

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dish Network L.L.C. v. Rex*,
2011 BCSC 1105

Date: 20110815
Docket: S094747
Registry: Vancouver

Between:

Dish Network L.L.C.

Plaintiff

And

**Richard Rex, Richard Rex d.b.a. Can-Am Satellites,
Richard Rex d.b.a. CanAm Satellites, Richard Rex, d.b.a.
www.smalldish.com, Susan Goodwin, Kendra Day, Deborah Wilkinson
Katalin Kupser a.k.a. Kathy Kupser, Mario Teixeira, John Doe, Jane Doe and
other persons unknown who have conspired with the named Defendants**

Defendants

Docket: S084517
Registry: Vancouver

Between:

DIRECTV, INC.

Plaintiff

And

**Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex
d.b.a. CanAm Satellites, Richard Rex d.b.a. www.smalldish.com,
Richard Rex d.b.a. www.smalldish.proboards54.com, Susan
Goodwin, John Doe, Jane Doe and other persons unknown who
have conspired with the named Defendants**

Defendants

Docket: S085635
Registry: Vancouver

Between:

Bell ExpressVu Limited Partnership

Plaintiff

And

**Richard Rex, Richard Rex d.b.a. Can-Am Satellites, Richard Rex,
d.b.a. CanAm Satellites, Richard Rex d.b.a. Can Am Satellites,
Richard Rex d.b.a. www.smalldish.com, Richard Rex d.b.a.
www.smalldish.proboards54.com, Susan Goodwin, John Doe, Jane
Doe and other persons unknown who have conspired with the named
Defendants**

Defendants

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
January 11-13, 2011

Place and Date of Judgment:

Vancouver, B.C.
August 15, 2011

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I. INTRODUCTION

[1] **The Court:** The applicant, Richard Rex, seeks an order for advance costs in order to fund a challenge he has brought pursuant to the *Canadian Charter of Rights and Freedoms*, R.S.C. 1985, App. II, No. 44, Schedule B. Mr. Rex seeks to strike down certain provisions of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 which he says effectively prohibit Canadian consumers from purchasing encrypted television broadcast signals from foreign broadcasters.

[2] The present litigation arises from Mr. Rex's "grey market" satellite businesses which involve the sale to Canadian residents of subscriptions to encrypted satellite television signals provided by two companies based in the United States, Dish Network L.L.C. ("Dish") and DIRECTV, Inc. ("DIRECTV"). Mr. Rex has carried on business under the names of Can-Am Satellites ("Can-Am"), www.smalldish.com, and Digital Valley Entertainment.

[3] Canadian residents have purchased decoding boxes and ancillary equipment from Mr. Rex's businesses and provided fictitious addresses in the United States to Dish and DIRECTV in order to access encrypted satellite television signals. The grey market is unlike the "black market", where television programming is pirated. In the grey market, Canadian residents pay for their subscriptions.

[4] Dish is incorporated in both Colorado and Texas. Its principal place of business is in Englewood, Colorado. Dish is the plaintiff in VA S094747.

[5] DIRECTV is incorporated in California, and maintains its principal place of business in El Segundo. DIRECTV is the plaintiff in VA S084517.

[6] Neither Dish nor DIRECTV are registered under any Canadian or provincial statute to carry on business in any province in Canada.

[7] Bell ExpressVu Limited Partnership is a limited partnership constituted under the *Limited Partnership Act*, R.S.O. 1990, c. L-16. Bell ExpressVu, now known as

“Bell TV” (“Bell”), is the general partner of the limited partnership. It maintains its main operational office in Toronto. Bell is the plaintiff in VA S085635.

[8] The Attorney General for Canada (“Canada”) is an intervenor on Mr. Rex’s *Charter* challenge and on this application.

[9] Dish, DIRECTV, and Bell have brought separate proceedings seeking, *inter alia*, injunctive relief and both statutory and common law damages against Mr. Rex and others for facilitating access to encrypted television broadcast signals from the United States contrary to the *Radiocommunication Act*. I have been appointed the case management judge for each of those proceedings. The quantum of damages has yet to be specified.

[10] Mr. Rex’s application for advance costs is brought in all three actions.

[11] Mr. Rex argues that the expressive freedom of nearly a million Canadians has been infringed by the *Radiocommunication Act*. In his submission, a *prima facie* case of a *Charter* breach has been established.

[12] The position advanced by Mr. Rex on the *Charter* challenge and on this application is that certain provisions of the *Radiocommunication Act* contravene s. 2(b) of the *Charter*, which guarantees freedom of expression to all Canadians, because they prohibit access by Canadian residents to expression from foreign broadcasters who transmit satellite television programming through encrypted broadcast signals.

[13] According to Mr. Rex, the issue in this case is whether that breach can be justified under s. 1 of the *Charter*, applying the analysis of the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 and *Alberta v. Hutterain Brethern of Wilson Colony*, 2009 SCC 37. Section 1 provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[14] The analytical framework for s. 1 of the *Charter* is commonly known as the “*Oakes test*”. The following summary of the *Oakes test*, which was set out by the Supreme Court of Canada in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 108, was recently applied by this Court in *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656 at para. 318:

A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the Charter guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

[15] Mr. Rex acknowledges that an advance costs order is rarely granted, and only in cases where very specific conditions have been met. He claims to lack financial resources necessary to pursue a *Charter* challenge. As a result, Mr. Rex says that, without an order for advance costs, an injustice will result because he will be unable to litigate a meritorious constitutional question of importance to a great number of Canadian residents.

[16] The respondents resist Mr. Rex’s application as well as his *Charter* challenge. The respondents’ position is that:

- (a) there is no merit to Mr. Rex’s claim that the *Charter* has been breached;
- (b) Mr. Rex’s *Charter* challenge is predicated on fraudulent conduct;
- (c) Mr. Rex has failed to establish that he lacks the financial means to fund the litigation; and
- (d) the claim is not of sufficient public importance to warrant an exceptional award of advance costs.

II. THE RADIOCOMMUNICATION ACT

[17] The *Radiocommunication Act* has been described by the Supreme Court of Canada as “one of the legislative pillars of Canada’s broadcasting framework”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 10.

[18] The provisions under challenge in this litigation are ss. 9(1)(c)-(d), 10(1)(b), and 18(1). They are directed toward the end user, and prohibit a person from decoding an encrypted subscription programming signal or network feed without authorization from the lawful distributor.

[19] The *Charter* relief sought by Mr. Rex is set out in his amended notice of application:

TAKE NOTICE, pursuant to Section 8(2) of the *Constitutional Question Act*, an application will be made by the applicant to the presiding judge at the courthouse ... questioning the constitutional validity or applicability of ss. 9(1)(c), 9(1)(d), 10(1)(b), and 18 of the *Radiocommunication Act*, R.S.C. 1985, c. R-2.

[20] Mr. Rex asserts that these provisions unjustifiably infringe s. 2(b) of the *Charter*, as follows:

2. The Impugned Provisions violate s. 2(b) of the *Charter* and that violation is deleterious.
3. The *Act*'s purpose as well as its effect is to deny individuals in Canada access to news, entertainment and information that is otherwise available from U.S. direct-to-home broadcasters. The effect of the prohibition is particularly deleterious for individuals in Canada whose first language is neither English nor French.

[21] Section 9 of the *Radiocommunication Act* provides:

9. (1) No person shall
 - ...
 - (c) decode an encrypted subscription programming signal or encrypted network feed otherwise than under and in accordance with an authorization from the lawful distributor of the signal or feed;
 - (d) operate a radio apparatus so as to receive encrypted subscription programming signal or encrypted network feed that has been decoded in contravention of paragraph (c);

[22] The *Radiocommunication Act* defines “broadcasting”, “encrypted”, “lawful distributor”, “radiocommunication”, and “subscription programming signal” in the following manner:

2. In this Act,

“broadcasting” means any radiocommunication in which the transmissions are intended for direct reception by the general public;

...

“encrypted” means treated electronically or otherwise for the purpose of preventing intelligible reception;

“lawful distributor”, in relation to an encrypted subscription programming signal or encrypted network feed, means a person who has the lawful right in Canada to transmit it and authorize its decoding;

“radiocommunication” or “radio” means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3000 GHz propagated in space without artificial guide;

...

“subscription programming signal” means radiocommunication that is intended for reception either directly or indirectly by the public in Canada or elsewhere on payment of a subscription fee or other charge;

[23] The *Radiocommunication Act* makes it an offence for a person to, without lawful excuse, import, distribute, lease, offer for sale, or install equipment that is used or intended to be used for the purpose of contravening s. 9. On conviction, an individual may be sentenced to a fine not exceeding \$10,000, or to imprisonment for up to one year, or both:

10. (1) Every person who

...

(b) without lawful excuse, manufactures, imports, distributes, leases, offers for sale, sells, installs, modifies, operates or possesses any equipment or device, or any component thereof, under circumstances that give rise to a reasonable inference that the equipment, device or component has been used, or is or was intended to be used, for the purpose of contravening section 9,

...

is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding one year, or to both, or in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

...

(2.1) Every person who contravenes paragraph 9(1)(c) or (d) is guilty of an offence punishable on summary conviction and is liable, in the case of an individual, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both, or, in the case of a corporation, to a fine not exceeding twenty-five thousand dollars.

(2.5) No person shall be convicted of an offence under paragraph 9(1)(c), (d) or (e) if the person exercised all due diligence to prevent the commission of the offence.

[24] Section 18(1) of the *Radiocommunication Act* also confers a cause of action on holders of an interest in the content of the subscription signal or network feed and to holders of a license issued by the Canadian Radio-Television and Telecommunications Commission (“CRTC”) to carry on broadcasting under the *Broadcasting Act*, S.C. 1991, c. 11. Those persons may, as DIRECTV, Dish, and Bell have done in this litigation, sue to recover damages suffered as a result of conduct contrary to s. 9(1)(c) from persons who engaged in that conduct, or to obtain other remedies (e.g., injunctive relief or an accounting).

[25] Section 18 provides:

18. (1) Any person who

- (a) holds an interest in the content of a subscription programming signal or network feed, by virtue of copyright ownership or a licence granted by a copyright owner,
- (b) is authorized by the lawful distributor of a subscription programming signal or network feed to communicate the signal or feed to the public,
- (c) holds a licence to carry on a broadcasting undertaking issued by the Canadian Radio-television and Telecommunications Commission under the *Broadcasting Act*, or
- (d) develops a system or technology, or manufactures or supplies to a lawful distributor equipment, for the purpose of encrypting a subscription programming signal or network feed, or manufactures, supplies or sell decoders, to enable authorized

persons to decode an encrypted subscription programming signal or encrypted network feed

may, where the person has suffered loss or damage as a result of conduct that is contrary to paragraph 9(1)(c), (d) or (e) or 10(1)(b), in any court of competent jurisdiction, sue for and recover damages from the person who engaged in the conduct, or obtain such other remedy, by way of injunction, accounting or otherwise, as the court considers appropriate.

[26] Section 26(c) of the *Broadcasting Act* permits the Governor in Council to “issue directions to the [CRTC] ... respecting the classes of applicants to whom licenses may not be issued or to whom amendments or renewals thereof may not be granted.”

[27] Following Order in Council SOR/96-192, made in April 1996, licenses have not been granted by the CRTC to foreign broadcasters. The situation was described in *Bell ExpressVu* by Iacobucci J. at para. 3:

The appellant is a limited partnership engaged in the distribution of direct-to-home (“DTH”) television programming. It is one of two current providers licensed by the [CRTC] as a DTH distribution undertaking under the *Broadcast Act*, S.C. 1991, c. 11. There are two similar DTH satellite television distributors in the United States, neither of which possesses a CRTC license. The door has effectively been shut on foreign entry into the regulated Canadian broadcast market since April 1996, when the Governor in Council directed the CRTC not to issue, amend or renew broadcasting licenses for non-Canadian applicants (SOR/96-192). The U.S. companies are, however, licensed by their country’s Federal Communications Commission to broadcast their signals within that country. The intervener DIRECTV is the larger of these two U.S. companies.

[28] The Order in Council states, in its preamble, that it was issued following consultation between the Minister of Communications and the CRTC:

... the Minister of Communications has consulted with the Canadian Radio-television and Telecommunications Commission with regard to the proposed *Direction to the CRTC (Ineligibility of Non-Canadians)* annexed hereto

[29] Orders in council have been described as the “manifestations of official government decisions”, made by the executive branch of government, that are decision-making in nature and not normative. Orders in council proclaim regulations to statutes. In René Dussault and Louis Borgeat, *Administrative Law: A Treatise*,

2nd ed. (Toronto: Carswell, 1985) vol. 1 at 327, the authors described the purpose and nature of orders in council in this way:

They are the manifestation of official government decisions; as such, they are of a decision-making nature and are not normative. Thus, when the government makes or approves a regulation ... it makes a decision to act, which, in its written formulation, assumes the form of an Order-in-Council. The fact of approving or making a regulation is a decision to change the existing legal order which, by itself, has nothing normative about it ... Therefore, it is important to distinguish the Order-in-Council mandating the instrument from the instrument itself.

[30] A practical result of an order in council is to give effect to a decision of the executive branch of government. The regulation proclaimed by an order in council announces the executive's decision to put into force a regulation that impacts upon the operation of a statute enacted by Parliament.

III. THE LAW OF ADVANCE COSTS

A. *The Criteria*

[31] Before setting out the issues for determination and the facts relevant to this application, I will set out the legal test for an advance costs order which is now well-established as a result of three decisions of the Supreme Court of Canada.

[32] Advance costs are ordered in "rare and exceptional cases" where to decline to order them will result in a court "participating in an injustice - against the litigant personally and against the public generally" because the litigation cannot proceed: *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paras. 5, 26, 33, 41, 73, and 78 ("*Little Sisters No. 2*").

[33] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, the Supreme Court of Canada said at para. 25 that "modern costs rules accomplish various purposes in addition to the traditional objective of indemnification." At para. 24, the Court approved of the reasoning of the Court of Appeal in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.) that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements is now outdated". The Supreme Court of Canada said that "costs can

be used as an instrument of policy and ... making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective”: *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.) at para. 19 (cited with approval in *Okanagan* at para. 28).

[34] In writing for the majority, LeBel J. said that access to justice is a relevant consideration in the application of costs rules. He elaborated, stating at para. 27, that “[t]his factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*”:

In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

[35] Although some cases refer to a court’s power to order advance costs arising from its inherent jurisdiction, statutory jurisdiction to do so is found in British Columbia in Rule 14-1(9) of the *Supreme Court Civil Rules*:

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[36] *Okanagan* involved Rule 57(9) of the former *Rules of Court*.

[37] An order for advance costs necessarily involves a predetermination of triable issues since a court will have decided that one party will receive costs “before it is known who will win on the merits (and since the winner is usually entitled to costs)”: *Okanagan* at para. 37. Alive to that concern, amongst a number of others, including the possibility that the Crown might well be treated as an unlimited source of funds in public interest litigation, and also to discourage applications of marginal merit, the Court in *Okanagan* set out a three part test, at para. 40, that must be met before a court can rely on its equitable and discretionary power to order advance costs:

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.

[38] All three conditions must be met: *Okanagan* at para. 41. Even when they are met, there is no automatic right to an order for advance costs. In *Little Sisters (No. 2)*, Bastarache and LeBel JJ. wrote the following for the majority:

37 ... 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 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 intended to be a high one, and although no rigid test can be applied systemically 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.

See also *Okanagan* at para. 41 and *R. v. Caron*, 2011 SCC 5 at para. 39.

[39] Bastarache and LeBel JJ. went on to identify three circumstances that may make a case exceptional:

39 First, the injustice that would arise if the application is not granted must relate both to the individual applicant and 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. ...

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. ...

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. ...

42 Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public pursue - or another party - takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds.

[40] LeBel J. observed in *Okanagan* at para. 33 that in private civil disputes advance costs are “most typically exercised in”, but not limited to, matrimonial or family cases. He said, at para. 34, that advance costs are also “potentially available,” in “certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason -- to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed.”

