-161]

Jurisprudence

Citée par les juges Bastarache et LeBel

Arrêt appliqué : *Colombie-Britannique (Ministre des Forêts) c. Bande indienne Okanagan*, [2003] 3 R.C.S. 371, 2003 CSC 71; **arrêts mentionnés :** *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69; *R. c. Butler*, [1992] 1 R.C.S. 452; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Succession Odhavji c. Woodhouse*, [2003] 3 R.C.S. 263, 2003 CSC 69; *Office and*

International Union, Local 378 v. British Columbia (Hydro and Power Authority), [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120; *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395, aff'd (1995), 126 D.L.R. (4th) 437; *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192; *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 2004 SCC 9; *R. v. Keating* (1997), 159 N.S.R. (2d) 357.

By McLachlin C.J.

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By Binnie J. (dissenting)

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Joseph J. Arvay, *Q.C.*, and *Irene Faulkner*, for the appellant.

Cheryl J. Tobias and *Brian McLaughlin*, for the respondents.

Janet E. Minor and *Mark Crow*, for the intervener the Attorney General of Ontario.

George H. Copley, *Q.C.*, for the intervener the Attorney General of British Columbia.

J. J. Camp, *Q.C.*, and *Melina Buckley*, for the intervener the Canadian Bar Association.

Cynthia Petersen, for the intervener Egale Canada Inc.

Chris Tollefson and *Robert V. Wright*, for the interveners the Sierra Legal Defence Fund and the Environmental Law Centre.

The judgment of Bastarache, LeBel, Deschamps, Abella and Rothstein JJ. was delivered by

Bastarache and LeBel JJ. —

1. Introduction

1 The appellant, Little Sisters Book and Art Emporium, is a corporation that operates a bookstore serving the gay and lesbian community in Vancouver. The issue in this appeal is whether it is proper for the appellant to have the costs of its court battle against the respondents (collectively referred to as "Customs") funded by the public purse by means of the exceptional advance (or interim) costs

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Saunders, Thackray et Oppal) (2005), 249 D.L.R. (4th) 695, 208 B.C.A.C. 246, 344 W.A.C. 246, 38 B.C.L.R. (4th) 288, 193 C.C.C. (3d) 491, 7 C.P.C. (6th) 333, 127 C.R.R. (2d) 165, [2005] B.C.J. No. 291 (QL), 2005 BCCA 94, qui a infirmé une décision de la juge Bennett (2004), 31 B.C.L.R. (4th) 330, [2004] B.C.J. No. 1241 (QL), 2004 BCSC 823. Pourvoi rejeté, les juges Binnie et Fish sont dissidents.

Joseph J. Arvay, *c.r.*, et *Irene Faulkner*, pour l'appelante.

Cheryl J. Tobias et *Brian McLaughlin*, pour les intimés.

Janet E. Minor et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

George H. Copley, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

J. J. Camp, *c.r.*, et *Melina Buckley*, pour l'intervenante l'Association du Barreau canadien.

Cynthia Petersen, pour l'intervenante Egale Canada Inc.

Chris Tollefson et *Robert V. Wright*, pour les intervenants Sierra Legal Defence Fund et Environmental Law Centre.

Version française du jugement des juges Bastarache, LeBel, Deschamps, Abella et Rothstein rendu par

Les juges Bastarache et LeBel —

1. Introduction

L'appelante Little Sisters Book and Art Emporium est une société qui exploite une librairie desservant la communauté gaie et lesbienne de Vancouver. Il s'agit, en l'espèce, de déterminer si l'appelante peut à bon droit obtenir que sa bataille judiciaire contre les intimés (collectivement appelés les « Douanes ») soit financée par les deniers publics au moyen de l'ordonnance exceptionnelle order contemplated in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71. In our view, the appellant cannot succeed.

accordant une provision pour frais, prévue dans l'arrêt *Colombie-Britannique (Ministre des Forêts) c. Bande indienne Okanagan*, [2003] 3 R.C.S. 371, 2003 CSC 71. À notre avis, elle ne saurait avoir gain de cause.

The situation in *Okanagan* was clearly out of the ordinary. The bands had been thrust into complex litigation against the government that they could not pay for, and the case raised issues vital both to their survival and to the government's approach to aboriginal rights. The issue before the Court in that case was whether the bands' inability to pay should have the effect of leaving constitutional rights unenforceable and public interest issues unresolved. Mindful of the serious consequences to the bands and of the contours of the anticipated litigation, this Court decided that a real injustice would result if the courts refused to exercise their equitable jurisdiction in respect of costs and if, as a consequence, the bands' impecuniosity prevented the trial from proceeding.

2 La situation dans l'affaire *Okanagan* était clairement inhabituelle. Les bandes avaient été plongées dans un litige complexe qui les opposait au gouvernement et qu'elles étaient incapables de financer, alors que l'affaire soulevait des questions d'une importance cruciale à la fois pour leur survie et pour l'approche du gouvernement en matière de droits ancestraux. La question soumise à la Cour dans cette affaire était de savoir si l'incapacité de payer des bandes devrait avoir pour effet d'empêcher l'application de droits constitutionnels et de laisser en suspens des questions d'intérêt public. Consciente de la gravité des conséquences pour les bandes et des limites du litige préságé, la Cour a décidé que le refus des tribunaux d'exercer leur compétence d'equity en matière de dépens entraînerait une véritable injustice si le manque de ressources des bandes empêchait le procès de suivre son cours.

The situation in the present case differs from that in *Okanagan*. A small business corporation is in particular engaging in litigation to gain the release of merchandise that was stopped at the border. On its face, this dispute is no different from any other one that could be initiated by the many Canadians whose shipments may be detained and scrutinized by Customs before they are allowed to receive them. But the history of this case reveals more. Understandably frustrated after years of court battles with Customs over similar issues, this corporation has chosen to enlarge the scope of the litigation and to pursue a broad inquiry into Customs' practices. The appellant wants its present interests, as well as its (and other importers') future interests, settled for good, and it wants to stop Customs from prohibiting any more imports until its complaints are resolved.

3 La situation en l'espèce diffère de celle qui se présentait dans l'affaire *Okanagan*. Une société exploitant une petite entreprise engage notamment des procédures pour obtenir le dédouanement de marchandises retenues à la frontière. À première vue, ce conflit ne diffère pas de ceux que pourraient déclencher les nombreux Canadiens dont les commandes seraient retenues ou examinées par les Douanes avant qu'elles leur soient remises. Mais il y a plus. Naturellement irritée après avoir passé des années à affronter les Douanes devant les tribunaux relativement à des questions similaires, cette société a décidé d'élargir la portée du litige et de procéder à une vaste enquête sur les pratiques des Douanes. L'appelante tient à ce que la question de ses droits présents et de ses droits (et ceux des autres importateurs) futurs soit tranchée définitivement, et elle veut empêcher les Douanes de prohiber d'autres importations jusqu'à ce que ses plaintes soient réglées.

The question in this appeal is not whether the appellant has a good cause of action, but whether the cost of the corporation's attempt to get Customs

4 La question en l'espèce est non pas de savoir si l'appelante a une cause d'action valable, mais plutôt si les contribuables canadiens devraient supporter

to release its merchandise, or the costs of its broad inquiry into Customs' practices, should be borne by the Canadian taxpayer. An exceptional order such as this can be made only in special circumstances, like those in *Okanagan*, subject to stringent conditions and to the appropriate procedural controls. In our opinion, the appellant's application meets none of the requirements developed by the Court in that decision.

les frais qu'elle a engagés pour amener les Douanes à dédouaner ses marchandises ou pour procéder à sa vaste enquête sur les pratiques des Douanes. Une telle ordonnance exceptionnelle ne peut être rendue que dans des circonstances particulières, comme celles de l'affaire *Okanagan*, et sous réserve de conditions strictes et des contrôles procéduraux indiqués. À notre avis, la demande de l'appelante ne satisfait à aucune des exigences que la Cour a établies dans cet arrêt.

5 The fact that the appellant's claim would not be summarily dismissed does not suffice to establish that interim costs should be granted to allow it to proceed. That is not the proper test. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation. Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon. *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. This Court's *ratio* in *Okanagan* applies only to those few situations where a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed.

Le fait que la demande de l'appelante ne serait pas rejetée sommairement ne suffit pas pour établir qu'il y a lieu d'accorder une provision pour frais pour en permettre l'instruction. Tel n'est pas le critère applicable. Fort malheureusement, des contraintes financières compromettent, chaque jour, l'examen de demandes qui peuvent être fondées. Placées devant ce dilemme, les législatures ont proposé des réponses qui ne remédient pas nécessairement à toutes les situations. Les programmes d'aide juridique demeurent sous-capitalisés et débordés. La non-représentation par un avocat devient de plus en plus fréquente devant les tribunaux. L'arrêt *Okanagan* n'était pas censé résoudre toutes ces difficultés. La Cour n'a pas cherché à établir un système parallèle d'aide juridique ou un vaste programme géré par les tribunaux, afin de compléter tout autre programme destiné à aider divers groupes à ester en justice, et sa décision ne doit pas servir à le faire. Cette décision n'a pas créé une nouvelle méthode de financement pour les plaideurs qui s'autoproclament représentants de l'intérêt public. Le raisonnement de notre Cour dans l'arrêt *Okanagan* ne s'applique qu'aux rares cas où un tribunal contribuerait à une injustice — envers le plaideur personnellement et envers le public en général — s'il n'accordait pas la provision pour frais requise pour que le plaideur puisse aller de l'avant.

2. Facts

2. Les faits

6 The appellant is a business corporation that operates the Little Sisters Book and Art Emporium, an establishment that caters to the lesbian and gay community of Vancouver. Book sales represent 30 to 40 percent of the appellant's business. Although

L'appelante est une société commerciale qui exploite l'entreprise Little Sisters Book and Art Emporium desservant la communauté gaie et lesbienne de Vancouver. Les ventes de livres représentent 30 à 40 pour 100 des activités de the appellant's asset value has grown significantly in recent years, from $218,446 in 2000 to $324,618 in 2003, it still struggles to make a profit. It has never netted more than $25,000 in one year, and in 2003 it lost almost $60,000. Recent losses are at least partly attributable to an embezzlement of $85,000.

l'appelante. Bien que la valeur de son actif ait augmenté considérablement au cours des dernières années, passant de 218 446 $ en 2000 à 324 618 $ en 2003, l'appelante parvient encore mal à réaliser un bénéfice. Son bénéfice net n'a jamais dépassé 25 000 $ par année et, en 2003, ses pertes ont atteint presque 60 000 $. Des pertes récentes sont dues, tout au moins en partie, à un détournement de 85 000 $.

7

The appellant's claim for advance costs must be considered in the context of the history of litigation between these two parties. When the present litigation began, the appellant had already fought a protracted legal battle against Customs, which culminated in this Court's decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"). In that case, the appellant, along with its shareholders, James Eaton Deva and Guy Bruce Smyth, challenged the constitutionality of Customs' procedures for detaining obscene material and of the legislative foundation for those procedures. Writing for the majority of this Court, Binnie J. agreed that Customs' practices at the time infringed ss. 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also determined that the burden of proving obscenity rested with the person alleging it. However, Binnie J. held that the provisions of the *Customs Act* themselves were constitutional.

Il faut examiner la demande de provision pour frais de l'appelante en fonction des poursuites qui ont opposé ces deux parties dans le passé. Lorsque le présent litige a pris naissance, l'appelante avait déjà livré aux Douanes une longue bataille judiciaire qui a abouti à l'arrêt de notre Cour *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69 (« *Little Sisters nº 1* »). Dans cette affaire, l'appelante, ainsi que ses actionnaires James Eaton Deva et Guy Bruce Smyth, contestaient la constitutionnalité des méthodes utilisées par les Douanes pour retenir le matériel obscène, ainsi que du fondement législatif de ces méthodes. S'exprimant au nom de notre Cour à la majorité, le juge Binnie a convenu que les pratiques des Douanes à l'époque contrevenaient à l'al. 2*b*) et au par. 15(1) de la *Charte canadienne des droits et libertés*. Il a aussi décidé que la charge de prouver l'obscénité incombait à la partie qui invoquait ce moyen. Le juge Binnie a toutefois conclu que les dispositions mêmes de la *Loi sur les douanes* étaient constitutionnelles.

8

The remedy sought by the appellant and its shareholders in *Little Sisters No. 1* was an injunction whose terms were generally the same as those of the injunction requested by the appellant in the case at bar. Binnie J. felt that a remedy of this nature was not warranted. He wrote the following, at para. 157:

Dans l'affaire *Little Sisters nº 1*, la réparation sollicitée par l'appelante et ses actionnaires était une injonction identique, dans l'ensemble, à celle que l'appelante demande en l'espèce. Le juge Binnie a estimé qu'une réparation de cette nature n'était pas justifiée. Il a écrit ceci, au par. 157 :

> I conclude, with some hesitation, that it is not practicable to [offer a structured s. 24(1) remedy]. The trial concluded on December 20, 1994. We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to

> C'est avec une certaine réticence que je conclus [qu'une réparation structurée en vertu du par. 24(1)] n'est pas réalisable. Le procès s'est terminé le 20 décembre 1994. On nous dit qu'au cours des six dernières années, les Douanes ont corrigé les problèmes institutionnels et administratifs éprouvés par les appelants. En l'absence de données plus précises sur ce qui a été fait exactement et sur la mesure dans laquelle on a ainsi remédié à la

endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265). Equally, however, we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that in the appellants' view would remedy any continuing problems.

He added that the "findings [in that case] should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (para. 158). Costs were awarded to the appellant and its shareholders on a party-and-party basis.

9 The present litigation, the appellant suggests, is the "further action" that Binnie J. anticipated. Counsel for the appellant drew a direct line tracing his client's current legal battle to this Court's refusal to offer injunctive relief back in 2000. Still arguing that it was denied the appropriate remedy nearly six years ago, the appellant seeks to have Customs bear the financial burden of its fresh complaint on these new facts.

10 This dispute over costs is related to litigation spawned by Customs' July 5, 2001 detention of books destined for the appellant. On that date, eight titles — comprising 34 books — were detained by Customs on the basis that they were obscene. The appellant was able to obtain the release of four of these titles within a month. With four titles still being detained, the appellant chose to request a redetermination for only two: *Meatmen*, vol. 18, *Special S&M Comics Edition* and *Meatmen*, vol. 24, *Special SM Comics Edition* (the "Meatmen comics"). Customs again determined that these two titles were obscene. Arguing that they were incorrectly classified, on February 14, 2002, the appellant appealed the redetermination to the British Columbia Supreme Court, as it was entitled to do pursuant to ss. 67 and 71 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

situation (si tant est qu'on l'a fait), je ne suis pas prêt à souscrire à la conclusion de mon collègue selon laquelle ces mesures ne sont « pas suffisantes » (par. 262) et ne sont pas d'un « grand secours » (par. 265). Dans le même ordre d'idées, toutefois, les appelants ne nous ont pas indiqué quelles sont, à leur avis, les mesures précises (à défaut de déclarer les dispositions législatives invalides ou inopérantes) qui permettraient de corriger tout problème qui subsisterait.

Il a ajouté que les « constatations [dans cette affaire] devraient fournir aux appelants des assises solides, susceptibles de fonder toute autre action qu'ils estimeraient nécessaire d'intenter devant la Cour suprême de la Colombie-Britannique » (par. 158). Des dépens comme entre parties ont été accordés à l'appelante et à ses actionnaires.

Selon l'appelante, le présent litige constitue l'« autre action » envisagée par le juge Binnie. L'avocat de l'appelante a établi un lien direct entre la présente bataille judiciaire de sa cliente et le refus de notre Cour d'accorder une injonction en 2000. Continuant d'alléguer qu'elle n'a pas eu droit à une réparation convenable il y a près de six ans, l'appelante cherche à faire supporter par les Douanes le fardeau financier de sa nouvelle plainte compte tenu de ces faits nouveaux.

Le présent litige relatif aux dépens est lié aux poursuites émanant de la décision des Douanes, le 5 juillet 2001, de retenir des livres destinés à l'appelante. Ce jour-là, les Douanes ont retenu huit titres — comprenant 34 livres — pour le motif qu'ils étaient obscènes. L'appelante a pu obtenir le dédouanement de quatre de ces titres dans un délai d'un mois. Quant aux quatre titres encore retenus, l'appelante a décidé de demander une révision concernant deux d'entre eux seulement : *Meatmen*, vol. 18, *Special S&M Comics Edition* et *Meatmen*, vol. 24, *Special SM Comics Edition* (les « bandes dessinées Meatmen »). Les Douanes ont de nouveau décidé que ces deux titres étaient obscènes. Prétendant que ces titres avaient été mal classés, l'appelante a, le 14 février 2002, porté cette révision en appel devant la Cour suprême de la Colombie-Britannique, comme elle en avait le droit en vertu des art. 67 et 71 de la *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2e suppl.).

While the litigation with respect to the Meatmen comics proceeded, Customs detained another shipment of books destined for the appellant. Once again, some of the titles detained by Customs were released without the need for a redetermination. But after a redetermination, Customs still found two titles to be obscene: *Of Men, Ropes & Remembrance — The Stories from Bound & Gagged Magazine* and *Of Slaves & Ropes & Lovers* (the "Townsend books"). On September 26, 2003, the appellant appealed this decision to the British Columbia Supreme Court, seeking the same relief it was seeking with respect to the Meatmen comics.

11 Pendant que se déroulait l'instance relative aux bandes dessinées Meatmen, les Douanes ont retenu un autre envoi de livres destiné à l'appelante. Là encore, certains titres retenus par les Douanes ont été dédouanés sans qu'une révision ait été nécessaire. Cependant, après une révision, les Douanes estimaient encore que deux titres étaient obscènes : *Of Men, Ropes & Remembrance — The Stories from Bound & Gagged Magazine* et *Of Slaves & Ropes & Lovers* (les « livres Townsend »). Le 26 septembre 2003, l'appelante a porté cette décision en appel devant la Cour suprême de la Colombie-Britannique, sollicitant la même réparation que pour les bandes dessinées Meatmen.

The parties have agreed to have the appeals relating to the Meatmen comics and the Townsend books heard together. The prohibition of these four titles provides the factual basis for the appellant's claim on the merits.

12 Les parties ont consenti à ce que les appels relatifs aux bandes dessinées Meatmen et aux livres Townsend soient entendus ensemble. L'interdiction de ces quatre titres constitue le fondement factuel de la demande au fond de l'appelante.

In its appeals, the appellant asks for a reversal of the Customs' obscenity determinations, as well as a declaration that Customs has been construing and applying the relevant legislation in an unconstitutional manner. As a remedy, it seeks an injunction restraining Customs from applying certain sections of the *Customs Tariff*, S.C. 1997, c. 36, and the *Customs Act* to its goods. The appellant also requests damages and "[s]pecial or increased costs".

13 Dans ses appels, l'appelante sollicite l'infirmation des décisions en matière d'obscénité rendues par les Douanes, ainsi qu'un jugement déclarant que les Douanes ont interprété et appliqué d'une manière inconstitutionnelle les dispositions législatives pertinentes. À titre de réparation, elle sollicite une injonction interdisant aux Douanes d'appliquer à ses marchandises certaines dispositions du *Tarif des douanes*, L.C. 1997, ch. 36, et de la *Loi sur les douanes*. L'appelante réclame également des dommages-intérêts et des [TRADUCTION] « [d]épens spéciaux ou majorés ».

On August 14, 2002, the appellant also filed a Notice of Constitutional Question. Alleging a breach of s. 2(*b*) of the *Charter*, it is seeking the same remedies as specified above, but is using the constitutional question to broaden the scope of the injunction it seeks. In its Notice of Constitutional Question, the appellant states that it wants an order preventing Customs from applying the relevant sections of the *Customs Tariff* and the *Customs Act* to "anyone or, in the alternative, to the Appellant, until such time as the Court is satisfied that the unconstitutional administration will cease".

14 Le 14 août 2002, l'appelante a aussi déposé un avis de question constitutionnelle. Alléguant une violation de l'al. 2*b*) de la *Charte*, elle demande les mêmes réparations que celles mentionnées plus haut, mais elle se sert de la question constitutionnelle pour élargir la portée de l'injonction demandée. Dans son avis de question constitutionnelle, l'appelante affirme qu'elle veut obtenir une ordonnance empêchant les Douanes d'appliquer les dispositions pertinentes du *Tarif des douanes* et de la *Loi sur les douanes* à [TRADUCTION] « qui que ce soit ou, subsidiairement, à l'appelante jusqu'à ce que la Cour soit convaincue que l'application inconstitutionnelle cessera ».

15 Bennett J. of the British Columbia Supreme Court, who is both the presiding judge in this case and the case management judge, defined the scope of the litigation in her ruling of February 6, 2003 ((2003), 105 C.R.R. (2d) 119, 2003 BCSC 148). Specifically, she approved the appellant's constitutional question and found that the appeal of Customs' decision to prohibit the appellant's books "gives a factual context to the issues raised by Little Sisters" (para. 24). That decision was not appealed.

La juge Bennett de la Cour suprême de la Colombie-Britannique, qui préside la présente affaire et qui est responsable de la gestion de l'instance, a défini la portée du litige dans sa décision du 6 février 2003 ((2003), 105 C.R.R. (2d) 119, 2003 BCSC 148). Plus particulièrement, elle a approuvé la question constitutionnelle de l'appelante et a conclu que l'appel interjeté à l'encontre de la décision des Douanes d'interdire les livres de l'appelante [TRADUCTION] « confère un contexte factuel aux questions soulevées par Little Sisters » (par. 24). Cette décision n'a pas été portée en appel.

16 On January 22, 2004, about a month after this Court released its decision in *Okanagan*, the appellant applied for advance costs, claiming, in the words of Bennett J., that it had "run out of money to pursue the litigation" (para. 6). As James Eaton Deva, a shareholder in the appellant, stated in his affidavit:

> After hearing [the testimony of Anne Kline, the official of Canada Customs who is responsible for making the final determination of obscenity], we were convinced that if her testimony reflected the way Canada Customs approached this issue, then it still had deep systemic problems. If true, then our ten-year battle, and partial victory in the Supreme Court of Canada, had failed to effect any significant change. In that case, a court determination that the *Meatmen* comics were not obscene would not be sufficient. Instead, we became convinced that the only way to rectify the problems in Canada Customs was a systemic remedy, not simply a ruling on individual books. We decided that we had an obligation to seek that remedy.

Le 22 janvier 2004, soit environ un mois après que notre Cour eut rendu l'arrêt *Okanagan*, l'appelante a demandé une provision pour frais en alléguant, pour reprendre les propos de la juge Bennett, qu'elle avait [TRADUCTION] « manqué d'argent pour poursuivre l'instance » (par. 6). Comme l'a indiqué dans son affidavit James Eaton Deva, un actionnaire de l'appelante :

> [TRADUCTION] Après avoir entendu [le témoignage d'Anne Kline, la fonctionnaire de Douanes Canada chargée de rendre la décision définitive en matière d'obscénité], nous étions convaincus que si son témoignage reflétait la façon dont Douanes Canada a abordé cette question, il y avait encore de graves problèmes systémiques. En l'occurrence, nos dix années de bataille et notre victoire partielle en Cour suprême du Canada n'avaient donné lieu à aucun changement significatif. Dans ce cas, une décision judiciaire que les bandes dessinées *Meatmen* n'étaient pas obscènes ne serait pas suffisante. Nous avons acquis la conviction que le seul moyen de remédier aux problèmes de Douanes Canada est d'obtenir une réparation systémique et non une simple décision concernant certains livres. Nous avons décidé que nous avions l'obligation de solliciter cette réparation.

3. Judicial History

3.1 *British Columbia Supreme Court* (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823

3. Historique des procédures judiciaires

3.1 *Cour suprême de la Colombie-Britannique* (2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823

17 On the application for advance costs in the British Columbia Supreme Court, Bennett J. ruled in favour of the appellant. She identified three "discrete, yet

À propos de la demande de provision pour frais présentée en Cour suprême de la Colombie-Britannique, la juge Bennett a statué en faveur linked, arguments" being advanced by the appellant (para. 15). The first issue for which the appellant sought an advance costs award was whether Customs had properly prohibited four titles that the appellant wanted to import (the "Four Books Appeal"). The second issue was whether Customs had addressed the systemic problems identified in *Little Sisters No. 1* (the "Systemic Review"). The third issue was whether the definition of obscenity established by this Court in *R. v. Butler*, [1992] 1 S.C.R. 452, is unconstitutional (the "Constitutional Question").

de l'appelante. Elle a dégagé trois [TRADUCTION] « arguments distincts mais néanmoins connexes » avancés par l'appelante (par. 15). La première question que l'appelante a soulevée dans sa demande de provision pour frais était de savoir si les Douanes avaient interdit à bon droit quatre titres que l'appelante voulait importer (l'« appel concernant les quatre livres »). La deuxième question consistait à déterminer si les Douanes avaient résolu les problèmes systémiques relevés dans l'arrêt *Little Sisters nº 1* (la « révision systémique »). La troisième question était de savoir si la définition d'obscénité établie par notre Cour dans l'arrêt *R. c. Butler*, [1992] 1 R.C.S. 452, est inconstitutionnelle (la « question constitutionnelle »).

Focussing first on the question of financial capacity, Bennett J. linked the "prohibitive" cost of appealing prohibition decisions to the fact that so few of them are brought to court (para. 19). In her brief analysis on this point, she applied a test of whether the litigant "genuinely cannot afford to pay for the litigation" and concluded that the appellant could not (paras. 21-22). Bennett J. also found that replacing the appellant's current counsel was not a "realistic option" (para. 24).

Examinant d'abord la question de la capacité financière, la juge Bennett a établi un lien entre le coût « prohibitif » d'un appel interjeté contre des interdictions et le fait qu'il y ait si peu de ces décisions qui sont soumises aux tribunaux (par. 19). Dans sa brève analyse de cette question, elle a appliqué un critère consistant à déterminer si le plaideur [TRADUCTION] « n'a véritablement pas les moyens de payer les frais occasionnés par le litige », et a conclu que l'appelante n'en avait pas les moyens (par. 21-22). La juge Bennett a également conclu que remplacer l'avocat qui représentait alors l'appelante n'était pas une « option réaliste » (par. 24). 18

Bennett J. then turned to apply this Court's analysis from *Okanagan* separately to each of the three issues raised by the appellant. On the *prima facie* merit requirement, Bennett J. found that there was *prima facie* evidence that Customs was not applying the obscenity test from *Butler* correctly (para. 29). She also gave some credence to the argument that Customs' procedures, under which the decision maker in the internal appeal did not look at the materials presented to the adjudicators at first instance, were flawed (para. 30). This convinced her that the Four Books Appeal satisfied the *prima facie* merit prong of the *Okanagan* test. Bennett J. then disposed of this requirement in respect of the Systemic Review and the Constitutional Question, referring, on the former, to her holding on public importance and,

La juge Bennett a alors appliqué séparément à chacune des trois questions soulevées par l'appelante la grille d'analyse adoptée par notre Cour dans l'arrêt *Okanagan*. Quant à l'exigence de bien-fondé à première vue, elle a conclu qu'il existait une preuve *prima facie* que les Douanes n'appliquaient pas correctement le critère d'obscénité établi dans l'arrêt *Butler* (par. 29). Elle a également ajouté foi, dans une certaine mesure, à l'argument voulant que les méthodes des Douanes, en vertu desquelles la personne chargée de statuer sur l'appel interne n'avait pas examiné les documents présentés aux décideurs en première instance, aient comporté des lacunes (par. 30). Cet argument l'a persuadée que l'appel concernant les quatre livres satisfaisait au volet du bien-fondé à première vue du critère de l'arrêt *Okanagan*. La juge Bennett a ensuite tranché la 19 on the latter, to changes in the decade since *Butler* (paras. 32-33).

question de cette exigence à l'égard de la révision systémique et de la question constitutionnelle, en mentionnant, dans le premier cas, sa conclusion sur l'importance pour le public et, dans le dernier cas, les changements survenus au cours de la décennie ayant suivi l'arrêt *Butler* (par. 32-33).

20 Bennett J. turned next to the question of whether the issues raised "[go] beyond individual interests, are of public importance and have not been decided in other cases" (para. 34). For the Four Books Appeal, she concentrated on the detentions that continue to affect the appellant, the "dearth of case law in this area" and the importance of freedom of expression in a democracy (paras. 35-43). She concluded that, if Customs is indeed applying the legal test for obscenity incorrectly, the issue affects all book importers and is therefore of public importance.

La juge Bennett s'est ensuite demandé si les questions soulevées [TRADUCTION] « transcend[ent] les intérêts individuels, si elles revêtent une importance pour le public et si elles n'ont pas été tranchées dans d'autres affaires » (par. 34). Quant à l'appel concernant les quatre livres, elle s'est concentrée sur les retenues qui continuent de toucher l'appelante, la « rareté de la jurisprudence dans ce domaine » et l'importance de la liberté d'expression dans une démocratie (par. 35-43). Elle a conclu que, si les Douanes appliquent effectivement mal le critère juridique d'obscénité, la question touche alors tous les importateurs de livres et revêt donc une importance pour le public.

21 On the public importance of the Systemic Review, Bennett J. began her analysis by noting the "large magnitude of detentions" by Customs (para. 48). She found that there was "some evidence" of continual targeting of gay and lesbian material, noted that the time requirements for review were not being met, and expressed her concern about some alleged inconsistencies in Customs' detention practices (paras. 49-52). Based on the past litigation between the parties, Bennett J. was sceptical of Customs' claim that it had recently changed its practices (paras. 53-58). In fact, she stated that there was a *prima facie* case that the problems in *Little Sisters No. 1* had not been "sufficiently addressed" (para. 59). Moving from this finding, Bennett J. held that the third requirement of *Okanagan* was satisfied, based on the constitutional issues at stake and the public's interest in knowing whether the government had failed to comply with a court order (para. 61).

Au sujet de l'importance de la révision systémique pour le public, la juge Bennett a commencé son analyse en soulignant [TRADUCTION] « l'ampleur considérable des retenues » effectuées par les Douanes (par. 48). Elle a décidé que « certains éléments de preuve » indiquaient que le matériel destiné aux gais et aux lesbiennes était constamment ciblé, en plus de noter que le délai imparti pour procéder à une révision n'était pas respecté, et de se dire préoccupée par de présumées incohérences dans les pratiques de retenue des Douanes (par. 49-52). En raison des poursuites qui avaient opposé les parties dans le passé, la juge Bennett mettait en doute la valeur de l'argument des Douanes voulant qu'elles aient récemment modifié leurs pratiques (par. 53-58). En fait, elle a affirmé qu'il existait une preuve *prima facie* qu'on ne s'était pas « suffisamment employé » à régler les problèmes relevés dans l'arrêt *Little Sisters n^o 1* (par. 59). Forte de cette conclusion, la juge Bennett a décidé que la troisième exigence de l'arrêt *Okanagan* était remplie compte tenu des enjeux constitutionnels et du fait qu'il était dans l'intérêt du public de savoir si le gouvernement avait omis de se conformer à une ordonnance judiciaire (par. 61).

22 However, Bennett J. did not find that the public importance requirement had been met with respect to the Constitutional Question. Referring to this Court's decisions in *Butler*, *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, and *Little Sisters No. 1*, she held that the Constitutional Question did not raise an issue of public importance that had not been resolved in a previous case, as required by *Okanagan* (paras. 75-87). This holding has not been appealed.

Toutefois, la juge Bennett a estimé que l'exigence de l'importance pour le public n'avait pas été remplie à l'égard de la question constitutionnelle. Mentionnant les arrêts de notre Cour *Butler*, *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, et *Little Sisters n^o 1*, elle a décidé que la question constitutionnelle ne soulevait pas une question d'importance pour le public qui n'avait pas encore été tranchée, comme l'exige l'arrêt *Okanagan* (par. 75-87). Cette décision n'a pas été portée en appel.

