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No Advance Costs Awarded on Charter Application

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Cases Considered:

D.W.H. v D.J.R., 2011 ABQB 119

Mr. H. and Mr. R. lived together as partners and planned to have a baby through a surrogate mother. The baby lived with the two male partners and visited the surrogate mother once or twice a week. The couple separated and Mr. H. applied for access. Madame Justice K.M. Eidsvik in *D.W.H. v D.J.R.*, 2009 ABQB 438 found that the child had a mother (who was the surrogate), but no father who would be recognized in law (see Melissa Luhtanen, Gay Fathers Not Seen as Parental Unit Under Family Law Act). Mr. H. was given access to the child and later, Mr. R. successfully applied to become the child's guardian. Mr. H. also applied for guardianship but his application was opposed. Mr. H. proceeded to make a section 15 *Charter* challenge to the validity of relevant sections of the *Family Law Act*, SA 2003, c. F-4.5 (*"FLA")* and *Vital Statistics Act*, RSA 2000, c. V-4 (*"VSA*"). In that application, Mr. H. is arguing that these sections discriminate against him on the grounds of gender and sexual orientation. The present application is for advance or interim costs in order for Mr. H to retain counsel for the constitutional argument.

Madam Justice Eidsvik of the Court of Queen's Bench considered Mr. H.'s application for advance costs. The leading case on determining whether advance costs are warranted is *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 (confirmed in *R v Caron*, 2011 SCC 5). In *Okanagan*, Mr. Justice LeBel said at para. 40:

> With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
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> 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.
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> 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.
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> 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 *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, the Supreme Court of Canada clarified its decision in *Okanagan* stating that not all

issues of public importance brought before the courts will automatically entitle a litigant to preferential costs treatment. Public interest advance costs orders must remain special and be granted only in rare and exceptional cases (paras. 35-36). When applying the three requirements set out in *Okanagan*, a "court must decide whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application" (para. 37), and "[n]o injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award" (para. 41).

The three considerations from *Okanagan* were summarized as: impecuniosity, a meritorious case, and special circumstances (*Okanagan* at para. 36). It is useful to examine how the ABQB dealt with each of these in *D.W.H. v D.J.R.*

Impecuniosity

Justice Eidsvik found that Mr. H. was impecunious. He had exhausted all financial avenues including his own financial means and seeking aid from gay rights groups, legal aid, pro bono legal services and Calgary Legal Guidance. However, the Court noted that it was important to look at the costs that would be incurred to complete the present case. In the current case, much of the evidence had already been submitted and there was only an afternoon of court time needed. The costs associated with the application would be limited when compared to other similar applications for advance costs. Justice Eidsvik found that it would not be impossible to proceed without advance costs at this stage.

Meritorious Case

The Court then looked at whether Mr. H.'s case was *prima facie* meritorious. In *Okanagan*, the Supreme Court of Canada noted: "Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties" (para 37).

In Mr. H.'s *Charter* case, he argues that he was not given an automatic right as a parent or guardian under the *FLA*, even though he was an intended parent. This treatment is different than other groups of intended parents. The *FLA* does recognize female partners of a biological mother. This right has been read in as a result of *Fraess v Alberta (Minister of Justice and Attorney General)*, 2005 ABQB 889. In addition, the rights of a heterosexual partner would also be recognized. Therefore, the *FLA* does potentially discriminate against gay male couples that use a surrogate.

After the application for advance costs was made in this case, the government of Alberta passed Bill 22, *Family Law Statutes Amendment Act*, 3rd Sess, 27th Leg, Alberta, 2010 (*"Amendment Act"*). This legislation has yet to be proclaimed but the government argued that these amendments would remove the discrimination.

Justice Eidsvik noted that the *Amendment Act* did not allow for three parents to exist in circumstances such as Mr. H's case, and that the amendments take away all automatic rights to intended non-biological parents (at para. 22). Mr. H argued that the amendments did not eliminate the discrimination to the group of parents to which he belongs.

Justice Eidsvik found that there were still legal issues to be determined even if the amendments were proclaimed, and that there could still be a *prima facie* meritorious case for Mr. H. (at para. 25).

Special Circumstances

The third consideration in the *Okanagan* test is whether the issue raised (a) transcends the individual interests of the particular litigant, (b) has not been resolved in previous cases, and (c) is of public importance. Justice Eidsvik noted that awarding advance costs should only be used as a last resort and under special circumstances (at para. 26).

Justice Eidsvik found that the rights argued for transcended Mr. H.'s personal interests and the issue had not been answered in other cases (at paras. 29-30). In fact, the Court of Queen's Bench in *Fraess* noted that its ruling did not cover this issue in regard to gay male couples.