B. Advance Cost Awards in Public Interest Litigation

[41] Applications for advance costs in public interest litigation, where “ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance”, are treated with additional scrutiny. In *Okanagan* at para. 38, LeBel J. described public interest litigation as a sub-category of civil disputes where costs are not necessarily awarded to a successful party:

The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. 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. 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.

[42] Public importance and public interest in bringing the issues to court are important factors for a court considering an advance costs application in public

interest litigation. As noted in the excerpt above, LeBel J. wrote at para. 38 that “special circumstances” that “are related to the public importance of the questions at issue in the case” must be present to justify an award of advance costs.

[43] At para. 39, he said that “[c]oncerns about prejudging issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits.”

[44] Advance costs were ordered in *Okanagan* because all three conditions were met. It is noteworthy that in terms of satisfying the merits condition, LeBel J. said at para. 46 that the issues must be ones requiring determination regardless of outcome:

The issues sought to be raised at the trial are of a 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.

[45] *Okanagan* is considered to be the leading decision enshrining the rights of Canadians to seek advance costs in public interest litigation. There, certain aboriginal bands were seen as having been “thrust” into litigation involving issues that cried out to be determined.

[46] There are very few cases involving public interest litigation where advance costs have been ordered.

[47] Many of the cases involved claims affecting the interests of the nation. In addition to *Okanagan* and *Caron*, they include: *William v. Riverside Forest Products Limited*, 2001 BCSC 1641, aff'd *Xeni Gwet'in First Nations British Columbia*, 2002 BCCA 434; *R. v. Fournier*, [2004] O.T.C. 260 (S.C.J.); *William v. HMTQ*, 2004 BCSC 610, aff'd *Tsilhqot'in Nation v. British Columbia*, 2006 BCCA 2; *Keewatin v. Ontario (Minister of Natural Resources)* [2006] O.J. No. 348 (S.C.J.); *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574; *L.C. v. Alberta (Metis Settlements Child & Family Services, Region 10)*, 2011 ABQB 42;

and *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2011 FC 230.

[48] In *Keewatin*, members of the Grassy Narrows First Nation and Grassy Narrows Trappers' Council sought advance costs in order to pursue their application to set aside permits granted by the Minister of Natural Resources, to conduct logging activity within certain trapline areas held by the Grassy Narrows trappers. The logging permits granted to Abitibi-Consolidated Inc. were alleged to have infringed the applicants' harvesting rights enjoyed under a certain treaty known as "Treaty 3". The Trappers Council, consisting of 60 members, was a special interest group representing approximately 1,200 trappers.

[49] N.J. Spies J. conducted a detailed review of the financial status of the applicants and their efforts to obtain financial resources to fund the litigation, and found that the financial criteria had been met. He also determined at para. 239 that the public interest was served "in ensuring that the treaty interpretation issue is tried". Although the order was granted, the Court took steps to craft a process designed to determine the issues in stages in order to avoid placing an unfair financial burden on the defendants, especially Abitibi (whose participation in treaty interpretation issues, the Court noted at para. 244, was not necessary since the dispute was "really an issue as between the plaintiffs and the Crown."

[50] In *Tsilhqot'in Nation*, the Court of Appeal upheld the order of the chambers judge awarding additional advance costs in an action involving aboriginal title and rights to lands located in the Cariboo region of British Columbia. By the time the appeal was heard, the original costs estimate of \$1 million provided in 2001 had been surpassed by costs in excess of \$10 million. The Court of Appeal refused to undertake an "economic analysis of a law firm engaged in the litigation for the purpose of fixing a fit scale of interim costs in this type of case": para. 115.

[51] In the Court of Appeal's decision in *Tsilhqot'in Nation*, Thackray J.A. said, in concurring reasons, that an order for advance costs should not result in an unfair burden on the party paying for them, including the Crown:

[122] The order under appeal cannot, in my opinion, be said to be in keeping with the principle of “efficient conduct of the particular litigation”. I would not presume to be able to ascertain at what level advance costs come into conflict with the principles set forth by the Supreme Court of Canada. However, I have no hesitation in saying that an order that grants them at the level of “special costs”, even with a 20% holdback, throws off the balance struck by *Okanagan Indian Band*. ... Objectively, it cannot be said that to advance to a law firm the full amount of its legal fees in advance, without any requirement that they will be repaid should the client be unsuccessful, can lead to “efficient conduct”. That is just not in the nature of human endeavour. As said by Madam Justice Southin, the fundamental problem with the order under appeal “is that there is no incentive to economy. It is an open cheque”.

[123] I would further note that, as said by Mr. Justice LeBel in *Okanagan Indian Band*, an award of interim costs must not impose an unfair burden on the other party. The fact that in the case at bar it is the public purse that is bearing the burden does not detract from that principle.

[52] In *Little Sisters (No. 2)*, the Court drew a very clear distinction between the facts of that case, where the applicant sought to raise a *Charter* issue to advance its own economic interests, and *Okanagan*, where the bands had been thrust into complex litigation where the issues raised were vital to their survival. At paras. 2, 3, and 33, Bastarache and LeBel JJ. described the features that called for an advance costs award:

[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 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.

...

[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 a claim - 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.

[53] The applicant in *Little Sisters (No. 2)* was a bookstore that catered to the lesbian and gay community. It was engaged in litigation to gain the release of four books prohibited by Canada Customs on the basis that they were obscene. After years of proceedings, the bookstore enlarged the scope of the litigation by pursuing a broad inquiry into Canada Customs' practices in light of the Supreme Court of Canada's prior decision (indexed at 2000 SCC 69) that those practises infringed ss. 2(b) and 15 of the *Charter*. According to Bastarache and LeBel JJ. at para. 14:

[Little Sisters] 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 *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."

[54] At para. 53 of its decision regarding the application for advance costs, the Court characterized the systemic review of Canadian Customs' practices as an attempt by the applicant to "expand the scope of litigation in the hope of bolstering its legal rights in individual cases". The Court said at para. 53 that as a frequent importer of books, Little Sisters would "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”. Although the Court said that this approach was “efficient and commendable”, it was not one that attracted advance costs: para. 53.

[55] The Court also determined that the issues raised in the case were not seen as having implications beyond the applicant:

[53] ... Specifically, the Systemic Review is not necessarily based on the prohibition, detention, or even delay of any books belonging to the appellant.

...

[58] ... [T]he 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. ...

[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”.

[56] When evaluating whether the impecuniosity requirement has been met, the majority in *Little Sisters (No. 2)* said that a court should also consider the potential cost of the litigation. In that case, the cost of the Four Books Appeal (which concerned Canada Customs’ seizure of specific books), was estimated to be approximately \$300,000. The cost of trial for the proposed systemic review was estimated to be well over \$1 million.

[57] The Court dismissed the application for advance costs.

[58] Although agreeing in the result, McLachlin C.J.C. (also writing for Charron J.) applied a slightly different legal formulation than the majority. She added the notion of “special circumstances” to the third requirement:

[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. ... 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.

[59] In *Little Sisters (No. 2)*, Bastarache and LeBel JJ. removed any notion that public interest litigation would, as a matter of course, attract advance costs:

[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.

...

[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: [citations omitted]. 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: [citations omitted]. Each case must be considered on its merits, and the consequences of an award for each party must be weighed seriously: [citations omitted].

...

[64] ... 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.

[Emphasis added]

[60] A decision by the Alberta Court of Appeal (affirming the decision below) to order advance costs was upheld by the Supreme Court of Canada in *Caron*. There, the accused argued that his constitutional language rights were not protected when he received a traffic violation ticket printed in English.

[61] The Supreme Court of Canada reiterated, at para. 6, that special circumstances are required in order to make an advance costs order against the Crown:

As a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. To promote trial fairness in criminal prosecutions, for instance, the courts have in narrow circumstances been prepared to order a stay of proceedings unless the Crown funded an accused in whole or in part: *R. v. Rowbotham* [citation omitted]; *R. v. Rain* [citation omitted]. In the civil context, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, extended the class of civil cases for which public funding on an interim basis could be ordered to include “special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate”. *Okanagan* was based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance that not only transcended the interest of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice.

[62] Binnie J. described the issue in *Caron* at paras. 6-7 as a “constitutional challenge of great importance” involving “a fundamental aspect of the rule of law in Alberta”. He elaborated at para. 8:

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

[63] The public importance of the issue in *Caron* transcended Mr. Caron’s own interests because, as Binnie J. put it at para. 45, “[t]he injury created by continuing uncertainty about French language rights in Alberta transcends Mr. Caron’s particular situation and risks injury to the broader Alberta public interest”.

[64] In addition to *Little Sisters (No. 2)*, I am aware of four decisions of courts in Canada denying applications for advance costs in public interest litigation:

Charkaoui (Re), 2004 FC 900; *Robertson v. HMTQ*, 2011 TCC 83; *Roberts v. HMTQ*, 2011 TCC 205; *D.W.H. v. D.J.R.*, 2011 ABQB 119.

[65] In each of those cases the courts did not view the issues raised as presenting the degree of public importance shown in cases such as *Okanagan* and *Caron*.

[66] It is apparent from these authorities that an advance costs order will be rare in public interest litigation and should only be granted in exceptional cases where the issue begs for determination regardless of the result.

C. Special Circumstances

[67] In *Little Sisters (No. 2)*, McLachlin C.J.C., in concurring reasons, distinguished “special circumstances” from proof of *prima facie* merit. She stated at para. 105 that special circumstances exist where the “issues raised are of high importance and are unlikely to proceed in the absence of an advance costs order”, resulting in a “serious denial of justice”. She also stated that the issues must raise a “vital private” or “public” issue:

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 last resort" (para. 78).

[Emphasis added]

[68] The case law suggests that the following factors demonstrate special circumstances:

- (a) the potential effect of the litigation is widespread and significant: *Caron* at para. 44; *Keewatin* at para. 233; *Okanagan* at para. 46; *William* at paras. 44-45;
- (b) the outcome of the litigation would resolve continued legal uncertainty: *Caron* at paras. 44-45; *William* at para. 49;
- (c) the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs: *William* at paras. 46, 49;
- (d) the issue would not be resolved but for the litigation: *Caron*; *Hagwilget* at para. 21; *D.W.H.* at paras. 31, 37;
- (e) the litigation involves scrutiny of government actions: *L.C.* at paras. 80, 91; *Hagwilget* at para. 24;
- (f) determination of the issue is an urgent matter: *Hagwilget* at paras. 20-21;
- (g) the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights: *Okanagan*; *Xeni* at paras. 123-124; *Hagwilget* at para. 22; and
- (h) one party controls all of the funds that are at issue in the litigation (e.g. trust and matrimonial litigation): *Little Sisters* at para. 104.

[69] Special circumstances do not exist where the issues do not transcend the applicant and may not exist where the issues affect only a small group of people. For example, *Roberts* involved the personal tax appeals of three individuals involving taxation of a fraction of their income. The Court found that special circumstances did not exist because the outcome of the case was not expected to affect more than 100 taxpayers' pending objections. In *Robertson and Charkaoui (Re)*, special circumstances did not exist because there was no evidence that the issue of interest to the applicants would have major repercussions on other persons or groups.

IV. ISSUES

[70] Accordingly, the issues to be determined on this application fall into three categories: the litigant's financial impediments, and the merits and public importance of the litigation.

[71] The financial issues are Mr. Rex's ability to afford to pay for the litigation and whether no other reasonable option exists for bringing the issues to trial, such that the litigation would not be able to proceed if the order were not made.

[72] The merits issue may be stated in the following way: is the *Charter* challenge *prima facie* meritorious, or, in other words, is there sufficient merit such that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited if Mr. Rex lacks the financial means to pursue it?

[73] The public importance issues for determination, arising from the majority decision in *Okanagan*, are whether Mr. Rex's *Charter* litigation is of exceptional public importance such that the case requires determination regardless of Mr. Rex's personal interests. This also involves consideration of whether the issues in the litigation have been resolved in previous cases.

[74] A further issue arises, in the third category, from the concurring reasons for judgment of McLachlin C.J.C. in *Little Sisters (No. 2)* when she spoke of the need for the issue of public importance to involve "special circumstances" before an order for advance costs may be made. I will also consider that requirement in these reasons

for judgment in view of the submission by counsel for Mr. Rex that special circumstances exist in this case.

V. FACTS

A. *Encrypted Broadcasting Signals*

[75] The nature of the encrypted broadcasting signals at issue in this case was the subject of comment by the Supreme Court of Canada in *Bell ExpressVu*. There, Mr. Rex was a party to protracted litigation that was brought in British Columbia. Bell sought to enjoin Mr. Rex and his business from engaging in essentially the same grey market activities that are in issue in this case.

[76] Mr. Rex raised a *Charter* issue in his defence for the first time when the case was argued before the Supreme Court of Canada. Submissions were made to the effect that s. 9(1)(c) of the *Radiocommunication Act* offended *Charter* values. The Court dismissed Mr. Rex's case. In doing so, the Court stressed its holding from prior cases that to the extent that a "*Charter* values" interpretive principle exists it is restricted to "circumstances of genuine ambiguity" (which the Court found was not the case on Mr. Rex's appeal): *Bell ExpressVu* at para. 62.

[77] Although the Court found against Mr. Rex, it left the door open for a *Charter* challenge to be brought when a proper evidentiary record was established:

[60] Respondents' counsel properly conceded during oral argument that there is no *Charter* record permitting this Court to address the stated questions. Rather, he argued that "*Charter* values" must inform the interpretation given to the *Radiocommunication Act*. This submission, inasmuch as it is presented as a stand alone proposition, must be rejected. Although I have already set out the preferred approach to statutory interpretation above, the manner in which the respondents would have this Court consider and apply the *Charter* warrants additional attention at this stage.

...

[67] It may well be that, when this matter returns to trial, the respondents' counsel will make an application to have s. 9(1)(c) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether these rights are violated by s. 9(1)(c), and, if they are, whether they are justified under s. 1.

[78] The lower courts held that s. 9(1)(c) applied only to the black market, i.e., to theft of signals from “lawful distributors” in Canada, and had no application to Canadians who paid for subscriptions to signals emanating from distributors outside of the country: [1999] B.C.J. No. 3092 (S.C.), aff’d 2000 BCCA 493. The Court of Appeal determined that Parliament had not chosen language that would prohibit the decoding of encrypted signals regardless of origin.

[79] The Supreme Court of Canada determined otherwise. It held, at para. 16, that Parliament chose to regulate signals transmitted by “parties who are authorized by Canadian law to do so.” The Court explained, at para. 33, that the “forbidden activity is decoding”, so that “the prohibition is ... directed towards the reception side of the broadcasting equation”. [Emphasis in original]

[80] Decoding permits an encrypted satellite signal to be received and viewed on a television set.

[81] The method of broadcasting at issue in *Bell ExpressVu* is commonly referred to as “direct to home” (“DTH”) broadcasting. DTH broadcasting relies on satellite technology to transmit television programming signals. The nature of DTH broadcasting was described in detail in *Bell ExpressVu* by Iacobucci J. at para. 4:

DTH broadcasting makes use of satellite technology to transmit television programming signals to viewers. All DTH broadcasters own or have access to one or more satellites located in geosynchronous orbit, in a fixed position relative to the globe. The satellites are usually separated by a few degrees of Earth longitude, occupying “slots” assigned by international convention to their various countries of affiliation. The DTH broadcasters send their signals from land-based uplink stations to the satellites, which then diffuse the signals over a broad aspect of the Earth’s surface, covering an area referred to as a “footprint”. The broadcasting range of the satellites is oblivious to international boundaries and often extends over the territory of multiple countries. Any person who is somewhere within the footprint and equipped with the proper reception devices (typically, a small satellite reception dish antenna, amplifier, and receiver) can receive the signal.

