

## **COSTS IN PUBLIC INTEREST LITIGATION REVISITED**

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### **Introduction**

Of late, developments in public interest costs law have — both in Canada and elsewhere in the Commonwealth — been unfolding at an accelerating rate and in some very intriguing directions. In this article, I explore how this new area of jurisprudence has emerged over the last 15 years, consider some of the issues and tensions that continue to animate it, and offer some thoughts on where it is going. To this end, I discuss the underlying (and sometimes competing) rationales for costs allocation in civil litigation, survey some interesting recent developments in U.K. and Australian public interest costs law, and conclude with a doctrinal overview and critique of recent Canadian public interest costs case law focusing on special costs, adverse costs, advance costs and protective costs orders.

### **Part I: Distinct and Coherent? Some Initial Musings about Costs in the Public Interest Context**

I begin with the following proposition: it is now plausible to talk about this area of law as a distinct and coherent jurisprudence in its own right.<sup>1</sup> When, as a freshly minted law prof, I first began writing

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1. See C. Tollefson, D. Gilliland and J. DeMarco, “Towards a Costs Jurisprudence in Public Interest Litigation” (2004), 83 Can. Bar Rev. 473 at p. 476 where the authors contend that “. . . the most critical variable affecting the long-term health of public interest litigation in this country is whether and to what extent we are committed to developing a coherent and distinct costs jurisprudence in public interest litigation”: quoted in *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 at para. 72, 147 C.R.R. (2d) 79, [2006] O.J. No. 2155 (S.C.J.) *per* Perell J. This article revisits themes earlier explored in this *Canadian Bar Review* article,

about costs in public interest litigation over 15 years ago, such an assertion would have seemed far-fetched. Back then courts only rarely considered costs issues in public interest cases and, when they did, they were often quite resistant to the idea that they raised unique considerations or merited special treatment.

Around this time, I became interested in the topic as a result of my involvement, as a junior board member, in a case taken on by the Sierra Legal Defence Fund. The case unfolded over the course of two years, concluding in July 1994—the same month that blockades went up in Clayoquot Sound to protest old growth logging in what by summer's end would become the largest episode of civil disobedience in Canadian history. In common with the protestors, the lawsuit claimed that clearcut logging by MacMillan Bloedel on Crown land adjacent to Pacific Rim National Park was unsustainable. The suit—brought by the Sierra Club of Western Canada—contended that in authorizing this cutting, B.C.'s Chief Forester had erred in his duty to set the allowable annual cut (AAC) at a “sustainable” level pursuant to the provincial *Forest Act*.<sup>2</sup>

Although the Chief Forester had traditionally interpreted the word “sustainable” to refer to the sustaining of forest jobs and communities, the suit alleged that the word should now be construed to include considerations of ecological sustainability. If this argument were accepted, logging in these contentious areas would have been postponed to allow for the AAC to be re-calculated. While the petition was framed narrowly to focus on how the Chief Forester had interpreted his legal authority, the B.C. Supreme Court allowed MacMillan Bloedel to be added as a party given its large financial stake in the outcome of the case.

In the result, Smith J. dismissed the application on the basis of legislative history and past practice.<sup>3</sup> At this juncture, while the

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and in C. Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009), 35 Adv. Q. 181.

2. R.S.B.C. 1996, c. 157.

3. The decision on the merits is at *Sierra Club of Western Canada v British Columbia (Chief Forester)*, [1993] B.C.J. No. 2677, 22 Admin. L.R. (2d) 129, 13 C.E.L.R. (N.S.) 13 (S.C.). By the time an appeal was heard, the *Forest Act* had been amended to allow the Chief Forester to adopt a broader approach to setting the AAC that included long run ecological considerations. These amendments, according the Court of Appeal, rendered the appeal largely moot: see *Sierra Club of Western Canada v British Columbia (Chief Forester)*, [1995] B.C.J. No. 1324, 126 D.L.R. (4th) 437, [1995] 8 W.W.R. 1 (C.A.). Three years later, MacMillan Bloedel announced that it would no longer engage in clearcutting on its coastal tenures: Press Release, MacMillan Bloedel to Phase Out Clearcutting (June 10, 1998), online: <<http://www.cathedralgrove.eu/media/01-3-macblo.pdf>>.

