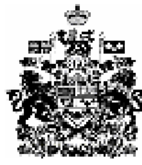

SUPREME COURT OF CANADA

CITATION: Little Sisters Book and Art Emporium *v.* Canada (Commissioner of Customs and Revenue), 2007 SCC 2

DATE: 20070119
DOCKET: 30894

BETWEEN:

Little Sisters Book and Art Emporium
Appellant
and
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

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

JOINT REASONS FOR JUDGMENT: (paras. 1 to 79) — Bastarache and LeBel JJ. (Deschamps, Abella and Rothstein JJ. concurring)

CONCURRING REASONS: (paras. 80 to 113) — McLachlin C.J. (Charron J. concurring)

DISSENTING REASONS: (paras. 114 to 162) — Binnie J. (Fish J. concurring)

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little sisters book and art emporium *v.* canada

Little Sisters Book and Art Emporium *Appellant*

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Commissioner of Customs and Revenue and
Minister of National Revenue *Respondents*

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Neutral citation: 2006 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 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 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 collected at the end of the trial should also be contemplated. [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]

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]

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 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]

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]

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]

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 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 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 pre-judgment rate as a first charge on any such award of damages. [159-161]

Cases Cited

By Bastarache and LeBel JJ.

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By McLachlin C.J.

Referred to: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71, aff'g (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69; *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ v. Barnett* (1992), 11 O.R. (3d) 210; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321.

By Binnie J. (dissenting)

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, 2000 SCC 69; *R. v. C. Coles Co.*, [1965] 1 O.R. 557; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71.

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Canadian Charter of Rights and Freedoms, ss. 2(*b*), 15(1), 24(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 163(8).

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), ss. 67, 71.

Customs Tariff, S.C. 1987, c. 49, Sch. VII, Code 9956.

Customs Tariff, S.C. 1997, c. 36.

Rules of Court, B.C. Reg. 221/90, r. 57(9).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Thackray and Oppal JJ.A.) (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, setting aside a decision of Bennett J. (2004), 31 B.C.L.R. (4th) 330, [2004] B.C.J. No. 1241 (QL), 2004 BCSC 823. Appeal dismissed, Binnie and Fish JJ. dissenting.

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 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.

2 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.

3 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.

4 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 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.

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.

2. Facts

6 The appellant is a business corporation that operates the Little Sister's 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 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.

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.

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:

> 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 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.).

11 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 and 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.

12 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.

13 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".

14 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".

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.

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.

3. Judicial History

3.1 *British Columbia Supreme Court* (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 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").

18 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).

19 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, on the latter, to changes in the decade since *Butler* (paras. 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.

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).

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.

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).

3.2 *British Columbia Court of Appeal* (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.

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.

26 Turning to the *Okanagan* criteria, Thackray J.A. focussed his attention on the impecuniosity and public importance requirements. On the *prima 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).

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).

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.

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 "efficiency" question was significantly less important to the public than the question of whether the problems were addressed at all (para. 57).

30 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).

31 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.

4. Analysis

4.1 *Rule in Okanagan*

32 *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 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.

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.

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 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. 1, 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.

35 *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) 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 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.

38 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.

39 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 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.

41 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.

42 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.

43 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 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.

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.

4.2 *Applying the Rule in Okanagan to the Facts of this Appeal*

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.

46 We will first consider the merit of these claims, and will then discuss their public importance. We 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.

4.2.1 Standard of Review

47 A trial judge enjoys considerable discretion in fashioning a costs award. This discretion has two corollaries.

48 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.

49 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.

50 Despite the deference owed to the exercise of a discretion by a trial judge, we conclude that, in the present case, Bennett J. went beyond the boundaries this Court set in *Okanagan*.

4.2.2 *Prima Facie* Merit and Public Importance

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.

52 Operating a business with some dependence on imports, the appellant is right to be concerned 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.

53 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.

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 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?

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.

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 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.

57 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.

58 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. 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.

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".

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. 158). At most, the Four Books Appeal deals with the application of *Little Sisters No. 1* to a specific set of facts.

61 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*.

62 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.

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.

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 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.

65 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.

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.

4.2.3 Impecuniosity

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*.

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]

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: 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.

70 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.

71 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

72 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 satisfied.

73 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 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 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.

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.

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.

6. Disposition

79 The appeal is dismissed, with the parties to bear their own costs.

The reasons of McLachlin C.J. and Charron J. were delivered by

THE CHIEF JUSTICE —

80 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.

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.

I. Test for Awarding Interim Costs

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.

83 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]

84 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 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 there described 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 special

circumstances be established as a pre-condition 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.

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.

II. Application of the Test to this Case

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 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".

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).

91 I agree with the Court of Appeal that this constituted a critical error, justifying disturbing the chambers judge's order for interim costs.

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.

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 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 in failing to consider whether Little Sisters could afford to pursue the appeal of the four books, rather than the broader systemic appeal.

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 is was "speculativ[e]" 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 impractical" 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.

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, <u>that party</u> 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 impossible task of proving no one else could or would pursue the litigation.

99 I conclude that the evidence supports the chambers judge's finding of inability to finance the litigation.

2. *Prima Facie Merit*

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.

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.

3. *Special Circumstances*

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). 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. (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.

105 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 necessary last resort" (para. 78).

106 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 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 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.

109 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.

110 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 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.

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.

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 give the applicant more than it would receive were it successful at trial.

III. Conclusion

113 I would dismiss the appeal, with the parties bearing their own costs.

The reasons of Binnie and Fish JJ. were delivered by

BINNIE J. —

114 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*

115 In the earlier proceedings, the appellant (a book and art shop described by the trial judge in *Little Sisters No. 1* as the "nerve-centre 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

(*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;

(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.

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 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 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 <u>invalidate the legislation</u> and invite Parliament to remedy the constitutional infirmities. [Emphasis added; para. 167.]

120 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*

121 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* relevant provisions of the *Customs Tariff* and *Customs Act* "have been construed and applied in a manner contrary to s. 2(b) and 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, etc.

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 and 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 facie* case to suggest they have not been sufficiently addressed.
>
> ((2004), 31 B.C.L.R. (4th) 330, 2004 BCSC 823, at para. 59)

123 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*)

124 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.]

125 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. . . .

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).

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.

C. *The Appellant's Application for Advance Costs*

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 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 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 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.

131 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*.

132 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]

133 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 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 is necessary in the public interest. In light of *Little Sisters No. 1*, I consider this to be a special case.

138 *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:

> 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.

139 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.

140 As did my colleagues, I will address each of the three conditions precedent.

1. <u>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</u>

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.
>
> <u>I disagree</u>. 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.]

As does our Chief Justice (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.

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.

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.R., at p. 171). 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.

2. <u>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</u>

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:

> 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]

145 The Chief Justice agrees that the "*prima facie* merit" condition is met (para. 22) 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. The Issues Raised Transcend the Individual Interests of the Particular Litigant, Are of Public Importance, and Have Not Been Resolved in Previous Cases

146 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 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]
>
> . . .
>
> 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 "While 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 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.

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]

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.

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 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)

154 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.

155 My view is that the "sufficiently special" test is essentially the same as the "rare and exceptional 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.

F. *The Exercise of Discretion in "Rare and Exceptional Circumstances"*

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.

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.

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.

G. *A Structured Costs Order*

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 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.

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.

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 aid is still available in such matters) and would be appropriate here.

I. *Conclusion*

162 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.

Appeal dismissed, BINNIE *and* FISH JJ. *dissenting.*

Solicitors for the appellant: Arvay Finlay, Victoria.

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.