[82] DTH broadcasting is regulated by international convention. DTH encryption makes regulation by the *Radiocommunication Act* possible. Otherwise, it would be

impossible to prevent Canadian residents from accessing the programming (just as “free to air” signals, picked up by ordinary television antennas, cannot be regulated).

[83] The broadcasting at issue in the present case is also DTH broadcasting.

[84] Dish and DIRECTV are DTH satellite-based subscription program providers. They are licensed by the United States Federal Communications Commission to broadcast their services in the United States and its territories, including Puerto Rico and the U.S. Virgin Islands. They broadcast to Mexico and Central and South America (together, “Latin America”) through related companies. They are not licensed to broadcast in Canada. Dish and DIRECTV do not offer their services for sale in Canada. Dish and DIRECTV hold copyrights and licenses from content providers to sell some (though not the majority) of their broadcast signals in Canada.

[85] Dish and DIRECTV purchase distribution rights for most of their DTH programming from program providers such as network affiliates, pay and specialty broadcasters, cable networks, motion picture distributors, sports leagues, event promoters, and other program rights holders.

[86] Bell is the larger of two Canadian DTH satellite-based subscription television programming providers licensed by the CRTC under the *Broadcasting Act*. Shaw Direct is the other. Counsel advised that Bell and Shaw Direct are the only two lawful distributors of DTH programming to Canadian residents.

[87] Bell holds copyrights and licenses to sell its signals in Canada. It sells some, but not all of the programming offered by Dish and DIRECTV.

[88] Because of the Order in Council, neither Dish, DIRECTV, or any other foreign broadcaster is able to obtain a license to distribute DTH programming in Canada.

B. Access to American DTH Programming by Canadian Residents

[89] In order to access DTH programming, customers must purchase or lease receiving equipment to decode the signals. Once the signal is decoded, customers can watch the programming. The receiving equipment consists of a satellite receiver

and a satellite dish. DTH broadcasters generally use different hardware designed to access their signals.

[90] Many DTH broadcasters use a “smart card” decoding system. The card resembles a credit card, and contains a computer chip. It is attached to the receiving equipment. The smart card is programmed to control decoding so that customers may only view signals they have paid for.

[91] The programming content of DTH programming consists of news, information, cultural, sports, and entertainment programs.

[92] Canadian residents purchased receiving equipment from Mr. Rex who lawfully imported that equipment from the United States. Mr. Rex purchased the receiving equipment directly from vendors in the United States.

[93] Mr. Rex’s customers are Canadian residents. A large number of them are ethnic and elderly and wish to maintain links with their culture and heritage. Many of those customers bought DTH programming in their native language that is not otherwise available for viewing from existing licensed providers of encrypted broadcasting signals in Canada.

[94] Dish offers multiple television channels in the following languages and cultures: Arabic, Armenian, Bangla, Brazilian, Cantonese, Filipino, French, German, Greek, Gujarati, Hindi, Israeli/Hebrew, Italian, Japanese, Kannada, Korean, Malayalam, Mandarin, Polish, Portuguese, Punjabi, Russian, Taiwanese, Tamil, Telugu, Ukrainian, Urdu, Vietnamese, and Spanish.

[95] Mr. Rex also deposed that DIRECTV offers multiple channels in the following languages and cultures: Brazilian, Cantonese, Filipino, Greek, Korean, Mandarin, Russian, Spanish, South Asian, and Vietnamese. Mr. Rex highlights the breadth of foreign language and cultural content offered by DIRECTV by pointing to its international programming literature, which lists 47 Spanish channels that are available to its subscribers.

[96] There is no evidence before me concerning the regulatory regime in the United States and Latin America.

[97] Mr. Rex's evidence, which was not challenged by the respondent broadcasters ("Broadcasters"), is that Bell and Shaw Direct offer much less foreign language programming than Dish and DIRECTV.

[98] Mr. Rex's customers paid a premium to watch programming from Dish and DIRECTV through subscriptions. To do so, they had to provide a false address in the United States. Unlike the black market, where signals are pirated, these Canadian customers paid Dish and DIRECTV to access their DTH program signals on a monthly or annual basis.

[99] Mr. Rex's position is that Dish and DIRECTV knew or had the means to know that Canadian residents were purchasing their DTH programming. Mr. Rex's evidence is that Dish and DIRECTV charged their subscription fees to Canadian customers' credit cards monthly or annually.

[100] Although Dish and DIRECTV took issue with that evidence, the affidavit evidence of Gavin Phillips, an investigator licensed by the Ministry of Community Safety and Correctional Services of Ontario, reveals that Mr. Phillips used his Canadian credit card to pay Dish for its DTH programming. Mr. Phillips' firm, King-Reed & Associates, was retained by Dish to investigate the operations of Mr. Rex and his businesses. His affidavit was filed in opposition to Mr. Rex's application for advance costs. Mr. Phillips used a fictitious name and address to purchase DTH programming and equipment from Dish through Can-Am Satellites. Mr. Phillips used a Canadian credit card, issued in that fictitious name, to pay Can-Am for the services it provided. His credit card invoice shows that the DTH subscription fee charged by Dish was billed to his credit card by Dish.

[101] Mr. Rex's customers also obtained from him a device known as an "auto-redialer", which allowed them to contact a U.S. program provider without being detected as calling from a telephone number in Canada. Mr. Rex charged his

customers an annual agency fee of \$85 as well as a \$10 call fee when customers sought to change their program channels.

[102] Mr. Rex's evidence, which was not challenged by the Broadcasters, is that his customers have not used Can-Am's services to save money. At paras. 18, 19, and 22 of his affidavit sworn on August 30, 2010 ("August affidavit"), Mr. Rex deposed:

18. Generally, the cost of subscribing to American DTH broadcasting through Can-Am was more expensive than the cost of Canadian DTH broadcasters. I have regularly spoken to customers who advised me and I verily believed that used our services not to save money but rather to access news, sports and cultural programming in their own language.

19. Many of Can-Am's customers including Fernando Franco told me, and I verily believe, that they used our services in order to keep in touch with their country of origin and to maintain their heritage. I am aware that Fernando Franco filed an affidavit in this action. Although my counsel had been working with him in the preparation of an affidavit, it was not finalized and he filed his affidavit without my direction. Nevertheless, it accurately describes the point I make above and I rely on it in this application.

...

22. I also had customers, who advised me and I verily believed that they used our services because they wished to access programming related to their religious beliefs that is not otherwise available in Canada. For example, one of my customers, Jeanette Reid, advised me that she used our services so that she could access programming from her church, which is broadcast on a channel that is available through American DTH broadcasters, but not offered by the Canadian DTH broadcasters. I believed her statement to be true.

[103] Mr. Franco was 82 years old when he swore his affidavit on June 21, 2010 in support of Mr. Rex's efforts to pursue his *Charter* challenge. The Broadcasters did not challenge Mr. Franco's evidence, which is that:

- (a) he emigrated to Canada from Portugal on May 7, 1928;
- (b) an interim injunction that I granted in August 2009 "greatly restricts" the amount of Portuguese television programming that he and others like him are able to receive;
- (c) the population of Canadians of Portuguese descent is approximately 1.2% of the Canadian population (over 350,000 people);

- (d) the Portuguese community in Canada has a large number of social, cultural, sports, and religious organizations (he is personally involved in some);
- (e) approximately 15 years ago, he learned that Portuguese television programming was available in Metro Toronto and Montreal, but not Vancouver (Bell did not offer it in British Columbia);
- (f) he became a client of Mr. Rex in 1996 in order to subscribe to television programs from Portugal and Brazil offered by Dish;
- (g) Dish's programs included information about many religious, sports, and cultural events that are not reported in Canada;
- (h) when the August 2009 injunction was issued, he lost that ability to view programming;
- (i) he telephoned Shaw Direct and learned that it was not possible to view through their broadcasting the Portuguese channels offered by Dish;
- (j) he has felt cut off from news, culture, and sports in Portugal;
and
- (k) without access to a reasonable variety of Portuguese programming, he feels that his culture, language, and ethnic background are not respected and accommodated in Canadian society.

[104] Mr. Franco attached to his affidavit a petition supporting Mr. Rex's *Charter* challenge, which is signed by approximately 400 members of the Portuguese community in Vancouver following a campaign run by the Portuguese Club of Vancouver and the Portuguese Canadian Seniors Foundation.

[105] DTH programming offered by licensed Canadian broadcasters is primarily in English and in French.

[106] When Mr. Rex registered Can-Am with the Registrar of Companies of British Columbia as a proprietorship on May 23, 1995, there were no Canadian DTH broadcasters. Mr. Rex deposed in his August affidavit:

10. When I registered Can-Am and began operations in March 1995, there were no Canadian DTH broadcasters. Our business consisted of providing equipment and assisting Canadians in accessing American DTH broadcasting. We purchased the equipment for the American DTH broadcasters from suppliers in Canada who had lawfully imported the equipment from the United States. We also purchased equipment from United States vendors directly, and lawfully imported the equipment into Canada ourselves.

[107] Mr. Rex acted as a sales agent for Bell and Shaw Direct in the past, and offered their equipment and subscriptions to their programming for sale to his customers. Mr. Rex acted as sales agent for Bell until 1999, and for Shaw Direct until 2002. He did so at the same time that he was facilitating access by Canadian residents to DTH programming from U.S. broadcasters (including Dish and DIRECTV).

[108] Mr. Rex did not hide his business activities from view. Can-Am operated a retail store and advertised its product openly. According to Mr. Rex, immediately prior to the issue of the injunctions (referred to in the next section), Can-Am had over 1,000 customers who subscribed to Dish and approximately 430 customers who subscribed to DIRECTV programming. All of those customers were located throughout Canada. Mr. Rex was not the only grey market provider of DTH programming operating in Canada.

C. The Current Litigation

[109] The *Bell ExpressVu* proceedings (VA A993004) that ultimately went to the Supreme Court of Canada were commenced on November 15, 1999.

[110] Bell obtained an Anton Pillar order and an interim injunction against Mr. Rex and Can-Am on December 10, 1999. The case was heard by the Supreme Court of Canada on December 4, 2001 and decided on April 26, 2002. As noted, the Court

left open to Mr. Rex the opportunity to bring a *Charter* challenge on an appropriate evidentiary record.

[111] According to Mr. Rex, the proceedings resumed in British Columbia as a *Charter* challenge, before then Chief Justice Brenner. Although a timetable for a hearing for the *Charter* issues was set, following a proposal by Canada, that timetable was not met. According to Mr. Rex, it was “at least in part because of costs”.

[112] Evidence tendered on behalf of Canada is at odds with Mr. Rex’s evidence that a timetable for the determination of the *Charter* issue was set by Brenner C.J.S.C. According to one of the lawyers representing Canada in the *Bell ExpressVu* litigation, Canada did not propose or agree to a timetable at the case management conference before Brenner C.J.S.C. held on May 28, 2002. Instead, it was left open to the parties to discuss and attempt to set a timetable. Despite an exchange of correspondence between Canada and Mr. Rex concerning a possible hearing of the *Charter* issues in the fall of 2003, no dates were set. Nor were any further steps taken in the action following August 30, 2002.

[113] In the interim, Mr. Rex resumed Can-Am’s business. At para. 27 of his August affidavit, he deposed:

In the interim, I resumed my business activities as Can-Am, including providing equipment and access for foreign satellite signals with the expectation that the *Charter* issue would be heard at some stage. In fact, this action has never been discontinued to the best of my knowledge and I have been confused as to how Bell Express Vu could commence another proceeding against me when this one is still outstanding and deals with substantially the same issue.

[114] Bell commenced the current action against Mr. Rex, VA S085635, on August 8, 2008. The present application for advance costs is brought in this action.

[115] In June 2009, Dish commenced its action against Mr. Rex, his businesses, and the other personal defendants (who were employees or independent contractors who worked for Mr. Rex and Can-Am). Dish seeks, *inter alia*, an interim and

permanent injunction against Mr. Rex and his businesses, an Anton Pillar order, and common law damages against Mr. Rex and the other personal defendants and damages pursuant to s. 9(1)(c) of the *Radiocommunication Act*.

[116] DIRECTV commenced its action in VA S094747 against many of the same defendants on June 25, 2009.

[117] Dish and DIRECTV point to a number of steps they have taken and continue to take to prevent Canadian residents from accessing their programming signals (e.g., requiring their customers to provide a physical street address where the receiving equipment will be located and the programming service provided). Customers are also told that the broadcasting signals are not available for sale outside of the United States.

[118] Dish and DIRECTV maintain security departments to monitor for unauthorized access to their encrypted programming signals. Those broadcasters do not hesitate to move quickly to seek injunctive relief and, further, to seek damages under the *Radiocommunication Act* and the common law from anyone involved, however remotely, in authorizing access to their signals.

[119] I agree with the submissions of Mr. Rex that the materials filed in this case and the decisions of other Canadian courts show that Dish and DIRECTV currently engage in an aggressive policy to seek legal redress against any Canadian resident who may be involved, however remotely, in grey market activities.

[120] Dish and DIRECTV are not licensed to carry on business in British Columbia or Canada. They are not registered with the Registrar of Companies in British Columbia or Ottawa, and there is no evidence that they maintain assets in this country. They are strangers to the *Charter*. Yet, they maintain a vigorous resistance to Mr. Rex's *Charter* challenge.

[121] Bell did not tender any evidence to show that its programming was similar to DTH programming offered by foreign broadcasters, including Dish and DIRECTV. Instead, Bell pleaded in its amended writ of summons that Dish and DIRECTV offer

“some of the same programming” in the United States that Bell ExpressVu offers in Canada. At para. 31, Bell described five different examples of programming. With the exception of one, all of them concern North American sporting events:

- (a) NFL Sunday Ticket, which allows viewers to watch up to 12 NFL football games per week and offers other specialized programming;
- (b) NHL Center Ice, which allows viewers to view up to 40 NHL hockey games per week;
- (c) NASCAR HotPass, which allows viewers to watch all NASCAR auto races and provides enhanced viewing options;
- (d) Setanta Sports, a specialty station that broadcasts European Soccer and Rugby matches 24 hours per day; and
- (e) MLB Extra Innings, a station dedicated to Major League Baseball programming.

There is no mention of any cultural or heritage programming offered by Bell ExpressVu.

[122] On June 25, 2008, DIRECTV obtained an interim injunction and Anton Pillar order against Mr. Rex and Can-Am in the action where DIRECTV is the plaintiff (VA S084517).

[123] On August 14, 2009, I issued an injunction and an Anton Pillar order (“August 2009 injunction”) against Mr. Rex and Can-Am Satellites in the action where Dish is the plaintiff (VA S094747). Mr. Rex, Can-Am, and other respondents on Dish’s application were given liberty to raise a *Charter* defence.

[124] Even though Mr. Rex has been seeking to advance the *Charter* challenge, Bell, Dish, and DIRECTV are actively pursuing common law damages, as well as their statutory remedies, against Can-Am’s former employees, including its minimum wage employees (e.g., receptionist, office clerks, and part-time staff). Some of those employees only worked for Can-Am for a short period of time (e.g., university students and housewives who worked part time to earn some income). The style of cause in the actions commenced by Dish and DIRECTV name some of those employees as defendants and also refer to “John Doe, Jane Doe, and other persons unknown who have conspired with the named Defendants.” The amended writ of

summons in the current *Bell ExpressVu* action names as defendants “John Doe, Jane Doe, and any other person or persons found on the premises [of Can-Am]”.

[125] On July 7, 2010, following a stay application brought on behalf of those employees, which was opposed by the Broadcasters, I issued an order preventing Dish, DIRECTV, and Bell from pursuing their claims against those employees pending the determination of the *Charter* challenge.

D. Prosecutions by Canada

[126] Canada takes an active role in prosecuting persons who are alleged to have contravened s. 9(1)(c) of the *Radiocommunication Act*. Records from the Public Prosecution Service of Canada show that since 2002 there have been 200 separate prosecutions pursued under s. 10(1)(b) of the *Radiocommunication Act*. There are currently more than 40 active prosecutions.