Crown did not seek costs, the forest company submitted that, having prevailed on the application, the Sierra Club should be liable for its costs. After hearing extensive submissions, Smith J. agreed.<sup>4</sup> While acknowledging the novelty and importance of the legal issue raised by the Sierra Club, its able work on forest sustainability issues over the years,<sup>5</sup> and the effective manner in which its case was presented, in his view MacMillan Bloedel was “a private citizen, not a public agency” and as such was entitled to recover its costs.<sup>6</sup>

This, my first exposure to the reality of adverse costs in public interest litigation, left me somewhat bemused, a reaction that was later channeled into a law review article.<sup>7</sup> In that piece, I argued that if we were serious about our rhetorical commitment to access to justice, in public interest litigation the two-way conventional “English Rule” as to costs should be replaced by a one-way rule. Under this approach, a public interest litigant could recover its costs if successful but would not be liable for adverse costs awards (in environmental lawsuits, often involving multiple private parties lining up on the side of the Crown) if they lost.

Adopting this approach in public interest cases, I contended, made sense because of the distinct public benefit and access to justice considerations typically associated with cases of this kind.<sup>8</sup> These considerations, I argued, trumped the rationales typically offered to support the presumption that the victor was entitled to its spoils in the form of costs.

American costs law in the public interest context mirrors these considerations. There the default position in ordinary civil litigation is a no-way rule. As such, at the conclusion of litigation, costs are borne by the parties who have incurred them regardless of the outcome. However, in a variety of areas (including environmental, securities and civil rights law) Congress has enacted fee-shifting statutes that effectively create a one-way model by entitling private citizens (who are seen as donning the mantle of the Attorney General)

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4. The decision on costs is at *Sierra Club of Western Canada v British Columbia (Chief Forester)*, [1994] B.C.J. No. 1713, 117 D.L.R. (4th) 395, [1994] 10 W.W.R. 279 (S.C.).

5. *Ibid.*, at para. 54.

6. *Ibid.*, at para. 55.

7. Chris Tollefson, “When the ‘Public Interest’ Loses: The Liability of Public Interest Litigants for Adverse Costs Awards” (1995), 29 U.B.C. L. Rev. 303. In a similar vein, see G. Mayeda, “Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations” (2010), 6 McGill J.S.D.L.P. 143.

8. *Ibid.*, at pp. 309 *et seq.*

to recover their full attorney fees and disbursements in cases in which they have ultimately prevailed either in court or by way of settlement.<sup>9</sup>

The 15 or so years since I first wrote on the topic have seen some major legal developments in the realm of public interest costs law in Canada and the Commonwealth with likely more to come.

In Canada, of course, the most important milestone is the 2003 decision of the Supreme Court of Canada in *Okanagan Indian Band*.<sup>10</sup> The most obvious significance of this decision is its approval of the practice, in exceptional cases, of ordering costs to be paid in advance of the litigation (advance costs orders). However, it is also noteworthy for its affirmation of the importance of access to justice in public interest cases and of the duty of the courts to craft costs orders that support and promote this goal. While in two subsequent cases — *Little Sisters No. 2* and *Caron* — the court has underscored the highly exceptional nature of orders of this kind, lower courts remain prepared to make such orders where the circumstances justify.<sup>11</sup> A recent illustration is *Rex v. Dish Network L.L.C.* (decided August 2011).<sup>12</sup> And trial decisions on the merits in cases where advance costs orders have been made tend strongly to underscore, I would argue, the social utility of this form of order particularly in complex litigation with respect to Aboriginal rights and title: see *Tsilhqot'in Nation v. British Columbia*<sup>13</sup> (Vickers J.) and the recent trial decision in *Keewatin v. Ontario (Minister of Natural Resources)*<sup>14</sup> (Sanderson J.). We have also seen over the last 15 years a growing judicial comfort with the practice of ordering that prevailing public interest litigants be awarded “special” or “solicitor and client” costs, and with excusing unsuccessful public interest litigants from adverse costs liability.<sup>15</sup>