23 Having determined that the three requirements in *Okanagan* were satisfied in respect of the Four Books Appeal and the Systemic Review, Bennett J. exercised her discretion in favour of ordering advance costs (paras. 44 and 63). She left the determination of the structure of the advance costs order and the quantum of the award to a later date (para. 94).

Après avoir décidé que les trois conditions de l'arrêt *Okanagan* étaient remplies dans le cas de l'appel concernant les quatre livres et celui de la révision systémique, la juge Bennett a exercé son pouvoir discrétionnaire et a ordonné le versement d'une provision pour frais (par. 44 et 63). Elle a reporté à une autre date la détermination de la structure et du montant de la provision pour frais (par. 94).

3.2 *British Columbia Court of Appeal* (2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94

3.2 *Cour d'appel de la Colombie-Britannique* (2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94

24 Leave to appeal Bennett J.'s advance costs decision to the British Columbia Court of Appeal was initially denied by Prowse J.A., in chambers. Two months later, a three-member panel of the Court of Appeal varied Prowse J.A.'s order and granted leave.

La juge Prowse, siégeant en chambre, a d'abord rejeté la demande d'autorisation de porter en appel devant la Cour d'appel de la Colombie-Britannique la décision de la juge Bennett d'accorder une provision pour frais. Deux mois plus tard, une formation de trois juges de la Cour d'appel a modifié l'ordonnance de la juge Prowse et accueilli la demande d'autorisation.

25 Writing for a unanimous court, Thackray J.A. allowed Customs' appeal. He began by commenting upon what he considered to be an "incompleteness" in the process (para. 25). Specifically, he felt that Bennett J.'s failure to consider the structure of the advance costs order and the quantum of the award undermined her order. After Bennett J.'s original order, the parties themselves had reached an agreement on structure and quantum.

S'exprimant au nom de la cour à l'unanimité, le juge Thackray a accueilli l'appel des Douanes. Il a d'abord commenté ce qu'il considérait comme un [TRADUCTION] « aspect incomplet » du processus (par. 25). Plus précisément, il estimait que l'omission de la juge Bennett d'examiner la structure et le montant de la provision pour frais compromettait son ordonnance. Après l'ordonnance initiale de la juge Bennett, les parties elles-mêmes s'étaient entendues sur la structure et le montant.

26 Turning to the *Okanagan* criteria, Thackray J.A. focussed his attention on the impecuniosity and public importance requirements. On the *prima*

Examinant ensuite le critère de l'arrêt *Okanagan*, le juge Thackray s'est attaché à l'étude des exigences de manque de ressources et d'importance pour *facie* merit requirement, he simply held that it was satisfied because the "case has attained a status above that of being merely frivolous" (para. 28).

le public. En ce qui concerne l'exigence de bien-fondé à première vue, il a simplement conclu qu'elle était remplie parce que [TRADUCTION] « l'affaire n'est plus simplement frivole » (par. 28).

27 Considering the appellant's impecuniosity, Thackray J.A. asked whether it might be possible for the court to hear the Four Books Appeal before the Systemic Review. The effect of doing so would be potentially large cost savings for the public purse, insofar as the result on the Four Books Appeal might shed light on whether the Systemic Review needed to be heard at all and, if so, whether it should be publicly funded (paras. 29 and 45). To the Court of Appeal, the inclusion of the Systemic Review in the litigation represented "an enormous escalation from [the case's] original purpose", making it proper to consider whether an advance costs award — if necessary — could be confined to the Four Books Appeal, at least at first (paras. 36-39 and 44). The Court of Appeal was also reticent to extend this Court's decision in *Okanagan* to a for-profit corporation (para. 41).

Passant à la discussion du manque de ressources de l'appelante, le juge Thackray s'est demandé si le tribunal pourrait entendre l'appel concernant les quatre livres avant d'examiner la question de la révision systémique. Une telle procédure pourrait permettre de réaliser une économie considérable de deniers publics, dans la mesure où l'issue de l'appel concernant les quatre livres pourrait aider à déterminer la nécessité de l'examen de la question de la révision systémique et, dans l'affirmative, s'il devrait être financé par les deniers publics (par. 29 et 45). Selon la Cour d'appel, l'inclusion de la question de la révision systémique dans le litige représentait [TRADUCTION] « un saut énorme par rapport à l'objet initial [de l'affaire] », de sorte qu'il convenait de se demander si l'attribution d'une provision pour frais — dans le cas où elle se révélerait nécessaire — pourrait, dans un premier temps tout au moins, être limitée à l'appel concernant les quatre livres (par. 36-39 et 44). La Cour d'appel hésitait également à appliquer à une société à but lucratif l'arrêt *Okanagan* de notre Cour (par. 41).

28 Thackray J.A. then turned to the public importance requirement. He noted that the Four Books Appeal was a narrow matter that was confined to four specific titles (para. 49). It did not involve broad issues that would affect all book importers.

Le juge Thackray a ensuite examiné l'exigence de l'importance pour le public. Il a fait remarquer que l'appel concernant les quatre livres portait strictement sur quatre titres précis (par. 49). Il ne portait pas sur des questions générales qui toucheraient tous les importateurs de livres.

29 On the Systemic Review, Thackray J.A. canvassed Bennett J.'s reasons in detail. He took issue with the latter's conclusions based on the fact that Customs continues to detain a large number of books, noting that this fact does not indicate that Customs' practices are in any way improper (para. 55). He also observed that the appellant was relying on evidence collected before Customs had purportedly changed its system; at most, such evidence could be relied upon to show how quickly Customs had reacted to *Little Sisters No. 1*, but it could not serve to determine whether all the problems in *Little Sisters No. 1* had eventually been addressed. This

Quant à la révision systémique, le juge Thackray a examiné attentivement les motifs de la juge Bennett. Il s'est dit en désaccord avec ses conclusions fondées sur le fait que les Douanes continuent de retenir un grand nombre de livres, soulignant que ce fait n'indique pas que les pratiques des Douanes sont irrégulières à quelque égard que ce soit (par. 55). Il a ajouté que l'appelante se fondait sur une preuve recueillie avant que les Douanes aient prétendument modifié leur système; au mieux, cette preuve pouvait être utilisée pour démontrer la célérité avec laquelle les Douanes avaient réagi à l'arrêt *Little Sisters nº 1*, mais non pour déterminer si "efficiency" question was significantly less important to the public than the question of whether the problems were addressed at all (para. 57).

les problèmes relevés dans l'arrêt *Little Sisters nº 1* avaient tous éventuellement été résolus. La question de « l'efficacité » était beaucoup moins importante pour le public que celle de savoir si les problèmes étaient un tant soit peu résolus (par. 57).

Finally, Thackray J.A. pointed out that Bennett J. had not considered whether the present litigation could be defined as "special" enough to merit advance costs, as opposed to simply being important (para. 60). Freedom of expression, he stated, is always of public interest, but not every freedom of expression case can satisfy the public importance requirement. In the present case, it was worth considering the fact that the communities on which the appellant's claim would have the greatest impact did not view this case as sufficiently important to undertake funding it (para. 63). What is more, Thackray J.A. was hesitant about spending public funds on litigation that could result in a significant award for the applicant (para. 62).

30

Enfin, le juge Thackray a souligné que la juge Bennett ne s'était pas demandé si le présent litige pouvait être qualifié de suffisamment « particulier » pour justifier une provision pour frais, au lieu de simplement important (par. 60). La liberté d'expression, a-t-il rappelé, est toujours d'intérêt public, mais les affaires où il est question de liberté d'expression ne peuvent pas toutes satisfaire à l'exigence d'importance pour le public. En l'espèce, il convenait de tenir compte du fait que les communautés qui seraient les plus touchées par la demande de l'appelante ne considéraient pas que la présente affaire était suffisamment importante pour qu'elles contribuent à son financement (par. 63). Qui plus est, le juge Thackray hésitait à affecter des deniers publics à un litige à l'issue duquel le demandeur pourrait se voir accorder un montant considérable (par. 62).

In all, the Court of Appeal concluded that the appellant's claim was not of sufficient significance that the public purse should be obligated to help it move forward. Thackray J.A. concluded that "the public has not appointed Little Sisters to this role" as a watchdog, and he was "not satisfied that it is necessary for Little Sisters to be the instrument of reform of Customs" (paras. 72 and 74). Although recognizing the deference owed to Bennett J., the court nonetheless felt that this was an appropriate circumstance to find that the trial judge had erred (para. 66). Accordingly, it set aside her order for advance costs.

31

Dans l'ensemble, la Cour d'appel a statué que la demande de l'appelante ne revêtait pas une importance suffisante pour que le trésor public soit tenu de l'aider à suivre son cours. Le juge Thackray a conclu que [TRADUCTION] « le public n'a pas confié à Little Sisters ce rôle » de surveillance, et il n'était pas « convaincu que Little Sisters doit être l'instrument de réforme des Douanes » (par. 72 et 74). Tout en reconnaissant la nécessité de faire montre de déférence envers la juge Bennett, la cour a néanmoins estimé qu'il convenait, en l'espèce, de conclure que la juge de première instance avait commis erreur (par. 66). La cour a donc annulé son ordonnance accordant une provision pour frais.

4. Analysis

4.1 *Rule in Okanagan*

Okanagan concerned logging rights of four Indian bands on Crown land in British Columbia. These bands had begun logging in order to raise funds for housing and desperately needed social

4. Analyse

4.1 *La règle de l'arrêt Okanagan*

32

L'affaire *Okanagan* portait sur le droit de quatre bandes indiennes à l'exercice d'activités d'exploitation forestière sur des terres publiques en Colombie-Britannique. Ces bandes avaient services. Contending that they had no right to do so, the Minister of Forests served them with stop-work orders and then commenced proceedings to enforce the orders. The bands tried to prevent the matter from going to trial, seeking to have it determined summarily by arguing that it would be impossible for them to finance a full trial.

commencé l'exploitation forestière dans le but de financer la construction de maisons ainsi que des services sociaux dont elles avaient désespérément besoin. Prétendant qu'elles n'avaient aucun droit à cet égard, le ministre des Forêts leur a signifié des ordonnances de cessation des travaux et a ensuite introduit une instance afin de les faire respecter. Les bandes ont tenté d'éviter que l'affaire fasse l'objet d'un procès et ont demandé qu'elle soit tranchée par procédure sommaire pour le motif qu'il leur serait impossible de financer un procès complet.

33 An exceptional convergence of factors occurred in *Okanagan*. At the individual level, the case was of the utmost importance to the bands. They were caught in a grave predicament: the costs of the litigation were more than they could afford, especially given pressing needs like housing; yet a failure to assert their logging rights would seriously compromise those same needs. On a broader level, the case raised aboriginal rights issues of great public importance. There was evidence that the land claim advanced by the bands had *prima facie* merit, but the courts had yet to decide on the precise mechanism for advancing such claims — the fundamental issue of general importance had not been resolved by the courts in other litigation. However the case was ultimately decided, it was in the public interest to have the matter resolved. For both the bands themselves and the public at large, the litigation could not, therefore, simply be abandoned. In these exceptional circumstances, this Court held that the public's interest in the litigation justified a structured advance costs order insofar as it was necessary to have the case move forward.

L'affaire *Okanagan* réunissait un ensemble exceptionnel de facteurs. D'un point de vue individuel, elle revêtait une importance capitale pour les bandes, qui se trouvaient dans une situation très difficile : les coûts du litige dépassaient ce qu'elles pouvaient se permettre, compte tenu surtout de leurs besoins urgents, notamment en matière de logement; l'omission de faire valoir leurs droits d'exercer des activités d'exploitation forestière compromettrait d'ailleurs gravement leurs chances de répondre à ces mêmes besoins. D'un point de vue général, l'affaire soulevait des questions de droits ancestraux d'une grande importance pour le public. Des éléments de preuve indiquaient que la revendication territoriale présentée par les bandes était fondée à première vue, mais les tribunaux n'avaient encore établi aucun mécanisme précis de présentation de ces revendications — la question fondamentale d'importance générale n'avait pas été tranchée par les tribunaux dans le cadre d'une autre instance. Sans égard à l'issue de l'affaire, il était dans l'intérêt du public qu'elle soit tranchée. Donc, tant pour les bandes elles-mêmes que pour le public en général, il n'était simplement pas possible d'abandonner l'instance. Dans ces circonstances exceptionnelles, notre Cour a jugé que l'intérêt du public dans le litige justifiait une ordonnance structurée de provision pour frais dans la mesure où il était nécessaire de permettre à l'affaire de suivre son cours.

34 In essence, *Okanagan* was an evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs. As was explained in that case, the idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a

Essentiellement, l'arrêt *Okanagan* constituait une phase d'évolution — et non une révolution — de l'exercice du pouvoir discrétionnaire que les tribunaux possèdent en matière de dépens. Comme l'a expliqué cet arrêt, on savait depuis longtemps que l'attribution de dépens peut constituer un novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), vol. I, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90.

moyen puissant d'assurer le fonctionnement équitable et efficace du système de justice. L'attribution de dépens est souvent liée à des objectifs d'intérêt général, comme ceux visant à décourager — et, partant, à punir — l'inconduite de la part d'un plaideur : voir M. M. Orkin, *The Law of Costs* (2e éd. (feuilles mobiles)), vol. I, § 205.2(2). Néanmoins, la règle générale fondée sur les principes d'indemnisation, selon laquelle les dépens suivent l'issue de la cause, n'a pas été abrogée. Cela indique que les justifications d'intérêt général et en matière d'indemnisation peuvent coexister en tant que principes sous-jacents d'une attribution convenable de dépens, même si [TRADUCTION] « [l]e principe voulant que la partie qui obtient gain de cause ait droit à ses dépens existe depuis longtemps et ne devrait faire l'objet d'une dérogation que pour de très bonnes raisons » (Orkin, p. 2-39). Le droit de la Colombie-Britannique a repris ce cadre en adoptant comme solution par défaut la règle selon laquelle « les dépens suivent l'issue de la cause », tout en permettant aux juges d'exercer leur pouvoir discrétionnaire de rendre une ordonnance différente : voir par. 57(9) des *Rules of Court* de la Cour suprême de la Colombie-Britannique, B.C. Reg. 221/90.

Okanagan did not establish the access to justice rationale as the paramount consideration in awarding costs. Concerns about access to justice must be considered with and weighed against other important factors. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69; *Office and Professional Employees' International Union, Local 378 v. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald v. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. By the same token, however, a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs: see, e.g., *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 69; *Valhalla Wilderness Society v. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d)

L'arrêt *Okanagan* n'a pas établi que le principe d'accès à la justice constitue désormais la considération primordiale en matière d'attribution de dépens. Les préoccupations concernant l'accès à la justice doivent être examinées et soupesées en fonction d'autres facteurs importants. Le fait de saisir les tribunaux d'une question d'importance pour le public ne signifie pas que le plaideur a automatiquement droit à un traitement préférentiel en matière de dépens : *Succession Odhavji c. Woodhouse*, [2003] 3 R.C.S. 263, 2003 CSC 69; *Office and Professional Employees' International Union, Local 378 c. British Columbia (Hydro and Power Authority)*, [2005] B.C.J. No. 9 (QL), 2005 BCSC 8; *MacDonald c. University of British Columbia* (2004), 26 B.C.L.R. (4th) 190, 2004 BCSC 412. Du même coup, cependant, la partie déboutée qui soulève une question de droit sérieuse et importante pour le public ne doit pas toujours supporter les dépens de l'autre partie : voir, par exemple, *Canadian Foundation for Children,* 35

120 (B.C.S.C.). Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: see *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (B.C.S.C.), at pp. 406-7, aff'd (1995), 126 D.L.R. (4th) 437 (B.C.C.A.).

36 *Okanagan* was a step forward in the jurisprudence on advance costs — restricted until then to family, corporate and trust matters — as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other

Youth and the Law c. Canada (Procureur général), [2004] 1 R.C.S. 76, 2004 CSC 4, par. 69; *Valhalla Wilderness Society c. British Columbia (Ministry of Forests)* (1997), 4 Admin. L.R. (3d) 120 (C.S.C.-B.). Chaque cas est un cas d'espèce où il faut soupeser sérieusement les conséquences d'une attribution de dépens pour chacune des parties : voir *Sierra Club of Western Canada c. British Columbia (Chief Forester)* (1994), 117 D.L.R. (4th) 395 (C.S.C.-B.), p. 406-407, conf. par (1995), 126 D.L.R. (4th) 437 (C.A.C.-B.).

L'arrêt *Okanagan* a fait évoluer la jurisprudence relative aux provisions pour frais — jusqu'alors limitée aux affaires concernant la famille, les sociétés et les fiducies — puisqu'il a permis, dans une affaire de droit public, d'obtenir une ordonnance accordant une provision pour frais dans des circonstances particulières tenant à l'importance des questions en jeu pour le public (*Okanagan*, par. 38). En d'autres termes, bien qu'elles soient maintenant permises, les ordonnances accordant une provision pour frais pour des raisons d'intérêt public doivent demeurer spéciales et, de ce fait, exceptionnelles. Elles doivent être rendues avec circonspection, en dernier recours et dans des circonstances où leur nécessité est clairement établie. Les principes qui précèdent ne sauraient donner lieu à un résultat différent. Les plaideurs qui soulèvent des questions d'intérêt public n'échappent pas toujours à une attribution de dépens défavorable à l'issue de leur procès, mais il est encore plus rare qu'ils puissent bénéficier d'une provision pour frais. Une demande de provision pour frais ne peut être accordée que si le plaideur établit l'impossibilité d'ester en justice et d'attendre l'issue du procès, et si le tribunal est en mesure de répartir équitablement entre les parties le fardeau financier de l'instance.

La nature de la démarche suivie dans l'arrêt *Okanagan* devrait se dégager de l'analyse qu'il prescrit relativement à la provision pour frais dans les affaires d'intérêt public. Le plaideur doit convaincre le tribunal que trois conditions absolues sont remplies (par. 40) :

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais

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.

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.

It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.

First, 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. The justice system must not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs

occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance.

2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers.

3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées.

En analysant ces conditions, le tribunal doit décider, eu égard à toutes les circonstances, si l'affaire est si particulière qu'il serait contraire aux intérêts de la justice de rejeter la demande de provision pour frais, ou s'il devrait envisager d'autres moyens de faciliter l'audition de l'affaire. Le pouvoir discrétionnaire du tribunal lui permet de tenir compte de tous les facteurs pertinents qui émanent des faits.

38 Seule une affaire « rar[e] et exceptionell[e] », qui est suffisamment particulière, peut justifier l'attribution d'une provision pour frais (*Okanagan*, par. 1). Cette norme se voulait sûrement élevée et, bien qu'aucun critère rigide ne puisse être appliqué systématiquement pour décider si une affaire est « suffisamment particulière », il est possible de formuler certaines observations. Comme l'a souligné le juge Thackray, c'est en omettant de vérifier si les circonstances de la présente affaire étaient suffisamment « exceptionnelles » que la juge de première instance a commis une erreur de droit.

39 Premièrement, l'injustice qui découlerait du rejet de la demande doit concerner à la fois le demandeur personnellement et le public en général. Cela signifie que le plaideur dont l'affaire, aussi impérieuse qu'elle puisse être, n'intéresse que lui se verra refuser la provision pour frais. Toutefois, cela ne signifie pas que toute affaire d'intérêt public satisfera à ce critère. Le système de justice ne doit pas tenir lieu de processus d'enquête publique et être inondé d'actions intentées par des demandeurs et des groupes

and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.

40 Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

de défense de l'intérêt public qui souhaitent établir un précédent. Aussi impérieuses qu'elles puissent être, les préoccupations concernant l'accès à la justice ne sauraient justifier notre Cour d'autoriser unilatéralement une révolution dans la planification et le déroulement d'une action en justice.

Deuxièmement, il importe que la provision pour frais demeure une mesure exceptionnelle; il doit être conforme aux intérêts de la justice de l'accorder. Par conséquent, le demandeur doit étudier toutes les autres possibilités de financement, ce qui inclut, sans y être limité, les sources de financement public telles que l'aide juridique et les autres programmes destinés à aider divers groupes à ester en justice. Une provision pour frais ne représente ni un substitut ni un complément de ces programmes. Le demandeur doit également pouvoir démontrer qu'il a tenté, mais en vain, d'obtenir du financement privé au moyen d'une levée de fonds, d'une demande de prêt, d'une convention d'honoraires conditionnels et de toute autre source disponible. Le demandeur qui n'a pas les moyens de payer tous les frais du litige, mais qui n'est pas dépourvu de ressources, doit s'engager à fournir une contribution. Enfin, il y a également lieu d'envisager divers types de mécanismes en matière de dépens, telle l'exemption de dépens en faveur de la partie adverse. Ce faisant, les tribunaux doivent se garder de présumer que l'exercice de créativité dans l'attribution de dépens se justifie toujours; cette mesure reste exceptionnelle et doit être prise dans des circonstances particulières. Les tribunaux devraient garder à l'esprit toutes les possibilités lorsqu'ils sont appelés à concevoir les ordonnances appropriées dans ces circonstances. Ils ne devraient pas non plus présumer que les plaideurs qui remplissent les conditions requises pour se voir attribuer ces sommes doivent absolument en bénéficier. Au Royaume-Uni, où il est possible d'accorder une exemption de dépens (ou des « ordonnances préventives ») dans des circonstances précises, l'ordonnance peut être assortie de la condition que la partie qui l'obtient ne pourra obtenir de l'adversaire que des dépens modestes à l'issue du procès : voir *R. (Corner House Research) c. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, par. 76. Nous souscrivons à cette interprétation nuancée.

Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.

41 Troisièmement, aucune injustice ne sera créée s'il est possible de régler l'affaire en cause ou de tenir compte de l'intérêt public sans accorder une provision pour frais. Là encore, nous devons souligner que les ordonnances de provision pour frais ne sont indiquées qu'en dernier recours. Dans l'affaire *Okanagan*, les bandes avaient tenté, avant de solliciter une provision pour frais, de résoudre leurs différends en évitant purement et simplement la tenue d'un procès. De même, les tribunaux devraient vérifier si une autre affaire visant les mêmes fins est en instance et peut se dérouler sans qu'il soit nécessaire de rendre une ordonnance accordant une provision pour frais. Ils devraient aussi se garder de recourir à ces ordonnances de manière à encourager les litiges purement artificiels qui sont contraires à l'intérêt public.

Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse — or another private party — takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

42 Enfin, l'attribution d'une provision pour frais ne donne pas pour autant carte blanche au plaideur. Au contraire, lorsque le trésor public — ou une autre partie privée — supporte une provision pour frais, le plaideur doit renoncer à exercer un certain contrôle sur la façon dont se déroule l'instance. Il ne peut dépenser l'argent de la partie adverse de manière incontrôlée. Ce type de financement ne signifie pas que la partie qui en bénéficie peut, à son gré, multiplier les heures de préparation, ajouter des témoins experts, recourir à toute procédure disponible ou avancer n'importe quel argument imaginable. Le tribunal lui-même doit prescrire ou approuver une structure précise, puisqu'il assume la responsabilité de vérifier le caractère réaliste du montant accordé.

For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of

43 Par exemple, le tribunal devrait limiter les tarifs et les heures de travail juridique pouvant être facturés, surveiller de près le respect de ses prescriptions par les parties et plafonner la provision pour frais à un montant global convenable. Il devrait également tenir compte du fait que la somme de travail s'ajuste souvent aux ressources disponibles et qu'il est presque certain que le montant « maximal » prévu par le tribunal sera atteint. De même, il devrait envisager la possibilité de déduire le montant de la provision pour frais des dommages-intérêts obtenus à l'issue du procès. Lorsqu'il détermine le montant de la provision pour frais, le tribunal ne doit pas

these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.

oublier que ces ordonnances visent à rétablir un certain équilibre entre les parties et non à créer une égalité parfaite entre elles. Les mécanismes établis par voie législative comme l'aide juridique et les autres programmes destinés à aider divers groupes à ester en justice ne sont d'ailleurs pas de nature à mettre les parties sur un pied d'égalité, et rien ne justifie que l'attribution d'une provision pour frais place la partie qui l'obtient dans une situation plus favorable. La provision pour frais vise à fournir l'aide minimale nécessaire pour que l'affaire suive son cours.

44 A court awarding advance costs must be guided by the condition of necessity. For parties with unequal financial resources to face each other in court is a regular occurrence. 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 all through the mechanism of advance costs 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.

L'état de nécessité doit guider le tribunal qui accorde une provision pour frais. Il arrive régulièrement que des parties ne disposant pas des mêmes ressources financières s'affrontent devant un tribunal. Des personnes aux moyens limités se voient trop souvent dissuadées de poursuivre l'instance en raison des coûts qui s'y rattachent. De tels problèmes sont préoccupants, mais ils ne donnent pas normalement lieu à l'attribution d'une provision pour frais. Nous ne voulons pas minimiser l'iniquité qu'ils créent. Au contraire, nous croyons que ces problèmes sont trop graves pour que notre Cour puisse prétendre les résoudre tous au moyen de la provision pour frais. Les tribunaux ne devraient pas chercher, de leur propre initiative, à mettre sur pied un autre système complet d'aide juridique. Cela constituerait un exemple d'activisme judiciaire imprudent et malencontreux.

4.2 *Applying the Rule in Okanagan to the Facts of This Appeal*

4.2 *Application de la règle de l'arrêt Okanagan aux faits du présent pourvoi*

45 The appellant has asked this Court to award it advance costs with respect to two separate issues it raises in its litigation against Customs. The Four Books Appeal concerns Customs' prohibition of four books imported by the appellant for sale in its store. The Systemic Review, on the other hand, involves a broad investigation of Customs' practices relating to obscenity prohibitions.

L'appelante a demandé à notre Cour de lui accorder une provision pour frais relativement à deux questions distinctes qu'elle soulève dans son action contre les Douanes. L'appel concernant les quatre livres porte sur l'interdiction des Douanes visant les quatre livres que l'appelante a importés pour les vendre dans son magasin. Par contre, la révision systémique met en cause une vaste enquête menée sur les pratiques des Douanes en matière d'interdiction pour cause d'obscénité.

46 We will first consider the merit of these claims, and will then discuss their public importance. We

Nous examinerons d'abord le bien-fondé de ces demandes et nous analyserons ensuite l'importance want to emphasize that the impecuniosity requirement, though listed first in *Okanagan*, cannot be used to give impecunious litigants a *prima facie* right to advance costs, as some interveners before this Court have suggested. Accordingly, we will consider it last. The question of impecuniosity will not even arise where a case is not otherwise special enough to merit this exceptional award.

qu'elles revêtent pour le public. Nous tenons à souligner que, bien qu'elle constitue la première condition énumérée dans l'arrêt *Okanagan*, l'exigence du manque de ressources ne saurait servir à reconnaître aux plaideurs impécunieux un droit *prima facie* à la provision pour frais, comme l'ont laissé entendre certains intervenants devant notre Cour. Nous l'examinerons donc en dernier. La question du manque de ressources ne se pose même pas lorsque l'affaire n'est pas par ailleurs suffisamment particulière pour justifier cette mesure exceptionnelle.

4.2.1 Standard of Review

4.2.1 Norme de contrôle

A trial judge enjoys considerable discretion in fashioning a costs award. This discretion has two corollaries.

Le juge de première instance jouit d'un pouvoir discrétionnaire considérable en matière de dépens. Ce pouvoir discrétionnaire comporte deux corollaires. 47

First, a plethora of options are available to a judge when rendering a decision on costs. While the general rule is that costs follow the cause, as we have seen, this need not always be the case.

Premièrement, un juge dispose d'une variété considérable d'options lorsqu'il se prononce sur les dépens. Bien que, comme nous l'avons vu, la règle générale veuille que les dépens suivent l'issue de la cause, ce principe ne s'applique pas toujours automatiquement. 48

Second, a judge's decision on costs will generally be insulated from appellate review. In the past, this Court has established that costs awards should not be interfered with lightly: see *Odhavji Estate*, at para. 77. But this does not mean that no decision on costs should ever be interfered with. For instance, in *Okanagan*, advance costs were granted on appeal after having been denied by the trial judge. A costs award can be set aside if it is based on an error in principle or is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 2004 SCC 9, at para. 27. In exercising their discretion regarding costs, trial judges must, especially in making an order as exceptional as one awarding advance costs, be careful to stay within recognized boundaries.

Deuxièmement, la décision d'un juge relative aux dépens échappe généralement à l'examen en appel. Dans le passé, notre Cour a établi que les attributions de dépens ne doivent pas être modifiées à la légère : voir l'arrêt *Succession Odhavji*, par. 77. Toutefois, cela ne signifie pas qu'une décision relative aux dépens ne doit jamais être révisée. Par exemple, dans l'arrêt *Okanagan*, la provision pour frais a été accordée en appel après avoir été refusée par le juge de première instance. L'attribution de dépens peut être annulée si elle repose sur une erreur de principe ou si elle est nettement erronée : *Hamilton c. Open Window Bakery Ltd.*, [2004] 1 R.C.S. 303, 2004 CSC 9, par. 27. En exerçant son pouvoir discrétionnaire en matière de dépens et plus particulièrement en rendant une ordonnance aussi exceptionnelle que celle accordant une provision pour frais, le juge de première instance doit prendre soin de respecter les limites reconnues. 49

Despite the deference owed to the exercise of a discretion by a trial judge, we conclude that, in the

Malgré la déférence dont il faut faire montre à l'égard de l'exercice d'un pouvoir discrétionnaire 50 present case, Bennett J. went beyond the boundaries this Court set in *Okanagan*.

d'un juge de première instance, nous concluons qu'en l'espèce la juge Bennett a outrepassé les limites que notre Cour a établies dans l'arrêt *Okanagan*.

4.2.2 *Prima Facie* Merit and Public Importance

4.2.2 Le bien-fondé à première vue et l'importance pour le public

51 As was explained in *Okanagan*, the merit requirement involves the following consideration:

> 2. The claim to be adjudicated [must be] *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. [Emphasis added; para. 40.]

The explicit reference in this passage to the interests of justice suggests that the test requires something more than mere proof that one's case has sufficient merit not to be dismissed summarily. Rather, an applicant must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation. The very wording of the requirement confirms that the interests of justice will not be jeopardized every time a litigant is forced to withdraw from litigation for financial reasons. The reason for this is that the context in which merit is considered is conditioned by the need to show that the case is exceptional. This does not mean that the case must be shown to have exceptional merit; rather, it must be shown to have sufficient merit to satisfy the court that proceeding with it is in the interests of justice. In the case at bar, as found by Bennett J., there is obviously a serious issue justifying a decision to have the matter proceed to trial. The question is whether a claim such as the one made by the appellant is sufficient to support a finding that the requirement of special circumstances is met. It is difficult to dissociate one from the other. We think there is no need to do so and will proceed accordingly.

Comme la Cour l'a expliqué dans l'arrêt *Okanagan*, l'exigence de bien-fondé comporte l'examen de la condition suivante :

> 2. La demande [doit valoir] *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers. [Nous soulignons; par. 40.]