VI. DETERMINATION

[127] In this section, I set out my determination of each group of issues and my findings of facts relevant to those issues.

A. Financial Issue

[128] I have determined that Mr. Rex is impecunious and not able to fund the *Charter* challenge.

[129] Mr. Rex’s tax returns disclose annual incomes for the years 2008 and 2009 as -\$148,383 and -\$19,279.45, respectively. His income for 2007 was \$51,738. His wife’s earnings for 2008 and 2009 were \$51,808 and \$47,835, respectively.

[130] Mr. Rex currently resides with his wife and three children. According to Mr. Rex, the combined monthly income and benefits he and his wife receive, in the amount of \$5,916, are insufficient to meet their monthly expenses, which exceed \$8,000. Mr. Rex’s evidence is that he and his family have financed the difference through his wife’s credit, which he deposed was coming to an end at the time of his August affidavit since there was only \$13,670 of credit remaining.

[131] Mr. Rex deposed in his August affidavit that he owes over \$268,000 (with interest continuing to accrue) and that he has assets valued at approximately \$60,000. In April 2010, he was advised by a credit counsellor that he is a good candidate for bankruptcy.

[132] Mr. Rex's explanation for his current financial state is found at para. 44 of the August affidavit:

The main reasons I am in this financial mess are loss of revenue as a result of two injunctions and that I have spent so much money pursuing challenges to the relevant provisions of the *Radiocommunication Act* the first time around that I basically had to start saving from square one. I continued pursuing the *Charter* challenge to the relevant provisions of the *Act* when I was hit with another injunction. Although the initial case cost me all my savings and many customers, by the time that DirecTV served their Anton Pillar Order seven years later in 2008, I was virtually debt-free. The combination of the expense of moving my business and renovations (\$100,000+ of debt) at the time of the DirecTV raid, combined with the loss of satellite-related revenues (about \$300,00) caused by the injunctions means that I am now saddled with debt that I am unable to service. Furthermore, the recent recession was damaging as well with more debt incurred. I have been trying to make a living with Digital Valley Entertainment, but so far there has not been enough profit to date to allow much of a wage, let alone to service my debt.

[133] Mr. Rex has paid approximately \$326,700 in legal fees to fund his defence thus far.

[134] Mr. Rex has made the following efforts to raise money in order to fund his case:

- (a) he has sold all of his RRSPs (valued at \$28,000) to fund legal representation in 1999;
- (b) he received help from others, including Incredible Electronics Inc., a business formerly operated in Ontario in 2000-2001 (while it was still in business), to help fund his appeal to the Supreme Court of Canada;
- (c) he has engaged in fund raising efforts by contacting 300 of his former customers, his family members, and the Royal Bank of Canada for a loan; and

- (d) he has sought assistance from the B.C. Civil Liberties Association and the Law Students' Legal Advice program at the University of British Columbia Law School.

[135] Mr. Rex received \$15,000 from his father in 2009, and, more recently, a further \$15,000 to pay for his present counsel's fees. He has also received \$11,000 from other family members and \$700 from former customers. In addition, his mother-in-law gifted the sum of \$20,000, made available on the death of his father-in-law, in order to help his family meet expenses.

[136] The Royal Bank of Canada declined his loan application.

[137] The B.C. Civil Liberties Association also declined his request, advising that they "lack the financial capacity" to fund cases, and raised the possibility that they may be able to participate in the litigation as an intervenor. In an email communication dated April 20, 2009, a case worker for the Association wrote:

Unfortunately the BCCLA cannot provide legal advice or representation. We simply don't have the financial capacity to provide such services. The extent of our legal work, for the most part, is that we intervene in cases, a much simpler a [sic] role that consists of making written submissions. You may want to contact lawyers involved in other free speech cases. Other than that, I'm not sure what else can be done. Getting pro bono representation in civil cases is nearly impossible.

[138] Mr. Rex also approached the Law Students' Legal Advice program at the University of British Columbia Law School in February 2009 for representation. They were not able to assist. The response, written by the assistant to the Dean, dated February 25, 2009, advised:

I am the Dean's Executive Coordinator. Dean Bobinski forwarded me your email and we have been actively trying to find ways which you could find legal help for the problem that you have described below. The delay in this response is that we have been waiting to hear back from the Director of our Law Students Legal Advice program to see if he had any ideas about potential avenues you could explore. We have not heard back from him, but if we do hear back from him with favourable news, we will be sure to let you know.

On our part, I regret to let you know that we cannot think of any means of obtaining pro bono services in your (presumed) income bracket. There are organizations like Access to Justice (<http://www.accessjustice.ca/>) or the

Salvation Army (<http://www.probono.ca/>), but generally these pro bono services are reserved for non profit organizations and individuals with a household income of less than \$3000/monthly. A third option is at the BCSC there is a 'duty counsel' office that is located in the library on the third floor. Duty counsel is there to help self represented litigants navigate the court process. Perhaps if you do pursue the matter further, the duty counsel would be able to assist you with various applications.

[139] Mr. Rex has not sought assistance from his former employees since they are defendants in the present litigation and must fund their own defence.

[140] Mr. Rex has also approached several lawyers with a request that they take his case on a *pro bono* basis. Those efforts have been unsuccessful.

[141] Mr. Rex's evidence concerning his financial position, his lack of resources to prosecute the *Charter* challenge, and his efforts to raise funds was not disputed by the respondents.

[142] Instead, the respondents argue that Mr. Rex has not made adequate efforts to raise money for his *Charter* challenge. They say that the lack of any meaningful contribution from his customers demonstrates that the *Charter* challenge lacks public interest sufficient to support an award for advance costs. Affidavit evidence filed on behalf of Dish and DIRECTV (which was, in essence, argument in the guise of evidence) points out that if Mr. Rex's customers each contributed once to his *Charter* challenge the cost of an annual subscription to DIRECTV or Dish, Mr. Rex could raise at least \$200,000, and possibly over \$1 million. Further, the respondents point out that Mr. Rex has only contacted 300 of his 1,400 former customers.

[143] In my respectful view, whether the issues raised on a *Charter* challenge are a matter of public interest warranting an award of advance costs should not be determined by their popularity. Otherwise, the rule of law in a democratic society may be adversely impacted.

[144] In *Little Sisters (No. 2)*, Bastarache and LeBel JJ., at para. 108, rejected popularity as a factor in awarding advance costs:

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 for 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.

[145] I agree with Mr. Rex's argument, also included in one of his affidavits in the guise of evidence, that a lack of sizeable funding from his customers does not mean that they do not support his case. There may well be differences between what a subscriber is willing to pay to watch DTH programming and what they might pay to support protracted litigation that may end up before the Supreme Court of Canada.

[146] I also agree with Mr. Rex's submission that customers may be fearful of supporting Mr. Rex financially because they could face statutory and common law claims for damages from Dish and DIRECTV. Those respondents have, in the present litigation and elsewhere, pursued damages from anyone who is seen to have assisted Mr. Rex.

[147] The quantum of the proposed award is a factor in determining whether advanced costs should be awarded: *Okanagan; Little Sisters*. In my view, that is especially so in this case because the application is premised on what Mr. Rex concedes is, at this stage of the litigation, a hypothetical question (one that Mr. Rex submits is nevertheless reasonable).

[148] The parties did not address the potential quantum of an advance costs award during oral submissions. At the conclusion of the hearing, I asked the parties to provide further written submissions concerning the range of quantum if an advance costs award for Mr. Rex's *Charter* challenge were made. Only Mr. Rex has provided the Court with a litigation plan and budget.

[149] Mr. Rex's proposed budget to determine the *Charter* issues ranges between approximately \$664,000 and \$804,000, including disbursements, experts fees, and taxes. He estimates that the budget could be reduced by one-third if Dish and DIRECTV do not participate in the *Charter* challenge.

[150] According to Mr. Rex, the costs he seeks for his *Charter* challenge are considerably lower than the combined costs claimed by Canada and Bell in other similar *Charter* litigation brought in Ontario involving Canada and the Bell ExpressVu Limited Partnership: *Incredible Electronics Inc. et. al. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (S.C.J.). In that case, leave of the Court was sought by eighteen applicants, including Incredible Electronics Inc., to abandon the case during the interlocutory phase after some cross examinations on the affidavits were carried out. The respondents sought an order for payment of "substantial indemnity costs" (which are akin to special costs in British Columbia) in the aggregate amount of \$2.2 million.

[151] The reasons for judgment in *Incredible Electronics* show the considerable efforts of the applicants to create, and the respondents to challenge, a suitable evidentiary record for the *Charter* challenge:

[43] The applicants filed 30 affidavits. Abner Martinez carrying on business as TV International, John Couchman, and Huseyin Perk carrying on business as Turkview Satellite delivered affidavits and were subjected to cross-examination. ...

[44] The Attorney General filed six affidavits. Bell ExpressVu filed 27 affidavits. The cross-examinations began with the witnesses of the Attorney General and Bell ExpressVu. Mr. Wagman cross-examined 22 witnesses over a period of three months.

[45] The cross-examinations of the applicants' witnesses then began. There were 25 affiants who had delivered the 30 affidavits for the applicants. Bell ExpressVu and the Attorney General sought to examine 23 affiants, but only nine persons ever appeared for their cross-examinations. To put it mildly, these cross-examinations and the creation of a factual record did not go well for the applicants. This outcome can, in part, be explained by the fact that Bell ExpressVu, amongst other things, had hired private investigators, who as undercover operatives attended at the business premises of some of the affiants to obtain information to impeach them as witnesses.

[152] Canada spent more than \$500,000 in preparing the record for court. The intervenors, which included Bell ExpressVu Limited Partnership, claimed costs of approximately \$1.69 million. DTH broadcasters from the United States were not parties to the litigation.

[153] I agree with Mr. Rex's submission that the Court in *Incredible Electronics* was cognizant of the expansive nature of the challenge to s. 9 of the *Radiocommunication Act*. Perell J. wrote:

[40] ... From my review of the issues in this application there were legitimate and appropriate reasons tactically, strategically and substantively, for Bell ExpressVu and the Attorney General not to accept the factual record offered by the applicants. Moreover, while it may have discomfited the applicants and increased the expense of the litigation, the exploration of these issues was consistent with and indeed necessary in order to provide the factual record that the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex* insisted was necessary before the *Charter* issues could be addressed by the court.

[41] ... The issue of whether infringement of freedom of expression was "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" is an issue that is by its nature almost infinite in its scope, and it is beyond naive to suggest that this *Charter* case could be kept within some narrow legal and factual boundaries. From the get-go, the case involved the regulation of broadcasting in the world.

[154] While I will say more about *Incredible Electronics* later in these reasons for judgment, it is sufficient to state in this section that the Court found that some of the applicants were public interest litigants. The Court did not require those that were to pay costs to Canada and BellExpressVu Limited Partnership. Other parties, including those who were engaged in black market as opposed to grey market conduct, were ordered to pay costs to Bell ExpressVu Limited Partnership but not Canada.

[155] Although Canada and the Broadcasters submit that Mr. Rex's budget is excessive and reflects the "speculative nature of his case", they have not provided any budget estimates.

[156] In my view, the respondents' submission concerning Mr. Rex's efforts to raise funds overlooks the considerable costs associated with advancing the issues raised

on Mr. Rex's *Charter* challenge, whether those costs are in the amounts estimated in Mr. Rex's budget or lower. In my opinion, the experience shown in *Incredible Electronics* demonstrates that the costs associated with Mr. Rex's *Charter* challenge, even if set at tariff amounts, or if funded by a budget equivalent to the amount spent by Canada in that case, would be outside the reach of most Canadian residents.

[157] In submissions, Canada acknowledged that an average Canadian could not afford to pursue this particular *Charter* challenge.

[158] The issues raised on Mr. Rex's *Charter* challenge should not have to await, as Canada urged in oral submissions, the participation of a wealthy foreign broadcaster. In *Caron*, Binnie J. said at para. 9:

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

[159] The Broadcasters also advance an alternative position. They seek to have the determination of the *Charter* challenge postponed until after their common law and equitable causes of action against all of the defendants, including Mr. Rex's former full and part-time employees, are determined.

[160] I agree with Mr. Rex's submission that it would not be appropriate to permit the Broadcasters to split their case in this way. In my opinion, the possible resolution of the *Charter* challenge in Mr. Rex's favour would have a significant impact on the litigation for several reasons:

- (a) the Broadcasters' statutory claims for damages against Mr. Rex and his former employees would be dismissed;
- (b) the Broadcasters common law claims for damages would stand alone;

- (c) the Broadcasters would have to prove the *delicts* of and damages caused by each defendant without being able to rely, directly or indirectly, upon any presumptions created by the current causes of action afforded by the *Radiocommunication Act*; and
- (d) any application brought by any of the defendants for an order that Dish or DIRECTV post security for costs would be considered solely in respect of the common law causes of action.

[161] The fact that Mr. Rex continued to operate his grey market business activity following the decision of the Supreme Court of Canada in *Bell ExpressVu* instead of actively pursuing his *Charter* challenge, while troubling, is not a factor to be considered under the first of the three criteria for advance costs awards. Nor is the fact that a litigant may have a pecuniary interest in the outcome of the litigation if the issues in the case are of sufficient public importance. In that event, the case will transcend the litigant's own individual interests: *Caron* at para. 44.

[162] I find that Mr. Rex lacks the funds necessary to pursue his *Charter* challenge, and that he has made appropriate efforts to raise funds to do so.

[163] I am also satisfied that Mr. Rex lacks the education, experience, or ability to adequately bring the *Charter* challenge acting on his own behalf, particularly where the issues include:

- (a) whether the alleged *Charter* breach of the right of freedom of expression may be pursued upon a hypothetical;
- (b) the importance of multicultural media to ethnic and linguistic minority populations in Canada;
- (c) the nature of the current broadcasting regime; and
- (d) the application of s. 1 of the *Charter*.

[164] The respondents have not challenged the evidence tendered by Mr. Rex concerning the lack of *pro bono* services to assist with his case.

[165] In conclusion, I find that Mr. Rex's *Charter* challenge would not be able to proceed in any meaningful manner unless an order for advance costs is made.

[166] Accordingly, I have determined that Mr. Rex has satisfied the first condition for an award of advance costs.

B. The Merits Issue

1. The Nature of Mr. Rex's Charter Challenge

[167] Mr. Rex's challenge is not confined to the combined effect of the Order in Council and s. 9 of the *Radiocommunication Act*.

[168] During oral submissions, a brief statement was made on behalf of Mr. Rex that, in effect, he was seeking to challenge the overall broadcasting scheme established by not only the *Radiocommunication Act*, but also the *Broadcasting Act*, and the *Copyright Act*, R.S.C. 1985, c. C-42, as infringing s. 2(b) of the *Charter*. Beyond this statement, Mr. Rex made no meaningful submissions with respect to this very broad challenge which, I also observe, was not set out in his amended notice of application.

2. Freedom of Expression

[169] Before turning to my determination of the merits, it is useful to set out the nature and scope of the freedom of expression protected by the *Charter*.

[170] Section 2(b) of the *Charter* provides:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]

[171] The significance of freedom of expression was described in the following way by the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at 170-171:

Freedom of expression cannot be jettisoned in any system which values self-government ... Rand J. for this Court in *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306, described freedom of expression as “little less vital to man’s mind and spirit than breathing is to his physical existence”. Cardozo J., for the United States Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327, proclaimed freedom of expression to be “the matrix, the indispensable condition, of nearly every other form of freedom”.

The importance of the freedoms in s. 2 of the Charter has been articulated from the earliest Charter cases. I would point to *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R., in which Dickson J., referring to the American experience, made these remarks albeit in the context of freedom of conscience and religion in s. 2(a) (at p. 346):

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or “firstness” of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as “fundamental”. They are the *sine qua non* of the political tradition underlying the *Charter*.