Justice Eidsvik found that Mr. H's application for advance costs clearly raised an issue of public importance (at para. 31). However, the surrogate laws were already under review by the Legislature and therefore, the case was not sufficiently special that it would be contrary to the interests of justice to deny the advance costs application. Justice Eidsvik stated that this case was distinguishable from *Caron* since the issue raised in Mr. H's application was squarely in the public arena and in Mr. Caron's litigation the issue raised would not have been dealt with if an advance cost was not awarded (at para. 31).

Costs of this application

Mr. H., as the unsuccessful party, could have been made to pay the costs of this application. However, Justice Eidsvik found that this case warranted departure from this general rule and that it was reasonable for the government to pay the costs of the application; she awarded Mr. H. $5,500.00 as per Schedule C of the *Alberta Rules of Court*.

Comment

As mentioned, the Court did not award advance costs to Mr. H for two reasons. Firstly, although he was found to be an impecunious litigant, it would not be impossible to proceed without advance costs. Second, the issue was already a matter of public debate and therefore, it was not sufficiently special to warrant advance costs in the interests of justice. This conclusion is problematic especially in light of the fact that Justice Eidsvik acknowledged that the *Amendment Act* may not address the issue raised by Mr. H; namely, whether the *FLA* discriminated against non-biological intended parents on the basis of gender and sexual orientation contrary to s. 15 of the *Charter*.

<u>Impecunious Litigant</u>

Justice Eidsvik concluded that Mr. H was an impecunious litigant. However, relative to similar applications for advance costs, his costs would be lower and therefore, it would not be impossible to proceed without an award of advance costs. The SCC in *Okanagan* stated that an impecunious litigant is one who genuinely cannot afford to pay for the litigation (paras. 40 and 77). To conclude that a litigant who genuinely cannot afford to pay for litigation should not be awarded advance costs simply because their litigation is less expensive than other litigation raises concerns about access to justice. If an applicant is found to be impecunious, it is difficult to understand how the Court could find that the litigant should pay for the litigation simply

because it could have cost more. If a litigant is found to be impecunious that litigant is unable to afford the litigation, no matter how the cost of their litigation compares to the cost of another applicant's litigation.

Special Circumstances

Under the *Amendment Act*, a non-biological intended parent such as Mr. H (married to or in a conjugal relationship of interdependence of some permanence with the male donor at the time of the child's conception and consented to be a parent of the child) may only be declared a parent of the child if the surrogate mother consents in the form provided for by the regulations (*Amendment Act*, subsection 8.1(2), 8.2(6)). If the surrogate mother changes her mind following the birth of the child, the non-biological intended parent will not be considered a parent since the *Amendment Act* only allows for a maximum of two parents of a child (s. 8.2(12)). If the surrogate mother made an agreement to give birth to the child for the purpose of relinquishing that child, the agreement is only enforceable if the surrogate mother consents in the form provided for by the regulations (s. 8.2(6)(8(c)).

In this case, Justice Eidsvik concluded that Mr. H raised a *prima facie* meritorious case that the *Amendment Act* discriminates against non-biological intended fathers on the basis of gender and sexual orientation contrary to section 15 of the *Charter*. She then stated that his application did not meet the 'special circumstances' test set out in *Okanagan* since the surrogacy laws were under review by the legislature. It is difficult to understand how the legislative review of the surrogacy laws is relevant in these circumstances since the Court found that a *prima facie* meritorious case existed despite the legislative review. The legislative review does not appear to settle the *Charter* issue, or satisfy the public interest on the issue raised in Mr. H's application for advance costs.

Mr. H's ability to argue his *Charter* case may be impacted by the decision not to award him advance costs. The Court acknowledged that the amended laws did not address the *Charter* issue raised by Mr. H, who raised a *prima facie* meritorious issue of public importance which transcended his situation and has not been dealt with, despite recent amendments to the legislation. Although Mr. H is an impecunious litigant, he will have to bear the costs and burden of presenting the *Charter* argument on his own. Based on previous experience this may be an inefficient process and fundamental procedural errors may be made (para. 32).

Since increasing numbers of gay people in Canada are parents (according to Statistics Canada, in 2006 three percent of male same-sex couples and sixteen percent of female same-sex couples had children aged 24 or younger living with them; nine percent of same-sex married males and 24.5% of same-sex married females had children under 24 living with them), current biological realities in the way that babies are made indicate that the *Charter* issue raised by Mr. H is significant. Thus, lack of access to justice in this case could impact several Canadians who are members of these families.