La mention explicite des intérêts de la justice dans cet extrait indique que cette condition exige plus que la simple preuve que l'affaire est suffisamment fondée pour ne pas être rejetée sommairement. Le demandeur doit plutôt prouver qu'il ne serait pas conforme aux intérêts de la justice qu'un manque de ressources l'oblige à mettre fin à l'affaire. Le libellé même de la condition confirme que les intérêts de la justice ne sont pas compromis dans tous les cas où un plaideur est forcé de se désister pour des raisons financières. En effet, le contexte dans lequel le bien-fondé est examiné est coloré par la nécessité d'établir le caractère exceptionnel de l'affaire. Cela signifie non pas qu'il faut démontrer que l'affaire a un bien-fondé exceptionnel, mais plutôt qu'elle est suffisamment fondée pour convaincre le tribunal qu'il est conforme aux intérêts de la justice de l'instruire. En l'espèce, comme l'a conclu la juge Bennett, il existe de toute évidence une question sérieuse justifiant une décision d'instruire l'affaire. Cette question est de savoir si une demande comme celle de l'appelante suffit pour autoriser la conclusion que l'exigence des circonstances particulières est remplie. La dissociation des deux questions demeure difficile. Nous croyons qu'il n'est pas nécessaire de les dissocier et nous poursuivrons notre analyse sur cette base.

52 Operating a business with some dependence on imports, the appellant is right to be concerned

L'appelante, dont les activités commerciales dépendent en partie d'importations, a raison de about what it alleges to be a discriminatory attitude by Customs towards its merchandise. Yet, the Four Books Appeal is extremely limited in scope. The appellant has advanced no evidence suggesting that these four books are integral, or even important, to its operations; furthermore, as mentioned above, book sales represent only 30 to 40 percent of its operations. In this context, we find it impossible to conclude that the appellant is in the extraordinary position that would justify an award of advance costs in the Four Books Appeal.

s'inquiéter de l'attitude discriminatoire, selon elle, que les Douanes adoptent à l'égard de ses marchandises. Pourtant, l'appel concernant les quatre livres conserve une portée extrêmement limitée. L'appelante n'a présenté aucun élément de preuve indiquant que ces quatre livres font partie intégrante de ses activités ou même qu'ils sont importants pour celles-ci; de plus, comme nous l'avons vu, les ventes de livres ne représentent que 30 à 40 pour 100 de ses activités. Dans ce contexte, nous estimons qu'il est impossible de conclure que l'appelante se trouve dans la situation extraordinaire qui justifierait l'attribution d'une provision pour frais relativement à l'appel concernant les quatre livres.

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The same can be said of the Systemic Review. What the appellant is essentially attempting to achieve with the Systemic Review is to expand the scope of the litigation in the hope of bolstering its legal rights in individual cases; as a frequent importer, it will ultimately benefit more from a general investigation now than it would if it were left to challenge each and every detention and prohibition when it happened. This is an efficient and commendable approach, and one that Bennett J. approved. However, it is not one that would bring the case within the scope of the advance costs remedy. Specifically, the Systemic Review is not necessarily based on the prohibition, detention, or even delay of any books belonging to the appellant.

On peut en dire autant de la révision systémique. Essentiellement, l'appelante recourt à la révision systémique pour tenter d'élargir la portée du litige de manière à renforcer les droits que lui reconnaît la loi dans chaque cas particulier; comme elle importe fréquemment des marchandises, une enquête générale effectuée maintenant lui sera, en fin de compte, plus profitable que si elle avait à contester chaque retenue et interdiction au moment où elles surviennent. Il s'agit d'une démarche efficace et louable que la juge Bennett a approuvée. Toutefois, ce n'est pas une démarche qui justifie, en l'espèce, l'attribution d'une réparation consistant en une provision pour frais. Plus précisément, la révision systémique n'est pas nécessairement fondée sur le fait que des livres appartenant à l'appelante sont interdits, retenus ou tardent même à lui parvenir.

54

We do not wish to understate the appellant's constitutional rights or the history of its relations with Customs. In fact, we agree that the appellant's history of litigation against Customs provides important context for the present dispute. From the appellant's perspective, this history represents the height of frustration with the government: the appellant already took Customs to court years ago, argued all the way to this Court that it was the victim of unconstitutional practices, and succeeded in securing an important victory that stopped just shy of providing it with the remedy it sought. The appellant says that any institutional changes made since then are insufficient, and that Customs may still be

Nous ne voulons pas sous-estimer les droits constitutionnels de l'appelante ni ses rapports antérieurs avec les Douanes. En fait, nous reconnaissons que les poursuites qu'elle a engagées auparavant contre les Douanes situent le présent litige dans un contexte important. Du point de vue de l'appelante, ces poursuites représentent le summum de la frustration pouvant être éprouvée envers le gouvernement : l'appelante a déjà poursuivi les Douanes en justice il y a plusieurs années, elle a prétendu jusque devant notre Cour qu'elle était victime de pratiques inconstitutionnelles et elle a réussi à remporter une importante victoire qui ne lui a cependant pas permis d'obtenir la réparation qu'elle victimizing it in the exact same way. It wants this investigated. Why, it demands to know, must it now abandon its quest of so many years simply because it lacks the funds to do so?

sollicitait. Selon l'appelante, les changements institutionnels qui auraient été apportés depuis lors sont insuffisants, et il se peut que les Douanes continuent de s'en prendre à elle exactement de la même manière. Elle sollicite une enquête à ce propos. Pourquoi, veut-elle savoir, devrait-elle abandonner maintenant la démarche qu'elle a entreprise depuis tant d'années simplement parce qu'elle manque de ressources pour la poursuivre?

55 The answer, we submit, is not as frustrating as the appellant implies. First of all, the appellant has not provided *prima facie* evidence that it continues to be targeted. On the contrary, when probed on this issue, counsel for the appellant simply suggested that Customs was cunning enough to stop its targeting once litigation had commenced. The appellant relies mainly on the fact that Customs continues to detain large quantities of imported material generally, including high proportions of gay and lesbian material; it then concludes that a significant percentage of these detentions must be improper. With respect, we cannot agree that this is *prima facie* evidence of targeting. Customs' own decisions, on which the appellant relies, to overturn a high percentage of its detentions only lend credence to Customs' argument that it has tried to scrutinize fairly those titles — like the appellant's — that remain detained. The fact that Customs continues to detain a number of titles is not, in itself, *prima facie* evidence of anything. There is no *prima facie* evidence that Customs is performing its task improperly, much less unconstitutionally.

À notre avis, la réponse à cette question n'est pas aussi frustrante que le laisse entendre l'appelante. D'abord, l'appelante n'a présenté aucune preuve *prima facie* qu'elle continue d'être ciblée. Au contraire, lorsqu'on l'a interrogé à ce sujet, l'avocat de l'appelante a simplement indiqué que les Douanes ont été suffisamment astucieuses pour cesser leur ciblage dès qu'une action était intentée. L'appelante invoque principalement le fait que les Douanes continuent généralement de retenir une grande quantité de matériel importé, dont une grande part de matériel gai et lesbien; elle en déduit qu'il doit survenir un fort pourcentage de retenues irrégulières. En toute déférence, nous ne pouvons pas accepter que cela constitue une preuve *prima facie* de ciblage. Les décisions — invoquées par l'appelante — que les Douanes ont elles-mêmes prises d'annuler un pourcentage élevé de leurs retenues ne font que renforcer l'argument des Douanes selon lequel elles ont tenté d'examiner de manière équitable les titres, comme ceux de l'appelante, qui sont encore retenus. Le fait que les Douanes continuent de retenir un certain nombre de titres ne constitue pas en soi une preuve *prima facie* de quoi que ce soit. Il n'existe aucune preuve *prima facie* que les Douanes s'acquittent de leur tâche de manière irrégulière et encore moins de manière inconstitutionnelle.

56 Since there is insufficient *prima facie* evidence to conclude that the appellant remains the victim of unfair targeting, the Court's focus for the Systemic Review must turn to the more general question of the efficacy of Customs' changes to its practices in the wake of *Little Sisters No. 1*, and how the effect of those changes on the appellant may still be such as to make individual challenges pointless. In fact, if one accepts that the Systemic Review is merely

En l'absence d'une preuve *prima facie* suffisante pour conclure que l'appelante continue d'être injustement ciblée, l'examen de la Cour relatif à la révision systémique doit être axé sur la question plus générale de l'efficacité des changements que les Douanes ont apportés à leurs pratiques à la suite de l'arrêt *Little Sisters n^o 1*, et sur celle de savoir comment ces changements rendraient inutiles les contestations individuelles en raison de l'incidence about the speed with which Customs reacted to *Little Sisters No. 1* in the past, it must be concluded that the appellant is at present enjoying the very outcome it sought in that first series of court battles. Customs' changes cannot be determined to be insufficient on the basis of the number of decisions that have been unfavourable to the appellant.

qu'ils auraient encore sur l'appelante. En réalité, si l'on accepte que la révision systémique ne concerne que la célérité avec laquelle les Douanes ont réagi à l'arrêt *Little Sisters n^o 1* dans le passé, il faut conclure que l'appelante bénéficie actuellement du résultat même qu'elle sollicitait lors de la première série de batailles judiciaires. Les changements apportés par les Douanes ne peuvent pas être qualifiés d'insuffisants en raison du nombre de décisions défavorables à l'appelante.

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The appellant is wrong to suggest that the history of its relations with Customs justifies its advance costs application. Binnie J.'s anticipation, at the conclusion of his majority reasons in *Little Sisters No. 1*, of subsequent litigation between the parties did not give the appellant the right to proceed by drawing on the public purse or even suggest that this was a possibility. Nor can this history be used to establish that an injustice will result if insufficient funds preclude the appellant from arguing the Systemic Review. In making the comment in question, Binnie J. merely recognized that the appellant, like any other importer, could rely on this Court's decision should any further disputes with Customs arise. What is more, his comments were clearly premised on the expectation that Customs would change — and was already changing — its practices to accord with the Court's ruling. None of the evidence that has been presented has convinced us that this premise should now be rejected.

L'appelante a tort de laisser entendre que ses rapports antérieurs avec les Douanes justifient sa demande de provision pour frais. Le fait que le juge Binnie ait prévu, à la fin de ses motifs majoritaires dans l'arrêt *Little Sisters n^o 1*, que les parties pourraient recourir de nouveau aux tribunaux ne donne pas à l'appelante le droit de faire appel aux deniers publics et n'indique même pas qu'il s'agissait là d'une possibilité. Ces rapports antérieurs ne peuvent pas non plus être invoqués pour établir qu'une injustice résultera si l'appelante ne peut pas débattre la question de la révision systémique parce qu'elle dispose de fonds insuffisants. En formulant les commentaires en question, le juge Binnie a simplement reconnu que l'appelante, comme tout autre importateur, pourrait se fonder sur l'arrêt de notre Cour si d'autres différends avec les Douanes survenaient. Qui plus est, ses commentaires étaient clairement fondés sur le fait qu'il s'attendait à ce que les Douanes modifient — ce qu'elles avaient déjà entrepris de faire — leurs pratiques de manière à les rendre conformes à la décision de la Cour. Aucun des éléments de preuve présentés ne nous a convaincus qu'il faille écarter cette prémisse.

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But even if the appellant had provided more convincing evidence on this point, and even if the Systemic Review had been framed with more pressing concerns in mind, we still believe that the requirement of exceptional circumstances has not been met. The reason for this is that the battle the appellant seeks to fight through the Systemic Review is, strictly speaking, unnecessary. It is the Four Books Appeal that lies at the heart of the appellant's claim against Customs; the Systemic Review is simply an attempt by the appellant to investigate Customs' practices independently of this context.

Cependant, même si l'appelante avait fourni une preuve plus convaincante à cet égard, et même si la révision systémique avait pu être formulée en fonction de préoccupations plus urgentes, nous continuerions de croire que l'exigence des circonstances exceptionnelles n'est pas remplie. Cette conclusion s'infère du fait que la bataille que l'appelante veut livrer au moyen de la révision systémique est, à proprement parler, inutile. C'est l'appel concernant les quatre livres qui se situe au cœur de l'action que l'appelante a intentée contre les Douanes; la révision systémique ne représente qu'une simple

This observation is underscored by the fact that the appellant initially did not even intend to pursue the Systemic Review, but changed its strategy once it began to believe that systemic problems remained after *Little Sisters No. 1*. Simply put, the appellant's direct interest in this litigation disappears if its books are released — something that it seeks to achieve uniquely through the Four Books Appeal.

tentative de l'appelante d'enquêter sur les pratiques des Douanes indépendamment du présent contexte. Cette conclusion est d'ailleurs confrontée au fait qu'au départ l'appelante n'avait même pas l'intention de tenter d'obtenir la révision systémique, mais qu'elle s'est ravisée lorsqu'elle a commencé à croire que des problèmes systémiques persistaient après l'arrêt *Little Sisters nº 1*. Bref, l'appelante n'aura plus d'intérêt direct dans la présente instance si ses livres sont dédouanés — ce qu'elle cherche à obtenir uniquement au moyen de l'appel concernant les quatre livres.

59 The nature of the injustice at stake in the case at bar can be contrasted with the one that was at stake in *Okanagan*. In that case, the bands, having been thrust into a situation requiring litigation, could not afford to pay for the litigation themselves, but could not afford the costs of forfeiting it either. The appellant in the instant case, on the other hand, has taken the Systemic Review upon itself even though it characterizes the fight as one that "makes no business sense".

Il convient de comparer la nature de l'injustice en cause en l'espèce avec celle dont il était question dans l'affaire *Okanagan*. Dans cette affaire, les bandes qui avaient été placées dans une situation requérant la tenue d'un procès n'avaient pas les moyens de payer elles-mêmes les frais occasionnés par le procès et ne pouvaient pas non plus se permettre de renoncer à ester en justice. Par contre, en l'espèce, l'appelante a pris l'initiative de la révision systémique bien qu'elle qualifie la bataille [TRADUCTION] « d'illogique sur le plan commercial ».

60 The requirement that the issues raised transcend the litigant's individual interests and that it be profoundly important that they be resolved in the interests of justice (*Okanagan*, at para. 46) can be disposed of with little difficulty where the Four Books Appeal is concerned. Because the appellant has chosen to investigate Customs' general operations under the Systemic Review, it is clear that the Four Books Appeal concerns no interest beyond that of the appellant itself and, as a consequence, is not special enough to justify an award of advance costs. This is especially so given that all the legal issues the appellant has canvassed in that appeal were already considered, and ruled upon, by this Court in *Little Sisters No. 1*. As the appellant itself observes at para. 10 of its factum, Binnie J. left the door open to further actions by the appellant with the words, "[t]hese findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (*Little Sisters No. 1*, at para.

Dans le cas de l'appel concernant les quatre livres, il est possible de déterminer sans trop de difficulté si on satisfait à l'exigence que les questions soulevées dépassent le cadre des intérêts du plaideur et qu'il soit profondément important qu'elles soient réglées d'une manière conforme aux intérêts de la justice (*Okanagan*, par. 46). Comme l'appelante a choisi d'enquêter sur les activités générales des Douanes dans le cadre de la révision systémique, il est clair que l'appel concernant les quatre livres ne vise aucun autre intérêt que celui de l'appelante elle-même et qu'il n'est donc pas suffisamment particulier pour justifier l'attribution d'une provision pour frais. Un tel constat est d'autant plus exact du fait que les questions juridiques que l'appelante a débattues dans le cadre de cet appel ont déjà été examinées et tranchées par notre Cour dans l'arrêt *Little Sisters nº 1*. L'appelante elle-même fait remarquer, au par. 10 de son mémoire, que le juge Binnie a laissé le champ libre à d'autres recours de l'appelante lorsqu'il a précisé que « [c]es constatations devraient fournir aux appelants des assises

158). At most, the Four Books Appeal deals with the application of *Little Sisters No. 1* to a specific set of facts.

solides, susceptibles de fonder toute autre action qu'ils estimeraient nécessaire d'intenter devant la Cour suprême de la Colombie-Britannique » (*Little Sisters nº 1*, par. 158). Au mieux, l'appel concernant les quatre livres porte sur l'application de l'arrêt *Little Sisters nº 1* à un ensemble particulier de faits.

Bennett J. held that the public importance of the constitutional issues underlying the appellant's claim and the broad impact of Customs' procedures sufficed to satisfy the public importance criterion. As mentioned above, she failed to address the special circumstances criterion. Yet, the Four Books Appeal does not address the issue of whether Customs is, in general, correctly applying the legal test for obscenity (para. 43). It is limited to the question of whether Customs reached the right result in prohibiting four specific titles. While evidence about Customs' general practices may arise incidentally in the course of the Four Books Appeal, and while some of those concerns may have been addressed in the course of the discovery of one witness for Customs, the broader issues raised by the appellant are being considered separately, as part of the Systemic Review. The appellant has defined the Four Books Appeal in a narrow, fact-specific manner such that this appeal cannot meet the requirements for public importance set out above that would have brought it within the category of special cases discussed by the Court in *Okanagan*.

61 La juge Bennett a conclu que l'importance pour le public des questions constitutionnelles qui sous-tendent la demande de l'appelante et l'incidence générale des méthodes des Douanes suffisaient pour satisfaire au critère de l'importance pour le public. Comme nous l'avons mentionné, elle n'a pas abordé le critère des circonstances particulières. L'appel concernant les quatre livres ne porte toutefois pas sur la question de savoir si, en général, les Douanes appliquent correctement le critère juridique d'obscénité (par. 43). Il est limité à la question de savoir si les Douanes sont arrivées au bon résultat en interdisant quatre titres particuliers. Même si des éléments de preuve sur les pratiques générales des Douanes peuvent surgir de manière incidente dans le cadre de l'appel concernant les quatre livres et que certaines de ces préoccupations peuvent avoir été abordées lors de l'interrogatoire préalable d'un témoin des Douanes, les questions générales soulevées par l'appelante sont examinées séparément dans le cadre de la révision systémique. L'appelante a défini l'appel concernant les quatre livres d'une manière si étroite et axée sur les faits que le présent pourvoi ne peut satisfaire à l'exigence mentionnée plus haut de l'importance pour le public qui l'aurait fait entrer dans la catégorie des cas particuliers que la Cour a analysée dans l'arrêt *Okanagan*.

Following the same reasoning, the Systemic Review offers greater promise on the public importance prong, however. To the extent that the narrowness of the Four Books Appeal discounts any potential for public importance, the breadth of the Systemic Review should satisfy this prong of the test. Because the review was framed so expansively, the appellant argues that a court's decision on this point will be of great interest both to importers and to Canada's lesbian, gay, bisexual and trans-identified communities.

62 Toutefois, suivant le même raisonnement, la révision systémique s'avère plus prometteuse à l'égard du volet de l'importance pour le public. Dans la mesure où le caractère étroit de l'appel concernant les quatre livres écarte toute possibilité d'importance pour le public, l'ampleur de la révision systémique devrait satisfaire à ce volet du critère. Selon l'appelante, parce que la révision a été conçue de manière si large, une décision judiciaire à cet égard présentera un grand intérêt à la fois pour les importateurs et pour les communautés lesbienne, gaie, bisexuelle et transidentifiée du Canada.

63 The appellant has sought to demonstrate the far-reaching importance of this litigation by arguing that proof that Customs has disobeyed a court order would have great ramifications. To the appellant, it seems, the integrity of Customs, if not of the entire government, is at stake in this appeal. And indeed, we would surmise that a finding that Customs had deliberately misled the court would be shocking to most Canadians. This country boasts a proud history of compliance by the executive with orders of the judiciary, and we should be loath to take it for granted. However, short of imputing bad faith to Customs, a finding that its present practices do not meet this Court's dictates would not impugn the integrity of the government at large. This would merely indicate that Customs has not met its specific obligations as defined by this Court. The appropriate remedy in such a situation could range from an award of damages to injunctive relief. But a finding such as this, even if supported by the kind of evidence this Court found lacking in *Little Sisters No. 1*, does not rise to the level of general public importance simply because it concerns a public body. If it did, the same logic would seem to imply that it is an exceptional matter every time a public actor is alleged to be acting illegally — from a Crown corporation involved in a labour dispute to an administrative agency acting beyond its jurisdiction.

L'appelante a tenté de démontrer que la présente instance revêt une importance considérable, en soutenant que la preuve que les Douanes ne se sont pas conformées à une ordonnance judiciaire aurait des répercussions majeures. Aux yeux de l'appelante, semble-t-il, c'est l'intégrité des Douanes, voire de tout le gouvernement, qui est en jeu dans le présent pourvoi. En réalité, nous sommes d'avis de présumer qu'une conclusion selon laquelle les Douanes ont délibérément induit le tribunal en erreur consternerait la plupart des Canadiens. Notre pays s'enorgueillit d'une tradition de respect des ordonnances du pouvoir judiciaire par le pouvoir exécutif, mais nous devrions nous garder de tenir cela pour acquis. Toutefois, sans aller jusqu'à imputer de la mauvaise foi aux Douanes, conclure que leurs pratiques actuelles ne respectent pas les prescriptions de notre Cour ne compromettrait pas l'intégrité du gouvernement en général. Cela indiquerait simplement que les Douanes ne se sont pas acquittées des obligations particulières qui leur ont été prescrites par notre Cour. Dans un tel cas, la réparation convenable pourrait aller des dommages-intérêts à une injonction. Toutefois, même si elle est étayée par le type de preuve que notre Cour a jugé manquante dans l'arrêt *Little Sisters n^o 1*, une telle conclusion ne revêt pas une importance générale pour le public du seul fait qu'elle vise un organisme public. Si tel était le cas, le même raisonnement semblerait indiquer qu'une affaire est exceptionnelle dans tous les cas où on allègue qu'une entité publique agit illégalement — ce qui peut aller de la société d'État qui est mêlée à un conflit de travail à l'organisme administratif qui outrepasse sa compétence.

64 The appellant also argues that this dispute is unique because of the constitutional rights involved, which engage the critical value of freedom of expression. It portrays itself as a champion of *Charter* values. But not all *Charter* litigation is of exceptional public importance, even if it involves allegations of infringements of freedom of expression. It is not enough to contend that the *Charter* breach, if proven, would have implications beyond the individual litigant. What must be proved is that the alleged *Charter* breach begs to be resolved in the public interest. In the context of *Okanagan*, this meant proving that there were issues that had to be

L'appelante soutient également que le présent différend est exceptionnel du fait que les droits constitutionnels qui y sont en cause font intervenir la valeur cruciale de la liberté d'expression. Elle se décrit comme le défenseur des valeurs de la *Charte*. Toutefois, les poursuites fondées sur la *Charte* ne revêtent pas toutes une importance exceptionnelle pour le public, même dans le cas où elles comportent des allégations d'atteinte à la liberté d'expression. Il ne suffit pas de prétendre que la violation de la *Charte*, si elle est prouvée, aurait des répercussions non limitées au plaideur en question. Il faut prouver qu'il est dans l'intérêt public de déterminer resolved one way or the other. The exceptional circumstances in that public interest case were related not so much to obtaining a certain result as to ensuring that the state's and bands' rights and obligations were defined properly — and definitively — in a context where it seemed important that the court develop a proper method for adjudicating land claims. Thus, not every case that could, once decided, be seen as being of public importance should be viewed as a special case within the meaning of *Okanagan*. Recognizing a case as special cannot be justified solely by reference to one particular desired or apprehended outcome of the litigation. It must be based on the nature of the litigation itself.

si l'allégation de violation de la *Charte* est fondée. Dans le contexte de l'affaire *Okanagan*, cela signifiait qu'il fallait prouver que certaines questions devaient être tranchées d'une manière ou de l'autre. Les circonstances exceptionnelles dans cette affaire d'intérêt public ne consistaient pas tant à obtenir un résultat déterminé qu'à assurer que les droits et obligations de l'État et des bandes soient définis correctement — et de manière définitive — dans un contexte où il paraissait important que le tribunal établisse une bonne méthode de règlement des revendications territoriales. Ainsi, les affaires qui, une fois tranchées, pouvaient être perçues comme étant d'importance pour le public ne devaient pas toutes être considérées comme étant un cas particulier au sens de l'arrêt *Okanagan*. La reconnaissance de la nature particulière d'une affaire ne saurait se justifier uniquement en fonction de l'issue souhaitée ou appréhendée du litige. Elle doit être fondée sur la nature du litige lui-même.

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In the present appeal, the argument is that the litigation is of exceptional public importance because Customs might be shown to be acting unconstitutionally. The corollary to this statement is that the litigation would not be of exceptional public importance if Customs were shown to be acting in accordance with its constitutional duties. Thus, a valid claim that a case is of public importance would depend on the outcome of the case. But if, in a case like the one at bar, the exceptional importance criterion, as properly defined, is found to be met, there is a danger that this would amount to prejudging the case on its merits. If the appellant succeeds on the merits, one might then conclude, based on the *Charter* breach it has proved, that the case is at the appropriate level of public importance. But if the appellant does not succeed, the court endorses Customs' current system and no finding of unconstitutionality is made, nothing in this case will have implications beyond the appellant. For a court to hold, in this situation, that the exceptional public importance criterion is met could therefore imply that the court has already decided what its holding on the merits will be.

En l'espèce, on prétend que le litige revêt une importance exceptionnelle pour le public parce qu'il pourrait être démontré que les Douanes agissent de manière inconstitutionnelle. Le corollaire de cet argument est que le litige ne revêtirait pas une importance exceptionnelle pour le public s'il était démontré que les Douanes agissent conformément à leurs obligations constitutionnelles. La validité de l'argument voulant qu'une affaire revête de l'importance pour le public dépendrait donc de l'issue de cette affaire. Toutefois, si, dans un cas comme la présente affaire, on conclut que le critère — correctement défini — de l'importance exceptionnelle pour le public est respecté, on risque alors d'en venir à préjuger de l'affaire quant au fond. Si l'appelante a gain de cause sur le fond, on pourrait alors conclure, compte tenu de la violation de la *Charte* dont elle a prouvé l'existence, que l'affaire revêt l'importance voulue pour le public. Mais si l'appelante n'a pas gain de cause, si le tribunal entérine le système actuel des Douanes et si aucune conclusion d'inconstitutionnalité n'est tirée, l'affaire n'aura alors de répercussions que sur l'appelante. Par conséquent, si un tribunal concluait, dans ce cas, que le critère de l'importance exceptionnelle pour le public est respecté, cela pourrait signifier qu'il a déjà décidé quelle sera sa conclusion quant au fond.

66 Bennett J. was very sensitive to concerns about prejudging issues and approached her advance costs analysis with great caution. However, we respectfully believe that it was an error, in a case like this, to hold that the public importance requirement was satisfied. Where only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met. It is in general only when the public importance of a case can be established regardless of the ultimate holding on the merits, that a court should consider this requirement from *Okanagan* satisfied.

La juge Bennett, très soucieuse de ne pas préjuger des questions, a abordé avec beaucoup de circonspection son analyse de la provision pour frais. Toutefois, nous estimons en toute déférence qu'il était erroné, dans un cas comme la présente affaire, de conclure que l'exigence de l'importance pour le public était remplie. Dans le cas où un seul des résultats possibles quant au fond pourrait rendre l'affaire importante pour le public, le tribunal ne devrait pas conclure que l'exigence de l'importance pour le public est remplie. En général, un tribunal devrait considérer que cette exigence de l'arrêt *Okanagan* est remplie uniquement dans le cas où l'importance d'une affaire pour le public peut être établie sans égard à la décision qui sera rendue en définitive sur le fond.

4.2.3 Impecuniosity

4.2.3 Manque de ressources

67 In a case like the present one, it is not even necessary for a court to consider the applicant's impecuniosity. The access to justice purpose of advance costs cannot be triggered absent the kind of exceptional circumstances that the Court discussed in *Okanagan*.

Dans un cas comme la présente affaire, il n'est même pas nécessaire qu'un tribunal prenne en considération le manque de ressources du demandeur. L'objectif d'accès à la justice visé par la provision pour frais ne peut pas entrer en jeu en l'absence du type de circonstances exceptionnelles que la Cour a analysées dans l'arrêt *Okanagan*.

68 We agree that corporations are not barred from receiving advance costs awards. However, the judge should ask in every case whether the applicant has made the effort that is required to satisfy a court that all other funding options have been exhausted. In *Okanagan*, this requirement was described as follows:

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. [para. 40]

Nous convenons que les sociétés ne sont pas inadmissibles à la provision pour frais. Toutefois, le juge devrait se demander, dans chaque cas, si le demandeur a fait tout ce qui était nécessaire pour convaincre un tribunal qu'il a épuisé toutes les autres options en matière de financement. Cette exigence a été décrite ainsi dans l'arrêt *Okanagan* :

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance. [par. 40]

69 In evaluating whether the impecuniosity requirement is met, a court should also consider the potential cost of the litigation. In the present appeal, the cost estimate for the trial is well over $1 million. The Four Books Appeal alone is somewhat more affordable according to the appellant's estimate:

Pour déterminer si l'exigence du manque de ressources est remplie, un tribunal devrait aussi prendre en compte le coût potentiel du litige. En l'espèce, le coût estimatif du procès s'élève à plus d'un million de dollars. Selon l'estimation effectuée par l'appelante, à lui seul l'appel concernant approximately $300,000. Such cost estimates form an integral part of the evidence; the court should subject them to scrutiny, and then use them to consider whether the litigant is impecunious to the extent that an advance costs order is the only viable option.

A court should generally consider whether the applicant has tried to obtain a loan. In the criminal law context, financing litigation through credit is something that courts will look for before deciding that an accused's failure to obtain counsel merits a constitutional remedy: *R. v. Keating* (1997), 159 N.S.R. (2d) 357 (C.A.). An application for advance costs should demand no less.

The impecuniosity requirement from *Okanagan* means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered. Advance costs should not be used as a smart litigation strategy; they are the last resort before an injustice results for a litigant, and for the public at large.

5. Conclusion

Once the three-part test from *Okanagan* has been met, the court must exercise its discretion to decide whether advance costs ought to be awarded or whether another type of order is justified. In exercising its discretion, the court must remain sensitive to any concerns that did not arise in its analysis of the test. Although the appellant in the case at bar has failed to meet the *Okanagan* test, we believe that this case also raises issues that should in any event have prompted Bennett J. to exercise her discretion against an advance costs award in respect of the Systemic Review even if the *Okanagan* test had been satisfied.

As we have stressed, the *Okanagan* test requires that an advance costs award be used only as a last resort in order to protect the public interest. The

les quatre livres est un peu plus abordable : environ 300 000 $. Ces estimations de coûts font partie intégrante de la preuve; le tribunal devrait les examiner attentivement et s'en servir pour déterminer si le plaideur manque de ressources à tel point qu'une ordonnance accordant une provision pour frais est la seule option valable.

Un tribunal devrait généralement vérifier si le demandeur a tenté d'obtenir un prêt. En droit criminel, la possibilité de recourir au crédit pour financer un litige est quelque chose que les tribunaux vérifient avant de décider si l'omission d'un accusé d'obtenir l'assistance d'un avocat justifie une réparation constitutionnelle : *R. c. Keating* (1997), 159 N.S.R. (2d) 357 (C.A.). Une demande de provision pour frais ne devrait commander rien de moins. 70

L'exigence du manque de ressources prévue dans l'arrêt *Okanagan* signifie qu'une provision pour frais ne pourra être ordonnée que s'il s'avère impossible de procéder autrement. La provision pour frais ne saurait être utilisée comme une stratégie d'instance habile; elle constitue plutôt un dernier recours avant que soit commise une injustice pour un plaideur et pour le public en général. 71

5. Conclusion

Une fois respecté le critère à trois volets de l'arrêt *Okanagan*, le tribunal doit exercer son pouvoir discrétionnaire de décider s'il convient d'accorder une provision pour frais ou de rendre un autre type d'ordonnance. Dans l'exercice de son pouvoir discrétionnaire, le tribunal doit demeurer attentif à toute préoccupation qui n'a pas été soulevée dans son analyse du critère. Bien qu'en l'espèce l'appelante n'ait pas satisfait au critère de l'arrêt *Okanagan*, nous croyons que l'affaire soulève également des questions qui, de toute façon, auraient dû inciter la juge Bennett à exercer son pouvoir discrétionnaire de refuser la provision pour frais à l'égard de la révision systémique même si le critère de l'arrêt *Okanagan* avait été respecté. 72

Comme nous l'avons souligné, le critère de l'arrêt *Okanagan* exige que la provision pour frais ne soit accordée qu'en dernier recours pour protéger 73 test prevents an applicant from succeeding in an advance costs application where legal action is unnecessary (the merit requirement) or where private funding has not been diligently sought (the impecuniosity requirement). But there will sometimes be other options that are not contemplated by the *Okanagan* analysis.