The profound role of the freedom of expression, as one of the fundamental freedoms in s. 2, was underlined by this Court in several ensuing *Charter* cases. For instance, Cory J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, stated that it would be “difficult to imagine a guaranteed right more important to a democratic society than freedom of expression” (p. 1366).

[172] Section 2(b) of the *Charter* protects all forms of expression, whether for profit or otherwise. The protection is afforded to recipients as well as the originators of the communication: *Committee for the Commonwealth of Canada; Ontario Film v. Video Appreciation Society* (1983), 41 O.R. (2d) 583 (Div. Ct.); *R. v. Videoflicks Ltd.* (1984), 15 C.C.C. (3d) 353, affd [1986] 2 S.C.R. 713; *Harper v. Canada (Attorney General)*, 2004 SCC 33; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69; *Ontario Film*.

[173] The Supreme Court of Canada defined “expression” broadly in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. “Expression” has both content and form. The method of expression is one aspect of the form of the message,

regardless of the content conveyed: *Irwin Toy; R. v. Keegstra*, [1990] 3 S.C.R. 697 at 729; *R. v. Butler*, [1992] 1 S.C.R. 452 at 488. In some circumstances, the two may be inextricably linked: *Irwin Toy; Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. In *Irwin Toy*, the Court said at 968-969:

“Expression” has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court “the matrix, the indispensable condition of nearly every other form of freedom” (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was “little less vital to man’s mind and spirit than breathing is to his physical existence” (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H.R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

... is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no “democratic society”.

[174] For example, violence and criminal conduct (e.g., murder, rape, or hate propaganda) would not be a protected form of expression: *Irwin Toy* at 969-970 and 978; *R. v. Andrews*, [1990] 3 S.C.R. 870; *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62.

[175] No argument has been made in the present case by the respondents that the *Radiocommunication Act* and the Order in Council were aimed at controlling harmful physical consequences.

[176] In *Irwin Toy*, the Court set out a two-step analysis to determine whether an expressive activity is protected by the *Charter*.

[177] The first step is to determine whether the activity falls within a sphere protected by freedom of expression. If the activity conveys or attempts to convey a

meaning, it has expressive content and “prima facie falls within the scope of the guarantee”: *Irwin Toy* at 969.

[178] If the activity is determined to fall within the protection of the *Charter*, the second step is to determine whether the purpose or effect of the government action was to restrict expression.

[179] In a joint decision in *Irwin Toy*, Dickson C.J.C. and Lamer and Wilson JJ. set out the test in full at 978-979:

When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[Emphasis in Original]

[180] According to *Irwin Toy*, at para. 51, characterization of the government's purpose in the impugned legislation “must proceed from the standpoint of the [*Charter*] guarantee in issue”:

In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where,

on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

[181] In the Supreme Court of Canada's recent decision in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, Deschamps J. said, in writing for the Court, that three questions must be answered in order to determine whether an expressive activity is protected by the *Charter*. At para. 38, she wrote:

In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? (*Criminal Lawyers' Association*, at para. 32, summarizing the test developed in *City of Montreal*, at para. 56).

[182] Thus, even where the purpose of government action was not to restrict freedom of expression, a person may still challenge the action if its effect restricts expression. In *Committee for the Commonwealth of Canada* at 187, L'Heureux-Dubé J. wrote:

However, even if the purpose itself is not primarily to restrict freedom of expression, which may well be the case here, the *Irwin Toy* majority also recognized that the *Charter* breach will still obtain if the "effect" restricts freedom of expression:

...

If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. *Irwin Toy*, at pp. 976-79.

[183] There is no *Charter* right to receive private communications that are not intended by the speaker to be received. Nor can the *Charter* be used to compel communications that are not intended to be received. There is no general right under

s. 2(b) to access information: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.); *Yeager v. Canada (Correctional Service)*, 2003 FCA 30 at para. 65; *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269. Further, a *Charter* right to freedom of expression cannot be used to compel private property to be used as a forum for expression: *Compagnie General des Etablissements Michelin v. C.A.W.* (1996), 124 F.T.R. 192 (T.D.); *New Brunswick Broadcasting Co. v. CRTC*, [1984] 2 F.C. 410 (C.A.); *Committee for the Commonwealth of Canada*.

3. Discussion

[184] The proposition that Mr. Rex, as any other Canadian resident, has standing to bring a *Charter* challenge is not in dispute, even where the challenge is advanced as a defence to his case: *Caron*.

[185] The focus of the respondents' arguments, insofar as the merits issue is concerned, is that no expressive right has been breached because there is no willing expressor (since Dish and DIRECTV do not intend to sell DTH programming to Canadian residents). As a result, the respondents' position is that Mr. Rex's case is challenged upon a hypothetical.

[186] The respondents also resist Mr. Rex's application for advance costs for the following reasons:

- (a) Mr. Rex's case is not about freedom of expression, but about the protection of Mr. Rex's business interests, which, the respondents assert, are predicated upon fraudulent conduct;
- (b) Mr. Rex seeks to compel Dish and DIRECTV to distribute their DTH programming in Canada against their will; and
- (c) the *Radiocommunication Act* appropriately protects Canadian content.

[187] In the following sections, I deal with those arguments as part of my analysis to determine if Mr. Rex has demonstrated a *prima facie* case of merit such that it is

contrary to the interests of justice to forfeit the opportunity to pursue the case because Mr. Rex lacks financial means.

[188] As a starting point, I wish to say that it is my opinion that the encrypted broadcast signals contain expressive content, bringing them, *prima facie*, within the scope of s. 2(b) protection. Further, the method and location of that expression are not excluded from protection under s. 2(b) of the *Charter*.

[189] I am also of the opinion that the effect of the impugned sections of the *Radicommunication Act* is to control expression.

(a) Hypothetical Case

[190] The respondents argue that Mr. Rex's *Charter* challenge is premised on a hypothetical, and that *Charter* cases should not be determined on that basis. They submit that, absent an appropriate evidentiary record that is not premised on a hypothetical, the Court should presume that the legislation is valid: *CHUM Ltd. v. Stempowicz*, 2003 FCT 800.

[191] The respondents submit that no expressive right has been breached because there is no willing expressor. They say that Dish and DIRECTV will not sell DTH programming to Canadian residents, and that they do not intend for Canadian residents to be able to decode their DTH signals. The respondents' position is that Dish and DIRECTV do not purchase from authorized distributors and copyright holders the rights to sell DTH programming in Canada. In addition, they submit that Dish and DIRECTV take active steps to prevent Canadian residents from doing so. They also regularly pursue Canadian residents (in civil proceedings) who sell or otherwise facilitate the sale or distribution of equipment and services to access their DTH programming.

[192] The respondents acknowledge, as they must, that the case law permits legislation to be challenged on the basis of "reasonable hypotheticals". In *R. v. Ferguson*, 2008 SCC 6, the Supreme Court of Canada permitted, at paras. 29-32, a *Charter* analysis based upon reasonable hypotheticals. The respondents argue,

however, that the case should be confined to its facts, i.e., sentencing in criminal law.

[193] In my opinion, the reasons for judgment in that case do not limit the effect of the decision. Instead, McLachlin C.J.C. made the following remarks of a general nature concerning unconstitutional laws:

59 When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects that either in his own case or on third parties: *Big M*; see also P. Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L.* 411, at pp. 432-34; M. Rosenberg and S. Perrault, "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 *S.C.L.R.* (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*; see Sankoff, at p. 438.

60 Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

[194] In *R. v. Heywood*, [1994] 3 S.C.R. 761, Cory J. remarked that the Court has approved the use of reasonable hypotheses in determining whether legislation contravenes the *Charter*. At 799, he said:

This Court has approved the use of reasonable hypothesis in determining whether legislation violates s. 12 of the *Charter*: *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Golz*, [1991] 3 S.C.R. 485. I think the same process may properly be undertaken in determining the constitutionality of s. 179(1)(b).

[195] The rule formulated by the Supreme Court of Canada in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-362 is that *Charter* decisions should not be made in a

vacuum because factual background is essential. There is no prohibition, however, on deciding *Charter* cases based upon a reasonable hypothetical:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

This Court has stressed the importance of a factual basis in *Charter* cases. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 762, Dickson C.J. stated:

Accordingly, there is no evidentiary foundation to substantiate the contention of some of the retailers that their freedom from conforming to religious doctrine has been abridged. The second form of coercion allegedly flowing from the *Retail Business Holidays Act* has not been established in these appeals.

He also stated at pp. 767 – 68:

In the absence of cogent evidence regarding the nature of Hindu observance of Wednesdays or Moslem observance of Fridays, I am unwilling, and unable, to assess the effects of the Act on members of those religious groups. The record includes only the testimony of Blulesh Lodhia, the Hindu retailer who testified at the trial of Longo Brothers. Mr. Lodhia acknowledged that the Hindu religion did not have a Sabbath Day, but said that Wednesday was observed as “a day of prayer and that’s the day we would prefer closing if given the choice”. I infer from this evidence that there is no religious prohibition enjoining adherents from working on Wednesdays, but that there exists some moral obligation to pray on that day. It is unclear to me whether the entire day is to be spent in prayer or whether only a portion or portions of the day are to be set aside for that purpose. The degree to which the Act interferes with the religious practices of Hindus has not been established with sufficient precision to warrant a finding that the Act abridges the religious freedoms of Hindus, particularly in the context of the present cases in which none of the retailers is a member of that faith.

The evidence regarding the Islamic faith is even less adequate. It is contained in its entirety in the following exchange during Mr. Lodhia’s examination-in-chief:

Q. ...You’re a Hindu, what is, to your knowledge, the Sabbath of the Moslem Religion?

A. I believe it is Friday.

This is not a satisfactory foundation upon which to mount a constitutional challenge. Whether the Act infringes the freedom

of Hindus or Moslems is a question which accordingly ought not to be answered in the present appeals.

[196] In *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, the Supreme Court of Canada said at 1101 that “[i]n general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects”. Otherwise, in the absence of that evidence, “courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred”.

[197] In the more recent case of *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, the Supreme Court of Canada cautioned, at para. 28, against “deciding cases without an adequate evidentiary record”.

[198] The hypothetical proposed is that there is a foreign broadcaster willing to sell DTH programming to Canadian residents if the broadcaster could be licensed in Canada.

[199] In my opinion, it is appropriate to consider the merits of this case, at least insofar as Mr. Rex’s advanced costs application is concerned, based on that hypothetical.

[200] Proceeding with the case on that basis is not akin to *MacKay* because Mr. Rex’s challenge would not be built upon the “unsupported hypotheses of enthusiastic counsel”. There is sufficient evidence tendered by Mr. Rex to provide appropriate context to his *Charter* challenge without the need to show that there is a foreign broadcaster willing to sell DTH programming in Canada. Evidence concerning the nature of the form and content of the impugned expression as well as the effects of the alleged *Charter* breach has been provided. Prior decisions (referred to in a subsequent section of these reasons) provide descriptions of the philosophical underpinnings and purpose of the impugned legislation. The question of whether there has been a breach of freedom of expression would not be considered in a vacuum simply because there was no evidence of a current foreign broadcaster willing to sell DTH programming to Canadian residents.

[201] I am unable to agree with Canada's submission that the *Charter* challenge should await the actual involvement of a willing foreign DTH broadcaster with financial resources sufficient to fund the litigation, simply to avoid the prospect of the challenge occurring on the basis of a hypothetical. Advance costs should not be denied on the basis that Canadian residents should wait for the arrival of a wealthy stranger to this country to demonstrate a breach of expressive rights and to finance the litigation. As discussed above, the Supreme Court of Canada has held that *Charter* challenges may be predicated on hypotheticals so long as appropriate contextual factors are in evidence. Foreign DTH providers may be disinclined to pursue a challenge to the *Radiocommunication Act* for at least two reasons: they are strangers to the *Charter*, and the challenge will necessarily engage an analysis of matters to which they sit as outsiders, e.g., Canadian cultural values and content, and the scope of the ability of Parliament and the executive branch to ban the presence of foreign businesses in this country.

[202] In my opinion, for the reasons cited above, it is appropriate to consider the case on the basis of a reasonable hypothetical, i.e., that there is a foreign DTH program provider willing to sell its program signals to Canadian residents. No additional purposeful context would be added to Mr. Rex's *Charter* challenge by the presence of a willing foreign broadcaster.

[203] Further, the very forceful submissions of Dish and DIRECTV that they will not sell DTH programming to Canadian residents has been questioned in three decisions of Canadian courts.

[204] In the Court of Appeal's decision in *Bell Expressvu v. Rex*, 2000 BCCA 493, at para. 32, Finch J.A. (as he then was), in writing for the majority, referred to and quoted from the decision of the Nova Scotia Supreme Court in *R v. LeBlanc*, [1997] N.S.J. No. 476 (S.C.). In that case, Haliburton J. made the following remarks at para. 24 concerning the facts before him:

On the particular facts alleged here, we have DIRECTV which is licensed to sell their satellite programming in continental U.S.A. and who are not lawfully authorized to sell that signal in Canada, complaining because receivers outside their broadcast area have found a way to pick up that signal. The

illegal activity, indeed, is the activity of DIRECTV who are clandestinely selling their signal to Canadians by the artifice of post office boxes within the U.S.A. Since the satellite signal is broadcast at large, the broadcaster has no special property interest in a signal disseminated over an area where they have no authority to recover a fee.

[205] On the present application, DIRECTV challenged the finding made by Haliburton J. on the basis that it was not a party in *LeBlanc*.

[206] Yet, in the subsequent decision of *R. c. D'Argy*, [2004] J.Q. no. 11142 (C.Q.), a case involving black market activity, the trial judge found that if there were no regulation in Canada, DIRECTV would consider selling DTH programming in Canada. In her decision at para. 116, which is quoted in the English translation of the decision of the Quebec Superior Court (indexed at [2005] Q.J. No. 2499 (S.C.)) at para. 21, the Court cited evidence given by a representative of DIRECTV that it could consider selling its programming to Canadian residents if there were no Canadian regulations:

In fact, according to the testimony of a DIRECTV representative, if there were no Canadian regulations, his company could decide whether to offer its subscription programming signal to Canadian residents. This would be a business decision, made on the basis of the market and various constraints such as copyright and its territorial scope, for example.

[207] The decision of the trial judge of the Court of Quebec was overturned by the Quebec Superior Court. That decision was affirmed by the Quebec Court of Appeal (indexed at 2006 QCCA 1249). Leave to appeal to Supreme Court of Canada was denied: [2006] C.S.C.R. no. 458.

[208] The decisions of the Quebec Superior Court and the Court of Appeal do not concern or comment upon the evidence given by the representative of DIRECTV.

[209] In *R. v. Ereiser*, [1997] S.J. No. 276 (Q.B.), which was referred to by Cullen J. in *Directv, Inc. v. Sandhu*, 2006 BCSC 1970 at para. 58, the Court found that DIRECTV participated in a “thinly veiled scheme to circumvent the laws of Canada” by accepting payment from Canadians:

DIRECTV, INC. is not licensed to broadcast in Canada and will not activate a Smart Card for anyone resident in Canada even though such person is ready, willing and able to pay the customary fee charged by DIRECTV. However, DIRECTV, INC. does participate in a thinly veiled scheme to circumvent the laws of Canada by accepting subscription fees directly from Canadians provided that they maintain a United States address. In the instant case, DIRECTV accepted numerous monthly fees paid by way of a Royal Bank of Canada Visa card. Presumably, it takes the position the activated Smart Card is located in the United States. From all the facts, it is easy to infer that it clearly knows otherwise.