9. *Ibid.*, at pp. 304-305 and see also Tollefson *et al. supra*, footnote 1, at pp. 498-500; C. Tollefson, “Costs in Public Interest Litigation”, *supra*, footnote 1, at p. 184 and Barton Thompson, “The Continuing Innovation of Citizen Enforcement” (2000), U. Ill. L. Rev. 185.

10. *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 S.C.R. 371, [2003] S.C.J. No. 76, 233 D.L.R. (4th) 577 (hereafter *Okanagan* or *Okanagan Indian Band*).

11. See *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 275 D.L.R. (4th) 1, [2007] 1 S.C.R. 38 and *R. v. Caron*, [2011] S.C.J. No. 5, 329 D.L.R. (4th) 50, [2011] 4 W.W.R. 1.

12. 2011 BCSC 1105, [2011] B.C.J. No. 1577 (*Dish Network*).

13. [2007] B.C.J. No. 2465, [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1 *sub nom. Williams v. British Columbia* (S.C.).

14. 2011 ONSC 4801, [2011] O.J. No. 3907.

15. See cases discussed in Part III, *infra*.

In Australia the trajectory with respect to legal developments in this area of costs law has been somewhat similar. There, without question, the most influential landmark is the 1995 Report of the Australian Law Reform Commission (ALRC) entitled *Costs Shifting — Who pays for litigation?*<sup>16</sup> This broadly mandated inquiry into costs rules explored whether and to what extent existing costs rules promoted access to justice and due process across the entire Australian legal system. Four of its 65 recommendations specifically addressed costs in public interest cases. It advocated, in this setting, legislative recognition of a judicial power to make “public interest costs orders” (at any stage of the proceedings) to relieve a party of paying some or all of an adverse party’s costs (Recommendation 47). It also suggested indicia for identifying public interest cases, urging that the mere existence of a personal interest in the matter on the part of one or more of the parties should not necessarily affect this characterization (Recommendation 45) and recommending that courts recognize and exercise the power to “cap” costs in advance (Recommendation 39).

Both judicially and by statutory amendment, these public interest-related recommendations have gained considerable attention and some measure of traction. Courts in New South Wales, particularly its Land and Environment Court, have played a leading role in the development of an emerging public interest costs jurisprudence.<sup>17</sup> At the federal level, and in other states, courts have shown a greater reluctance to depart from the English Rule in public interest cases.<sup>18</sup> There is also a growing body of case law on protective costs orders and “cost-capping” in civil rights litigation arising out of the interpretation of newly enacted federal and state cost-capping provisions: see *Haraskin v. Murrays Australia Ltd.*<sup>19</sup>

Without a doubt, however, it is in the United Kingdom where costs law reform has gained the greatest momentum. There developments

16. ALRC Report 75 (1995), online: <<http://www.alrc.gov.au/report-75>>.

17. See *Oshlack v. Richmond River Council* (1998), 193 CLR 72, [1998] HCA 11, 152 ALR 83; *Blue Mountains Conservation Society v. Delta Electricity*, [2009] NSWLEC 150, 170 LGERA 1, affd [2010] NSWCA 263, 176 LGERA 424 and *Caroona Coal Action Group Inc. v. Coal Mines Australia Pty Ltd (No 3)*, [2010] NSWLEC 59, 173 LGERA 280.

18. For a very useful current overview of the Australian context see Public Interest Law Clearing House, “Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011” (PILCH: Melbourne, 2011). Further legislative reforms in this area may be on the horizon: see New South Wales Law Reform Commission, *Security for costs and associated costs orders* (Consultation paper 13: May 2011).