74 Before the appellant raised the advance costs issue, Bennett J. had decided that it could proceed with three issues before the British Columbia Supreme Court: the Four Books Appeal, the Systemic Review, and the Constitutional Question. In her ruling on advance costs, Bennett J. dealt with each of these issues separately. This was a proper approach to take. However, after finding that the three steps of the *Okanagan* test had been satisfied, Bennett J. should still have addressed the question of whether there was any way to prevent the injustice she had identified other than through an advance costs award.

75 There was in fact another possibility: to consider the Four Books Appeal before hearing the Systemic Review. Resolving — or at least hearing evidence on — the Four Books Appeal offered the hope of avoiding an advance costs award for the Systemic Review. Bennett J. should therefore have considered this approach as an alternative to her award. In these circumstances, it would be premature to award advance costs for the Systemic Review. Though her subsequent decision on advance costs in respect of the Systemic Review would still need to stop short of prejudging the issues raised therein, it is possible that the evidence and argument presented in the Four Books Appeal would be helpful in scrutinizing the Systemic Review for merit and exceptional public importance — and perhaps for determining whether it was even necessary.

76 On the other hand, we recognize that the possible advantages of pursuing the Four Books Appeal

l'intérêt public. Il empêche la partie qui demande la provision pour frais de l'obtenir lorsqu'une action en justice est inutile (l'exigence de bien-fondé) ou qu'un financement privé n'a pas été sollicité assidûment (l'exigence du manque de ressources). Cependant, des possibilités non envisagées dans l'analyse effectuée dans l'arrêt *Okanagan* sont susceptibles de se présenter.

Avant que l'appelante soulève la question de la provision pour frais, la juge Bennett avait décidé qu'elle pouvait soumettre trois questions à la Cour suprême de la Colombie-Britannique : l'appel concernant les quatre livres, la révision systémique et la question constitutionnelle. Dans sa décision relative à la provision pour frais, la juge Bennett a examiné chacune de ces questions séparément. C'était une bonne façon de procéder. Toutefois, après avoir conclu que les trois volets du critère de l'arrêt *Okanagan* avaient été respectés, la juge Bennett aurait tout de même dû se demander s'il y avait un autre moyen que la provision pour frais d'empêcher l'injustice qu'elle avait relevée.

En fait, une autre option existait : examiner l'appel concernant les quatre livres avant de passer à la révision systémique. En tranchant l'appel concernant les quatre livres — ou à tout le moins en entendant la preuve s'y rapportant — on pourrait espérer éviter l'attribution d'une provision pour frais à l'égard de la révision systémique. La juge Bennett aurait donc dû considérer cette démarche comme une solution de rechange à la provision pour frais qu'elle a consentie. Dans ces circonstances, il serait prématuré d'accorder une provision pour frais à l'égard de la révision systémique. Même si, dans sa décision ultérieure sur la provision pour frais relative à la révision systémique, elle devrait se garder de préjuger des questions qui y sont soulevées, la preuve et l'argumentation présentées dans le cadre de l'appel concernant les quatre livres pourraient se révéler utiles pour examiner le bien-fondé et l'importance exceptionnelle pour le public de la révision systémique — voire même pour statuer sur leur nécessité.

Par ailleurs, nous reconnaissons que procéder en premier lieu à l'audition de l'appel concernant first could be outweighed by the disadvantages of doing so. When issues are segregated, the potential for inefficiency abounds. Witnesses examined on the first issue may need to be recalled to address the second. Redundant expert reports may be sought. The length of the trial itself may grow exponentially. If it were eventually determined that advance costs in respect of the Systemic Review were warranted, these additional costs would be borne by the public purse; this result should definitely be avoided.

les quatre livres comporte des inconvénients susceptibles de l'emporter sur les avantages qu'il peut y avoir de le faire. Si les questions sont traitées séparément, les risques d'inefficacité demeurent nombreux. Les témoins interrogés relativement à la première question peuvent devoir être appelés de nouveau à déposer relativement à la deuxième question. Des rapports d'expertise redondants peuvent être sollicités. Le procès risque de se prolonger de façon exponentielle. Si on décidait, en fin de compte, qu'une provision pour frais était justifiée à l'égard de la révision systémique, ces frais supplémentaires seraient supportés par le trésor public; ce résultat doit assurément être évité.

77 To proceed in this way is consistent with the principle stated above that an applicant must be willing to relinquish some control over the litigation to benefit from an advance costs award. Since a litigant who has been awarded advance costs is proceeding with the aid of funds received from another party, the litigant must accept certain limitations. These may be strictly financial — e.g., caps on spending — but they may also go more directly to the litigant's litigation strategy. For instance, spending limits will mean that litigants proceeding with the aid of advance costs awards may be limited in their choice and in the number of counsel and experts. Also, the court awarding advance costs must consider whether the litigant's chosen method of proceeding at trial is compatible with the notion of advance costs being a last resort and may thus need to establish a framework for the conduct of the planned litigation. In the present appeal, while the appellant understandably wants to resolve the issues in the Systemic Review as quickly as possible, it may be preferable to proceed first with the Four Books Appeal before deciding the issues arising out of the Systemic Review. In response to an argument of this sort, an applicant must be able to prove either that modifying its litigation strategy would not be more efficient and would not lead to demonstrable savings, or that retaining its original litigation strategy is necessary to ensure that justice is done.

Cette façon de procéder est conforme au principe énoncé précédemment, à savoir qu'un demandeur doit être disposé à renoncer à exercer un certain contrôle sur le déroulement de l'instance pour bénéficier d'une provision pour frais. Le plaideur qui a obtenu une provision pour frais doit consentir à certaines limites étant donné qu'il utilise alors les fonds reçus d'une autre partie. Ces limites peuvent être strictement financières — par exemple, plafonds en matière de dépenses — mais elles peuvent aussi toucher plus directement la stratégie d'instance du plaideur. Par exemple, le plafonnement des dépenses signifie que le plaideur bénéficiant d'une provision pour frais peut disposer d'une moins grande latitude quant au choix d'un avocat et d'experts, et quant à leur nombre. De même, le tribunal qui accorde une provision pour frais doit se demander si la façon dont le plaideur a choisi d'ester en justice est compatible avec le concept de l'attribution de la provision pour frais en dernier recours, et il peut ainsi devoir établir un cadre régissant le déroulement de l'instance projetée. En l'espèce, bien que l'appelante veuille naturellement résoudre le plus rapidement possible les questions soulevées dans la révision systémique, il peut se révéler préférable d'instruire préalablement l'appel concernant les quatre livres avant de trancher ces questions. Pour répondre à ce genre d'argument, un demandeur doit être en mesure de prouver soit qu'il ne gagnerait pas en efficacité et ne réaliserait pas des économies appréciables s'il modifiait sa stratégie d'instance, soit qu'il doit s'en tenir à sa stratégie d'instance initiale pour que justice puisse être rendue.

78 The rule in *Okanagan* arose on a very specific and compelling set of facts that created a situation that should hardly ever reoccur. As this Court held in *Okanagan*, an advance costs award should remain a last resort. The costs award in the instant case did not meet the required standards.

La règle de l'arrêt *Okanagan* découlait d'un ensemble de faits très particuliers et déterminants qui engendraient une situation qui ne devrait guère se reproduire. Comme notre Cour l'a décidé dans l'arrêt *Okanagan*, la provision pour frais ne devrait être accordée qu'en dernier recours. En l'espèce, l'attribution de dépens ne respectait pas les normes requises.

6. Disposition

6. Dispositif

79 The appeal is dismissed, with the parties to bear their own costs.

Le pourvoi est rejeté, les parties devant supporter leurs propres frais.

The reasons of McLachlin C.J. and Charron J. were delivered by

Version française des motifs de la juge en chef McLachlin et de la juge Charron rendus par

80 THE CHIEF JUSTICE — I have read the joint reasons of my colleagues Justices Bastarache and LeBel to dismiss the appeal, as well as those of Justice Binnie to allow it.

LA JUGE EN CHEF — J'ai pris connaissance des motifs conjoints de mes collègues les juges Bastarache et LeBel, qui sont d'avis de rejeter le pourvoi, ainsi que des motifs du juge Binnie, qui l'accueillerait.

81 I would dismiss the appeal, although for somewhat different reasons than Bastarache and LeBel JJ. I cannot, with respect, concur entirely in the statement of the test put forth in either the reasons of Bastarache and LeBel JJ., nor in the reasons of Binnie J. This disagreement leads me to a different formulation of the test and a different analysis.

Je suis d'avis de rejeter le pourvoi, bien que ce soit pour des motifs différant quelque peu de ceux de mes collègues les juges Bastarache et LeBel. En toute déférence, je ne puis souscrire entièrement à leur formulation du critère, pas plus qu'à celle de mon collègue le juge Binnie, ce qui m'amène donc à le formuler autrement et à procéder à une analyse différente.

I. Test for Awarding Interim Costs

I. Le critère applicable en matière de provision pour frais

82 The law does not require a party to provide advance financing of the claim of its opponent as a general rule. Litigation proceeds on the basis that each party must finance its own case, subject to post-litigation costs awards. Sometimes, the state provides assistance to an impecunious party, through legal aid. Sometimes, lawyers assist a needing party by offering *pro bono* services or by working on a contingency fee arrangement. These possibilities do not negate the general rule that each party must finance its own litigation.

En règle générale, la loi n'oblige pas une partie à verser une provision pour frais destinée à financer l'action intentée par son adversaire. Dans un litige, chaque partie doit payer ses propres frais, sous réserve des dépens auxquels elle peut être condamnée à l'issue de l'instance. Parfois, l'État vient au secours d'une partie impécunieuse, au moyen de l'aide juridique. Il arrive aussi que des avocats aident une partie dans le besoin en lui offrant bénévolement leurs services ou en concluant avec elle une convention d'honoraires conditionnels. L'existence de ces possibilités n'écarte pas pour autant la règle générale voulant que chaque partie finance sa cause.

However, in certain cases raising special circumstances, judges, invoking their equitable jurisdiction, may order one party to pay the other's interim costs if "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time": *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.). Such an order is rare, and may be made only in "special circumstances", where necessary to avoid unfairness or injustice. Such orders have been made in certain trust, bankruptcy, corporate and family cases. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, this Court held that the public interest in litigation could support a finding of exceptional circumstances sufficient to permit an award of interim costs. In such cases, policy interests often supersede the interest to the litigant, and the issues are of significance not only to the parties, but to the broader community. As LeBel J., for the Court, wrote:

In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. . . . [para. 38]

In *Okanagan*, the third condition that must be met before a court can order interim costs is described in terms of "special interest", more particularly special interest established by the public importance of the litigation. The test for interim costs orders generally as set out in *Okanagan* reads as follows:

There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be

Toutefois, dans certaines affaires qui présentent des circonstances particulières, un juge peut invoquer sa compétence d'equity pour ordonner à une partie de verser à l'autre partie une provision pour frais si [TRADUCTION] « en raison de sa pauvreté, la personne ne pourra pas faire entendre sa cause à moins que la cour n'ordonne au défendeur de payer entre-temps une certaine somme à la demanderesse » : *Jones c. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.). Ces ordonnances sont rares et ne peuvent être rendues que dans des « circonstances particulières », lorsqu'elles sont nécessaires pour éviter une iniquité ou injustice. Elles ont été accordées dans certaines affaires concernant les fiducies, la faillite, les sociétés et la famille. Dans l'arrêt *Colombie-Britannique (Ministre des Forêts) c. Bande indienne Okanagan*, [2003] 3 R.C.S. 371, 2003 CSC 71, notre Cour a statué que l'intérêt public dans une instance pouvait justifier de conclure à l'existence de circonstances exceptionnelles suffisantes pour permettre l'attribution d'une provision pour frais. En pareil cas, des considérations d'intérêt général priment souvent l'intérêt du plaideur, et les questions soulevées revêtent de l'importance non seulement pour les parties au litige, mais encore pour la collectivité en général. Comme le juge LeBel l'a affirmé au nom de la Cour : 83

Sous ces deux aspects, les causes de droit public en tant que catégorie se distinguent des litiges civils ordinaires. Elles peuvent être considérées comme une sous-catégorie dans laquelle les « circonstances particulières » qui sont nécessaires pour que l'on puisse justifier l'octroi de provisions pour frais tiennent à l'importance des questions en jeu pour le public. . . [par. 38]

Dans l'arrêt *Okanagan*, la troisième condition à remplir pour qu'un tribunal puisse ordonner le versement d'une provision pour frais fait état d'un « intérêt spécial » et, plus particulièrement, l'intérêt spécial tenant à l'importance de l'instance pour le public. Selon l'arrêt *Okanagan*, le critère généralement applicable en matière de provision pour frais est le suivant : 84

La jurisprudence pose plusieurs conditions à l'exercice de ce pouvoir, toutes devant être présentes pour qu'une provision pour frais soit accordée. La partie qui granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be 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. . . . in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court. [Emphasis added; para. 36.]

85 Again, in applying the test, the Court, *per* LeBel J., stated:

Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. [Emphasis added; para. 46.]

86 However, in setting out the test in the context of public interest litigation at para. 40 of *Okanagan*, the third condition of special circumstances was expressed in terms of public interest without express reference to special circumstances. The third branch is described there as follows: "3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."

87 Notwithstanding the restricted formulation of the third requirement of the test at para. 40 of *Okanagan*, it is clear from the overall tenor of the reasons in *Okanagan* that the Court did not intend to depart from the common law requirement that

sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans cette ordonnance, de faire entendre sa cause. Elle doit prouver *prima facie* que sa cause possède un fondement suffisant pour justifier son instruction devant le tribunal. De plus, il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs. [. . .] [N]ormalement, lorsque le tribunal exerce sa compétence en equity pour ordonner de telles provisions pour frais parce qu'il conclut qu'il y va de l'intérêt de la justice, il doit ressortir de la preuve que les trois conditions sont réunies : le manque de ressources nécessaires, une cause qui vaut d'être instruite et des circonstances spéciales. [Je souligne; par. 36.]

Là encore, en appliquant le critère, la Cour, s'exprimant sous la plume du juge LeBel, a affirmé :

Si j'applique les conditions que j'ai énoncées à la preuve en l'espèce telle que le juge en chambre l'a appréciée, je suis d'avis qu'il est satisfait à chacune d'elles. Les intimés ne disposent pas de ressources suffisantes et ne peuvent faire entendre leur cause sans ordonnance de paiement d'une provision pour frais. L'affaire vaut d'être instruite. Les questions que l'on cherche à soulever au procès sont d'une importance cruciale pour la population de la Colombie-Britannique, tant autochtone que non autochtone, et une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Bref, les circonstances de l'espèce sont effectivement particulières, voire exceptionnelles. [Je souligne; par. 46.]

Toutefois, en énonçant le critère dans le contexte d'une instance d'intérêt public, au par. 40 de l'arrêt *Okanagan*, la Cour a décrit la troisième condition des circonstances particulières ou spéciales sous l'angle de l'intérêt public, sans mentionner expressément les circonstances particulières ou spéciales. Le troisième volet du critère y est décrit ainsi : « 3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées. »

Malgré la formulation restrictive du troisième volet du critère figurant au par. 40 de l'arrêt *Okanagan*, il ressort clairement de la teneur globale des motifs de cet arrêt que la Cour n'entendait pas déroger à la condition de common law selon special circumstances be established as a precondition of interim costs. The test for interim costs in public interest litigation should not be less exacting than the test for interim costs generally. Indeed, there is no reason why they should not be the same. In applying the test, as discussed, the Court confirmed that the search is not merely for a matter of public interest, but for the very special circumstances required to justify this extraordinary order.

laquelle la provision pour frais ne peut être ordonnée que si l'existence de circonstances particulières est préalablement établie. Le critère applicable à la provision pour frais dans une instance d'intérêt public ne devrait pas être moins exigeant que celui généralement applicable en matière de provision pour frais. En fait, rien ne justifie qu'ils diffèrent. Comme nous l'avons vu, la Cour a confirmé que, dans l'application du critère, il faut se demander non seulement si l'affaire est d'intérêt public, mais également si l'on est en présence des circonstances très particulières qui sont requises pour justifier cette ordonnance exceptionnelle.

88

I therefore proceed on the basis that the three criteria for an order for advance costs are: (1) impecuniosity; (2) a meritorious case; and (3) special circumstances making this extraordinary exercise of the court's power appropriate. This formulation differs from that used by my colleagues Bastarache and LeBel JJ. in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances in the sense indicated. The third requirement of special circumstances has been found in cases involving trusts, family maintenance, corporate and bankruptcy matters, and, in *Okanagan*, in cases involving issues of public importance. However, public importance is not enough in itself to meet the third requirement. The ultimate question is whether the matter of public interest rises to the level of constituting special circumstances. As with all equitable orders, the order is in the court's discretion, provided the conditions are made out. However, absent these conditions, it cannot be made.

Je tiens donc pour acquis que les trois conditions qui doivent être réunies pour qu'une ordonnance accordant une provision pour frais soit rendue sont les suivantes : (1) le manque de ressources, (2) l'affaire vaut d'être instruite et (3) l'existence de circonstances particulières justifiant l'exercice exceptionnel de ce pouvoir judiciaire. Cette formulation diffère de celle de mes collègues les juges Bastarache et LeBel en ce que la troisième condition veut non seulement que l'affaire soit d'intérêt public, mais qu'elle présente des circonstances particulières au sens indiqué. On a conclu que la troisième condition, celle des circonstances particulières, était remplie dans des affaires concernant les fiducies, le soutien familial, les sociétés et la faillite, et, dans l'arrêt *Okanagan*, dans des affaires soulevant des questions d'importance pour le public. Cependant, l'importance pour le public n'est pas suffisante en soi pour remplir la troisième condition. En définitive, il s'agit de savoir si l'affaire d'intérêt public présente des circonstances particulières. Comme pour toutes les ordonnances d'equity, cette ordonnance relève du pouvoir discrétionnaire du tribunal, qui peut la rendre seulement s'il est établi que les conditions sont remplies. En l'absence de ces conditions, l'ordonnance ne peut pas être rendue.

II. Application of the Test to This Case

II. Application du critère à la présente affaire

89

How the third requirement of the test is formulated makes a difference in this case. Indeed, it makes a critical difference. The chambers judge applied the formulation of the test found at

La façon de formuler la troisième condition n'est pas sans incidence en l'espèce. En fait, elle a une incidence cruciale. La juge en chambre a appliqué le critère tel qu'il est formulé au par. 40 de l'arrêt para. 40 of *Okanagan* ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823). She found impecuniosity, merit and public interest. Having done so, she explained the exercise of her residual discretion in two short paragraphs. In all of this, she never discussed the critical condition that the case displayed "special circumstances".

Okanagan ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823). Elle a conclu qu'il y avait un manque de ressources et que l'affaire valait d'être instruite et était d'intérêt public, puis elle a expliqué l'exercice de son pouvoir discrétionnaire résiduel dans deux courts paragraphes, le tout sans jamais analyser la condition cruciale que l'affaire présente des « circonstances particulières ».

90 The Court of Appeal, in setting aside the chambers judge's order for interim costs, relied on this error ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94). Thackray J.A. pointed out that the chambers judge did not consider whether the litigation could be defined as "special" enough — as opposed to simply being important — to merit advance costs (para. 60).

La Cour d'appel invoque cette erreur pour annuler l'ordonnance de la juge en chambre accordant une provision pour frais ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94). Le juge Thackray a souligné que la juge en chambre ne s'était pas demandé si l'instance pouvait être qualifiée de suffisamment « particulière » — au lieu de simplement importante — pour justifier l'attribution d'une provision pour frais (par. 60).

91 I agree with the Court of Appeal that this constituted a critical error, justifying disturbing the chambers judge's order for interim costs.

Je conviens avec la Cour d'appel que cela constituait une erreur déterminante qui justifiait de modifier l'ordonnance de la juge en chambre accordant la provision pour frais.

92 The standard for an appellate court setting aside an order for interim costs is stated succinctly by LeBel J. in *Okanagan* (at para. 43):

> An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

Dans l'arrêt *Okanagan* (par. 43), le juge LeBel énonce brièvement la norme applicable à l'annulation en appel d'une ordonnance accordant une provision pour frais :

> Une cour d'appel peut et doit intervenir lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Comme la Cour l'a dit dans *Pelech c. Pelech*, [1987] 1 R.C.S. 801, p. 814-815, les conditions d'exercice du pouvoir discrétionnaire du juge constituent des critères juridiques et leur définition, tout comme leur non-application ou leur mauvaise application, pose des questions de droit susceptibles de révision en appel.

93 Major J., at para. 82, agreed and added:

> I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

Here, as the Court of Appeal held, the chambers judge misapplied the criteria relevant to the exercise of her discretion by failing to consider whether

Au paragraphe 82, le juge Major s'est dit du même avis et a ajouté ceci :

> Je reconnais également qu'une mauvaise application des critères relatifs à l'exercice du pouvoir discrétionnaire constitue une erreur de droit.

En l'espèce, comme l'a conclu la Cour d'appel, la juge en chambre a mal appliqué les critères relatifs à l'exercice de son pouvoir discrétionnaire en the case was special enough to justify the extraordinary measure of ordering the respondents to pay the appellant's interim costs. That constitutes an error of law, attracting appellate review.

94 For the reasons that follow, I conclude, as do my colleagues Bastarache and LeBel JJ., that the third pre-condition of an order for interim costs is not met in this case, not because the case entirely lacks public interest, as they assert, but because it does not rise to the level of the special circumstances required to give the court jurisdiction to make the order. In my view, this case does not fall into the narrow class of cases where one party may be ordered to pay the interim costs of the other party. If this case qualifies for advance costs, so will many other cases involving constitutional issues and other issues of public importance. This Court's decision in *Okanagan* was not intended to provide a general funding mechanism for important cases.

1. *Inability to Pay*

95 Under *Okanagan*, the first question is whether Little Sisters "genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, [whether] the litigation would be unable to proceed if the order were not made" (para. 40). This involves an examination of the cost of the projected litigation and the appellant's ability to meet those costs.

96 The scope of the case is central to this issue. Customs argued that an appeal regarding four of the books may determine whether a broader review of systemic practices is necessary, and that therefore the question of whether Little Sisters could afford the Four Books Appeal should be determined first. The Court of Appeal found that Bennett J. erred

ne se demandant pas si l'affaire était suffisamment particulière pour justifier la mesure exceptionnelle consistant à ordonner aux intimés de verser une provision pour frais à l'appelante. Il s'agit d'une erreur de droit qui donne ouverture à une révision en appel.

Pour les motifs qui suivent, je conclus, à l'instar de mes collègues les juges Bastarache et LeBel, que la présente affaire ne remplit pas la troisième condition préalable de l'ordonnance accordant une provision pour frais, non pas en raison de l'absence totale d'intérêt public, comme ils l'affirment, mais parce qu'elle ne présente pas les circonstances particulières requises pour qu'un tribunal soit fondé à rendre cette ordonnance. À mon avis, elle n'entre pas dans la catégorie restreinte des affaires où une partie peut se voir ordonner de payer une provision pour frais à l'autre partie. Si la présente affaire réunit les conditions requises pour qu'une provision pour frais puisse être ordonnée, il en ira de même pour de nombreuses autres affaires soulevant des questions constitutionnelles ou d'autres questions d'importance pour le public. L'arrêt *Okanagan* de notre Cour ne visait pas à établir un mécanisme général de financement des affaires importantes.

1. *Incapacité de payer*

Suivant l'arrêt *Okanagan*, il faut d'abord se demander si Little Sisters « n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, [si] elle serait incapable d'agir en justice sans l'ordonnance » (par. 40). Il faut, à cette fin, s'interroger sur le coût de l'instance projetée et sur la capacité de l'appelante de le supporter.

La portée de l'affaire est au cœur de cette question. Les Douanes ont fait valoir qu'un appel concernant quatre des livres peut indiquer si un examen plus large des pratiques systémiques est nécessaire, et qu'il y a donc lieu de commencer par vérifier si Little Sisters avait les moyens de payer les frais occasionnés par l'appel concernant in failing to consider whether Little Sisters could afford to pursue the appeal of the four books, rather than the broader systemic appeal.

les quatre livres. La Cour d'appel a conclu que la juge Bennett avait commis une erreur en omettant de se demander si Little Sisters avait les moyens de poursuivre l'appel concernant les quatre livres au lieu de l'appel plus large sur les pratiques systémiques.

97 Like my colleagues, I am content to proceed on the basis of the Four Books Appeal. However, I disagree with the Court of Appeal's conclusion that it was "speculati[ve]" for Bennett J. to find the cost of that appeal exceeded Little Sisters' financial resources. The high cost of appealing specific prohibitions was noted by this Court in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"): the "cost of challenging [prohibitions] through the various levels of administrative review" make it difficult — if not "completely impracticable" to contest them (*per* Iacobucci J., at para. 230). More importantly, Little Sisters presented extensive evidence of the resources required to advance this appeal, and established to the motion judge's satisfaction that the cost was beyond its means.

À l'instar de mes collègues, je m'en tiendrais à l'appel concernant les quatre livres. Toutefois, je ne puis souscrire à la conclusion de la Cour d'appel selon laquelle la juge Bennett s'est livrée à des [TRADUCTION] « conjectures » en décidant que Little Sisters n'avait pas les moyens de financer l'appel en question. Dans l'arrêt *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69 (« *Little Sisters n^{o} 1* »), notre Cour a fait état du coût élevé d'un appel visant des interdictions particulières : « les coûts qu'entraîne [la] contestation [d'une interdiction] aux différents niveaux de révision administrative » font en sorte qu'il est difficile — voire « totalement impossible en pratique » de la contester (le juge Iacobucci, par. 230). Qui plus est, Little Sisters a présenté une preuve abondante au sujet des ressources requises pour interjeter l'appel qui nous intéresse et a démontré à la satisfaction de la juge en chambre qu'elle n'avait pas les moyens de supporter ce coût.

98 The intervener Attorney General of Ontario submitted that, much like the test for public interest standing, the test for advance costs should consider whether there are other parties capable of bringing the issue before the courts. It proposes this as a way of ensuring that interim costs orders only be issued where absolutely necessary, while also reducing the risk of plaintiff shopping. Bastarache and LeBel JJ. adopt this submission, while Binnie J. rejects it. I agree with Binnie J. on this point. As LeBel J. stated in *Okanagan*, the "party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case" (para. 36 (emphasis added)). The fact that other plaintiffs are actually pursuing similar claims might impact the overall assessment of the public importance of the case, but it does not negate impecuniosity. To hold otherwise would place on the applicant the

L'intervenant le procureur général de l'Ontario a soutenu que, dans le cadre du critère applicable à la provision pour frais, tout comme dans celui applicable à la qualité pour agir dans l'intérêt public, il faut se demander si d'autres parties sont en mesure de soumettre la question aux tribunaux. Cette proposition constitue, selon lui, un moyen de faire en sorte que les provisions pour frais ne soient ordonnées que dans les cas où elles sont absolument nécessaires, tout en réduisant le risque de recherche d'un demandeur y ayant droit. Les juges Bastarache et LeBel retiennent cet argument, mais non le juge Binnie, dont je partage l'avis sur ce point. Comme l'a affirmé le juge LeBel dans l'arrêt *Okanagan*, la « partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans cette ordonnance, de faire entendre sa cause » (par. 36 (je souligne)). Le fait que d'autres demandeurs aient intenté des actions semblables est impossible task of proving no one else could or would pursue the litigation.

susceptible d'influer sur l'évaluation globale de l'importance de l'affaire pour le public, mais il n'écarte pas la prise en compte de l'impécuniosité. Conclure différemment aurait pour effet d'imposer à la partie qui demande la provision pour frais la tâche impossible de prouver que personne d'autre ne pourrait ou ne voudrait poursuivre l'instance.

99 I conclude that the evidence supports the chambers judge's finding of inability to finance the litigation.

J'estime que la preuve étaye la conclusion d'incapacité de financer l'instance tirée par la juge en chambre.

2. *Prima Facie Merit*

2. *Bien-fondé à première vue*

100 Both the chambers judge and the Court of Appeal concluded that this threshold is relatively low, and that it is met on the facts of the instant case.

La juge en chambre et la Cour d'appel ont toutes les deux conclu que cette condition préalable était relativement peu exigeante et qu'elle était remplie selon les faits de la présente affaire.

101 I agree that the threshold set by the *prima facie* merit criterion is relatively low. Imposing too high a threshold at this stage risks engaging courts in the very exercise of pre-determining the merits that it is supposed to avoid. What is required at this stage, on the test for interim costs, applying *Okanagan*, is that "[t]he case is of sufficient merit that it should go forward" (*per* LeBel J., at para. 46). The chambers judge correctly considered this requirement and found it to be met. In my view, her finding on this issue should not be disturbed.

Je conviens que la condition préalable du bien-fondé à première vue est relativement peu exigeante. L'application d'une condition trop stricte à ce stade risque d'amener les tribunaux à préjuger du bien-fondé de la demande, ce qu'ils sont censés éviter de faire. Ce qui est requis à ce stade, selon le critère régissant les provisions pour frais et en application de l'arrêt *Okanagan*, c'est que « [l]'affaire va[ille] d'être instruite » (le juge LeBel, par. 46). La juge en chambre a examiné adéquatement cette condition et a conclu qu'elle était remplie. Selon moi, il n'y a pas lieu de modifier sa conclusion sur ce point.

3. *Special Circumstances*

3. *Circonstances particulières*

102 As already discussed, for more than 250 years, courts have insisted that a pre-condition of an order for interim costs is a finding that the case fulfills the requirement of "special circumstances". More precisely, "there must be 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": *Okanagan*, at para. 36. LeBel J. cited with approval the statement of Macdonald J. in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.), at p. 215, that the jurisdiction to award interim costs is "limited to very exceptional cases and ought to be narrowly applied" (para. 32).

Comme nous l'avons vu, les tribunaux exigent depuis plus de 250 ans qu'une condition préalable d'une ordonnance accordant une provision pour frais soit que l'affaire satisfasse à l'exigence des « circonstances spéciales ou particulières ». Plus précisément, « il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs » : *Okanagan*, par. 36. Le juge LeBel a cité en l'approuvant l'affirmation de la juge Macdonald dans la décision *Organ c. Barnett* (1992), 11 O.R. (3d) 210 (Div. gén.), p. 215, selon

Similarly, La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, stated that an interim costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases" (para. 122).

103 The reasons for this stricture are apparent. They lie in the general rule that parties must bear the costs of their litigation, subject to post-judgment costs orders. It is an extraordinary and unusual thing to make a defendant pay not only its own litigation expenses, but to assist the plaintiff in bringing the case against him. Cases raising issues that transcend the plaintiff's individual interest, are of public importance and are unresolved, are legion. The Court in *Okanagan* did not intend interim costs to be available in all such cases, as confirmed by the requirement of "special circumstances" and the emphasis on a "narrow class of cases" and the "extraordinary" nature of the order (para. 36).