[210] The position taken by Dish in the present case appears to be at odds with one of its defences in *WIC Premium Corporation v. General Instrument Corporation*, 2000 ABQB 628. In that case, Dish was one of many defendants in an action brought by WIC seeking a permanent injunction to stop the sale of grey market DTH programming in WIC's territory. One of the positions taken by all of the defendants in opposition to the claim is that it was lawful for a foreign DTH program provider to transmit encrypted signals in Canada. The defence was described by the Court at para. 40:

The Defendants, particularly GI, say that a foreign programming service that transmits its encrypted signal in Canada is lawful, providing the service has the Canadian copyright for the program. The application of the Acts is restricted to broadcasting undertakings carried on in whole or in part within Canadian territory under s. 3(3) of the *RCA*. The right to transmit and retransmit signals in Canada is governed by the *BA*, s. 4(2) of which states it applies to "broadcast undertakings" carried on in whole or in part within Canada. ... The CRTC is limited to licensing undertakings which transmit or send signals from within Canada. Section 9(1)(c) is aimed at "the person with a dish on the ground". Parliament does not create serious offence by silence or inference.

[211] The strong positions taken by Dish and DIRECTV on this application that they do not do business outside the United States are difficult to reconcile with the evidence presented by Mr. Rex that they do, through affiliates, subsidiaries, or related companies, distribute DTH programming to residents of countries in Latin America.

[212] I find that it is not clear, therefore, that Dish and DIRECTV would continue to refuse to sell DTH programming in Canada if they were able to be licensed to do so.

[213] Bell is also taking an active role in resisting Mr. Rex's *Charter* challenge. In my view, it is appropriate to infer that, in stepping into the role of a private Attorney General, Bell seeks to protect its own economic interests from foreign broadcasters who may seek to sell DTH programming in Canada.

[214] The respondents submit that Mr. Rex has not established lack of access by Canadian residents to foreign programming that is not in the English and French languages. They point to Mr. Rex's affidavit evidence which deposes that foreign content is available in Canada. In my respectful view, however, the evidence only demonstrates that some but not all of the DTH programs offered by Dish and DIRECTV are offered to Canadian residents by Bell.

[215] In my opinion, this factual issue is best dealt with at the hearing of Mr. Rex's *Charter* challenge, and not on this application. The threshold for Mr. Rex to meet on his application for advance costs is low. Mr. Rex must demonstrate that his claim has *prima facie* merit: *Little Sisters (No. 2)* at paras. 100-101.

(b) *The Charter Does Not Protect Fraudulent Conduct*

[216] The respondents' submit that Mr. Rex's case is not about freedom of expression. They submit that the case is nothing more than an attempt by Mr. Rex to protect his business interests, which, they argue, are predicated on fraud.

[217] The respondents rely on *Irwin Toy* and *R. v. Pedra*, 2008 ONCJ 422, in support of their position that where the activity in question is based upon criminal theft or civil fraud, it falls outside the scope of the protection of s. 2(b) of the *Charter*.

[218] In *Pedra*, the Court accepted the accused's submission that he should be entitled, as a supplier of DTH reception equipment, to protection subject to the exclusionary language in *Irwin Toy* (which excludes criminal conduct):

5 Both the Defence and the Crown agree that the satellite signals contain programming that are expressions that convey meaning as contemplated by the *Irwin Toy* decision. They differ, however, on the next fundamental point in the *Irwin Toy* test, that is whether Mr. Pedra's "activity" falls within the sphere of conduct associated with freedom of expression that is protected or conversely is exclusively the criminal act of assisting others to

commit theft by selling them the devices to do so which, it is submitted, should not be protected by s. 2(b). It should be noted that s. 2(b) protects not only the disseminators of the programming, but also the receivers of it (see *Ford v. A.G. Quebec* [1988] 2 S.C.R. 712).

6 I am prepared to accept the Defence submission that if the content creator and the ultimate receiver of the communication are entitled to s. 2(b) protection, then the intermediaries who assist in conveying the communication between them are equally entitled to the same protection even if they have no interest in the content of the communication. Accordingly, I would not deprive Mr. Pedra of s. 2(b) protection even if his only interest in selling these devices was to make a profit and he personally had no interest in any pursuit of truth, participation in the community or individual self-fulfilment or human flourishing components that underlie s. 2(b) in the programming that was being conveyed. Accordingly, just as the book seller in *Little Sisters Book and Art Emporium et al. v. Canada* (1998), 125 C.C.C. (3d) 485, is entitled to s. 2(b) protection for conveying the expressive content from its producer to its reader, so to [sic] is Mr. Pedra entitled to protection for supplying the equipment to permit the conveyance of programming between its producer and its viewer if the producer or viewer are held to be entitled to s. 2(b) protection.

7 I am satisfied that Mr. Pedra's actions are of a type that could fall within the sphere of protected activity provided the restricting qualification in *Irwin Toy* is not applicable.

[219] Mr. Pedra was convicted of theft of satellite signals pursuant to ss. 326 and 327 of the *Criminal Code*. Ultimately, Bellefontaine J. concluded that the theft was the type of activity that should be excluded from s. 2(b) protection. The activity should be viewed, the Court said at para. 11, as seeking a *Charter* right to "steal books from the book store and deprive the content maker and content distributors of their lawful profits". At para. 11, the Court refused to accept "that the level of criminal culpability is so low that Mr. Pedra's actions should be protected by the Charter."

[220] In my view, the holding in *Pedra* is inapplicable to the present case because *Pedra* involved black market theft of satellite signals. In the present case, Dish and DIRECTV are paid for their DTH programming by Mr. Rex's customers.

[221] Further, Mr. Rex does not assert a constitutional right to receive DTH signals through fraudulent means.

[222] In my respectful view, the respondents' focus on the conduct of Mr. Rex and his customers ignores the question of whether the impugned legislation itself breaches the *Charter*.

(c) *Compelling an Unwilling Seller to Sell its Private Property*

[223] The respondents characterize Mr. Rex's *Charter* challenge as an attempt to compel Dish and DIRECTV to sell their signals into Canada when they do not wish to do so. If Mr. Rex were successful on his *Charter* challenge, the Broadcasters argue that Dish and DIRECTV would be forced to breach their copyright and license agreements. The Broadcasters also argue that Mr. Rex's *Charter* challenge has no merit because, if successful, it would force foreign DTH broadcasters to sell programming into Canada even where they lack the necessary authorization from the holder of the copyright to do so.

[224] In my respectful opinion, the respondents' arguments misconstrue the nature of Mr. Rex's *Charter* challenge.

[225] The issue in this case is not whether Dish or DIRECTV should be forced to sell DTH signals to Canadian residents, or compelled to breach their contracts with others. Nor does the *Charter* challenge seek to force foreign DTH distributors to breach their distribution agreements with copyright holders or their agents. According to Mr. Rex, his case is about whether Canadian residents are deprived of their freedom of expression by virtue of s. 9 of the *Radiocommunication Act*.

[226] The respondents also submit that the *Radiocommunication Act* does not limit access to DTH programming from the United States and other countries which is otherwise available to Canadian residents. The statute, they say, prohibits decoding of programming that is otherwise not available from licensed Canadian distributors or by means other than encrypted communication.

[227] The respondents' submission overlooks the combined effect of s. 9 of the *Radiocommunication Act* and the Order in Council. That effect is an absolute prohibition on anyone in Canada who wants to decode an encrypted signal from a foreign broadcaster, because no foreign DTH broadcaster may obtain a license to

broadcast DTH programming to Canadian residents even where it is authorized to do so by its copyright or license agreements.

[228] Unless Bell or Shaw Direct take the necessary steps to offer Canadian residents DTH programming currently offered by foreign DTH providers, or unless the programming is available on the internet or on a “free to air basis”, Canadian residents are not able to view those programs even where there is a foreign broadcaster willing to sell them.

[229] I do not accept the respondents’ additional argument that Mr. Rex must demonstrate that the benefit he is claiming is a benefit provided by law to others, which he cannot do because no one in Canada may lawfully access DTH programming offered by foreign providers. With respect, that position rests on the constitutional validity of the *status quo* arising from the combined effect of the Order in Council and the *Radiocommunication Act*.

(d) *Protection of Canadian Content*

[230] The respondents argue that the *Radiocommunication Act* appropriately protects Canadian content and, hence, there is no merit to Mr. Rex’s *Charter* challenge.

[231] Mr. Rex argues to the contrary. He submits that the restrictive nature of s. 9(1), as interpreted by the Supreme Court of Canada in *Bell ExpressVu*, serves only to protect the commercial interests of existing Canadian broadcasters such as Bell and Shaw Direct.

[232] A useful starting point to consider the parties’ submissions is s. 2(3) of the *Broadcasting Act*. It recognizes freedom of expression as a principle of statutory interpretation. The *Broadcasting Act* does not, on its face, subordinate the right to freedom of expression to protection of Canadian content. Section 2(3) of the *Broadcasting Act* states:

This Act shall be construed and applied in a manner that is consistent with the freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

[233] Canadian content is protected in the *Broadcasting Act*, which prescribes a broad purpose and scope to the Canadian broadcasting system. Section 3 of the *Broadcasting Act* includes as one of its purposes the requirement to serve the multicultural and multiracial nature of Canadian society:

3. (1) It is hereby declared as the broadcasting policy for Canada that

(a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

...

(d) the Canadian broadcasting system should

...

(ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society;

[Emphasis added]

[234] The purpose and indeed importance of the *Broadcasting Act* (and its associated regulatory regime) is discussed in *R. v. Knibb* (1997), 198 A.R. 161 at paras. 27 - 41 (Prov. Ct.), aff'd [1998] A.J. No. 628 (Q.B.), which is a decision that pre-dates *Bell ExpressVu*. At paras. 37-38, Judge LeGrandeur said that the *Broadcasting Act* operates "together" with the *Radiocommunication Act* (including s. 9(1)(c)) "as part of the mechanism by which the stated policy of regulation of broadcasting in Canada is to be fulfilled". At paras. 39-40, he described the purpose of broadcasting policy in Canada. He said that the purpose is to put Canadian broadcasters on a "flat playing field" on which they can fairly compete with other broadcasters through regulation. LeGrandeur J. did not mention prohibiting the issuance of licenses to foreign broadcasters, however:

39 It is clear from the stated policy of the Broadcasting Act that there is only one broadcast system in Canada that is to be regulated by a single entity. Programs that are not a part of the Canadian Broadcasting system, eg. encrypted satellite signals from outside Canada that are not distributed by a lawful distributor in Canada are not capable of regulation in the normal sense, that is by regulation of the distributor. This of course means that there can be no regulation in the context of the policy set out in s. 3 of the Broadcasting Act. It is impossible to prevent the transmission of satellite signals emanating from outside Canada because it is impossible to block such signals once transmitted. The regulation of encrypted signals that are not or do not become part of the Canadian Broadcasting system can only occur by regulation of the recipient. That is, to prohibit such reception except in circumstances where the signal is subject to the regulated control of the Canadian Broadcasting system, i.e. through a lawful distributor.

40 This prohibition serves to protect and enhance the purposes of the regulatory legislation as set out in s. 3 of the Broadcast Act. Concurrently it protects and enhances the business of Broadcasting in Canada by giving Canadian broadcasters a flat playing field on which to compete with other providers of services, that is in the sense that everyone entitled to broadcast, or distribute does so under the same terms and conditions. This same policy and flat playing field hopefully will allow Canadian broadcasters to expand and it also serves to assure that the protection of Canadian cultural requirements and the concern that we could effectively be deculturized by unregulated programming from outside services. (see Commons Debates on Bill C-40 Hansard, November the 3rd, 1989, p.p. 5546 through 5565).

[235] In *Knibb*, the accused did not argue that s. 9(1)(c) breached the right of freedom of expression provided in the *Charter*. Instead, they unsuccessfully argued an interpretation of the *Radiocommunication Act* that, if accepted, would have resulted in a dismissal of the Crown's case.

[236] In *Broadcasting Act (Can.) (Re)*, 2010 FCA 178 at para. 49, the Federal Court of Appeal described the "primary focus" of the *Broadcasting Act* as the "cultural enrichment of Canada through broadcasting of programs which involve a significant amount of Canadian artistic creativity". The Court of Appeal said, at para. 49, that the statute should be interpreted in a manner that recognizes freedom of expression:

The primary focus is on the cultural enrichment of Canada through the broadcasting of programs which involve a significant amount of Canadian artistic creativity in their production, encourage Canadian expression and the use of Canadian talent, and which reflect Canada's linguistic duality and multicultural society. The *Broadcasting Act* sets out specific provisions on programming content to achieve these objectives such as the allocation of broadcasting time, the character and volume of advertising, and the carriage of foreign programming (subsection 10(1) of the *Broadcasting Act*).

Furthermore, in setting out the manner in which the *Broadcasting Act* is to be interpreted, subsection 2(3) refers to the “freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings.

[237] If licensing is made available to permit foreign broadcasters to sell DTH programming, Canadian content could be protected by requiring them to provide the requisite amount of Canadian content stipulated by the *Broadcasting Act*.

[238] Multiculturalism is an important component of the fabric that makes up Canada. In *R. v. Andrews* (1988), 65 O.R. (2d) 161 (C.A.), aff’d [1990] 3 S.C.R. 870, Cory J.A. (as he then was) described the importance of Canada’s multicultural background to our society at para. 17:

It is our multicultural background that gives richness, depth and vibrance to Canadian society. The Charter has recognized and emphasized the importance of our background by providing that the Charter itself is to be interpreted so as to preserve and enhance our multicultural heritage. That clause in itself gives a very clear indication that s. 1 of the Charter should be applied in this case. The clause coupled with the Canadian multicultural heritage gives the strongest possible direction to apply s. 1.

[239] In *Bruker v. Marcovitz*, 2007 SCC 54, the Supreme Court of Canada said at paras. 1-2:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada’s mainstream based on and notwithstanding these differences have become a defining part of our national character.

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada’s fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.

[240] Mr. Rex's submission is that the *Radiocommunication Act* is inconsistent with *Charter* principles concerning multiculturalism. The statute, he argues, prevents many Canadian residents from preserving their cultural heritage. In his submission:

Many of Can-Am's customers use Can-Am to keep in touch with their country of origin and to maintain their heritage. Dish Network and DIRECTV offer a much greater variety of foreign language programming than is available in Canada. Other customers use Can-am services to access programming related to their religious beliefs that is not otherwise available in Canada.

[241] The parties' submissions appropriately fall into an analysis of s. 1 of the *Charter*. I have deliberately refrained from determining those submissions as well as any other s. 1 issues because the parties' written and oral submissions did not engage fulsome argument concerning s. 1. I am able to determine, however, that the combined effect of the Order in Council and s. 9 of the *Radiocommunication Act* prevents Canadian residents from accessing programming related to their cultural heritage available from foreign broadcasters that is otherwise not available from licensed Canadian broadcasters.

(e) Conclusion

[242] In my opinion, application of the principles from *Irwin Toy* and *Canadian Broadcasting Corporation* demonstrates that one of the effects of s. 9 of the *Radiocommunication Act* is a restriction of freedom of expression. In that respect, Mr. Rex has demonstrated a *prima facie* case of merit.

[243] I have also determined that the issues raised in the litigation are such that the interests of justice would not be served if Mr. Rex's *Charter* challenge was abandoned due to lack of financial resources.

C. Public Interest and Exceptional Public Importance

1. Discussion

[244] The case law referred to in these reasons demonstrates that the third condition for an advance costs award is not merely that the matter be one of public interest, but that it also rises to the level of constituting special circumstances.

[245] In my opinion, Mr. Rex's *Charter* challenge raises issues of public interest that transcend his own pecuniary interests. His case concerns the nature and scope of the right of freedom of expression in Canada.

[246] In *Incredible Electronics*, Perell J. found at 92 that the issues raised on the *Charter* challenge in that case, which were the same as those raised in the present case, were a matter of public interest:

In the immediate case, the public interest component of this application was not treated as a trite point because there was a debate about whether the applicants or Bell ExpressVu qualified as public interest litigants. That debate will be considered further below, but, in my opinion, whether as a private interest litigant or a public interest litigant, both the applicants and also Bell ExpressVu were partisans in a matter of significance not only to the parties but to the broader community. Even apart from its focus on an important freedom guaranteed by the *Charter*, freedom of expression, the application could have affected individual Canadians and Canadian society. It raised important public policy questions about the media, the dissemination of information, cultural sovereignty, and the regulation of the broadcasting and entertainment industries. I regard the application as raising matters that went far beyond the private interests of any of the parties.