19. [2010] FCA 1133.

have unfolded on two fronts. A major growth area in the case law since the late 1990s has been the emergence of protective costs orders, or "PCOs". Protective costs orders are now regularly sought by public interest litigants at or near the commencement of litigation. They are intended to enhance access to justice by providing such litigants with some degree of immunization against adverse costs liability. This typically occurs by means of an order that "caps" at a predetermined amount what a litigant will recover (if successful) or for which they will be liable (if not). The leading case on PCOs is a 2005 Court of Appeal decision known as *Corner House Research*.<sup>20</sup> As will be discussed in Part III, the *Corner House* test has been broadly criticized for not going far enough to promote access to justice. And, indeed, the English Court of Appeal in two recent cases has acknowledged that the *Corner House* approach must be liberalized, at least in environmental assessment litigation, to comply with the U.K.'s access to justice obligations under the Aarhus Convention and associated EU directives.<sup>21</sup>

Even more intriguing is the potential that the U.K. will soon legislatively jettison its ancient two-way English costs rule in favour of a one-way model.<sup>22</sup> This possibility presents itself as a result of a cluster of factors that have led both politicians and the profession to conclude that dramatic action must be taken to bring spiraling litigation costs under control.<sup>23</sup> In the U.K., even more so than in Canada, the "loser pays" approach to costs ensures that litigation is

20. *R (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 WLR 2600, EWCA Civ 192, [2005] 4 All E.R. 1, cited *infra* as *Corner House*.

21. See *Morgan v. Hinton Organics (Wessex) Ltd.*, [2009] EWCA Civ 107, [2009] 2 P. & C.R. 4, [2009] Env LR 30 and *R (on the application of Garner) v. Elmbridge BC*, [2010] EWCA Civ 1006, [2011] 1 Costs LR 48, [2010] 3 EGLR 137. See also further discussion *infra*, text accompanying footnotes 46-48.

22. Controversy in the U.K. over access to justice has been a significant political issue since the early 1990s. In 1996 Lord Woolf concluded a two-year review of the country's civil law system by remitting a report titled *Access to Justice* (available at <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/index.htm>>). This led to the most significant reforms of civil law in a century including new civil court rules and the *Access to Justice Act 1999* (UK), c. 22. See J. Eaglesham and J. Mason, "Civil justice: the Woolf reforms: legal system poised for 'big bang' overhaul from today", *Financial Times* (April 26, 1999), p. 10. However, costs rules remained largely unaffected and, as such, increasingly were identified as a key access to justice issue setting the stage for Jackson L.J.'s appointment. See generally M. Peel and M. Murphy, "Judge set to probe costs of lawsuits", *Financial Times* (November 3, 2008), p. 7 and "Access to Justice — Justice Restructured" *The Post Magazine* (February 5, 2009), p. 15.

23. Peel and Murphy, *ibid.*

inevitably a high stakes game — a function of the fact that there, the losing party is typically liable to indemnify the winner for its full legal costs (unlike in Canada where the indemnification in ordinary cases is typically less than 50%).

The most recent and forceful volley in this growing debate is a provocative and far-reaching report on the costs law reform authored by Lord Justice Jackson and released in early 2010.<sup>24</sup> Among his recommendations is instituting a general one-way rule for all judicial review petitions against government action. More controversially, however, he urges eliminating the ability of plaintiffs to insure against adverse costs awards (by means of ATE or “after the event” policies). Currently, if a claim succeeds, the costs of the ATE are passed onto the other side as a recoverable disbursement.

## **Part II: Towards a Principled Approach to Costs Allocation in Public Interest Litigation**

In the preceding part, I argued that recent legal developments in Canada, Australia and the U.K. have strongly trended towards a greater appreciation and practical recognition of the unique nature of public interest litigation and the importance of the judicial role in ensuring its continued viability. In this part, I consider how these developments relate to the rationales underpinning costs allocation, and whether and to what extent a more principled and predictable public interest costs jurisprudence is emerging.