104 What identifies the rare case where "special circumstances" permit an order for interim costs? Some cases emphasize the importance of the subject matter of the suit. This is different from the question of *prima facie* merit at issue in the second requirement, discussed above. The issue is not whether the case has *prima facie* merit — that has already been established — but whether it is of such great importance that justice requires it to go forward. The importance may be private, public, or both. The "profound importance" of the case to the litigants in *Okanagan* was explicitly noted by LeBel J. (para 46). A similar analysis entered the equation in *B. (R.)* where the Ontario Court of Appeal, upholding the award of costs against the intervening Attorney General, noted that the case was one in which "parents rose up against state power because of their religious beliefs" ((1992), 10 O.R.

laquelle la compétence pour accorder une provision pour frais [TRADUCTION] « se limit[e] à des cas vraiment exceptionnels et [devrait] être appliquée avec restriction » (par. 32). De même, dans l'arrêt *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, le juge La Forest a affirmé qu'une ordonnance enjoignant au Procureur général de verser une provision pour frais était « fort inhabituelle » et ne devrait être permise « que dans des cas très rares » (par. 122).

Les raisons de cette restriction sont évidentes. Elles tiennent à la règle générale selon laquelle les parties doivent financer leur participation à un litige, sous réserve des dépens auxquels elles peuvent être condamnées après le jugement. Ce n'est qu'exceptionnellement et rarement qu'un défendeur sera tenu non seulement de supporter ses propres dépenses, mais encore d'aider le demandeur à le poursuivre en justice. Les affaires soulevant des questions qui dépassent le cadre des intérêts du demandeur, revêtent une importance pour le public et n'ont pas encore été tranchées sont nombreuses. Dans l'arrêt *Okanagan*, la Cour n'a pas voulu que la provision pour frais puisse être obtenue dans tous ces cas, comme le confirment l'exigence des « circonstances particulières » et l'insistance sur la « catégorie restreinte de causes » et la nature « exceptionnel[le] » de l'ordonnance (par. 36).

Quand sommes-nous en présence d'un de ces rares cas où des « circonstances particulières » justifient d'ordonner une provision pour frais? Certaines affaires font ressortir l'importance de l'objet de la poursuite. Cette question diffère de celle du bien-fondé à première vue qui est visée dans la deuxième condition analysée plus haut. Il s'agit de déterminer non pas si l'affaire est fondée à première vue — ce qui a déjà été établi — mais si elle revêt une importance si grande que la justice exige qu'elle suive son cours. L'affaire peut être importante pour un plaideur, pour le public en général ou pour les deux à la fois. Dans l'arrêt *Okanagan*, le juge LeBel a explicitement fait état de l'« importance cruciale » de l'affaire pour les plaideurs (par. 46). Une analyse semblable a été effectuée dans l'arrêt *B. (R.)* où la Cour d'appel de l'Ontario a maintenu la condamnation aux

(3d) 321, at pp. 354-55). Other cases find unfairness not so much in the special subject matter of the suit, as in the circumstances of the parties. For example, it may appear fair that a trustee who is sued bear some of the cost of settling an issue relating to a trust, or that a husband who controls the assets of the marriage pay something toward the cost of resolving how they are to be divided. Often, considerations of subject matter and circumstances intertwine. The ultimate question is whether the order for interim costs is required to prevent systemic unfairness or injustice.

dépens du procureur général intervenant en indiquant qu'il s'agissait d'une affaire dans laquelle [TRADUCTION] « des parents se sont élevés contre le pouvoir de l'État en raison de leurs convictions religieuses » ((1992), 10 O.R. (3d) 321, p. 354-355). Dans d'autres affaires, les tribunaux ont conclu que l'iniquité ne résultait pas tant de l'objet particulier de l'action en justice que de la situation des parties. Par exemple, il peut sembler juste qu'un fiduciaire poursuivi en justice supporte une partie des frais engagés pour faire trancher une question touchant une fiducie, ou que le mari qui contrôle les biens du mariage contribue aux frais requis pour faire décider des modalités de leur partage. Il arrive souvent que les considérations susmentionnées — l'objet et les circonstances — soient inextricablement liées. En définitive, il s'agit de déterminer s'il est nécessaire d'accorder une provision pour frais pour empêcher une iniquité ou injustice systémique.

What elevates a case to the special and narrow class where advance costs may be ordered cannot be determined by precise advance description. Generally, however, an award should be made only if the court concludes that issues raised are of high importance and are unlikely to proceed in the absence of an advance costs order, thereby producing a serious denial of justice. The injustice at stake here is not denial to the appellant of an anticipated remedy, nor denial to the public of a desired outcome, but the injustice of denial of an opportunity to have a vital private and/or public issue judged and resolved by the courts. If the statement is confined to systemic injustice in this sense, I agree with the conclusion of Bastarache and LeBel JJ. that "[a]n advance costs award should remain a last resort" (para. 78).

105

Il est impossible de décrire à l'avance de façon précise ce qui fait qu'une cause appartient à la catégorie spéciale et restreinte des cas où une provision pour frais peut être ordonnée. En règle générale, cependant, une provision pour frais ne devrait être accordée que dans le cas où le tribunal conclut que les questions soulevées ont une grande importance et qu'elles ne seront vraisemblablement pas examinées et tranchées en l'absence d'une provision pour frais, ce qui entraînera un grave déni de justice. L'injustice dont il est question en l'espèce n'est pas le fait de priver l'appelante d'une réparation escomptée ou le public d'un résultat souhaité, mais le fait de refuser la possibilité de faire examiner et trancher par les tribunaux une question cruciale d'intérêt privé, public ou les deux. Si l'affirmation se limite à cette notion d'injustice systémique, je souscris à la conclusion des juges Bastarache et LeBel selon laquelle « la provision pour frais ne devrait être accordée qu'en dernier recours » (par. 78).

Against this background, I turn to whether the evidence adduced before the chambers judge establishes a special case in this sense. The chambers judge did not address this question. The Court of Appeal, *per* Thackray J.A., did consider it, and concluded that the case, while raising issues of public importance, did not meet the third requirement

106

C'est dans ce contexte que j'examinerai si la preuve soumise à la juge en chambre établit l'existence d'un cas particulier en ce sens. La juge en chambre n'a pas abordé cette question, mais la Cour d'appel, par l'entremise du juge Thackray, l'a examinée et a conclu que, même si elle soulevait des questions d'importance pour le public, l'affaire ne of being "special" enough to permit an order for interim costs:

> Freedom of expression is of public interest at any time, as is compliance with court orders. However, it is only the "special" case that will engage the extraordinary step of requiring the public purse to contribute funds, through advanced costs, to the prosecution or defence of a case. I am of the opinion that the case at bar has not been shown to be special as to its circumstances as compared to *Okanagan Indian Band* nor to be "special" by its very nature as a public interest case. [para. 61]

107 I agree with the Court of Appeal. It cannot be denied that the present case raises issues of some public importance. Free expression, as Thackray J.A. states, is always of public importance. And as Binnie J. points out, inferences may be drawn from the decision-making process for these books to the processes used for other material. This may be important to other booksellers relying on imports and, more broadly, to citizens concerned with how Customs defines obscenity and the contest between state power and freedom of expression. The public also has an interest in compliance with court orders.

108 I note the suggestion of both the Court of Appeal and Customs that Little Sisters' difficulty in collecting money to fund this case indicates that the lesbian and gay community does not regard this issue as particularly important. In my view, this argument should be rejected. First, this reasoning appears to penalize an applicant for not being able to raise money and flies in the face of the requirement to show that it genuinely cannot afford to pay for the litigation. Second, lack of concern is not the only inference that can be drawn from lack of financial support from the community. For example, other issues may be competing for its pecuniary attention. Finally, the question of public importance is not about popularity; indeed, the issues of greatest importance may sometimes be

remplissait pas la troisième condition selon laquelle elle devait être suffisamment « spéciale » ou « particulière » pour permettre l'attribution d'une provision pour frais :

> [TRADUCTION] La liberté d'expression est toujours d'intérêt public, tout comme le respect des ordonnances judiciaires. Cependant, ce n'est que dans un cas « spécial » que sera prise la mesure exceptionnelle consistant à obliger le trésor public à contribuer au financement d'une poursuite ou d'une défense au moyen de la provision pour frais. À mon avis, il n'a pas été démontré que la présente affaire présente des circonstances spéciales comme celles de l'affaire *Bande indienne Okanagan* ni qu'elle est « spéciale » de par son caractère même d'intérêt public. [par. 61]

Je partage l'opinion de la Cour d'appel. On ne saurait nier que la présente affaire soulève des questions revêtant une certaine importance pour le public. Comme l'affirme le juge Thackray, la liberté d'expression revêt toujours de l'importance pour le public. De plus, comme le souligne le juge Binnie, le processus décisionnel appliqué aux livres en question peut permettre de faire des inférences au sujet des méthodes utilisées pour d'autre matériel. Cela peut être important pour d'autres libraires importateurs et, plus généralement, pour les citoyens préoccupés par la façon dont les Douanes définissent l'obscénité et par le conflit entre le pouvoir de l'État et la liberté d'expression. La population a elle aussi intérêt à ce que les ordonnances judiciaires soient respectées.

Je remarque que la Cour d'appel et les Douanes ont affirmé que la difficulté de Little Sisters de réunir les fonds nécessaires pour financer la présente affaire indique que la communauté gaie et lesbienne ne considère pas cette question particulièrement importante. À mon avis, cet argument doit être rejeté. Premièrement, ce raisonnement semble pénaliser un demandeur qui est incapable de lever des fonds, en plus d'aller à l'encontre de la condition requérant qu'il démontre qu'il n'a véritablement pas les moyens de payer les frais occasionnés par le litige. Deuxièmement, le manque d'intérêt n'est pas la seule inférence qui puisse être tirée de l'absence de soutien de la part de la communauté gaie et lesbienne. Par exemple, il peut y avoir d'autres causes pour lesquelles the least popular and hence the least supported. It is true, as the Court of Appeal noted, that the main issues concerning free speech were resolved in *Little Sisters No. 1*. However, the evidence supports residual issues of public importance in this litigation.

The real question is whether the issues of public importance raised by the present case rise to the level of being special enough to justify an order for interim costs. Is this one of those rare cases where justice demands that the questions raised be litigated? Here again, I agree with the Court of Appeal. At stake is the prospect of not learning how Customs proceeded on the Four Books Appeal and, in the event it proceeded wrongly, not having a remedial order. In my view, the possible insight that may be gained into Customs' practices through the prosecution of this case and the limited remedy, while of interest to Little Sisters, do not rise to the level of compelling public importance or demonstrate systemic injustice.

It is argued that the history of the litigation raises "special circumstances" elevating this case to the narrow and exceptional category where advance costs may be ordered. The intervener EGALE puts it thus: "[h]aving effectively *invited* the Bookstore to return to court in the event of further problems with Customs [in *Little Sisters No. 1*], it would be contrary to the interests of justice to now deny the Bookstore the funding it requires to pursue its *prima facie* meritorious claims" (I.F., at para. 58 (emphasis in original)). In my view, the words of the majority of the Court in *Little Sisters No. 1*, in declining to order a more structured remedy, do not move the case beyond the general rule that litigants must finance their litigation, subject to post-judgment costs awards. Referring to the findings of

son aide financière est sollicitée. Enfin, l'importance pour le public n'est pas une question de popularité; en fait, il arrive que les questions les plus importantes soient les moins populaires et reçoivent, par conséquent, le moins d'appui. Il est vrai, comme l'a souligné la Cour d'appel, que les principales questions concernant la liberté d'expression ont été tranchées dans l'arrêt *Little Sisters n^o 1*. Toutefois, la preuve indique que des questions d'importance pour le public restent à résoudre.

La véritable question qui se pose est de savoir si les questions d'importance pour le public soulevées en l'espèce sont suffisamment particulières pour justifier l'attribution d'une provision pour frais. Est-on en présence de l'un des rares cas où la justice exige que les questions soulevées soient soumises aux tribunaux? Là encore, je partage l'avis de la Cour d'appel. L'enjeu est le risque qu'on n'apprenne pas comment les Douanes ont agi relativement à l'appel concernant les quatre livres et que, dans le cas où elles auraient mal agi, aucune ordonnance réparatrice ne soit accordée. À mon avis, les indications qu'un procès pourrait apporter sur les pratiques des Douanes et la réparation limitée qui pourrait en résulter n'atteignent pas, malgré leur importance pour Little Sisters, un niveau déterminant d'importance pour le public et ne démontrent pas non plus l'existence d'une injustice systémique. 109

On a fait valoir que l'historique du litige crée des « circonstances particulières » qui font entrer l'affaire dans la catégorie restreinte et exceptionnelle des cas où une provision pour frais peut être ordonnée. L'intervenante EGALE s'exprime ainsi : [TRADUCTION] « [a]près avoir effectivement *invité* [dans *Little Sisters n^o 1*] la librairie à s'adresser de nouveau aux tribunaux si jamais elle éprouvait d'autres difficultés avec les Douanes, il serait contraire aux intérêts de la justice de lui refuser maintenant le financement dont elle a besoin pour soumettre aux tribunaux ses demandes qui valent *prima facie* d'être instruites » (m.i., par. 58 (en italique dans l'original)). À mon avis, les propos que la Cour à la majorité a tenus dans l'arrêt *Little Sisters n^o 1*, en refusant d'ordonner une réparation 110 the Court, Binnie J. wrote: "These findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary" (para. 158). This is a comment on the legal foundation of future claims, not a statement that they should be supported by advance costs.

plus structurée, ne soustraient pas l'affaire à l'application de la règle générale selon laquelle les plaideurs doivent financer leur participation à un litige, sous réserve des dépens auxquels ils peuvent être condamnés après le jugement. Au sujet des conclusions de la Cour, le juge Binnie a écrit : « Ces constatations devraient fournir aux appelants des assises solides, susceptibles de fonder toute autre action qu'ils estimeraient nécessaire d'intenter devant la Cour suprême de la Colombie-Britannique » (par. 158). Il s'agit là d'une observation sur le fondement juridique d'actions futures et non d'une déclaration qu'elles devraient être supportées au moyen d'une provision pour frais.

111 Notwithstanding some sympathy for the appellant, I find nothing in this case which establishes the special circumstances necessary to support the extraordinary remedy of an order that the respondents pay the appellant advance costs to defray the interim expense of its litigation. If advance costs are justified here, they will be justified in a host of other cases. I cannot read *Okanagan* as requiring this result.

Bien que je sympathise jusqu'à un certain point avec l'appelante, je ne vois rien en l'espèce qui établisse l'existence des circonstances particulières requises pour justifier d'accorder la réparation exceptionnelle consistant à ordonner aux intimés de verser à l'appelante une provision pour frais qui lui permettra de supporter les dépenses occasionnées par son litige. Si la provision pour frais est justifiée en l'espèce, elle le sera dans une multitude d'autres affaires. Je ne vois rien dans l'arrêt *Okanagan* qui commande un tel résultat.

112 I wish to add a note on the scale of costs. The chambers judge said nothing about the scale of costs. My colleagues appear to endorse a capped limit on spending, having regard to the projected costs of the litigation and litigation strategy. It is not clear to me that interim costs, where justified, should be awarded on the basis of indemnification or partial indemnification. In the seminal case of *Jones v. Coxeter*, the court spoke of directing the defendant "to pay something to the plaintiff in the mean time" (p. 642). In *Okanagan*, the costs were explicitly stated to be "'costs' in the way it is usually used in the *Supreme Court Rules* [B.C. Reg. 221/90] and in litigation parlance — i.e., taxable costs described in R. 57 [party and party costs]": see para. 10 of Newbury J.A.'s reasons in *Okanagan* ((2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647), which were approved by this Court, at para. 47, when it dismissed the appeal. It seems reasonable that an advance costs award cannot

Je tiens à ajouter un commentaire sur le barème des dépens. La juge en chambre n'a rien dit à ce sujet. Mes collègues semblent approuver l'idée d'un plafonnement des dépenses, compte tenu des coûts estimatifs du litige et de la stratégie d'instance adoptée. Je ne suis pas certaine que, lorsqu'elles sont justifiées, les provisions pour frais doivent être accordées à titre d'indemnisation ou d'indemnisation partielle. Dans l'arrêt de principe *Jones c. Coxeter*, le tribunal a parlé d'ordonner au défendeur [TRADUCTION] « de payer entre-temps une certaine somme à la demanderesse » (p. 642). Dans l'arrêt *Okanagan*, les dépens ont été explicitement qualifiés de [TRADUCTION] « "dépens" au sens où ce terme est habituellement utilisé dans les *Supreme Court Rules* [B.C. Reg. 221/90] et dans le langage juridique — c'est-à-dire les dépens taxables décrits à l'art. 57 de ces règles [dépens entre parties] » : voir le par. 10 des motifs de la juge Newbury dans l'arrêt *Okanagan* ((2001), 95 B.C.L.R. (3d) 273, 2001 give the applicant more than it would receive were it successful at trial.

III. Conclusion

I would dismiss the appeal, with the parties bearing their own costs.

The reasons of Binnie and Fish JJ. were delivered by

BINNIE J. (dissenting) — I differ from my colleagues about what is truly at stake in this appeal and this leads to our disagreement about the appropriate outcome. In my view, the earlier case of *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 ("*Little Sisters No. 1*"), provides more than "important context" (as my colleagues Bastarache and LeBel JJ. describe it at para. 54). The ramifications of that decision go to the heart and soul of the appellant's present application. Were it not for the findings of serious abuses on the part of Customs authorities in *Little Sisters No. 1*, I doubt if the appellant's request for advance costs in the present follow-up case would have had the legs to make it this far. This case is not the beginning of a litigation journey. It is 12 years into it.

A. *What the Court Decided in Little Sisters No. 1*

In the earlier proceedings, the appellant (a book and art shop described by the trial judge in *Little Sisters No. 1* as the "nerve center for the homosexual community" in Vancouver ((1996), 18 B.C.L.R. (3d) 241, at para. 90)) challenged the constitutional validity of provisions of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), and the *Customs Tariff*, S.C. 1987, c. 49, Schedule VII, that provide for border screening and prohibition of entry into Canada of:

9956 Books, printed paper, drawings, paintings, prints, photographs or representations of any kind that

BCCA 647), que notre Cour a approuvés, au par. 47, en rejetant le pourvoi. Il semble raisonnable qu'une provision pour frais ne puisse donner au demandeur plus que ce qu'il recevrait s'il avait gain de cause.

III. Conclusion

113 Je suis d'avis de rejeter le pourvoi, les parties devant supporter leurs propres frais.

Version française des motifs des juges Binnie et Fish rendus par

114 LE JUGE BINNIE (dissident) — Je ne partage l'avis de mes collègues quant à ce qui est véritablement en jeu dans le présent pourvoi, d'où notre désaccord au sujet du résultat qui s'impose. À mon avis, l'arrêt antérieur *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69 (« *Little Sisters nº 1* »), fournit plus qu'un « contexte important » (tel que le décrivent mes collègues les juges Bastarache et LeBel au par. 54). Les ramifications de cette décision sont cruciales en ce qui concerne la présente demande de l'appelante. N'était-ce les conclusions de l'arrêt *Little Sisters nº 1*, voulant que les autorités douanières aient commis de graves abus, je doute que la demande de provision pour frais présentée par l'appelante à la suite de cet arrêt se serait rendue aussi loin. La présente affaire ne fait pas que débuter, elle dure depuis 12 ans.

A. *Ce que la Cour a décidé dans l'arrêt Little Sisters nº 1*

115 Au cours des procédures antérieures, l'appelante (une librairie doublée d'un commerce d'objets d'art, que le juge de première instance dans l'affaire *Little Sisters nº 1* avait qualifiée de [TRADUCTION] « centre nerveux de la communauté homosexuelle » de Vancouver ((1996), 18 B.C.L.R. (3d) 241, par. 90)) avait contesté la constitutionnalité des dispositions de la *Loi sur les douanes*, L.R.C. 1985, ch. 1 (2e suppl.), et du *Tarif des douanes*, L.C. 1987, ch. 49, annexe VII, relatives au contrôle frontalier et à l'interdiction d'entrée au Canada :

9956 Des livres, imprimés dessins, peintures, gravures, photographies ou reproductions de tout genre qui :

(*a*) are deemed to be obscene under subsection 163(8) of the *Criminal Code*;

The Customs legislation was challenged in *Little Sisters No. 1* as an unlawful prior restraint on freedom of expression, and its administration by Customs officials as targeting the lesbian and gay community contrary to principles of fair procedure in administrative law and the freedom of expression and equality provisions of the *Canadian Charter of Rights and Freedoms* (ss. 2(*b*) and 15(1)).

116 Based on the findings of the trial judge, and after examining the ample evidentiary record, our Court concluded unanimously that systemic discrimination by Customs officials and unlawful interference with free expression were clearly established. As it was put in the majority reasons:

> Government interference with freedom of expression in any form calls for vigilance. Where, as here, a trial judge finds that such interference is accompanied "by the systemic targeting" of a particular group in society (in this case individuals who were seen as standard bearers for the gay and lesbian community), the issue takes on a further and even more serious dimension. Sexuality is a source of profound vulnerability, and the appellants reasonably concluded that they were in many ways being treated by Customs officials as sexual outcasts. [para. 36]

More specifically, the majority attributed the numerous *Charter* violations to systemic problems in the administration of the Customs legislation as follows (at para. 154):

2. The rights of the appellants under s. 2(*b*) and s. 15(1) of the *Charter* have been infringed in the following respects:

(a) They have been targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard;

a) sont réputés obscènes au sens du paragraphe 163(8) du *Code criminel*;

Dans l'affaire *Little Sisters n^o 1*, la législation douanière était contestée pour le motif qu'elle imposait une restriction préalable illégale à la liberté d'expression et que son application par les fonctionnaires des douanes ciblait la communauté gaie et lesbienne, contrairement aux principes d'équité procédurale en droit administratif et aux dispositions de la *Charte canadienne des droits et libertés* relatives à la liberté d'expression et à l'égalité (al. 2*b*) et par. 15(1)).

Compte tenu des conclusions du juge de première instance et après examen de l'abondante preuve au dossier, notre Cour a estimé à l'unanimité que l'existence de discrimination systémique de la part des fonctionnaires des douanes et d'atteinte illégale à la liberté d'expression était clairement établie. Comme les juges majoritaires l'ont expliqué dans leurs motifs :

> Le gouvernement se doit de faire montre de vigilance lorsqu'il porte atteinte à quelque forme que ce soit de liberté d'expression. Dans les cas où, comme en l'espèce, le juge de première instance estime que cette atteinte s'accompagne de la [TRADUCTION] « prise systématique pour cibl[e] » d'un groupe particulier dans la société (en l'espèce des individus qui étaient considérés comme des porte-étendards de la communauté gaie et lesbienne), la question revêt alors une dimension supplémentaire et encore plus sérieuse. La sexualité est source de profonde vulnérabilité, et les appelants ont à juste titre estimé que, à bien des égards, ils étaient traités en parias sur le plan sexuel par les fonctionnaires des douanes. [par. 36]

Plus précisément, les juges majoritaires ont attribué les nombreuses violations de la *Charte* aux problèmes systémiques d'application de la législation douanière (par. 154) :

2. Il a été porté atteinte de la manière suivante aux droits qui sont garantis aux appelants par l'al. 2*b*) et le par. 15(1) de la *Charte* :

a) Les appelants ont été visés comme importateurs de matériel obscène malgré l'absence de tout élément de preuve tendant à indiquer que le matériel érotique gai et lesbien risque davantage d'être obscène que le matériel érotique hétérosexuel, ou encore que les appelants sont vraisemblablement des contrevenants à cet égard.

(b) In consequence of the targeting, the appellants have suffered excessive and unnecessary prejudice in terms of delays, cost and other losses in having their goods cleared (if at all) through Canada Customs;

(c) The reasons for this excessive and unnecessary prejudice include:

(i) failure by Customs to devote a sufficient number of officials to carry out the review of the appellants' publications in a timely way;

(ii) the inadequate training of the officials assigned to the task;

(iii) the failure to place at the disposal of these officials proper guides and manuals, failure to update Memorandum D9-1-1 and its accompanying illustrative manual in a timely way, and the failure to develop workable procedures to deal with books consisting mostly or wholly of written text;

(iv) failure to establish internal deadlines and related criteria for the expeditious review of expressive materials;

(v) failure to incorporate into departmental guides and manuals relevant advice received from time to time from the Department of Justice;

(vi) failure to provide the appellants in a timely way with notice of the basis for detention of publications, the opportunity to make meaningful submissions on a re-determination, and reasonable access to the disputed materials for that purpose; and

(vii) failure to extend to the appellants the equal benefit of fair and expeditious treatment of their imported goods without discrimination based on sexual orientation.

b) Du fait qu'ils ont été ciblés, les appelants ont souffert d'un préjudice excessif et inutile en raison des délais, frais et autres pertes subis afin de faire dédouaner leurs marchandises (si tant est qu'ils y sont parvenus) par Douanes Canada.

c) Les raisons de ce préjudice excessif et inutile sont notamment:

(i) l'omission des Douanes d'affecter un nombre suffisant de fonctionnaires au contrôle des publications des appelants pour faire effectuer cette tâche en temps utile;

(ii) la formation inadéquate des fonctionnaires affectés à cette tâche;

(iii) l'omission de mettre à la disposition de ces fonctionnaires des guides et manuels appropriés, l'omission de mettre à jour en temps utile le Mémorandum D9-1-1 et le guide illustré connexe, et l'omission d'élaborer des procédures applicables pour évaluer les livres constitués entièrement ou essentiellement de texte;

(iv) l'omission d'établir des délais et autres critères connexes applicables à l'interne en vue d'assurer le contrôle expéditif du matériel expressif;

(v) l'omission d'incorporer aux guides et manuels du ministère les avis pertinents reçus du ministère de la Justice;

(vi) l'omission de donner aux appelants, en temps utile, un avis les informant des raisons de la retenue des publications, ainsi que la possibilité de présenter des observations utiles en cas de révision ou réexamen, et, à cette fin, de consulter le matériel contesté; et

(vii) l'omission d'accorder aux appelants l'égalité de bénéfice en matière de traitement équitable et expéditif de leurs marchandises importées, indépendamment de toute discrimination fondée sur l'orientation sexuelle.

117 The Court divided on the issue of remedy. The majority (McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ.) concluded that the Customs legislation was valid but

La Cour était toutefois partagée sur la question de la réparation. Les juges majoritaires (la juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Major, Bastarache et Binnie) ont conclu its administration by Canada Customs was deeply flawed. Systemic problems within the bureaucracy could and should, it was held, be addressed at the bureaucratic level. However, the fact that it had taken six years for the case to reach our Court meant the evidence before us was already six years out of date. The Minister of Justice assured the Court that the systemic problems had been properly addressed as of the date of our hearing. Because of the staleness of the evidence, the majority declined at para. 157 to grant a structured s. 24(1) remedy:

> We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague's conclusion that these measures are "not sufficient" (para. 262) and have offered "little comfort" (para. 265). . . .

118 It was anticipated, however, that there could well be follow-up litigation if, in fact, the systemic problems condemned by all three levels of court continued. According to the majority:

> A more structured s. 24(1) remedy might well be helpful but it would serve the interests of none of the parties for this Court to issue a formal declaratory order based on six-year-old evidence supplemented by conflicting oral submissions and speculation on the current state of affairs. The views of the Court on the merits of the appellants' complaints as the situation stood at the end of 1994 are recorded in these reasons and those of my colleague Iacobucci J. These findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary. [para. 158]

119 The minority (Iacobucci, Arbour and LeBel JJ.) joined in the condemnation of Customs' practices but proposed a more drastic remedy, namely to declare the relevant Tariff Item to be of no force and effect (para. 283) and thereby to eliminate the

que la législation douanière était valide mais que son application par Douanes Canada comportait de profondes lacunes. Selon eux, les problèmes systémiques de la bureaucratie pouvaient et devaient être réglés au niveau bureaucratique. Toutefois, comme l'affaire avait mis six ans à parvenir à notre Cour, la preuve dont nous étions saisis remontait déjà à plus de six ans. Le ministre de la Justice a assuré la Cour que les problèmes systémiques étaient réglés correctement au moment de l'audience. À cause du caractère peu récent de la preuve, les juges majoritaires ont refusé, au par. 157, d'accorder une réparation structurée en vertu du par. 24(1) :

> On nous dit qu'au cours des six dernières années, les Douanes ont corrigé les problèmes institutionnels et administratifs éprouvés par les appelants. En l'absence de données plus précises sur ce qui a été fait exactement et sur la mesure dans laquelle on a ainsi remédié à la situation (si tant est qu'on l'a fait), je ne suis pas prêt à souscrire à la conclusion de mon collègue selon laquelle ces mesures ne sont « pas suffisantes » (par. 262) et ne sont pas d'un « grand secours » (par. 265). . .

On s'attendait cependant à ce que d'autres procédures suivent si, en réalité, les problèmes systémiques réprouvés par les trois instances judiciaires persistaient. Les juges majoritaires ont ajouté ceci :

> Le fait de prononcer une réparation plus structurée en vertu du par. 24(1) pourrait bien être utile, mais il ne servirait les intérêts d'aucune des parties que notre Cour rende une ordonnance déclaratoire formelle sur la foi d'une preuve vieille de six ans, complétée par des plaidoiries contradictoires et des conjectures quant à l'état actuel de la situation. Les vues de notre Cour sur le fond des plaintes des appelants, au regard de la situation qui existait à la fin de 1994, sont exprimées dans les présents motifs et dans ceux de mon collègue le juge Iacobucci. Ces constatations devraient fournir aux appelants des assises solides, susceptibles de fonder toute autre action qu'ils estimeraient nécessaire d'intenter devant la Cour suprême de la Colombie-Britannique. [par. 158]

Les juges dissidents (les juges Iacobucci, Arbour et LeBel), qui réprouvaient eux aussi les pratiques douanières, préconisaient une réparation beaucoup plus draconienne : déclarer inopérant le code tarifaire (par. 283) et supprimer ainsi le pouvoir légal statutory authority of Customs officials to detain at the border *any* material they allege to be obscene:

> Particularly in a case like the one before us, where there is an extensive record of the improper detention of non-obscene works, the only choice to ensure full protection of the constitutional rights at stake is to invalidate the legislation and invite Parliament to remedy the constitutional infirmities. [Emphasis added; para. 167.]

The present application for advance costs comes before us precisely because the appellant says that the Minister's assurances proved empty in practice, that the systemic abuses established in the earlier litigation have continued, and that (in its view) Canada Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination. Of course there are two sides to the story. Although for good reason the majority declined to strike down the legislation, it was never doubted that Customs has been given a difficult job to do by Parliament, and that solutions to entrenched problems would take time to put in place. The question of public importance is this: was the Minister as good as his word when his counsel assured the Court that the appropriate reforms had been implemented? The chambers judge, from whose decision the present appeal has been taken, concluded that Little Sisters had established a *prima facie* case that the promised reforms had *not* been implemented.

B. *The Appellant's Four Books Appeal*

As noted by my colleagues, the present application arises out of the detention by Canada Customs of four books sought to be imported by the appellant. By originating Notice of Appeal dated February 13, 2002, the appellant sought the following orders pursuant to s. 67 as modified by s. 71 of the *Customs Act*:

1. A declaration pursuant to s. 24 of the [*Charter* that relevant provisions of the *Customs Tariff* and

des fonctionnaires des douanes de retenir à la frontière *tout* matériel qu'ils qualifient d'obscène :

> Plus particulièrement dans une affaire comme celle dont nous sommes saisis, où il y a de nombreux antécédents de retenue irrégulière d'ouvrages non obscènes, la seule façon d'assurer la protection complète des droits constitutionnels en jeu est d'invalider les dispositions législatives contestées et d'inviter le Parlement à remédier aux atteintes à la Constitution. [Je souligne; par. 167.]