[247] I agree with those remarks, which also apply to Mr. Rex's *Charter* challenge.

[248] The evidence on this application also demonstrates that the broadcasting issues raised on Mr. Rex's *Charter* challenge affect a broad segment of the Canadian population.

[249] The August affidavit highlights the significant cultural and ethnic diversity of the Canadian population and attaches a partial transcript of proceedings of the House of Commons Standing Committee on Industry, Science, and Technology. The evidence suggests that in 2004 over 700,000 Canadians were receiving unauthorized satellite signals. The evidence adduced by Canada on Mr. Rex's application is that a significant number of prosecutions have and continue to be brought against Canadian residents.

[250] As far back as 1997, in *LeBlanc*, at para. 23, Haliburton J. remarked upon the number of Canadian residents attempting to access DTH signals:

Recent press reports, "Globe and Mail", November 8th, 1997, suggests as many as 300,000 Canadian subscribers are presently receiving these signals,

and paying their fees to American distributors. The intention of the Legislature as declared in the Radiocommunication Act and in the Telecommunications Act is obviously being ignored by the mass of Canadians. That fact, however, does not make the sale of American television signals “lawful” in Canada.

[251] The respondents submit that Mr. Rex’s case lacks the requisite public interest aspects necessary for an advance costs award because foreign language television programming is available on the internet. In my respectful opinion, their submission overlooks the fact that the public’s current access to television programming on the internet results only from a temporary exception issued by the CRTC that may be revoked at any time.

[252] Canada acknowledges that the current unlimited and unrestricted access by Canadian residents to the internet results from a temporary exemption to the requirement to satisfy the Canadian content requirements found in Part II of the *Broadcasting Act*. The first exemption was issued in 1999 and then amended on October 22, 2009: *Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14; Public Notice CRTC 1999-118; Public Notice CRTC 1999-197; and Broadcasting Order CRTC 2009-660*.

[253] According to Canada, the exemption is issued at the discretion of the CRTC to “see where it [internet broadcasting] goes” and may be amended or revoked at any time. Paragraph 15 of *Broadcasting Order CRTC 2009-660* states:

The Commission notes that, pursuant to subsection 9(4) of the [Broadcast] Act, it can impose such terms and conditions on exempt broadcasting undertakings as it determines appropriate.

[254] Canada also concedes that the CRTC has revoked a previous exemption order (for mobile television broadcasting undertakings: para. 28 of *Broadcasting Order CRTC 2009-660*).

[255] Further, the respondents’ submission also assumes, incorrectly in my view, that all Canadian residents who wish to access foreign DTH programming know how to use the internet and that they have internet access with sufficient bandwidth to stream television programs.

[256] No court in Canada has decided the issue left open by the Supreme Court of Canada in *Bell ExpressVu*. Instead, *Charter* issues continue to be raised as a defence to prosecutions brought by Canada pursuant to the *Radiocommunication Act* and in civil actions without a proper evidentiary record. *Lahaie v. Canada (Attorney General)*, 2010 ONCA 516 is a recent example of the former.

[257] In *Caron*, Binnie J. considered, at paras. 44 and 45, uncertainty in the law as a factor making the case “sufficiently special”:

44 The public importance aspect of the *Okanagan* test has three elements ... Not every constitutional case meets these criteria, as it could be said in each and every case that it is “sufficiently special that it would be contrary to the interests of justice to deny the advanced costs application (*Little Sisters (No. 2)*, para. 37). ...

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

[258] Mr. Rex’s *Charter* challenge constitutes an attack on one of the “legislative pillars” of Canada’s broadcasting framework, which is of national significance. It also involves scrutiny of government action in the form of the Order in Council. As in *Caron*, the issue will not be dealt with but for the litigation. The outcome of the case would resolve the ongoing uncertainty in respect of the freedom of expression issue. Prosecutions by Canada pursuant to the *Radiocommunication Act* continue on a regular basis in an environment where the *Charter* issues concerning grey market conduct remain unsettled.

[259] Further, the personal defendants in this case, some of whom are university students and housewives who sought to earn extra income, worked for Mr. Rex’s businesses in minimum wage clerical positions. They are being pursued by Dish, DIRECTV, and Bell for recovery of damages pursuant to the *Radiocommunication Act*. While Mr. Rex’s position in this case is not comparable to *Okanagan* because he was not “thrust” into litigation, the outcome of Mr. Rex’s challenge is of

tremendous significance to this category of defendants who can be said to have been “thrust” into this litigation.

[260] In my opinion, the issues described by Perell J. at para. 92 in *Incredible Electronics* make the case sufficiently special. Another issue that makes Mr. Rex’s challenge sufficiently special is that resolution of the issues, regardless of outcome, could substantially eliminate ongoing grey market activity, the costs of prosecutions, and the costly litigation practises taken by Dish and DIRECTV.

[261] Prosecutions should not persist if they rely upon an unconstitutional law or regulation. Foreign broadcasters should not be permitted to pursue litigation that depends upon a private cause of action that cannot be sustained. It is in the public interest that the issue be dealt with now.

[262] This case is not like *Little Sisters (No. 2)* where nothing in the result could be found to have implications beyond the appellants.

[263] I have also considered whether it is appropriate to order advance costs where the *Charter* challenge is based, in part, on a reasonable hypothetical. I have considered whether reliance on a reasonable hypothetical should mean that a case lacks sufficient importance. In my opinion, the hypothetical does not detract from the special circumstances arising in this case. I have considered the hypothetical involved in this case as part of my analysis of the second and third conditions set out in *Okanagan*.

[264] Further, counsel for the respondents have not drawn my attention to any decision where an application for advance costs was denied because the case involved a hypothetical. I see no principled basis to conclude that there should be a rule that advance cost awards should not be granted simply because a *Charter* challenge involves a reasonable hypothetical.

[265] I am also not able to agree with the respondents’ submissions that the issue arising on the current *Charter* challenge has been decided in prior cases.

[266] The respondents submit that the decisions of the Quebec Superior Court and the Court of Appeal in *D'Argy* are dispositive of the issues raised on Mr. Rex's challenge.

[267] The charges against the accused in that case involved only black market conduct. As I point out below, the remarks made by the trial judge concerning grey market activity are *obiter dicta* that are not grounded in any evidence.

[268] The reasons of the trial judge have not been formally translated into English. Canada provided me with a partial and unofficial translation of paras. 15-17, 26-27, and 310. From that translation, I am able to glean that Mr. D'Argy lacked legal representation and sought to buttress his defence by introducing into evidence an affidavit (and the cross-examination) of Mr. Richard Schultz, a professor of political science at McGill University, which was also filed in *Incredible Electronics*.

[269] The trial judge acquitted Mr. D'Argy. Her decision was appealed to the Quebec Superior Court. The English translation of the Quebec Superior Court's reasons for judgment contain some of the trial judge's remarks. In reversing the acquittal, the Superior Court found that the trial judge fell into error when she found that, notwithstanding that the Crown had proven beyond a reasonable doubt that the accused were in possession of equipment allowing DIRECTV's programming to be pirated, ss. 9(1)(c) and 10(1)(b) of the *Radiocommunication Act* violated the right of freedom of expression in the absence of any evidentiary foundation.

[270] A review of the reasons for judgment of the Quebec Superior Court and Court of Appeal shows that the case is not dispositive of the issues on Mr. Rex's challenge.

[271] After noting that the trial judge found that the accused's black market activity was not protected by s. 2(b) of the *Charter*, Décarie J. of the Quebec Superior Court wrote:

13 As mentioned earlier, Côté J. found that the prosecution had succeeded in establishing beyond a reasonable doubt the essential elements of the offences with which the respondents were charged. Therefore, since

she rejected their defence that the legislative provisions creating the offences impaired their freedom of expression, she should have found them guilty:

[128] The Court shares the Crown's view that the accused cannot invoke the protection of subsection 2(b) to justify the illegal appropriation and subsequent illegal sale of property belonging to others, in this case, the DIRECTV subscription programming signal. It is clear that the black market cannot be considered an "expressive activity" linked to the underlying values protected by freedom of expression.

14 With respect, her analysis should have ended there, and she should have found the accused guilty. In the court's view, she should not have extended her analysis further, as she did ...

15 In fact, having decided that the respondents could not invoke the protection of paragraph 2(b) of the Charter to justify their illegal appropriation of the DIRECTV subscription programming signal, it was not necessary to go further and rule on a constitutional issue in order to resolve the matter before her. With respect, she should have refused the invitation to do so and refrained from comment.

...

17 Such restraint is all the more appropriate since no evidence having to do with the grey market was submitted during the consideration of whether the impugned legislative provisions impaired the respondents' freedom of expression.

[Emphasis added]

[272] The English translation of the Quebec Court of Appeal's decision also provides insight into the decision of the trial judge. The English translation shows that the Court of Appeal disagreed (as did the Superior Court) with the part of the trial judge's decision that was based on statutory interpretation. According to the Quebec Court of Appeal, the trial judge determined that the *Radiocommunication Act* prohibited both black and grey market activity. Having previously determined that freedom of expression had been breached with respect to grey market activity, the trial judge acquitted Mr. D'Argy because she determined that the statute could not be read down.

[273] The Quebec Court of Appeal noted at para. 9 that the accused "were not charged with having taken part in the grey market." To conclude that the accused could not be declared guilty of black market activity "on the ground that the legislator could not prohibit the grey market" was, according to the Court of Appeal, an error.

The Court remarked at para. 8 that a legal provision, such as the *Radiocommunication Act*, “must be interpreted by presuming that the legislator has limited its scope to what the Constitution allows.”

[274] My view that the decision of the Court of Appeal is focused on black market activity is reinforced by the Court’s remarks at para.12. There, the Court said that even if DIRECTV had the right to sell decoders in Canada and the accused had the right to acquire them, it does not mean that “they would not have violated the law by selling and possessing pirate devices and thus by stealing from DIRECTV.”

[Emphasis added]

[275] In the circumstances, I cannot accept the respondents’ submission that *D’Argy* has decided issues raised by Mr. Rex’s *Charter* challenge.

[276] The respondents also cite a subsequent decision of the Quebec Superior Court in *R. v. Abdul Kesodia and S.M. Electronique Hi-Fi Inc.*, 2008 QCCS 4538. An unofficial translation of the reasons for judgment provided by Canada shows that the Court concluded that *D’Argy* also applies to grey market activity. The Court’s reasoning, at para. 29, is brief:

This Court concludes that the constitutional validity of ss. 9 and 10 of the RCA as they apply to the grey market is equally determined by *D’Argy* since the grey market is equally prohibited by the RCA.

[277] In my respectful opinion, that brief statement overlooks the reasoning of the upper courts in *D’Argy* and offers no assistance to the issues raised on Mr. Rex’s application.

[278] There is no indication in the reasons for judgment of the Quebec Court of Appeal that the result in *D’Argy* followed upon an evidentiary record contemplated by the Supreme Court of Canada in *Bell ExpressVu*.

[279] Nor is there any indication in the reasons for judgment in *D’Argy* that the decision of the Quebec Court of Appeal intended its decision to apply to grey market activity as opposed to black market activity (the latter, according to *Irwin Toy*, would

be excluded from *Charter* protection). Notwithstanding that I am not bound to follow *D'Argy* and *Kesodia*, I choose not to in any event as there is no reasoning in the case reports that addresses the issues in Mr. Rex's *Charter* challenge or the current application.

[280] *DIRECTV Inc. v. Gillott* (2007), 84 O.R. (3d) 595 (S.C.J.), a case cited by the respondents, is also not dispositive. There, Perell J. ordered a *Mareva* injunction against a party engaging in grey market activity based upon the decision of the Supreme Court of Canada in *Bell ExpressVu*. In doing so, he acknowledged that the Supreme Court of Canada had yet to decide the *Charter* issue:

[38] In *Bell ExpressVu Limited Partnership v. Rex* [citation omitted], the Supreme Court of Canada ruled that s. 9(1)(c) of the *Radiocommunication Act* prohibited the decryption of encrypted signals emanating from U.S. and other foreign broadcasters. Because of the absence of an adequate factual record, the Supreme Court of Canada declined to decide whether s. 9(1)(c) of the *Radiocommunication Act* contravened the *Canadian Charter of Rights and Freedoms* as an infringement of freedom of expression, whether any infringement could be justified under s. 1 of the *Charter*, and, if not justified, whether s. 9(1)(c) should be struck out of the statute.

[39] However, the current law in Canada is that the activities of grey marketers are unlawful. That there is an uncertain *Charter* issue about freedom of expression does not alter that truth.

[281] Perell J. did not rule or comment upon the *Charter* issues raised on Mr. Rex's application.

[282] None of the other cases cited by the respondents, such as *DIRECTV, Inc. v. Gray*, 2003 BCSC 1509, are helpful to this application because they do not deal with the *Charter* issues raised on Mr. Rex's application.

[283] Canada submits that the issue has been previously decided by the Supreme Court of Canada in *Re New Brunswick Broadcasting Co. v. Canadian Radio-Television & Telecommunications Commission*, (1984) 13 D.L.R. (4th) 77. At issue in that case was an order in council directed to the CRTC to limit the issuance of broadcasting licenses to persons who own or control newspapers circulated in the proposed broadcasting territory. The applicant argued, unsuccessfully, that the order in council deprived it and the public of the right to freedom of expression guaranteed

under the *Charter*. The respondents submit that the case is dispositive of any issue that the Order in Council operates, in combination with the *Radiocommunication Act*, to restrict freedom of expression. I respectfully disagree for two reasons.

[284] First, in my opinion, the holding in *Re New Brunswick Broadcasting* is entirely fact dependant. The order in council was seen as appropriate in order to avoid a concentration of control over the newspaper and free-to-air television broadcast media in the same broadcast territory. Free-to-air television broadcast was thought, at that time, to be a scarce public resource. DTH programming was not available in 1984.

[285] Second, in dismissing the applicant's challenge, the Federal Court of Appeal engaged in what appears to be an analysis under s. 1 of the *Charter* at 80 and 87. The Court said at 80:

The appellant's owners do not want to discontinue the television broadcasting operation. Nor do they want to dispose of their newspaper publishing operations. On the other hand, it is apparent from the historical facts appearing in the record as well as the opposition mounted by the Consumers' Association of Canada and others to the renewal of the appellant's television broadcasting licenses that not everyone is persuaded that it is a good thing to have several forms of media communication in the same market controlled by a single person or group of persons.

[286] Then at 87, the Court said of the order in council:

On its face it is a direction relating to who may not hold broadcasting licenses. In fact what it does is to restrict the classes of who may hold broadcasting licenses. It says nothing and does nothing to regulate either the concentration of ownership of newspapers or the owners of newspapers. They are as free as ever to own and control newspapers. But if they own newspapers it is not regarded as appropriate for them to hold broadcasting licenses as well for the areas where these newspapers circulate.

[287] In my opinion, the analysis carried out by Thurlow C.J. in relation to concentration of media control has no bearing on the issues arising on Mr. Rex's *Charter* challenge. No Canadian court has undertaken an analysis of whether a complete ban on any foreign DTH program provider is justified under s. 1 of the *Charter*. No Canadian court has undertaken the analysis that the Supreme Court of

Canada left open for another day, based upon a proper evidentiary record, in *Bell ExpressVu*.

[288] However, I am of the opinion that an award of advance costs should not be made to support Mr. Rex's broad challenge of the *Radiocommunication Act*. I hold that view because the matters of public interest arising from the evidence on this application may be addressed by resolving the narrower, limited, and more discrete challenge, i.e., the combined effect of the Order in Council and the *Radiocommunication Act* at significantly less expense.