### **(1) Rationales for Costs Allocation**

It is worthwhile to start out by rehearsing the rationale for the traditional English rule that costs follow the event. In many jurisdictions, particularly those where costs law remains uncodified, this rationale is seldom articulated, let alone questioned. Historically, the predominant reason for the “loser pays” rule was a *compensatory* rationale.<sup>25</sup> It comes in two main guises. The first is based on the notion of fault: that the successful party should be compensated for some or all of its litigation costs on the footing that the unsuccessful party should be deemed to have been at fault (either in its conduct of the litigation, or the underlying

24. Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2010), online: <<http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>> (hereafter the Jackson Report). The report was commissioned about 18 months earlier by the office of the Master of the Rolls.

25. Tollefson, *supra*, footnote 7, at pp. 309-11.

transaction, or both) and that the prevailing party is therefore entitled to be made whole. In this variant, costs are seen as being akin remedially to damages. A second variant of the compensation rationale, typically invoked where a fault-based analysis was tenuous, is the spoils-based rationale. Under this approach, costs presumptively flow to the winner as a form of just desert. Here the overarching concern is fairness to the winner; other factors, relating to the nature of the case or the circumstances of the unsuccessful party, are deemed irrelevant.

Allied against the loser pays presumption embedded in the English Rule are two competing considerations: what might be termed the *public benefit* and the *access to justice* rationales. While these two rationales are closely related and sometimes conflated, they are distinguishable. While the public benefit rationale mandates a utilitarian evaluation of the litigation from the public's perspective (and the related desirability of promoting the adjudication of similar cases and issues), the access to justice rationale is concerned with ensuring that costs rules do not impede weaker or more poorly financed interests from pursuing claims against more powerful adversaries.<sup>26</sup>

Where the court concludes that there is misconduct by a party to the litigation, yet another rationale for allocating costs becomes relevant. In jurisdictions where the English Rule holds sway the punishment rationale is triggered in one of two situations: where the winning party has engaged in misconduct or sharp practice such that the *punishment* rationale would justify a denial of costs, or where the losing party has engaged in misconduct or sharp practice such that the winning party should be entitled to an elevated level of costs.<sup>27</sup>

Over the last 15 years, Canadian courts have become increasingly comfortable with the notion that litigation involving the public interest raises unique policy considerations that may justify a departure from ordinary costs rules.<sup>28</sup> In so doing, they have recognized that the view that the compensatory rationale for awarding costs (described above) is only one of several factors to be considered when crafting costs orders: see *Okanagan Indian Band*.<sup>29</sup> Indeed, in a majority of the Supreme Court made it clear that courts

26. *Ibid.*, at p. 313.

27. *Ibid.*, at p. 311.

28. To paraphrase the B.C. Court of Appeal in *Victoria (City) v. Adams*, 2009 BCCA 563 at para. 181, 313 D.L.R. (4th) 29, [2010] 3 W.W.R. 1, where the court cites the S.C.C.'s decision *Okanagan Indian Band*, *supra*, footnote 10, and its own decision in *Barclay (Gurdian ad Litem of) v. British Columbia*, 2006 BCCA 434, 381 W.A.C. 98, 57 B.C.L.R. (4th) 63.

29. *Supra*, footnote 10, at para. 24.



should regard their power to award costs as a legitimate “instrument of policy” to be deployed in a manner that “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”.<sup>30</sup>

In some jurisdictions the relevance of access to justice and public benefit rationales in costs determinations has been reinforced by statutory language. For instance, since 1998 Federal Court Rule 400 has affirmed a “full discretionary power over the amount and allocation and the determination of by whom they are to be paid”: Rule 400(1).<sup>31</sup> Among the factors courts may consider in exercising this discretion are “whether the public interest in having the proceeding litigated justifies a particular award of costs”: Rule 400(3)(h).