La présente demande de provision pour frais 120
nous est soumise précisément parce que l'appelante soutient que les assurances données par le ministre se sont révélées vaines en pratique, que les abus systémiques dont l'existence a été établie dans l'instance antérieure se sont poursuivis et que (selon elle) Douanes Canada ne s'est pas montré disposé à appliquer la législation douanière de manière équitable et non discriminatoire. Naturellement, il y a deux versions des faits. Bien que les juges majoritaires aient, pour de bonnes raisons, refusé d'invalider les dispositions législatives en cause, on n'a jamais douté que le législateur a confié aux Douanes une tâche difficile et que les problèmes profondément enracinés seraient longs à corriger. La question d'importance pour le public est la suivante : le ministre donnait-il l'heure juste lorsque son avocat a assuré la Cour que les réformes appropriées avaient été mises en œuvre? La juge en chambre, dont la décision est à l'origine du présent pourvoi, a conclu que Little Sisters avait établi une preuve *prima facie* que les réformes promises *n*'avaient *pas* été mises en œuvre.

B. *L'appel de l'appelante concernant les quatre livres*

Comme l'ont souligné mes collègues, la pré- 121
sente demande découle de la retenue par Douanes Canada de quatre livres que l'appelante cherchait à importer. Par avis d'appel daté du 13 février 2002, l'appelante a sollicité les ordonnances suivantes conformément à l'art. 67 modifié par l'art. 71 de la *Loi sur les douanes* :

[TRADUCTION]

1. un jugement fondé sur l'art. 24 de la [*Charte*, déclarant que les dispositions pertinentes du *Tarif*

Customs Act] have been construed and applied in a manner contrary to s. 2(b) and [s.] 15(1) of the *Charter*;

2. An injunction restraining Customs from applying and administering [these provisions] to goods of Little Sisters Book and Art Emporium permanently or until such time as there is no risk that the unconstitutional administration will continue;

3. Damages, including aggravated and punitive damages;

4. Special or increased costs;

5. Such further relief . . . .

The *Charter* and "systemic" issues were therefore part of the proceedings from the outset. Little Sisters says that in the course of examinations for discovery it became convinced that the banning of the four books showed little had changed in the Customs treatment of gay and lesbian literature. It then sought to broaden greatly the scope of the inquiry by way of the so-called "Systemic Review".

122 The four books remain banned. Other books sought to be imported by Little Sisters have been detained and released only after the cost and delay of a challenge. Some of the banned material consists of comics but at least one of the books is described as "a paperback compilation of short stories originally published in *Bound & Gagged* magazine between 1993-1997" (*Of Men, Ropes & Remembrance* (1997), on copyright page). As counsel for the appellant acknowledges, much of this material is "not . . . for the faint of heart" (A.F., at para. 95). In the end, a court may conclude that the books *are* obscene within the meaning of s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46. The result cannot be pre-judged either way. But the chambers judge concluded that the Little Sisters' complaint has *prima facie* merit, stating:

. . . an administrative review to determine if the systemic changes as identified by [*Little Sisters No. 1*] have, in fact been made, is appropriate. There is a *prima*

des douanes et de la *Loi sur les douanes*] ont été interprétées et appliquées d'une manière contraire à l'al. 2b) et au par. 15(1) de la *Charte*;

2. une injonction interdisant aux Douanes d'appliquer [ces dispositions] à des marchandises de Little Sisters Book and Art Emporium de façon permanente ou jusqu'à ce que disparaisse le risque d'application inconstitutionnelle de ces dispositions;

3. des dommages-intérêts, y compris des dommages-intérêts majorés et punitifs;

4. des dépens spéciaux ou majorés;

5. toute autre réparation . . .

Les questions relatives à la *Charte* et les questions « systémiques » faisaient donc partie intégrante de l'instance dès le départ. Little Sisters affirme que les interrogatoires préalables l'ont convaincue que l'interdiction des quatre livres démontrait que la façon dont les Douanes traitaient la littérature gaie et lesbienne avait peu changé. Elle a donc cherché à élargir considérablement la portée de l'examen au moyen de la soi-disant « révision systémique ».

Les quatre livres sont encore interdits. D'autres livres que Little Sisters voulait importer ont été retenus, puis dédouanés seulement à la suite d'une contestation longue et coûteuse. Certains livres retenus sont des bandes dessinées, mais au moins l'un de ceux-ci est décrit comme [TRADUCTION] « une compilation en format de poche de nouvelles publiées initialement dans la revue *Bound & Gagged* entre 1993 et 1997 » (*Of Men, Ropes & Remembrance* (1997), sur la page des droits d'auteur). Comme le reconnaît l'avocat de l'appelante, une bonne partie de ce matériel ne s'adresse [TRADUCTION] « pas [. . .] aux petites natures » (m.a., par. 95). Il se peut qu'un tribunal conclue, en définitive, que les livres *sont* obscènes au sens du par. 163(8) du *Code criminel*, L.R.C. 1985, ch. C-46. On ne saurait préjuger du résultat ni dans un sens ni dans l'autre. Toutefois, la juge en chambre a décidé que la plainte de Little Sisters était fondée à première vue, en affirmant ceci :

[TRADUCTION] . . . il convient de procéder à une révision administrative qui permettra de déterminer si les changements systémiques décrits [dans l'arrêt *Little* *facie* case to suggest they have not been sufficiently addressed.

((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, at para. 59)

Book censorship has long been considered particularly offensive to civil liberties:

The freedom to write books, and thus to disseminate ideas, opinions, and concepts of the imagination — the freedom to treat with complete candour of an aspect of human life and the activities, aspirations and failings of human beings — these are fundamental to progress in a free society. In my view of the law, such freedom should not, except in extreme circumstances, be curtailed. . . .

(*R. v. C. Coles Co.*, [1965] 1 O.R. 557 (C.A.), at p. 563, dismissing obscenity charges in relation to *Fanny Hill — Memoirs of a Woman of Pleasure*)

The majority said in *Little Sisters No. 1* in relation to banning books at the border:

The evidence is that Customs officials failed in general to deal properly with books. Few, if any, were read in their entirety. The usual procedure was for a Customs official to thumb through the pages of a book and as soon as three passages replicating material considered to be obscene under Memorandum D9-1-1 were identified in the text the book was deemed obscene and prohibited. The procedure would be clearly inadequate in all but the most egregious cases. No attempt was made to gain an impression of the book as a whole on which "artistic merit" *could* be assessed. [Emphasis in original; para. 96.]

The minority also expressed particular concern about the apparent unwillingness or inability of Customs officials to deal responsibly with books, *per* Iacobucci J., at para. 196:

I also wish to make it absolutely clear that a book must be read in its entirety when determining whether or not it is obscene. . . .

Sisters nº 1] ont effectivement été apportés. Une preuve *prima facie* indique qu'on ne s'est pas suffisamment employé à les apporter.

((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, par. 59)

On considère depuis longtemps que la censure littéraire est particulièrement attentatoire en matière de libertés civiles : 123

[TRADUCTION] La liberté d'écrire des livres et, par conséquent, celle de diffuser des idées, opinions et autres fruits de l'imagination — la liberté de traiter sans retenue d'un aspect de la vie humaine et des activités, des aspirations et des faiblesses des êtres humains — sont fondamentales pour le progrès dans une société libre. Selon ma vision du droit, cette liberté ne devrait pas être restreinte, sauf dans des circonstances extrêmes. . .

(*R. c. C. Coles Co.*, [1965] 1 O.R. 557 (C.A.), p. 563, rejetant des accusations d'obscénité concernant *Fanny Hill — Memoirs of a Woman of Pleasure*)

Dans l'arrêt *Little Sisters nº 1*, les juges majoritaires se sont exprimés ainsi au sujet de l'interdiction de livres à la frontière : 124

Il ressort de la preuve que les fonctionnaires des douanes ont été en général incapables de bien évaluer les livres. Peu sinon aucun des livres ont été lus en entier. Selon la procédure habituellement suivie, l'agent feuilletait le livre et, dès que trois passages correspondant à du matériel considéré obscène au regard du Mémorandum D9-1-1 étaient repérés dans le texte, le livre était réputé obscène et prohibé. Cette procédure est clairement inadéquate sauf dans les cas d'obscénité les plus flagrants. Aucun effort n'était fait pour dégager du livre dans son ensemble une impression *permettant* d'en apprécier « la valeur artistique ». [En italique dans l'original; par. 96.]

Les juges dissidents aussi se sont dits particulièrement préoccupés par la réticence ou l'inaptitude apparente des fonctionnaires des douanes à traiter les livres de manière responsable (le juge Iacobucci, par. 196) : 125

Je désire aussi qu'il soit absolument clair qu'un livre doit être lu au complet lorsqu'on détermine s'il est obscène ou non. . .

126 The appellant's position is that while the books are different the problems are the same problems that have troubled every court that dealt with *Little Sisters No. 1*. There is no doubt that the Customs legislation, while valid, is open to abuse. The appellant contends that the pattern of discrimination and abuse of freedom of expression documented in *Little Sisters No. 1* has continued and that the ban of the four books in issue demonstrate that Little Sisters won the battle but is losing the subsequent bureaucratic war. My colleagues Bastarache and LeBel JJ. write that "Simply put, the appellant's direct interest in this litigation disappears if its books are released — something that it seeks to achieve uniquely through the Four Books Appeal" (para. 58). I do not agree. The four books in question here will be followed by other importations of gay and lesbian erotica and no doubt other book bans. A flawed procedure can from time to time produce a correct result just as a good procedure can produce mistakes. For that reason, as will be seen, the Crown agreed that the Notice of Appeal under the Act properly initiated an enquiry into the Customs process that was followed as well as the result and the reasons arrived at for the ban in these cases. As counsel for the Crown acknowledged at the hearing before us, "it would make sense, given the breadth of the powers of the court [under s. 67], that it is possible to look past simply the end result" (transcript, at p. 82).

L'appelante soutient que, bien que les livres soient différents, les problèmes sont les mêmes que ceux qui ont préoccupé tous les tribunaux ayant instruit l'affaire *Little Sisters n^o 1*. Il est indubitable que, bien qu'elle soit valide, la législation douanière prête le flanc aux abus. L'appelante prétend que le comportement discriminatoire et les atteintes à la liberté d'expression relevés dans l'arrêt *Little Sisters n^o 1* persistent et que l'interdiction des quatre livres en cause démontre que, même si Little Sisters a gagné la bataille, elle est en train de perdre la guerre bureaucratique. Selon mes collègues les juges Bastarache et LeBel, « [b]ref, l'appelante n'aura plus d'intérêt direct dans la présente instance si ses livres sont dédouanés — ce qu'elle cherche à obtenir uniquement au moyen de l'appel concernant les quatre livres » (par. 58). Je ne suis pas de cet avis. D'autre matériel érotique gai et lesbien sera importé après les quatre livres en cause et, sans aucun doute, d'autres livres seront interdits. Une méthode déficiente peut parfois produire un bon résultat tout comme une bonne méthode peut engendrer des erreurs. C'est pourquoi, comme nous le verrons, la Couronne a convenu que l'avis d'appel fondé sur la Loi a déclenché à bon droit une enquête sur le processus douanier suivi de même que sur le résultat et les raisons ayant justifié l'interdiction dans ces cas. Comme l'avocat de la Couronne l'a reconnu à l'audience devant notre Cour, [TRADUCTION] « il serait logique, compte tenu de l'ampleur des pouvoirs du tribunal [en vertu de l'art. 67], de pouvoir pousser l'analyse au-delà du simple résultat final » (transcription, p. 82).

127 Canada is committed to freedom of expression, to non-discrimination and to government conducted according to law. The issues raised by Little Sisters are of pressing public interest.

Le Canada adhère aux principes de liberté d'expression, de non-discrimination et d'État de droit. Little Sisters soulève des questions d'intérêt public urgentes.

C. *The Appellant's Application for Advance Costs*

C. *La demande de provision pour frais présentée par l'appelante*

128 It is against this background that the appellant's current application must be addressed. This case, as the chambers judge (who is also the case management judge) correctly observed, is about *Charter* compliance. I therefore do not agree with the assertion of my colleagues Bastarache and LeBel JJ. that

C'est dans ce contexte qu'il faut examiner la demande actuelle de l'appelante. Comme l'a souligné à juste titre la juge en chambre (qui est également responsable de la gestion de l'instance), la présente affaire porte sur le respect de la *Charte*. Je ne puis donc souscrire à l'affirmation de mes the appellant's case should be analysed in business terms. They write:

Yet, the Four Books Appeal is extremely limited in scope. The appellant has advanced no evidence suggesting that these four books are integral, or even important, to its operations; furthermore, . . . book sales represent only 30 to 40 percent of its operations. [para. 52]

It can be stated with absolute confidence that there is no "business case" that could possibly justify Little Sisters' continuation of its battle with Canada Customs. The chambers judge noted that the Four Books Appeal involves only a few dozen individual copies. The profit on the sale of those books would not pay for half an hour of the appellant's lawyer's time. The Four Books Appeal necessarily comprises four obscenity cases in one combined with an examination of how those obscenity determinations came to be made by Canada Customs. This fight is not just about four books. As was the case in *Little Sisters No. 1*, the real fight is about alleged systemic discrimination *exemplified* by the Four Books Appeal. As stated, the Crown concedes that the systemic issues are to be explored to some extent in the Four Books Appeal. The chambers judge's order of February 6, 2003 noted the concession:

6. The Appellant's application for an order compelling answers on examination for discovery is adjourned generally, save for the part of the application with respect to "the process that was followed and the reasons that the Comic Books (*Meatmen*, Volume 18, Special S&M Comics Edition and volume 24, Special SM Comics Edition) were determined to be obscene" which is granted by consent; [Emphasis added.]

The Crown has deep pockets and there is no reason to think the present contest will be any less fiercely

collègues les juges Bastarache et LeBel selon laquelle la preuve de l'appelante doit être analysée dans une perspective commerciale. Ceux-ci écrivent :

Pourtant, l'appel concernant les quatre livres conserve une portée extrêmement limitée. L'appelante n'a présenté aucun élément de preuve indiquant que ces quatre livres font partie intégrante de ses activités ou même qu'ils sont importants pour celles-ci; de plus, [. . .] les ventes de livres ne représentent que 30 à 40 pour 100 de ses activités. [par. 52]

On peut affirmer sans crainte de se tromper qu'aucun « argument d'ordre commercial » ne saurait justifier la poursuite de la bataille que Little Sisters livre à Douanes Canada. La juge en chambre a souligné que l'appel concernant les quatre livres ne vise que quelques douzaines d'exemplaires. Le profit tiré de la vente de ces livres ne permettrait pas de payer une demi-heure du temps de l'avocat de l'appelante. L'appel concernant les quatre livres réunit nécessairement quatre affaires d'obscénité auxquelles se greffe l'examen de la façon dont Douanes Canada en est venu à décider que les livres en question étaient obscènes. La présente bataille ne concerne pas seulement quatre livres. Tout comme dans l'arrêt *Little Sisters n^o 1*, la vraie bataille porte sur la présumée discrimination systémique que *met en lumière* l'appel concernant les quatre livres. Comme nous l'avons vu, la Couronne concède que l'appel concernant les quatre livres nécessite un certain examen des questions systémiques. L'ordonnance rendue par la juge en chambre le 6 février 2003 fait état de cette concession :

[TRADUCTION]

6. La demande de l'appelante visant à obtenir une ordonnance enjoignant de donner des réponses lors de l'interrogatoire préalable est suspendue pour une période indéterminée, sauf pour ce qui est de la partie concernant « le processus suivi pour déclarer les bandes dessinées obscènes (*Meatmen*, volume 18, Special S&M Comics Edition, et volume 24, Special SM Comics Edition), et les raisons qui sous-tendent cette décision », qui est accueillie avec le consentement des parties; [Je souligne.]

La Couronne dispose de ressources considérables et il n'y a aucune raison de penser que la présente fought than the last. Both parties have already advised the case management judge of their intention to call extensive expert evidence, which is itself a major expense.

129 The government is in effect being accused of fighting a war of attrition. Today four books, tomorrow another four books. Litigation follows litigation until the rational businessperson is forced to throw in the towel. This is how civil liberties can be eroded, little by little, yielded in small increments that case by case are not worth the cost of the fight. It takes an unbusinesslike litigant like Little Sisters to elbow aside purely financial considerations (to the extent it can) and carry on what it sees as unfinished *Charter* business against the government. Having done so successfully and at its own expense in *Little Sisters No. 1*, it asks the court for an exceptional order of advance costs to make good the victory it thought it had won in *Little Sisters No. 1*. Little Sisters may be right or it may be wrong in its allegations, but its motive can hardly be financial, and its claim to advance costs should not be assessed on that basis.

D. *The "Four Books Appeal" Versus the "Systemic Review"*

130 It is difficult to assess the scope of the appellant's proposed "Systemic Review" because there are no pleadings. This is so, at least in part, because the Crown insists that Little Sisters must utilize the appeal procedures under the *Customs Act* rather than proceeding by way of an ordinary action. However, as described by appellant's counsel, the proposal for a "Systemic Review" seems to approximate a privately initiated public enquiry into the workings of Canada Customs, not only with respect to the appellant's problems, but with respect to those of other importers in similar lines of business as well. The appellant's attempt to assume the role of a private Attorney General operating on public funds, or to escalate the Four

bataille sera moins féroce que la précédente. Les deux parties ont déjà informé la juge responsable de la gestion de l'instance qu'elles entendent présenter une abondante preuve d'expert, ce qui représente en soi une dépense importante.

En fait, le gouvernement est accusé de se livrer à une guerre d'usure. Quatre livres aujourd'hui, quatre autres demain. Les litiges se succédant jusqu'à ce que le commerçant raisonnable soit contraint de baisser les bras. Voilà comment les libertés civiles peuvent être minées peu à peu et subir de légers reculs qui, individuellement, ne valent pas le coût de la bataille. Il faut une partie non mercantile comme Little Sisters pour écarter les considérations purement financières (autant qu'elle peut se le permettre) et poursuivre ce qu'elle considère comme un litige inachevé avec le gouvernement au sujet de la *Charte*. Après avoir mené cette lutte avec succès et à ses propres frais dans l'affaire *Little Sisters n^o^ 1*, elle demande maintenant aux tribunaux de rendre une ordonnance exceptionnelle, à savoir une provision pour frais concrétisant la victoire qu'elle pensait avoir remportée dans cette affaire. Peu importe que Little Sisters ait tort ou raison, les motifs qui la poussent à formuler ses allégations ne sont guère financiers, et sa demande de provision pour frais ne devrait pas être appréciée sur cette base.

D. *L'« appel concernant les quatre livres » par opposition à la « révision systémique »*

Il est difficile d'évaluer la portée de la « révision systémique » proposée par l'appelante en raison de l'absence d'actes de procédure. Cette situation est attribuable, en partie du moins, au fait que la Couronne exige que Little Sisters recoure à la procédure d'appel prévue par la *Loi sur les douanes* au lieu de procéder par voie d'action ordinaire. Toutefois, telle qu'elle est décrite par l'avocat de l'appelante, la « révision systémique » proposée semble correspondre à une enquête publique d'origine privée sur les activités de Douanes Canada, non seulement en ce qui concerne les problèmes de l'appelante, mais également en ce qui concerne ceux d'autres importateurs œuvrant dans des secteurs similaires. La Cour d'appel de la

Books Appeal into a sort of informal class action without bothering to certify the class, was rightly rejected by the B.C. Court of Appeal. Courts exist to resolve defined issues between litigants. Public enquiries are initiated elsewhere. Nevertheless, the appellant's allegations, if shown to be true, mean that it has suffered special damage as a result of a systemic failure of Canada Customs to respect the constitutional rights of readers and writers as well as importers. The public has an interest in whether or not its government respects the law and operates in relation to its citizens in a non-discriminatory fashion. That is where the interest of this litigation transcends the interests of the appellant.

I agree with Thackray J.A. that the so-called Systemic Review is an impermissible expansion of the Four Books Appeal, but I think the courts are quite capable of keeping the Four Books Appeal within proper bounds. I also agree with him that what is of importance to the public now are the procedures that were used to evaluate obscenity at the time these books were banned, not the history of the speed at which those procedures were modified following *Little Sisters No. 1*.

My colleagues Bastarache and LeBel JJ. state that:

> It is the Four Books Appeal that lies at the heart of the appellant's claim against Customs; the Systemic Review is simply an attempt by the appellant to investigate Customs' practices independently of this context. [para. 58]

Strictly speaking, of course, there is no such proceeding as the "Systemic Review" outside the wish list of appellant's counsel. There is only one proceeding before the Court and it is for the relief claimed in the originating Notice of Appeal dated February 13, 2002 (as expanded from two to four books). The Four Books Appeal provides

Colombie-Britannique a rejeté à bon droit la tentative de l'appelante de jouer un rôle de procureur général privé financé par les deniers publics ou de transformer l'appel en une sorte de recours collectif officieux sans se soucier d'obtenir l'autorisation nécessaire. Les tribunaux sont là pour trancher des questions précises opposant des parties. Les enquêtes publiques trouvent leur origine ailleurs. Cependant, si elles s'avèrent, les allégations de l'appelante signifieront que le défaut systémique de Douanes Canada de respecter les droits constitutionnels des lecteurs, des écrivains et des importateurs lui a causé un préjudice particulier. La population a le droit de savoir si son gouvernement respecte la loi et traite ses citoyens d'une manière non-discriminatoire. C'est là que l'intérêt du présent litige dépasse le cadre des intérêts de l'appelante.

Je souscris à l'opinion du juge Thackray selon laquelle la soi-disant révision systémique élargit de manière inacceptable la portée de l'appel concernant les quatre livres, mais j'estime que les tribunaux sont tout à fait capables de contenir cet appel dans les limites qui s'imposent. Je conviens également avec lui que ce qui revêt maintenant de l'importance pour le public ce sont les méthodes qui ont été utilisées pour évaluer l'obscénité à l'époque où les livres en cause ont été interdits et non la célérité avec laquelle ces méthodes ont été modifiées à la suite de l'arrêt *Little Sisters nº 1*. 131

Mes collègues les juges Bastarache et LeBel affirment ceci : 132

> C'est l'appel concernant les quatre livres qui se situe au cœur de l'action que l'appelante a intentée contre les Douanes; la révision systémique ne représente qu'une simple tentative de l'appelante d'enquêter sur les pratiques des Douanes indépendamment du présent contexte. [par. 58]

À proprement parler, la « révision systémique » n'existe certes que dans la liste de ce que souhaite obtenir l'avocat de l'appelante. Il n'y a qu'une seule instance devant la Cour et elle vise à obtenir la réparation sollicitée dans l'avis d'appel du 13 février 2002 (qui vise désormais quatre livres au lieu de deux). L'appel concernant les quatre livres 133 the appellant with an opportunity to explore, within a limited context, the process under which the importation of these four books was banned, and to that extent provides an opportunity for the systemic issues to be canvassed. The floating by appellant's counsel of a more ambitious idea for a Systemic Review does not empty the originating Notice of Appeal of its original content or in any way restrict or expand its ambit. The Notice of Appeal stands unamended. That is the only application for which advance costs can properly be sought.

E. *The Requirements for Advance Costs*

134 The courts have always exercised a broad discretion in the matter of costs. Although the appellant made its application pursuant to (and apparently because of) this Court's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, *Okanagan* is illustrative rather than exhaustive of a broader costs jurisdiction.

135 It is true that an order for advance costs should not be made where a lesser costs order would suffice, such as protective costs orders, which ensure that plaintiffs or applicants in public interest litigation do not have costs orders made against them at the conclusion of proceedings. Here the immediate problem is not the possibility of a calamitous post-trial award of costs. The problem is to get the case to trial in the first place.

136 It is also true that a party seeking advance costs must provide evidence that it has exhausted all realistic alternative avenues to fund its case including, where appropriate, legal aid, *pro bono* representation, contingency fees, private fundraising efforts and class action certification.

137 Further, I agree with my colleagues that an award of advance costs must be rare and exceptional and granted only in "special cases" where it

donne à l'appelante la possibilité d'étudier, dans un contexte limité, le processus en vertu duquel l'importation de ces quatre livres a été interdite et permet, dans cette mesure, d'examiner les questions systémiques. L'idée plus ambitieuse de la révision systémique lancée par l'avocat de l'appelante ne dépouille pas l'avis d'appel de son contenu initial et n'a pas non plus pour effet d'en restreindre ou d'en élargir la portée. L'avis d'appel demeure inchangé. C'est la seule demande pour laquelle une provision pour frais peut être sollicitée à bon droit.

E. *Les conditions d'une provision pour frais*

Les tribunaux ont toujours exercé un vaste pouvoir discrétionnaire en matière de dépens. Bien que l'appelante ait présenté sa demande sur la foi (et manifestement par suite) de l'arrêt de notre Cour *Colombie-Britannique (Ministre des Forêts) c. Bande indienne Okanagan*, [2003] 3 R.C.S. 371, 2003 CSC 71, cet arrêt constitue davantage un exemple d'exercice d'une compétence générale en matière de dépens qu'une analyse exhaustive de la question.

Il est vrai qu'il n'y a pas lieu d'ordonner le versement d'une provision pour frais dans le cas où une ordonnance moins onéreuse en matière de dépens suffirait, par exemple une ordonnance d'exemption de dépens, qui garantit aux demandeurs dans un litige d'intérêt public qu'ils ne seront pas condamnés aux dépens à l'issue de l'instance. En l'espèce, toutefois, le problème concret n'est pas le risque d'une condamnation aux dépens désastreuse à l'issue du procès, mais la tenue même d'un procès.

Il est également vrai que la partie qui sollicite une provision pour frais doit prouver qu'elle a épuisé toutes les autres possibilités réalistes de financement, dont l'aide juridique, la représentation par avocat bénévole, les honoraires conditionnels, les levées de fonds privées et l'autorisation de recours collectif, selon le cas.

En outre, je conviens avec mes collègues que l'ordonnance accordant une provision pour frais doit être une mesure rare et exceptionnelle et is necessary in the public interest. In light of *Little Sisters No. 1*, I consider this to be a special case.

n'être rendue que dans les « cas particuliers » où l'intérêt public l'exige. Compte tenu de l'arrêt *Little Sisters nº 1*, j'estime que la présente affaire est un cas particulier.

Okanagan established a three-part threshold, each of which must be demonstrated to give the trial judge the discretion to make the award in "special" cases, *per* LeBel J., at para. 40:

138 L'arrêt *Okanagan* a établi trois conditions préalables dont l'existence doit être démontrée pour que le juge de première instance ait le pouvoir discrétionnaire d'accorder une provision pour frais dans des cas « particuliers » (le juge LeBel, par. 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.

1. La partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance.
2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers.
3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées.

Although Thackray J.A. seemed to doubt whether an entity that seeks to earn a profit could qualify for advance costs ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94, at para. 41), I agree with the intervener Canadian Bar Association that "there is no principled reason to find that public and private interests cannot co-exist in a case that is deserving of advance costs" and that "the public interest must be clearly served by the litigation, but it does not have to operate to the exclusion of other interests" (factum, at para. 5). The Attorney General of British Columbia seems to agree (factum, at para. 11). In *Okanagan* itself, the band had a private financial interest in the assertion of its claimed logging rights.

139 Bien que le juge Thackray ait semblé douter qu'une entité à but lucratif puisse avoir droit à une provision pour frais ((2005), 38 B.C.L.R. (4th) 288, 2005 BCCA 94, par. 41), je souscris à l'opinion de l'intervenante l'Association du Barreau canadien, selon laquelle [TRADUCTION] « il n'y a aucune raison de principe de conclure que des intérêts publics et privés ne peuvent pas coexister dans une affaire où une provision pour frais est justifiée » et « l'instance doit clairement servir l'intérêt public, mais pas nécessairement à l'exclusion de tout autre intérêt » (mémoire, par. 5). Le procureur général de la Colombie-Britannique semble être du même avis (mémoire, par. 11). Dans l'affaire *Okanagan* elle-même, la bande indienne avait un intérêt financier privé dans la revendication de ses droits d'exploitation forestière.

As did my colleagues, I will address each of the three conditions precedent.

140 À l'instar de mes collègues, j'examinerai chacune des trois conditions préalables.

1. The Appellant 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

141 Whether or not an applicant "genuinely cannot afford to pay for the litigation" is a question of fact. After a four-day hearing and consideration of extensive financial material, the chambers judge made the following observation:

> I propose to deal with the financial aspect of the litigation first. The Commissioner submits that I should limit this case to the appeal. If I do that, then says the Commissioner, Little Sisters can afford to bring that aspect of the litigation.
>
> I disagree. Appeals from prohibitions are rarely brought to court, no doubt because the cost is prohibitive. Little Sisters intends to call expert evidence, as does the Commissioner, to establish the factual foundation for their respective arguments. [Emphasis added; paras. 18-19.]

She concluded that Little Sisters, with its resources in part depleted by the earlier litigation, could not afford to bring even the Four Books Appeal to trial. The appellant says that it realized it could not afford the litigation when Customs filed six expert affidavits in the Four Books Appeal itself. The chambers judge made strong findings of fact on the issue of lack of means:

> Having reviewed the evidence, it is clear that Little Sisters cannot genuinely afford to pay for this litigation, or any reasonable aspect of it.
>
> . . .
>
> I conclude that Little Sisters meets the first requirement of *Okanagan Indian Band*, regardless of the scope of the litigation. [Emphasis added; paras. 22 and 25.]

1. L'appelante n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal — bref, elle serait incapable d'agir en justice sans l'ordonnance

La question de savoir si un demandeur « n'a véritablement pas les moyens de payer les frais occasionnés par le litige » est une question de fait. À l'issue d'une audience de quatre jours et après avoir examiné de nombreux documents financiers, la juge en chambre a formulé l'observation suivante :

> [TRADUCTION] Je compte examiner d'abord l'aspect financier du litige. Le commissaire soutient que je devrais limiter l'instance à l'objet de l'appel. Il a ajouté que, si je fais cela, Little Sisters a les moyens de financer le litige.
>
> Je ne suis pas de cet avis. Il est rare que les interdictions fassent l'objet d'un appel devant les tribunaux, sans doute en raison du coût prohibitif d'un tel recours. Little Sisters et le commissaire entendent présenter une preuve d'expert destinée à établir le fondement factuel de leurs arguments respectifs. [Je souligne; par. 18-19.]

La juge a conclu que Little Sisters, dont les ressources avaient été épuisées en partie par le litige antérieur, n'était même pas en mesure de financer l'appel concernant les quatre livres. L'appelante affirme qu'elle s'est rendu compte qu'elle n'avait pas les moyens de payer les frais occasionnés par le litige lorsque les Douanes ont déposé six affidavits d'expert dans le cadre même de l'appel concernant les quatre livres. La juge en chambre a tiré de solides conclusions de fait sur la question du manque de ressources :

> [TRADUCTION] Il ressort clairement de la preuve que Little Sisters n'a véritablement pas les moyens de payer les frais occasionnés par le présent litige ou par tout aspect raisonnable de celui-ci.
>
> . . .
>
> Je conclus que Little Sisters satisfait à la première exigence de l'arrêt *Bande indienne Okanagan*, quelle que soit la portée du litige. [Je souligne; par. 22 et 25.]

As does our Chief Justice (at para. 99), I accept the chambers judge's finding that the impecuniosity requirement is met. The chambers judge was satisfied that sources of alternate funding had been explored. This is not a case where a contingency fee is attractive to lawyers. Even an optimistic view of the damages that might be recovered is insufficient to justify the risk to a law firm of time and disbursements. Nor is this a case where settlement is possible. Customs has given as much ground as it is prepared to give. Thackray J.A. speculated that if this case were of general importance, members of the gay and lesbian community would support it financially, and so they have, but not enough. Speculation of at least equal value is that the supporters are suffering donor fatigue. If Little Sisters is correct that Customs has not changed its ways despite *Little Sisters No. 1* rational people may well conclude that "you can't fight City Hall" and put their money into more productive activities. Disillusionment with the capacity of the legal system to remedy *Charter* wrongs effectively is of public concern.