[289] The evidence adduced on this application focused on the reality that at least hundreds of thousands of Canadians are presently receiving satellite signals from, and paying fees to, foreign broadcasters in order to receive the programming of their choice. If the narrower challenge is resolved in favour of Mr. Rex, which of necessity will involve a determination of the nature and extent of regulation that is justifiable under s. 1 of the *Charter*, so that the Order in Council is struck or rescinded because it cannot be justified under s. 1, foreign broadcasters will have the opportunity to apply for licenses in order to legally broadcast DTH programming to Canadians. In that event, Canadian residents may be allowed to receive DTH programming of their choice from licensed foreign broadcasters in accordance with s. 2(b) of the *Charter*. Grey market activity, the associated costs of prosecutions, and the costly litigation practices adopted by foreign broadcasters such as Dish and DIRECTV, may be substantially eliminated. Prosecutions and civil actions would then be directed towards black market activity as well as any grey market activity that might occur in respect of non-licensed foreign broadcasters.

[290] As I see it, determining whether the exclusion of foreign broadcasters is justifiable will, of necessity, involve determining whether regulation of DTH programming itself is justifiable under s. 1 of the *Charter*.

[291] For example, if the restriction of freedom of expression that presently exists on the narrower challenge is determined to be justifiable under s. 1, then that determination would resolve the same issues concerning regulation that are raised

on the broader challenge sought by Mr. Rex. If the exclusion of licenses to a class of persons such as all foreign broadcasters is justifiable under s. 1, then it is axiomatic that regulation of DTH programming is also justifiable.

[292] Likewise, if exclusion of foreign broadcasters cannot be justified, that conclusion could result from a determination that regulation itself is not justifiable. Or, a determination that the present exclusion of foreign broadcasters cannot be justified could result from the conclusion that regulation is justifiable although not to the extent that an entire class of persons can be excluded from the opportunity to obtain licenses simply because of their status. In either event, an analysis of whether regulation of DTH programming itself is justifiable will have been undertaken and determined.

[293] Although resolving the broader challenge may also have these effects, it is not necessary to do so in order to achieve those effects. The concerns noted above may be resolved by addressing the narrower challenge alone. Advance costs are ordered in “rare and exceptional cases” where to decline to order them would result in a court “participating in an injustice - against the litigant personally and against the public generally”: *Little Sisters*, at paras. 5, 26, 33, 41, 73, and 78. Moreover, as the majority observed in *Okanagan* at para. 41 when describing circumstances that make a case exceptional, “no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied without an advance costs award.” In this case, there would be no injustice in declining to grant advance costs for the broader challenge because the public interests associated with it may be satisfied by resolving the narrower challenge alone. Accordingly, a holding that only the narrower challenge attracts an award of advance costs is consistent with the conclusion of McLachlin C.J.C. in *Little Sisters* (at para. 105) and the majority in *Okanagan* (at para. 78) that “[a]n advance costs award should remain a last resort”.

2. Conclusion

[294] I have determined that Mr. Rex has met the third condition for an award of advance costs.

[295] In my opinion, the facts of this case are sufficiently special to support an order for advance costs. I would exercise my discretion to make such an order, subject to ongoing scrutiny to ensure that there is no unfair burden imposed upon the parties paying for them.

VII. QUANTUM

[296] In *Little Sisters (No. 2)*, the Court said that a recipient of an order for advance costs should not have “free rein”. At para. 42, the Court said that “[t]he litigant cannot spend the opposing party’s money without scrutiny”:

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.

[297] Following the conclusion of oral submissions, I asked counsel to provide an estimate of the quantum of anticipated costs. In my memorandum to counsel dated March 15, 2011, I wrote:

Given the great importance that Courts place on the proposed quantum of anticipated costs when considering whether to order advance costs, I am of the view that my decision on the present application should not be made without that information. I am therefore requesting that counsel provide me with written submissions providing an estimate of the quantum (which should also outline a litigation plan). The submission should address quantum on two separate bases: with and without the participation of the US respondents, Dish and DIRECTV.

The submission from Mr. Rex and his company should come first; the respondents’ response submissions should follow thereafter, with the opportunity to Mr. Rex and his company to provide reply.

[298] Mr. Rex provided his budget (with analysis) in a written submission dated April 15, 2011.

[299] In that submission, counsel for Mr. Rex emphasized that his client's budget was a rough estimate. He suggested the respondents provide specific information in their own budgets:

To reiterate, [Mr. Rex's budget] is a very rough estimate. One way perhaps of testing its reasonableness will be for the plaintiffs [Bell, Dish, and DIRECTV] and the government to provide the Court with its estimate of its legal fees (and for the government if it is going to use in-house counsel by calculating the time required multiplied by reference to comparable hourly rates for outside counsel) together with its estimate of disbursements (including expert fees) it believes will be involved in defending the constitutional challenge. We look forward to receiving that information as part of the plaintiffs' and the government's response.

[300] The respondents chose not to provide their own budgets. Instead, on May 16, 2011, they delivered written submissions criticizing Mr. Rex's budget as excessive, uncertain, and speculative. The respondents:

- (a) took issue with the scope of expert opinions proposed by Mr. Rex as irrelevant or having usurped the Court's function;
- (b) criticized Mr. Rex for failing to "determine how many witnesses he requires to support his section 2(b) argument - an argument which he has the burden of establishing and so is not significantly impacted by the other parties' approaches";
- (c) submitted that if an order for advance costs is made, it should be a scale costs order based on the tariff in the *Rules of Court* in an amount that provides "a basic level of assistance"; and
- (d) submitted that a "hard cap" should be set given the uncertainty in Mr. Rex's budget.

[301] The Broadcasters advanced the alternative position that if an award is made beyond basic tariff amounts it should be at 50% of special costs.

[302] In its submission, Canada suggested the possibility of conducting an examination for discovery of Mr. Rex for one day. Otherwise, the respondents'

submissions are silent as to their litigation plan to resist Mr. Rex's case concerning s. 2(b) of the *Charter* and to prove justification under s. 1 of the *Charter* (the onus of which, under *Oakes* falls upon them).

[303] In their written submissions, the Broadcasters urged particular caution in determining the amount of advance costs to be paid by a litigant who has been inadvertently "thrust" into litigation. Relying upon *Okanagan*, the Broadcasters wrote:

[I]n the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the effect of laws of general application.

[304] That submission mischaracterizes the facts. The Broadcasters have not been thrust into this litigation. They are the plaintiffs.

[305] Dish and DIRECTV are strangers to Canada and the *Charter*. They currently do not carry on business in Canada, nor are they registered to do so. Nonetheless, they maintained their position during oral argument that they will continue to vigorously resist Mr. Rex's *Charter* challenge. I agree with the submission made on behalf of Mr. Rex that the decisions made by Dish and DIRECTV to "mount a vigorous defence" to the challenge will add to the financial cost of the litigation.

[306] Bell will also vigorously oppose Mr. Rex's *Charter* challenge. As I noted above, I think it appropriate to infer that Bell does so in order to protect its commercial interests.

[307] In resisting Mr. Rex's *Charter* challenge, Dish, DIRECTV, and Bell have chosen to act, in effect, as private Attorneys General.

[308] Advance costs can and have been ordered against private parties: *Carom v. Bre-X Minerals Ltd.*, 2010 ONSC 6921; *Little Sisters (No. 2)* at para. 42. To the extent that the involvement of Dish, DIRECTV, and Bell create additional costs on Mr. Rex's *Charter* challenge, those respondents should pay for them on an advance costs order. The financial burden created by their efforts to protect their commercial interests should not be imposed upon the taxpayers of Canada.

[309] The estimate of quantum in Mr. Rex's budget ranges between approximately \$664,000 and \$804,000, depending upon the involvement of Dish and DIRECTV. His budget contemplates discovery of documents, limited examination for discovery of representatives of Canada and the Broadcasters, provision of affidavit evidence and expert opinion, attendance at cross examination on affidavits, case management conference preparation and attendance, and determination of the *Charter* challenge on a summary trial application pursuant to Rule 9-7 of the *Rules of Court*. Mr. Rex's budget also includes disbursements, expert fees, and taxes.

[310] Mr. Rex's request for legal fees is calculated at 75% of special costs. Hourly rates for one senior and one junior counsel are set out in the amounts of \$340 and \$130, respectively. Mr. Rex also proposes to have his legal accounts reviewed by a neutral third party for reasonableness. He is prepared to cap advance costs in the amount of \$1 million, inclusive of all disbursements, expert fees, and taxes, so long as his right to seek full indemnity at the end of the case (assuming he is successful) is not affected.

[311] The affidavit evidence that Mr. Rex contemplates tendering for the summary trial application are said to come from:

... person(s) who will provide the Court with a description of what programming is presently available in Canada from licensed broadcasters and what would be available from foreign DTH providers

... persons both lay and expert who will depose to the importance of obtaining the programming offered by foreign DTH providers and especially multicultural programming from foreign DTH providers

... foreign DTH provider(s) who would be willing to provide its programming to Canadians who are willing to pay.

[312] Mr. Rex's budget also describes the requirement for expert evidence, estimated to cost \$255,000, in the following manner:

... the objectives of the impugned provisions and whether such objectives are pressing and compelling within the meaning of s. 1 of the *Charter*. We anticipate that there will be at least two experts required assuming that the government and the plaintiffs assert both economic and cultural protection as the objectives of the impugned provisions. We anticipate the same experts can opine on ways in which Parliament could achieve its objectives (such as

economic or cultural protectionism) without banning the programming of foreign DTH providers who wish to do business with Canadians willing to pay for such services.

An expert in U.S. (or other foreign) law or regulatory policy who can opine on whether and to what extent such law might prevent foreign DTH providers from doing business in Canada if Canadian law was to so allow.

An expert on copyright law and the extent to which, if at all, copyright law can or should pose any obstacles to U.S. DTH providers doing business with Canadians.

[313] In addition to disputing the scope of the expert reports and affidavit evidence proposed by Mr. Rex, the respondents take issue with the proposed hourly rates. Relying on *Tsilhqot'in*, the respondents argue that advance costs should only provide a “basic level of assistance”.

[314] In my respectful view, this submission overlooks the overarching principle in the case law that the purpose of advance costs awards is to ensure a level playing field that properly resolves the issue of public importance. There is no public interest in a “lopsided” trial in which a litigant is precluded, due to financial constraints, from putting forth their case in a capable manner. In complex cases, skilled counsel is required to ensure a level playing field: *Caron; Xeni*. In *Caron*, the Court noted that advance costs were necessary to ensure that a “lopsided” trial would not impeach the creation of the factual record. This presumably encapsulates the concept that advance costs should be used to ensure that counsel is specialized and experienced if demanded by the complexity of the litigation:

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

[315] In *Xeni*, the Court of Appeal considered the facts in *Okanagan* and recognized that the purpose of advance costs is to permit applicants to put forth their position, however complex, in a way that ensures that the litigants are on an even playing field, even if this requires experienced and specialized counsel:

123 In [*Okanagan*], the circumstances or factors found to make that case special or exceptional were these: (a) the particular facts of the case removed it from the realm of ordinary litigation in that the proceedings were of a "test case" nature, that is, they stood to try rights in a new or largely unexplored domain; (b) the proceedings raised issues of obvious public importance such as the applicability of the *Forest Practices Code* to the constitutional rights to be tried; (c) the proceedings were initiated and were being pursued by the Crown; and (d) the nature of the proceedings were such that experienced and specialized legal counsel would be required to put forth the position of the aboriginal communities involved. In [*Okanagan*], Newbury J.A. went on to observe that the honour of the Crown is at stake in dealings between the Crown and aboriginal peoples and stated, at para. 37, that "the broad discretion exercisable by the Supreme Court in making costs orders must surely be informed by that principle in the particular circumstances of this case". She expressed the opinion that in the circumstances of that case, it was "simply unrealistic for the Crown in this case to fold its hands and say that the Bands will have to manage without counsel."

124 In his reasons for judgment, Mr. Justice Vickers said he was unable, in any principled way, to distinguish the case before him from [*Okanagan*]. In other words, he found that the circumstances of the case before him were of such an extraordinary or special nature as to compel the same result. Putting the test in the language used by Newbury J.A. in [*Okanagan*],

Mr. Justice Vickers found there were special, exceptional or unique circumstances that outweighed the concerns about prejudging the outcome of the case.

[Emphasis added]

[316] In my opinion, the hourly rates proposed on behalf of Mr. Rex are reasonable and fall well below rates charged by senior counsel, who practise in Vancouver and other urban centres in British Columbia, for complex commercial and criminal matters.

[317] I agree that part of Mr. Rex's budget is speculative. That speculation arises, quite naturally, from Mr. Rex's attempts to estimate the nature and extent of the legal work necessary to meet the respondents' case under s. 1 of the *Charter*. The respondents' failure to provide any budget or line item analysis offers no assistance to the Court and perpetuates speculation.

[318] While much, if not most, of Mr. Rex's budget concerns the s. 1 analysis, he has provided some, albeit limited, line items concerning the s. 2(b) issues. Mr. Rex's descriptions of other legal work and expert evidence is more global in nature. For

example: Mr. Rex has allocated \$47,000 to preparation and attendance at all case management conferences; \$30,000 for disbursements such as filing fees, transcripts, and copying; and \$50,000 for experts fees concerning Canadian telecommunications policy.

[319] Some of the legal work and expert evidence in Mr. Rex's proposed budget concerning the *Oakes* test may not be necessary. The outcome depends on the scope of the issues and positions advanced by the respondents.

[320] For some issues, the parties may not need to spend significant time locating evidence since they have access to evidence adduced in the House of Commons proceedings, *Incredible Electronics*, and *D'Argy*. The existence of such evidence ought to result in costs savings. Rigorous and proactive case management should prevent excessive costs from being incurred through a plethora of interlocutory proceedings (of the type that occurred in *Incredible Electronics*). Taxpayers should not face the spectre of burgeoning costs over time. For that reason, I agree with Mr. Rex and the respondents that a hard cap should be imposed.

[321] I also agree with Mr. Rex's submission that the litigation and funding of advance costs should proceed in stages. In my opinion, the necessity to proceed in stages is accentuated by the respondents' failure to provide a budget and analysis.

[322] The first stage of Mr. Rex's case requires him to identify his litigation plan to prove a breach of s. 2(b). The respondents should also provide their proposed plans and budgets for their s. 1 case. From there, I can assess the quantum of advance costs to be awarded as well as the cap that should be set. It may be that the \$1 million cap proposed by Mr. Rex is too high. I will also be in a position to allocate costs to be paid by Canada and the Broadcasters.

[323] In the meantime, funding should be provided for Mr. Rex's legal fees, disbursements, expert fees, and taxes to prepare his plan, identify the evidence presently available, and identify the evidence required to prepare affidavits. In my opinion, that amount should be set at \$35,000. That amount should be divided so

that Canada pays 50% and the Broadcasters collectively pay the other 50%, without prejudice to their rights to argue a different allocation at a later date.

[324] Mr. Rex should deliver a more detailed budget and plan concerning the s. 2(b) issues within 45 days. The respondents should deliver their budgets and plans concerning the s. 1 issues within that time frame as well. The parties may then deliver their responding budgets and analyses 30 days thereafter. After that, the parties should then arrange to appear before me to review the budgets.

VIII. SUMMARY

[325] I have determined that Mr. Rex has met the conditions required for an award of advance costs to pursue the narrower challenge concerning the combined effect of the Order in Council and the *Radiocommunication Act*. I exercise my discretion to order advance costs in all three actions.

[326] The quantum of advanced costs to be funded will be determined on a step-by-step basis, through proactive case management. A hard cap will be imposed.

[327] Preliminary funding in the amount of \$35,000 is to be provided to Mr. Rex at this time, with 50% to be paid by Canada and 50% to be paid by the Broadcasters.

[328] The parties are to provide detailed budgets and litigation plans within the next 45 days, with responding submissions 30 days thereafter. The parties should arrange a further case management conference immediately thereafter.

“P. Walker J.”

The Honourable Mr. Justice Paul W. Walker