À l'instar de la Juge en chef (au par. 99), j'accepte la conclusion de la juge en chambre selon laquelle la condition du manque de ressources est remplie. La juge en chambre était convaincue que d'autres possibilités de financement avaient été examinées. La présente affaire n'est pas un cas où les honoraires conditionnels représentent une option intéressante pour un avocat. Même une perception optimiste des dommages-intérêts susceptibles d'être obtenus n'est pas suffisante pour justifier le risque auquel un cabinet d'avocats serait exposé sur les plans du temps et des débours. Il ne s'agit pas non plus d'une affaire où il y a possibilité de règlement. Les Douanes ont cédé tout le terrain qu'elles étaient disposées à céder. Le juge Thackray a supposé que si la présente affaire revêtait une importance générale, les membres de la communauté gaie et lesbienne l'appuieraient financièrement; ils l'ont fait, mais pas suffisamment. Une autre hypothèse, au moins tout aussi valable, est que les partisans de Little Sisters sont las de contribuer. Si Little Sisters a raison d'affirmer que les Douanes n'ont pas changé leurs méthodes en dépit de l'arrêt *Little Sisters n^o 1*, des gens raisonnables peuvent bien conclure qu'« on ne peut rien contre l'administration » et consacrer leur argent à des activités plus productives. La désillusion face à la capacité du système de justice de corriger efficacement les atteintes à la *Charte* est effectivement un sujet d'intérêt public.

142 My colleagues Bastarache and LeBel JJ. assert that the impecuniosity requirement cannot be satisfied where "other litigation is pending [which] may be conducted for this same purpose, without requiring an interim order of costs" (para. 41). This is a legitimate consideration, but Customs is in the best position to know of such litigation, and has not disclosed any such cases. I do not believe the appellant should be called on to prove a negative when the party in the best position to raise such a concern — Customs — has not done so. In any event, on these particular facts, Little Sisters has taken on what it refers to as "Big Brother" for the past 12 years and I think it has earned the right to complete what the chambers judge considered to be a work in progress.

Mes collègues les juges Bastarache et LeBel affirment que la condition du manque de ressources ne peut pas être remplie dans le cas où « une autre affaire visant les mêmes fins est en instance et peut se dérouler sans qu'il soit nécessaire de rendre une ordonnance accordant une provision pour frais » (par. 41). C'est là une considération légitime, mais les Douanes, qui sont les mieux placées pour connaître l'existence d'une telle affaire, n'en ont fait part d'aucune. Je ne crois pas que l'appelante devrait être appelée à prouver l'inexistence de quelque chose alors que la partie la mieux en mesure de soulever cette question — les Douanes — ne l'a pas fait. De toute façon, selon ces faits particuliers, Little Sisters s'en est prise à ce qu'elle appelle « Big Brother » au cours des 12 dernières années et j'estime qu'elle s'est méritée le droit de terminer ce que la juge en chambre a qualifié d'entreprise toujours en cours.

143 Over more than a decade, Little Sisters has borne the brunt of the battle on this branch of expression and equality rights. In 1996, it financed a two-month trial and two subsequent successful appeals to establish the existence of systemic *Charter* violations at Canada Customs. That case vindicated (at least in principle) the rights generally of the lesbian and gay community, not just Little Sisters. We are told that the costs award in *Little Sisters No. 1* covered only 60 percent or so of actual costs (A.F., at para. 51). The present issue is whether the rights established in principle have (or will) become rights in reality. In the circumstances, Little Sisters should not have to prove that there is no one else in Canada with a potential interest in the subject matter with pockets deep enough to take up the cause.

Depuis plus d'une décennie, Little Sisters fait les frais de la bataille concernant cet aspect de la liberté d'expression et du droit à l'égalité. En 1996, elle a financé un procès de deux mois — suivi de deux appels à l'issue desquels elle a eu gain de cause — afin d'établir l'existence de violations systémiques de la *Charte* chez Douanes Canada. Cette cause a confirmé (en principe du moins) les droits de la communauté gaie et lesbienne en général, et non seulement ceux de Little Sisters. On nous dit que les dépens accordés dans l'arrêt *Little Sisters nº 1* ne représentaient qu'environ 60 pour 100 des frais réellement engagés (m.a., par. 51). Il s'agit en l'espèce de décider si les droits dont l'existence a été établie en principe sont devenus (ou vont devenir) réalité. Dans les circonstances, Little Sisters ne devrait pas avoir à démontrer qu'il n'y a, au Canada, personne d'autre susceptible d'avoir un intérêt dans cette question et disposant des ressources suffisantes pour prendre le relais.

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

2. La demande vaut *prima facie* d'être instruite, c'est-à-dire qu'elle paraît au moins suffisamment valable et, de ce fait, il serait contraire aux intérêts de la justice que le plaideur renonce à agir en justice parce qu'il n'en a pas les moyens financiers

144 The courts below, while not prejudging the outcome, considered that the appellant had easily met this requirement. The chambers judge noted that Customs did not "strenuously oppose the granting of costs" on the ground of whether the claim is *prima facie* meritorious (para. 28). Similarly, the Court of Appeal said that Customs "raised, but did not press" this issue (para. 28). The chambers judge nevertheless addressed it in some detail, noting that the determinations of obscenity in issue are those of Ms. Anne Kline, who at the relevant time was the Customs official in Ottawa ultimately in charge of the obscenity determinations. Ms. Kline acknowledged on discovery that she does not recall *ever* having allowed an appeal based on artistic merit (A.R., at p. 2935, Q 3167). The chambers judge stated:

Sans préjuger de l'issue, les tribunaux d'instance inférieure ont estimé que l'appelante avait aisément rempli cette condition. La juge en chambre a souligné que les Douanes ne s'étaient pas [TRADUCTION] « farouchement opposées à l'attribution de dépens » en soulevant la question de savoir si la demande valait *prima facie* d'être instruite (par. 28). De même, la Cour d'appel a affirmé que les Douanes avaient [TRADUCTION] « soulevé [cette question], sans toutefois insister » (par. 28). La juge en chambre l'a néanmoins examinée avec soin, constatant que les déclarations d'obscénité en cause émanaient de Mme Anne Kline, qui à l'époque pertinente était, à Ottawa, la fonctionnaire des douanes chargée, en dernier ressort, de rendre les décisions en matière d'obscénité. En interrogatoire préalable, cette dernière a reconnu qu'elle ne se rappelait pas avoir *jamais* accueilli un appel fondé sur la valeur artistique (d.a., p. 2935, question 3167). La juge en chambre a affirmé :

With respect to the appeal, there is *prima facie* evidence that Ms. Kline may not be applying the *Butler* test correctly [*R. v. Butler*, [1992] 1 S.C.R. 452]. For example, there is some evidence that Ms. Kline uses a "dirt for dirt's sake" approach (cross-examination on affidavit Q. 516-517, 526-7) which was rejected by *Butler* at p. 492, para. 79. There is some evidence to suggest she may not be correctly applying the risk of harm test: See her Examination for Discovery Questions: 2107-2110. Further, there is evidence that Ms. Kline may not be correctly applying the "artistic merit" test. For example, she may not be considering some or all of the factors which define artistic merit: See *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. [para. 29]

Further, the chambers judge added:

Unbeknownst to Little Sisters, Ms. Kline did not look at anything that was before the s. 58 arbitrators, including Little Sisters' written submissions. [para. 30]

The Chief Justice agrees that the "*prima facie* merit" condition is met (para. 101) but our colleagues Bastarache and LeBel JJ. say that to establish *prima facie* merit an applicant must "prove that the interests of justice would not be served" were the action to fail to proceed for want of resources (para. 51). With respect, this conflates a *prima facie* merit test with the "interests of justice" test. A *prima facie* merit test avoids the need for prejudgment and in my view is to be preferred. The potential for injustice should be addressed under the other factors, particularly at the residual discretion stage.

3. <u>The Issues Raised Transcend the Individual Interests of the Particular Litigant, Are of Public Importance, and Have Not Been Resolved in Previous Cases</u>

The appellant's position of course is that the issues *ought* to have been resolved in *Little Sisters No. 1* but in the end were not. It seeks a structured s. 24(1) remedy on updated material which would

[TRADUCTION] Quant à l'appel, il existe une preuve *prima facie* que M^me^ Kline n'applique peut-être pas correctement le critère de l'arrêt *Butler* [*R. c. Butler*, [1992] 1 R.C.S. 452]. Par exemple, il y a une preuve que M^me^ Kline utilise une méthode de « l'obscénité pour l'obscénité » (contre-interrogatoire sur affidavit, questions 516-517, 526-527) qui a été rejetée dans l'arrêt *Butler* (p. 492, par. 79). Une preuve indique qu'elle n'applique peut-être pas correctement le critère du risque de préjudice : voir les questions 2107-2110 de son interrogatoire préalable. Il y a, en outre, une preuve que M^me^ Kline n'applique peut-être pas correctement le critère de la « valeur artistique ». Par exemple, il se peut qu'elle ne tienne pas compte de tous les facteurs définissant la valeur artistique ou d'une partie de ces facteurs : voir *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2. [par. 29]

La juge en chambre a ajouté ceci :

[TRADUCTION] Sans que Little Sisters le sache, M^me^ Kline n'a rien consulté de ce qui avait été soumis aux décideurs agissant en vertu de l'art. 58, y compris les observations écrites de Little Sisters. [par. 30]

La Juge en chef reconnaît que la condition du « bien-fondé à première vue » est remplie (par. 101), mais nos collègues les juges Bastarache et LeBel affirment que, pour établir le bien-fondé à première vue, un demandeur doit « prouver qu'il ne serait pas conforme aux intérêts de la justice » qu'un manque de ressources empêche l'action de suivre son cours (par. 51). En toute déférence, cela revient à assimiler le critère du bien-fondé à première vue au critère des « intérêts de la justice ». Le critère du bien-fondé à première vue écarte la nécessité de préjuger et, à mon avis, doit être privilégié. La question du risque d'injustice devrait être abordée lors de l'examen des autres facteurs, particulièrement à l'étape de l'exercice du pouvoir discrétionnaire résiduel. 145

3. <u>Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées</u>

L'appelante soutient naturellement que les questions *auraient dû* être réglées dans l'arrêt *Little Sisters n^o^ 1*, mais qu'en fin de compte elles ne l'ont pas été. Elle sollicite en vertu du par. 24(1), sur 146 operate as a set of detailed instructions binding on Customs officials, only this time accompanied with ongoing judicial supervision. As appellant's counsel put it,

> we will be pressing very hard for the kind of structural reform that this Court I think has opened up in . . . *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [[2003] 3 S.C.R. 3, 2003 SCC 62]. [Transcript, at p. 4]

147 On the issue of public interest, the chambers judge concluded:

> Clearly, if the Commissioner, via Ms. Kline, is not correctly applying the legal test for obscenity, that issue transcends the interests of Little Sisters and touches all book importers, both commercial and private. . . . [para. 43]

148 The importance of the obscenity issue also affects potential readers. Section 2(*b*) of the *Charter* protects not only writers and artists, but also readers, who are denied access to books they may wish to peruse. The impact of discrimination may start with the appellant but it reaches "through them to Vancouver's gay and lesbian community" (*Little Sisters No. 1*, at para. 123) and beyond.

149 Underpinning her conclusion, the chambers judge noted several circumstances she regarded as significant:

> Since 1996, 57 titles imported by Little Sisters have been detained. Nineteen titles have been detained since the decision by the Supreme Court of Canada in *Little Sisters No. 1* . . . (affidavit of Ms. Kline, para. 17). It is not clear if these four titles are part of the nineteen. Numerous titles have been seized from other book sellers, and in particular, gay and lesbian book sellers. [para. 35]

. . .

la base d'éléments plus récents, une réparation structurée qui prendrait la forme d'un ensemble de directives détaillées liant les fonctionnaires des douanes et qui, cette fois, serait assortie d'une supervision judiciaire continue. Comme l'a exposé l'avocat de l'appelante,

> [TRADUCTION] nous réclamerons avec insistance le genre de réforme structurelle que la Cour a, je pense, instaurée dans [. . .] l'arrêt *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)* [[2003] 3 R.C.S. 3, 2003 CSC 62]. [Transcription, p. 4]

Au sujet de la question de l'intérêt public, la juge en chambre a tiré la conclusion suivante :

> [TRADUCTION] De toute évidence, si le commissaire, par l'entremise de M^me^ Kline, n'applique pas correctement le critère juridique en matière d'obscénité, cette question dépasse le cadre des intérêts de Little Sisters et touche tous les importateurs de livres, autant commerciaux que privés. . . [par. 43]

La question de l'obscénité revêt également de l'importance du point de vue des lecteurs potentiels. En effet, l'al. 2*b*) de la *Charte* protège non seulement les écrivains et les artistes, mais aussi les lecteurs, qui se voient privés de l'accès à des livres qu'ils pourraient souhaiter lire. L'incidence de la discrimination touche peut-être d'abord l'appelante, mais elle se répercute également « par l'intermédiaire [de celle-ci sur] [. . .] la communauté gaie et lesbienne de Vancouver » (*Little Sisters n^o^ 1*, par. 123) et au-delà.

Dans sa conclusion, la juge en chambre a relevé plusieurs circonstances qu'elle considérait importantes :

> [TRADUCTION] Depuis 1996, 57 titres importés par Little Sisters ont été retenus. Dix-neuf titres ont été retenus depuis l'arrêt *Little Sisters n^o^ 1* de la Cour suprême du Canada [. . .] (affidavit de M^me^ Kline, par. 17). Il n'est pas certain que les quatre titres en cause figurent parmi ces dix-neuf titres. D'autres libraires et, plus particulièrement, des libraires desservant la communauté gaie et lesbienne, se sont fait saisir de nombreux titres. [par. 35]

. . .

There is evidence that Customs is detaining hundreds, if not thousands of titles. [para. 37]

Ms. Kline has the final say, prior to court review, on the detentions of all titles imported into this country. . . . [para. 38]

. . .

The legislation prohibiting obscene material violates [the *Charter*], but is saved by s. 1 . . . on the understanding that certain safeguards to protect citizens are in place. One of these safeguards is the defence of artistic merit. [paras. 40-41]

. . .

Little Sisters has filed evidence to show that Customs has detained 190,000 items and prohibited 67,000-68,000 items in the past five years. This does not equate to titles, but the statistics demonstrate a large magnitude of detentions. [para. 48]

Further, the statistics demonstrate that 70% of detentions are gay and lesbian material. This is some evidence of continual targeting. [para. 49]

150 While I agree with Thackray J.A. that raw numbers of detained books are not necessarily significant, nevertheless the high *percentage* of gay and lesbian material detained *is* significant (70 percent of all items seized). In *Little Sisters No. 1*, our Court observed that "[w]hile homosexuals are said to form less than 10 per cent of the Canadian population, up to 75 per cent of the material from time to time detained and examined for obscenity was directed to homosexual audiences" (para. 113). We noted then that there was no evidence that gay and lesbian erotica was more likely to be obscene than heterosexual erotica (para. 121). If the systemic problems had been resolved since our decision in 2000, one would expect the percentage of gay and lesbian material detained to now be less than 70 percent of the total. An explanation for this lack of proportionality may lie in "the process that was followed and the reasons [the books] were determined to be obscene" as agreed to by the Crown in the February 6, 2003 consent order. I accept the view of the chambers judge that the 70 percent

Il est prouvé que les Douanes retiennent des centaines, voire des milliers de titres. [par. 37]

Avant l'exercice d'un contrôle judiciaire, c'est M[me] Kline qui a le dernier mot sur la retenue de tous les titres importés au Canada. . . [par. 38]

. . .

Les dispositions législatives interdisant le matériel obscène violent [la *Charte*], mais sont justifiées au regard de l'article premier [. . .] pour autant qu'existent certaines garanties visant à protéger les citoyens. L'une de ces garanties est le moyen de défense fondé sur la valeur artistique. [par. 40-41]

. . .

Little Sisters a déposé des éléments de preuve démontrant que les Douanes ont retenu 190 000 articles et en ont interdit entre 67 000 et 68 000 au cours des cinq dernières années. Il ne s'agit pas du nombre de titres, mais ces chiffres démontrent que la retenue se pratique à une grande échelle. [par. 48]

Ces chiffres démontrent, en outre, que 70 pour 100 des retenues concernent du matériel gai et lesbien. Il existe une preuve de ciblage constant. [par. 49]

Bien que je convienne avec le juge Thackray que le nombre brut de livres retenus n'est pas nécessairement significatif, le *pourcentage* élevé de matériel gai et lesbien retenu l'*est* néanmoins (70 pour 100 de tous les articles saisis). Dans l'arrêt *Little Sisters n^{o} 1*, notre Cour a fait observer que « [b]ien que les homosexuels constituent, dit-on, moins de 10 pour 100 de la population canadienne, jusqu'à 75 pour 100 du matériel retenu et contrôlé pour voir s'il est obscène était destiné à des publics homosexuels » (par. 113). Nous avons alors souligné qu'il n'y avait aucune preuve que le matériel érotique gai et lesbien était plus susceptible d'être obscène que le matériel érotique hétérosexuel (par. 121). Si les problèmes systémiques avaient été réglés depuis notre arrêt de l'an 2000, on pourrait s'attendre à ce que le pourcentage de matériel gai et lesbien retenu soit maintenant inférieur à 70 pour 100 de tous les articles retenus. Cette disproportion peut s'expliquer par le « processus suivi pour déclarer [les livres] obscènes [. . .] et les raisons qui sous-tendent cette décision », auxquels la Couronne a detention rate six years after *Little Sisters No. 1* is a statistic that taken together with the other evidence seems to signal an ongoing problem.

consenti dans l'ordonnance sur consentement du 6 février 2003. J'accepte le point de vue de la juge en chambre voulant que le taux de retenue de 70 pour 100 qui existe six ans après l'arrêt *Little Sisters nº 1* soit une donnée statistique qui, conjuguée aux autres éléments de preuve, semble indiquer l'existence d'un problème persistant.

151 In short, on the issue of public importance, I read the chambers judge as saying she is satisfied on a *prima facie* basis that there is unfinished business of high public importance left over from *Little Sisters No. 1*. She goes on to say:

> There is a strong public interest at stake, and that is ensuring that government does not interfere with the s. 2(*b*) rights of citizens. Further, whether the government has complied with a court order. [para. 61]

Bref, en ce qui concerne la question de l'importance pour le public, il ressort, selon moi, des propos de la juge en chambre que celle-ci est convaincue à première vue que l'arrêt *Little Sisters nº 1* n'a pas tout réglé et qu'il reste à trancher un aspect d'une grande importance pour le public. Elle ajoute :

> [TRADUCTION] Il y a un enjeu d'intérêt public important, qui est d'assurer que le gouvernement ne porte pas atteinte aux droits garantis aux citoyens par l'al. 2*b*). Il y a, en outre, la question de savoir si le gouvernement s'est conformé à une ordonnance judiciaire. [par. 61]

152 My colleagues Bastarache and LeBel JJ. further narrow *Okanagan* by observing that "the litigation would not be of exceptional public importance if Customs were shown to be acting in accordance with its constitutional duties" (para. 65). With respect, I cannot agree that the public importance of a case depends on whether the government loses it. The issue of public importance is whether Canada Customs learned the lessons of *Little Sisters No. 1*, and now performs its mandate without discrimination on grounds of sexual orientation, and has lived up to its assurances given to the Court. A positive answer to those questions would have as much significance as a negative one.

Mes collègues les juges Bastarache et LeBel restreignent davantage la portée de l'arrêt *Okanagan* en faisant remarquer que « le litige ne revêtirait pas une importance exceptionnelle pour le public s'il était démontré que les Douanes agissent conformément à leurs obligations constitutionnelles » (par. 65). En toute déférence, je ne puis accepter que l'importance d'une affaire pour le public dépende de la question de savoir si le gouvernement perd sa cause. La question d'importance pour le public en l'espèce consiste à déterminer si Douanes Canada a tiré de l'arrêt *Little Sisters nº 1* les leçons qui s'imposent et s'acquitte désormais de sa mission sans faire montre de discrimination fondée sur l'orientation sexuelle, et si elle se conforme aux assurances qu'elle a données à la Cour. Une réponse affirmative à ces questions serait tout aussi importante qu'une réponse négative.

153 My colleague the Chief Justice formulates the third criterion differently than Bastarache and LeBel JJ. She writes that her

> formulation differs from that used by my colleagues . . . in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances in the sense indicated. . . . [P]ublic importance is not enough in itself to meet the third requirement. The ultimate question is whether the

Ma collègue la Juge en chef formule le troisième critère d'une manière différente de celle des juges Bastarache et LeBel. Elle écrit :

> [Ma] formulation diffère de celle de mes collègues [. . .] en ce que la troisième condition veut non seulement que l'affaire soit d'intérêt public, mais qu'elle présente des circonstances particulières au sens indiqué. [. . .] [L]'importance pour le public n'est pas suffisante en soi pour remplir la troisième condition. En définitive, il

matter of public interest rises to the level of constituting special circumstances. . . . [para. 88]

. . .

How the third requirement of the test is formulated makes a difference in this case. Indeed, it makes a critical difference. [para. 89]

Having found that Little Sisters demonstrated both impecuniosity (para. 99) and *prima facie* merit (para. 101), the Chief Justice nevertheless rejects the Little Sisters application on the basis that its case is not "special enough" and the potential "insight" to be gained by its pursuit "do[es] not rise to the level of compelling public importance or demonstrate systemic injustice" (para. 109).

Whether a case, though special, is not "special enough" or fails to "rise to the level" of compelling public importance is a subjective test whose outcome will inevitably depend to a significant extent on the eye of the beholder. The discretionary nature of the order was, of course, recognized in *Okanagan*, although in that case it was identified as a residual discretion rather than as part of the "public importance" criterion. More significantly, *Okanagan* recognized that the discretion is given to the trial court. LeBel J. wrote for the majority that:

It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate. [Emphasis added; para. 38.]

It is ironic that in both cases to reach this Court on the advance costs issue, the trial court has been reversed.

My view is that the "sufficiently special" test is essentially the same as the "rare and exceptional

s'agit de savoir si l'affaire d'intérêt public présente des circonstances particulières. . . [par. 88]

. . .

La façon de formuler la troisième condition a une incidence en l'espèce. En fait, elle a une incidence cruciale. [par. 89]

Après avoir conclu que Little Sisters a démontré l'existence d'un manque de ressources (par. 99) et le bien-fondé à première vue de sa demande (par. 101), la Juge en chef rejette néanmoins cette demande pour le motif que son cas n'est pas « suffisamment particulier » et que les « indications » qu'un procès pourrait apporter « n'atteignent pas [. . .] un niveau déterminant d'importance pour le public et ne démontrent pas non plus l'existence d'une injustice systémique » (par. 109).

154 La question de savoir si un cas, bien que particulier, n'est pas « suffisamment particulier » ou « n'attei[nt] pas [. . .] un niveau » déterminant d'importance pour le public constitue un critère subjectif dont le résultat est inévitablement tributaire, dans une large mesure, de l'identité de celui qui l'applique. Il va sans dire que la nature discrétionnaire de l'ordonnance a été reconnue dans l'arrêt *Okanagan*, quoique, dans cette affaire, on ait parlé de pouvoir discrétionnaire plutôt que d'élément du critère de « l'importance pour le public ». Qui plus est, l'arrêt *Okanagan* a reconnu que ce pouvoir discrétionnaire est conféré au tribunal de première instance. S'exprimant au nom des juges majoritaires, le juge LeBel a écrit ceci :

Il incombe au tribunal de première instance de décider dans chaque cas si une affaire qui peut être qualifiée de « particulière » de par son caractère d'intérêt public est suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée. [Je souligne; par. 38.]

Il est ironique que la décision du tribunal de première instance ait été infirmée dans les deux affaires portant sur la provision pour frais qui sont parvenues à notre Cour.

155 J'estime que le critère de la nature « suffisamment particulière » est essentiellement le même

circumstances" test set out in *Okanagan*, which was dutifully applied by the chambers judge in this case, as I will address in the next section.

que le critère des « circonstances rares et exceptionnelles » qui a été énoncé dans l'arrêt *Okanagan* et que la juge en chambre a consciencieusement appliqué en l'espèce, comme je l'expliquerai dans la partie suivante.

F. *The Exercise of Discretion in "Rare and Exceptional Circumstances"*

F. *L'exercice du pouvoir discrétionnaire dans des « circonstances rares et exceptionnelles »*

156 The chambers judge properly directed herself on the "sufficiently special circumstances" test under the rubric of "rare and exceptional circumstances", as follows:

> Advanced costs are ordered in "rare and exceptional circumstances." The jurisdiction to make such an order in British Columbia was confirmed in *Okanagan Indian Band*. [para. 8]
>
> . . .
>
> [*Okanagan*] held . . . that even if all the conditions are met, that opens the "narrow jurisdiction" to consider an order for advanced costs. Even if all three criteria are met, it is still within the judge's discretion to make such an order. The order is made in "rare and exceptional circumstances". [para. 10]
>
> . . .
>
> Having met the threshold test for advanced costs, I would exercise my discretion in favour of ordering advanced costs to fund these appeals. The issues raised are too important to forfeit this litigation because of lack of funds. [para. 44]

In other words, the chambers judge did what *Okanagan* asked of her, namely to determine whether this case is "special enough to rise to the level where the unusual measure of ordering costs would be appropriate" (LeBel J., at para. 38). She held that it did, and absent a demonstration that she erred in her appreciation of the facts or the law, her assessment on this point should be upheld, in my view.

La juge en chambre ne s'est pas trompée au sujet du critère des « circonstances suffisamment particulières » figurant sous la rubrique des [TRADUCTION] « circonstances rares et exceptionnelles » :

> [TRADUCTION] Une provision pour frais est ordonnée dans des « circonstances rares et exceptionnelles ». La compétence pour rendre une telle ordonnance en Colombie-Britannique a été confirmée dans l'arrêt *Bande indienne Okanagan*. [par. 8]
>
> . . .
>
> [Dans l'arrêt *Okanagan*, la Cour] a [. . .] conclu que, même si les conditions sont toutes remplies, cela permet d'exercer la « compétence limitée » relative à la possibilité de rendre une ordonnance accordant une provision pour frais. Même si les trois conditions sont toutes remplies, le juge conserve le pouvoir discrétionnaire de rendre cette ordonnance. Celle-ci est rendue dans des « circonstances rares et exceptionnelles ». [par. 10]
>
> . . .
>
> Le critère préliminaire applicable à la provision pour frais étant respecté, je suis d'avis d'exercer mon pouvoir discrétionnaire et d'ordonner le versement de la provision pour frais requise pour financer les présents appels. En l'espèce, les questions soulevées sont trop importantes pour que l'on renonce à agir en justice à cause d'un manque de fonds. [par. 44]

En d'autres termes, la juge en chambre a fait ce que le critère de l'arrêt *Okanagan* l'obligeait à faire, à savoir décider si la présente affaire était « suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée » (le juge LeBel, par. 38). La juge a conclu qu'elle l'était et, à moins qu'il soit démontré qu'elle a commis une erreur dans son appréciation des faits ou du droit, j'estime qu'il y a lieu de maintenir son évaluation à cet égard.

157

Only one error in principle has been identified, and it goes to the scope of the proceeding, not the appropriateness of its advanced funding. For the reasons stated earlier, I accept that the chambers judge erred in principle in ordering advance costs for the "extended" Systemic Review because there is no such action pending. The taxpayers cannot be ordered to finance a piece of litigation that is neither pending nor defined in any concrete form in a proposed statement of claim. All that is before the court is the originating Notice of Appeal under ss. 67 and 71 of the *Customs Act*. The scope of the statutory appeal will have to be determined by the Supreme Court of British Columbia, although the chambers judge (who is also the case management judge) gave some indication of its elasticity. But in terms of scope, that is as much elbow room as the law permits.

Seule une erreur de principe a été décelée et cette erreur ne touche que la portée de l'instance et non la pertinence d'accorder une provision pour frais pour la financer. Pour les raisons déjà exposées, j'accepte que la juge en chambre a commis une erreur de principe en ordonnant le versement d'une provision pour frais pour la révision systémique « approfondie », du fait qu'aucune action de cette nature n'est en cours. On ne saurait ordonner aux contribuables de financer une affaire qui n'est ni en instance ni décrite de manière concrète dans un projet de déclaration. Le tribunal n'est saisi que de l'avis d'appel fondé sur les art. 67 et 71 de la *Loi sur les douanes*. Il appartiendra à la Cour suprême de la Colombie-Britannique d'établir la portée de l'appel prévu par la Loi, bien que la juge en chambre (qui est également responsable de la gestion de l'instance) ait donné une idée de son élasticité. Toutefois, en ce qui concerne la portée, c'est là toute la latitude que permet le droit.

158

No such error affects the chambers judge's exercise of discretion in relation to the Four Books Appeal. Having found the Little Sisters' allegations to have *prima facie* merit, and considering everything that has gone on in the last 12 years as creating "rare and exceptional" circumstances, she concluded this case justified an order for advance costs. We have been shown no basis on which to interfere with the exercise of her discretion in that respect.

Aucune erreur de cette nature n'entache l'exercice du pouvoir discrétionnaire de la juge en chambre relativement à l'appel concernant les quatre livres. Après avoir conclu que les allégations de Little Sisters étaient fondées à première vue et après avoir considéré que tout ce qui s'est passé au cours des 12 dernières années créait des circonstances « rares et exceptionnelles », la juge a décidé qu'une provision pour frais était justifiée en l'espèce. On ne nous a démontré aucune raison de modifier l'exercice de son pouvoir discrétionnaire à cet égard.

G. *A Structured Costs Order*

G. *Une ordonnance structurée en matière de dépens*

159

The chambers judge properly insisted that "This order does not mean the government must write a blank cheque." (para. 93) I agree. In this Court, appellant's counsel estimated the costs of the Four Books Appeal at $300,000 (A.F., at para. 66). It seems to me reasonable to cap the *maximum* potential public contribution to the Four Books Appeal at that amount, subject to further order of the trial court. It is perfectly possible that, properly supervised, the required state contribution to the costs of Little Sisters will be less than $300,000. A

La juge en chambre a eu raison d'insister sur le fait que [TRADUCTION] « [l]a présente ordonnance ne signifie pas que le gouvernement doit donner carte blanche » (par. 93). Je suis de cet avis. Devant nous, l'avocat de l'appelante a estimé que les dépens de l'appel concernant les quatre livres s'élèveraient à 300 000 $ (m.a., par. 66). Il me paraît raisonnable de fixer ce *plafond* à la contribution publique à l'appel concernant les quatre livres, sous réserve d'une autre ordonnance du tribunal de première instance. Il est tout à fait possible que, moyennant cap is fair to the public and fair to the appellant because it gives notice of the $300,000 upper limit to which the public purse will potentially finance the litigation. The appellant will have to budget accordingly.

une supervision adéquate, la contribution requise de l'État aux dépens de Little Sisters soit inférieure à 300 000 $. Un plafonnement est juste pour le public et juste pour l'appelante étant donné qu'elle avise que le montant maximal que le trésor public pourra être appelé à débourser pour financer le litige est de 300 000 $. L'appelante devra établir son budget en conséquence.

160 The chambers judge repeated the stricture set out in *Okanagan*, at para. 41:

> Such orders 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.

Hence, she concluded, "Further submissions are needed on the structure of the order and quantum" (para. 94). Subsequent to her order, the parties entered into a funding agreement which requires Little Sisters to submit budgets to a Costs Administrator appointed by Customs, to have all budgets and payments approved by the Costs Administrator and which limits Little Sisters to hourly and daily rates agreed to by the parties (A.R., at p. 2106). To the extent Little Sisters can make a contribution to the costs, it should be required to do so. The case management judge can ensure that the public is getting value for money. It seems to me that this was the proper way to proceed and I would not interfere with it.

La juge en chambre a réitéré la restriction énoncée au par. 41 de l'arrêt *Okanagan* :

> De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite, qui est également l'un des objectifs de l'attribution de dépens.

Du même coup, elle a conclu qu'il [TRADUCTION] « faudra présenter d'autres observations sur la structure de l'ordonnance et sur le montant de la provision » (par. 94). À la suite de son ordonnance, les parties ont conclu une entente de financement qui oblige Little Sisters à soumettre des budgets à un gestionnaire des coûts nommé par les Douanes, à faire approuver par ce gestionnaire des coûts tous les budgets et paiements et à respecter les tarifs horaires et quotidiens convenus par les parties (d.a., p. 2106). Dans la mesure où Little Sisters peut contribuer aux coûts, elle devrait être tenue de le faire. La juge responsable de la gestion de l'instance peut veiller à ce que le public en ait pour son argent. Il me semble que c'était la bonne façon de procéder, et je suis d'avis de ne pas la modifier.

H. *Impact of the Claim for Damages*

161 The appellant seeks substantial damages. The award of such damages would, if made, alleviate the impecuniosity. It would be entirely fair to both the public and the appellant to order that the appellant is obligated to repay the entire amount of the advance costs plus interest at the usual prejudgment rate as a first charge on any such award of damages. Such arrangements are not uncommon in cases of legal aid in civil matters (to the extent that legal

H. *Incidence de la demande de dommages-intérêts*

L'appelante réclame des dommages-intérêts substantiels qui, s'ils lui étaient accordés, atténueraient les effets de son impécuniosité. Il serait tout à fait juste, à la fois pour le public et pour l'appelante, d'ordonner que, si de tels dommages-intérêts lui sont accordés, cette dernière rembourse en priorité sur ceux-ci le montant total de la provision pour frais, majoré des intérêts au taux habituel des intérêts avant jugement. De tels arrangements aid is still available in such matters) and would be appropriate here.

ne sont pas rares lorsqu'une partie reçoit de l'aide juridique en matière civile (dans la mesure où l'aide juridique est encore disponible en ces matières), et ils seraient indiqués en l'espèce.

I. *Conclusion*

I would allow the appeal and reinstate the award of advance costs for the Four Books Appeal only, with a maximum potential limit of $300,000. The appellant should have its costs of the advanced costs motion and appeals on the regular scale throughout.

I. *Conclusion*

J'accueillerais le pourvoi et je rétablirais la provision pour frais accordée, mais seulement pour l'appel concernant les quatre livres et jusqu'à concurrence d'un montant maximal de 300 000 $. L'appelante devrait avoir droit à ses dépens à l'égard de la demande de provision pour frais et des appels, établis selon le barème normal, devant toutes les cours. 162

Appeal dismissed, BINNIE *and* FISH JJ. *dissenting.*

Solicitors for the appellant: Arvay Finlay, Vancouver.

Solicitor for the respondents: Deputy Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener Egale Canada Inc.: Sack Goldblatt Mitchell, Toronto.

Solicitor for the interveners the Sierra Legal Defence Fund and the Environmental Law Centre: Sierra Legal Defence Fund, Toronto.

Pourvoi rejeté, les juges BINNIE *et* FISH *sont dissidents.*

Procureurs de l'appelante : Arvay Finlay, Vancouver.

Procureur des intimés : Sous-procureur général du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Ministère du Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante l'Association du Barreau canadien : Camp Fiorante Matthews, Vancouver.

Procureurs de l'intervenante Egale Canada Inc. : Sack Goldblatt Mitchell, Toronto.

Procureur des intervenants Sierra Legal Defence Fund et Environmental Law Centre : Sierra Legal Defence Fund, Toronto.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20111117

Docket: A-344-11

Citation: 2011 FCA 312

Present: **STRATAS J.A.**

BETWEEN:

MYLAN PHARMACEUTICALS ULC

Appellant

and

ASTRAZENECA CANADA, INC.
ASTRAZENECA UK LIMITED, and
THE MINISTER OF HEALTH

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on November 17, 2011.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111117

Docket: A-344-11

Citation: 2011 FCA 312

Present: **STRATAS J.A.**

BETWEEN:

MYLAN PHARMACEUTICALS ULC

Appellant

and

ASTRAZENECA CANADA, INC.
ASTRAZENECA UK LIMITED, and
THE MINISTER OF HEALTH

Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] Mylan Pharmaceuticals ULC appeals from a decision of the Federal Court: 2011 FC 1023. The appeal is yet to be heard.

[2] Two motions have been brought in this Court, one telling us to go slow and the other telling us to go fast:

- AstraZeneca Canada, Inc. and AstraZeneca UK Limited move for an order staying the appeal until after the Supreme Court of Canada has rendered its decision in *Teva Canada Limited v. Pfizer Canada Inc., et al.* (S.C.C. file no. 33951).

- Mylan moves for an order expediting the appeal.

A. Astra Zeneca's motion for an order staying the appeal

(1) The applicable legal test

[3] AstraZeneca submits that the legal test is whether, in all the circumstances, it is in the interests of justice to order the stay. It submits that this test emanates from section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. That section empowers this Court to stay proceedings where "it is in the interests of justice that the proceeding be stayed."

[4] On the other hand, Mylan submits that AstraZeneca must satisfy the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[5] In considering this issue, the relief AstraZeneca seeks must be characterized. AstraZeneca is not asking this Court to enjoin another body from exercising its jurisdiction. Rather, it is asking this Court not to hear this appeal until some time later. There is a material difference between these two things and different considerations apply:

- *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in *RJR-MacDonald Inc.*, this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: *RJR-MacDonald Inc.*, *supra* at pages 343-347.

- *This Court deciding not to exercise its jurisdiction until some time later*. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends

> on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

[6] The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354; *Epicept Corporation v. Minister of Health*, 2011 FCA 209.

[7] Mylan cites another authority of this Court and says that it is to the contrary: *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research)* (1994), 58 C.P.R. (3d) 342 (F.C.A.).

[8] In *D & B Companies*, a party asked the Competition Tribunal to delay its proceedings. The Competition Tribunal refused. It held that the factors relevant to its discretion to delay its proceedings were the same as those set out in *RJR-Macdonald*. A motion was then brought in this Court to stay the Competition Tribunal's proceedings. As an attempt to have this Court enjoin another body from carrying out its mandate, the test in *RJR-Macdonald* was properly applied and the stay was refused.

[9] In the course of its reasons in *D & B Companies*, this Court observed that the Competition Tribunal was right to apply the test in *RJR-MacDonald* in order to determine whether it should delay the hearing before it. Mylan relies on this observation.

[10] There are three considerations that reduce the authority of this observation. First, in *D & B Companies*, this Court had to apply the test in *RJR-Macdonald* anyway. So its observation must be seen as *obiter*. Second, *D & B Companies* can be seen as one where, in the particular circumstances of that case, the Competition Tribunal saw the factors normally canvassed under the *RJR-MacDonald* test to be relevant to the exercise of discretion before it. Third, *D & B Companies* may be explained as a decision by a specialist administrative tribunal – not this Court – about what factors ought to apply to such matters before it, and, in making its observation, this Court appropriately deferred to the tribunal's decision.

[11] Because of these three considerations, the observation made by this Court in *D & B Companies* should not be seen as a statement of general principle, binding in all future cases.

[12] As a result, I do not agree with the reasoning of certain Federal Court cases cited by Mylan that follow the observation in *D & B Companies*: *Sawridge Band v. Canada*, 2006 FC 1218 and *Re Zündel*, 2004 FC 198.

[13] In any event, the reasoning in *Epicept* and *Boston Scientific* are preferable to that in *D & B Companies*. As explained above, cases such as *Epicept*, *Boston Scientific* and this case do not

involve forbidding another body from doing what Parliament says it can do. As explained above, in such cases the *RJR-MacDonald* test is inapt.

[14] Therefore, as Astra-Zeneca is asking this Court not to hear this appeal until some time later, the *RJR-Macdonald* test does not apply. Rather, we are to ask ourselves whether, in all the circumstances, the interests of justice support the appeal being delayed.

(2) Application of the test to the circumstances of this case

[15] AstraZeneca submits that the decision of the Supreme Court of Canada in *Teva Canada Limited v. Pfizer Canada Inc., et al.* (S.C.C. file no. 33951) has such a bearing on this appeal that this Court should exercise its discretion in favour of waiting until the Supreme Court has released its decision.

[16] Mylan disagrees. It emphasizes that if this Court waits until the Supreme Court has decided the *Teva* appeal, the wait will be a very long one. It also suggests that the decision of the Supreme Court may not have any bearing on the outcome of this appeal.

[17] Mylan is correct about the possible length of the wait. The *Teva* appeal is scheduled to be heard on February 8, 2012. The most recent statistics of the Supreme Court of Canada, filed before me, show that the average time required by that Court to issue a decision after hearing an appeal is 7.7 months. There are recent cases, albeit rare, where it has taken 18 months after a hearing to issue

a decision: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. Of course, a number of others are released well below the 7.7 month average.

[18] The parties helpfully filed the memoranda of the parties in the *Teva* appeal. The issues appear to be of considerable complexity. Added to whatever time the Supreme Court takes must be the time for the parties to file their memoranda of fact and law in this Court and to get a hearing. This means that AstraZeneca’s request that this Court wait until the Supreme Court has released its decision is really a request that this Court not hold its appeal hearing until, perhaps, the spring of 2013.

[19] This is a request for a long wait. Only a very direct nexus between the issues in the *Teva* appeal and this appeal might warrant an exercise of discretion in favour of that wait.

[20] Upon reviewing the memoranda of the parties in the *Teva* appeal, I am not convinced that such a direct nexus exists.

[21] The *Teva* appeal involves an allegation made by Teva under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 that a patent, which claims the use of sildenafil in the treatment of erectile disfunction, is invalid for insufficient disclosure. Teva’s allegation of insufficient disclosure is based on a particular feature of this patent: it is said that this particular patent does not reveal which of 260 quintillion compounds disclosed was observed to induce

erections in men. In this case, the patent at issue, unlike the patent at issue in the *Teva* appeal, only claims a single compound, anastrozole. Mylan is not arguing that the patent in issue in this case is invalid because it conceals the identity of anastozole among numerous other compounds.

[22] In this case, both Mylan and the Federal Court relied on a particular statement made by this Court in its decision on the *Teva* appeal. AstraZeneca says that the validity of that statement is one of the issues before the Supreme Court in the *Teva* appeal. That is true, but the Supreme Court may never decide that issue: many other arguments against the sufficiency and utility of the patent at issue are before it.

[23] AstraZeneca expresses concern that if this Court does not delay the appeal, this Court may decide the appeal against it on a basis that turns out to be wrong in light of the later decision of the Supreme Court in the *Teva* appeal. It points to the unlikelihood of the Supreme Court granting it leave to appeal in such a circumstance.

[24] AstraZeneca overlooks that in that situation the Supreme Court has the power to remand the case back to this Court and "order any further proceedings that would be just in the circumstances," such as a redetermination of the matter based on its decision in the *Teva* appeal: *Supreme Court Act*, R.S.C. 1985, c. S-26, subsection 43(1.1). This can be done without granting leave to appeal: see the words "notwithstanding subsection [43](1)" at the beginning of subsection 43(1.1). In light of this available avenue of relief, the concern expressed by AstraZeneca is insignificant.

[25] I also point out that it may be possible for the parties to intervene in the *Teva* appeal and make submissions on issues that could conceivably affect them later in any remand proceedings ordered under subsection 43(1.1): see Rules 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, and see also Rule 6 on extensions of time. This option becomes attractive if, contrary to the view I take of the matter, there is in fact a very direct nexus between the issues in the *Teva* appeal and this appeal. An application for intervention in circumstances such as these is not without precedent: the Mounted Police Members' Legal Fund successfully applied to the Supreme Court to intervene in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. The application was partly on the basis that the Supreme Court's decision might affect an appeal from a case in which it was a party (*Mounted Police Association of Ontario v. Canada (Attorney General)* (2009), 96 O.R. (3d) 20 (S.C.J.)): see Supreme Court of Canada, *Bulletin of Proceedings*, November 13, 2009 at page 1589 and the intervention materials filed with the Court.

[26] For the foregoing reasons, I shall dismiss the motion for an order staying the appeal, with costs.

B. Mylan's motion to expedite the appeal

[27] Mylan offers two reasons for expediting this appeal.

[28] First, Mylan is concerned that if the appeal is not decided before the expiry of the '420 Patent on October 24, 2012, it may be considered moot. I reject this. AstraZeneca has undertaken

not to argue that the appeal is moot. It is true that, on its own motion, this Court could raise the issue of mootness at the hearing of the appeal and dismiss the appeal on that basis. However, the current state of the hearing list is such that this appeal will be heard long before October 24, 2012, most likely in March-May, 2012.

[29] Second, Mylan suggests that if the appeal is expedited, Mylan may gain a first-to-market advantage over other generics, assuming that the appeal is decided before expiry of the patent and Mylan is successful on the appeal. I reject this as well. In my view the evidence is purely speculative as to whether Mylan would get a first-to-market advantage if this appeal were allowed.

[30] In any event, I would exercise my discretion against expediting the appeal. Those who seek expedition should themselves expedite. That has not happened here. Mylan took 25 days to issue its eight page notice of appeal, another 27 days to file the agreement as to the contents of the appeal book, and another 27 days to file the appeal book. All three of these procedural steps took close to the maximum time permitted under the *Federal Courts Rules*. The uneventful pace at which the appeal is being prosecuted belies any need for an expedition order.

[31] Therefore, for the foregoing reasons, I shall dismiss the motion to expedite, with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-344-11
STYLE OF CAUSE:	Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc. AstraZeneca UK Limited, and The Minister of Health

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	Stratas J.A.
DATED:	November 17, 2011

WRITTEN REPRESENTATIONS BY:

J. Bradley White Vincent M. de Grandpré	FOR THE APPELLANT
J. Sheldon Hamilton Colin B. Ingram Daniel S. Davies	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Osler, Hoskin & Harcourt LLP Ottawa, Ontario	FOR THE APPELLANT
Smart & Biggar Ottawa, Ontario	FOR THE RESPONDENTS

Federal Court of Appeal | Cour d'appel fédérale

Date: 20170519

Docket: A-118-17

Citation: 2017 FCA 106

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

THE HONOURABLE FRANCIS J.C. NEWBOULD

Applicant (Appellant)

and

ATTORNEY GENERAL OF CANADA

Respondent (Respondent)

Heard at Ottawa, Ontario, on May 16, 2017.

Judgment delivered at Ottawa, Ontario, on May 19, 2017.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: TRUDEL J.A.
RENNIE J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20170519

Docket: A-118-17

Citation: 2017 FCA 106

CORAM: **PELLETIER J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

THE HONOURABLE FRANCIS J.C. NEWBOULD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] This is an appeal by the Honourable Mr. Justice Francis Newbould (the appellant) from the dismissal of his motion for a stay of a decision of the Judicial Conduct Review Panel (the Review Panel) dated February 10, 2017 constituting an Inquiry Committee to inquire into his conduct. In effect, the appellant seeks to prevent the continuation of the Canadian Judicial

Council (CJC) proceedings investigating his conduct until such time as his application for judicial review of the Review Panel's decision is decided. In reasons reported as 2017 FC 326, the Federal Court dismissed the motion on the grounds that it was premature and, in the alternative, that he had not satisfied the irreparable harm portion of the tripartite test set out in *RJR—MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385 [*RJR—MacDonald*].

[2] For the reasons set out below, I would dismiss the appeal.

II. FACTS

[3] In late 2014, the CJC received a number of complaints about the appellant's involvement in a public controversy regarding an aboriginal land claim in the vicinity of a cottage property owned by his family. The Chairperson of the CJC's Judicial Conduct Committee, Chief Justice MacDonald, after reviewing these complaints and the submissions of the appellant, closed the files while communicating to the appellant his concerns about the latter's conduct. This outcome is contemplated by section 5.1 of the CJC's *Procedures for the Review of Complaints or Allegations about Federally Appointed Judges* (the *2014 Review Procedures*).

[4] Six months later, one of the complainants, the Indigenous Bar Association, requested reconsideration of the decision to take no further action with respect to its complaint. Chief Justice MacDonald deferred the reconsideration request to the next most senior judge on the Judicial Conduct Committee, Senior Associate Chief Justice Pidgeon. In a decision dated May 5,

2016, Pidgeon S.A.C.J. decided to forward the matter to a Review Panel to determine whether an Inquiry Committee should be constituted.

[5] In response to an invitation to make submissions to the Review Panel, the appellant provided submissions as did his chief justice, Chief Justice Smith of the Ontario Superior Court of Justice. In her letter Chief Justice Smith raised the question as to whether the *2014 Review Procedures* in force at the time the original complaints were received or the subsequent revision of those procedures (the *2015 Review Procedures*) provided for reconsideration at all, or by someone other than the original decision maker.

[6] Before the Review Panel advised him of its decision, the appellant wrote to the Minister of Justice resigning from his office as judge effective June 1, 2017.

[7] In a decision dated February 10, 2017, the Review Panel concluded that the CJC had jurisdiction to reopen the Indigenous Bar Association's complaint. It went on to constitute an Inquiry Committee as provided in section 63(3) of the *Judges Act*, R.S.C 1985 c. J-1 (the Act) and subsection 2(4) of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203.

[8] The appellant applied for judicial review of that decision, seeking a declaration that the CJC had no jurisdiction to reconsider Chief Justice MacDonald's decision and an order prohibiting the CJC from taking any further steps concerning the complaints disposed of by Chief Justice MacDonald. In his notice of application he alleges that Pidgeon S.A.C.J. had no

jurisdiction to reconsider the decision of Chief Justice MacDonald in relation to the same subject matter and therefore, Pidgeon S.A.C.J. had no jurisdiction to refer the matter to a review panel. As a result, the Review Panel was itself without jurisdiction to constitute an Inquiry Committee.

[9] In the interim, the appellant moved for an order staying the decision of the Review Panel pending the outcome of his application for judicial review. That motion was heard by Mr. Justice Boswell of the Federal Court.

III. THE DECISION UNDER REVIEW

[10] After setting out the facts and the parties' submissions, the Federal Court set out the issues which it was called upon to decide:

1. Was the application for judicial review of the Review Panel's decision premature?
2. Should the Review Panel's decision constituting an Inquiry Committee be stayed pending the outcome of the judicial review?

[11] The Federal Court began its analysis of the prematurity issue by referring to a decision I wrote as a single judge of this Court sitting on motions, *Groupe Archambault v. CMRRA/SODRAC Inc.*, 2005 FCA 330, 357 N.R. 131 [*Groupe Archambault*] in which I stated at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." Following my review of the circumstances, I dismissed the motion for a stay before considering the *RJR—McDonald* test for an injunction or a stay of proceedings.

[12] In light of this authority, the Federal Court reviewed the law as to prematurity and adequate alternate remedies, quoting at length from this Court's decision in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332. The Federal Court was of the view that there were no extraordinary circumstances that would justify interfering with the ongoing administrative proceedings until they were completed or until all effective available remedies were exhausted.

[13] The Federal Court referred to the case of *Girouard v. Inquiry Committee Constituted Under the Procedures for Dealing With Complaints Made to the Canadian Judicial Council About Federally Appointed Judges*, 2014 FC 1175, [2014] F.C.J. No. 1360 (QL) [*Girouard*]. In that case, the Federal Court struck a notice of application brought by a federally appointed judge seeking judicial review of a Review Panel decision to constitute an Inquiry Committee. The Federal Court did so on the basis that the application for judicial review was premature: see *Girouard* at para. 17. In the course of discussing *Girouard*, the Federal Court commented that the Attorney General had not brought a motion to strike out the underlying application for judicial review. In the result, the Federal Court dismissed the application for a stay on the basis that it was premature. Given that there was no motion before it seeking the striking out of the application for judicial review, it did not do so.

[14] In the event that this Court did not agree with its view as to prematurity, the Federal Court addressed the merits of the motion for a stay. As is well known, the elements of the tri-partite test in *RJR—MacDonald* are:

1. A serious question to be tried; (serious issue)
2. Irreparable harm if the relief is not granted; and (irreparable harm)

3. The balance of convenience.

RJR—MacDonald at 343

[15] In this case, the Federal Court found that the application for judicial review raised a serious issue and that it was neither frivolous nor vexatious.

[16] On the issue of irreparable harm, the Federal Court found that any harm to the appellant's reputation had conceivably already occurred as a result of media coverage of his participation in the public controversy in relation to the aboriginal land claim. The Federal Court found that irreparable reputational harm could not be proven by unsubstantiated allegations; in the Court's view, irreparable harm could only be established by clear and compelling evidence. The Federal Court found that there was no evidence that any harm suffered by the appellant would be irreparable.

[17] Given that the tri-partite test is conjunctive, the Federal Court did not go on to consider the balance of convenience since the appellant's motion for a stay failed on the issue of irreparable harm.

IV. STATEMENT OF ISSUES

[18] The issues considered by the Federal Court are the issues in this appeal. The question as to whether prematurity is a preliminary issue which must be decided prior to consideration of the tri-partite test is challenged by the appellant as is the Federal Court's conclusion that no reputational damage amounting to irreparable harm has been shown here.

V. STANDARD OF REVIEW

[19] This is an appeal of a discretionary decision of a judge of the Federal Court. As a five-member panel of this Court found in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paragraph 79, 402 D.L.R. (4th) 497, the standard of review in such a case is the appellate standard identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, save where an extricable question of law can be identified.

VI. PREMATURITY

[20] In *RJR—MacDonald* at pages 337-38, the Supreme Court discussed the characteristics of "a serious question to be tried." It noted that there were no specific requirements to be met in order to satisfy the test; the threshold is a low one. The judge hearing the motion for the injunction (or stay) is required to make a preliminary assessment of the merits of the case. If the judge concludes that the issues raised are not frivolous or vexatious, the test is satisfied even if the judge's own view is that the applicant is unlikely to succeed when the case is heard on the merits. The Supreme Court brought this portion of its analysis to a close by remarking that "[a] prolonged examination of the merits is generally neither necessary nor desirable": *RJR—MacDonald* at 338.

[21] This is to be contrasted with *Groupe Archambault*, where the following comment appears at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of

proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." This led the motions judge in that case to dismiss the motion for a stay before even addressing the *RJR—MacDonald* factors. While the result in *Groupe Archambault* can perhaps be justified on its facts – the underlying judicial review, a challenge to a decision as to the disclosure of documents in the course of a discovery process, was doomed to fail – its reasoning cannot be reconciled with *RJR—MacDonald*.

[22] The insertion of a decision on the merits of the underlying application before consideration of the tri-partite test for granting a stay or an injunction pre-empts the question of whether there is a serious issue, as the Supreme Court has conceived it. It forces applicants who need only meet a low threshold under the serious issue branch of the tri-partite test to satisfy the more demanding test of showing extraordinary circumstances as a condition of being heard on their application for a stay. Prematurity/extraordinary circumstances is a feature of the law of judicial review, and not of the law of injunction. The creation of a requirement that prematurity be negatived before the tri-partite test can be considered is a conflation of the law governing two distinct remedies, for which no justification has been offered other than a repetition of the rationale underlying the doctrine of prematurity.

[23] I can only conclude that *Groupe Archambault* was wrongly decided and ought not to be followed. As it was a decision of a single judge of this Court, *Groupe Archambault* is not binding on a panel of the Court so there is no need to engage in the analysis set out in *Miller v. Canada (Attorney General)*, 2002 FCA 370 at paragraphs 8-10, 220 D.L.R. (4th) 149.

[24] To summarize, prematurity and extraordinary circumstances (two aspects of the same policy of judicial restraint) are not free-standing preliminary questions which must be addressed before considering the tri-partite test. These issues should be considered under the heading of serious issue where, consistently with *RJR—MacDonald*, the question is whether their weight is such that the underlying application can be considered frivolous or vexatious. If not, the Court proceeds to the next step of the analysis.

[25] In this case, the Federal Court's determination that it could dismiss the appellant's motion for a stay on the basis of prematurity was based on an error of law, though the responsibility for the error lies elsewhere. This error would justify our intervention but for the fact that consideration of the tri-partite test persuades me that the appeal must be dismissed.

VII. THE TRI-PARTITE TEST

[26] The Federal Court found that there was a serious question as to the jurisdiction of the CJC to reconsider complaints which it had previously dismissed. The Federal Court's conclusion on this point was not challenged in the argument before us. As a result, I will proceed on the basis that this portion of the tri-partite test has been satisfied.

[27] Two issues have been raised in relation to irreparable harm, (i) whether the Federal Court chose the right evidentiary standard and (ii) whether the Federal Court made a palpable and overriding error in concluding that the appellant would not suffer irreparable damage if the stay was not granted.

[28] As regards the first issue, the Federal Court applied the clear and compelling evidence standard set out in cases such as *Choson Kallah Fund of Toronto v. Canada (Minister of National Revenue)*, 2008 FCA 311 at paragraphs 5-11, 383 N.R. 196 and *Gateway City Church v. Canada (Minister of National Revenue*), 2013 FCA 126 at paragraph 14, 445 N.R. 360 [*Gateway City Church*] and the cases cited therein. The appellant argues that in cases involving reputational damage or damage to other social attributes such as credibility, the occurrence of irreparable harm can be inferred, relying on cases such as *Adriaanse v. Malmo-Levine*, 161 F.T.R. 25 at paragraphs 20-22, 1998 CanLII 8809 (F.C.) [*Malmo-Levine*], *Douglas v. Canada (Attorney General)*, 2014 FC 1115 at paragraph 43, 94 Admin. L.R. (5th) 229 [*Douglas*], and *Bennett v. British Columbia (Superintendent of Brokers)*, 77 B.C.L.R. (2d) 145, 1993 CanLII 2057 (B.C.C.A.) at paragraphs 17-18 [*Bennett*].

[29] In my view, the presence of two lines of cases such as these shows that the quality of the evidence – "clear and compelling" or something less – is a function of the nature of the irreparable harm being alleged. Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at paragraph 17 of *Gateway City Church*. In the case of harm to social interests such as reputation or dignity, as in *Douglas*, the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.

[30] In my view, the Federal Court erred in law in excluding the possibility of proof of damage to reputation by inference.

[31] That said, the question is whether the appellant is able to show such damage to his reputation. The appellant says that the proceedings before the Inquiry Committee will irreparably harm the reputation he acquired in the course of his years on the bench. I am sensitive to this argument, but the difficulty I have is that the harm of which the appellant complains is inherent in the process in which he is engaged. If the appellant is likely to suffer irreparable harm solely from the fact that his conduct will be the subject of Inquiry Committee proceedings, then all judges who find themselves in the same position also suffer irreparable harm. I am not prepared to make such a finding.

[32] This difficulty is compounded by the fact that, in this case, the appellant has already been exposed to a certain amount of public exposure resulting from the contemporary coverage of his involvement in the events giving rise to these proceedings as well as in the coverage of the proceedings themselves to date.

[33] This is not to say that judicial conduct proceedings can never give rise to irreparable harm to a judge's reputation. But in order to do so, it appears to me that there must be some factor, some element in the surrounding circumstances that takes the case out of the normal run of such proceedings. The judge would have the burden of showing the presence of such a factor. Once the presence of such a factor was shown, the issue is whether it permits the inference of the likelihood of irreparable harm.

[34] In the cases the appellant put to us as examples of proceedings stayed on the basis of irreparable harm, there were such factors. In *Douglas*, the issue was a privacy interest in relation

to certain photos, whereas in *Bennett* and *Malmo-Levine*, the issue was the risk of an adverse result by a tribunal which was alleged to be biased. These factors raise issues of reputational damage but, in my view, but it was the addition of another element which gave rise to the inference of irreparable harm.

[35] Does an allegation of lack of jurisdiction permit an inference of irreparable harm? It could but I do not believe that it gives rise to that inference in every case. The threat of damage to reputation inherent in Inquiry Committee proceedings does not flow from the Committee's jurisdiction but from the evidence it hears. To the extent that the possibility of vindication at the end of the proceedings exists, any harm suffered in the course of proceedings could be remedied in whole or in part.

[36] It is no doubt infuriating to be dragged into a process which one believes has no basis in law but that does not amount to irreparable damage to reputation. It may, in particular circumstances, give rise to some other kind of irreparable harm but, on this record, there is no reason to believe that we are in the presence of such circumstances.

[37] In the circumstances, I have not been persuaded that the Federal Court fell into palpable and overriding error in concluding that the appellant has not shown that he will suffer irreparable harm if his motion for a stay is not granted.

VIII. CONCLUSION

[38] In light of the above, I would dismiss the appeal. As costs have not been sought, none will be awarded.

"J.D. Denis Pelletier"

J.A.

“I agree
Johanne Trudel”

“I agree
Donald J. Rennie

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-118-17
STYLE OF CAUSE:	THE HONOURABLE FRANCIS J.C. NEWBOULD v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	TRUDEL J.A. RENNIE J.A.
DATED:	MAY 19, 2017

APPEARANCES:

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RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

Indexed as: RJR — MacDonald Inc. *v.* Canada (Attorney General)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms.* The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment,* would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada.* In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

Répertorié: RJR — MacDonald Inc. *c.* Canada (Procureur général)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés.* La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada.* En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada.*

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada.*

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé and in the prevention of the widespread and serious medical problems directly attributable to smoking.

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et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Lebœuf*, for the respondent.

W. Ian C. Binnie, Q.C., and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

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Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives.* Scarborough, Ont.: Carswell, 1991, 271.
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DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, c.r., et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4[e] suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1[er] janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment,* SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

étant dissident sur ce dernier point. Le juge Brossard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 $.

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent decision of this Court confirming the validity of *Tobacco Products Control Act.*

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> **3.** The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> **65.1** The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac.*

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3:

> **3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:
>
> *a*) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
>
> *b*) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
>
> *c*) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

> **65.1** La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2*b*) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2*b*) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d'appel (relativement au sursis d'exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

> [TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

La cour a fait droit en partie au redressement demandé:

> [TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

. . .

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdît pas la consommation, n'interdît pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Brossard J.A. (dissenting in part)

2. Le juge Brossard (dissident en partie)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Jurisdiction

IV. Compétence

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

> **97.** . . .
>
> (*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale n° 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)*a*) de cette disposition prévoit que des règles peuvent être adoptées pour:

> **97.** . . .
>
> *a*) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé regulations constitute conduct under a law that has been declared constitutional by the lower courts.

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

> On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

> Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms.*
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:
   (i) There is a serious constitutional issue to be determined.
   (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.
2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.
3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.
4. Les critères applicables à une suspension d'instance sont satisfaits:
   (i) Il existe une question constitutionnelle sérieuse à juger.
   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra.* If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

> [TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

> [TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le court of the public interest benefits which will flow from the granting of the relief sought.

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir lic interest is equally well served, in the same sense, by any appeal . . . .

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. <u>The Status Quo</u>

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. <u>Le statu quo</u>

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> **3.** The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

> **3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:
>
> *a*) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
>
> *b*) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
>
> *c*) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

> L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du vention of the widespread and serious medical problems directly attributable to smoking.

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.