## **(2) Coherence and Predictability in Allocation Costs in Public Interest Cases**

... because costs are a matter of judicial discretion, it is to be expected that the case law about costs will not demonstrate a consistent pattern; nevertheless a review of the case law does reveal erratic and unpredictable results in cases of public interest litigation . . .<sup>32</sup>

Now that the legitimacy of allocating costs mindful of public interest considerations (including the public benefit and access to justice rationales) is broadly accepted, arguably the next challenge is to enhance the coherence and predictability with which such decisions are made. It is difficult to quarrel with Perell J.’s assessment of the state of the case law set out above, particularly that of earlier vintage. But just how much more coherence and predictability can be achieved is debatable.

One view is that whenever the matter involves a public interest litigant or constitutes public interest litigation, courts should presumptively be prepared to craft some form of “special” public interest costs order.<sup>33</sup> It would be wrong, of course, to assume that this “binary” test would necessarily lead to more generous treatment of public interest litigants. That would depend on the rigour of the test to establish that a case (or a litigant) qualified for special treatment. Moreover, the form of order may itself, in the end, not differ

30. *Ibid.*, per Lebel J., at para. 27.

31. The effect and implications of the 1998 amendments are discussed in Tollefson *et al.*, *supra*, footnote 1, at pp. 489-90.

32. Perell J. in *Incredible Electronics Inc. v. Canada (Attorney General)*, *supra*, footnote 1, at para 74.

33. See the decision of Perell J. in *Incredible Electronics*, *ibid.*

significantly in its terms from what would have been ordered in the private interest setting. Nonetheless, there are those who would resist even going this far. Traditionalists argue that it is dangerous to seek to draw a bright line distinction between private and public interest litigation in relation to costs — that it is critical in this area to preserve a broad judicial discretion that takes account of the specific features of particular cases and does not distinguish between public and private interest litigation.<sup>34</sup>

Increasingly, it would seem, courts are coming down somewhere between these two positions. As discussed in Part III, before they make what might be termed generically a “public interest costs order”, courts are looking to the applicant to demonstrate not only that they are a public interest litigant but also that there are other circumstances or features of the litigation that militate in favour of the order sought. How this judicial expectation (that there be “something more” to a case in order to justify special costs treatment) should be articulated and applied remains a matter of some debate.<sup>35</sup>

As a preliminary caveat to a consideration of the case law, it is worth bearing in mind that the jurisprudence should be read in light of significant differences that can exist as between jurisdictions depending on whether and how the law of costs has been codified. This caution is of particular relevance in our Federal Courts. There, prior to the 1998, the default position as to costs was a no way regime. In 1998, this default preference was replaced as a result of amendments that affirmed, instead, a broad discretionary power to award costs based on a menu of factors. Included on this menu is one that specifically empowers a court to consider the public interest nature of the proceeding.<sup>36</sup> Accordingly, to secure a costs order in

34. This theme is strongly articulated in the majority judgment of Bastarache and Lebel JJ. in *Little Sisters*, *supra*, footnote 11: see, for example, paras. 5, 35 and 64. Indeed, some courts have mused that recognition of a distinct public interest costs jurisprudence could give rise to more erratic and unpredictable results (rather than less). To a similar effect is the following passage from a judgment of the Court of Appeal for Western Australia: “great care must be taken with the concept of public interest litigation that it does not become an umbrella for the exercise of discretion with respect to costs in an unprincipled, haphazard or unjudicial manner”: *Buddhist Society of Western Australia (Inc) v. Shire of Serpentine-Jarrahdale*, [1999] WASCA 55 at para. 11, cited in *Caroona Coal Action Group Inc v. Coal Mines Australia Pty Ltd (No 3)*, [2010] NSWLEC 59 at para. 12.

35. The existence of “special circumstances” has now become a requirement for an advance costs order under *Okanagan*, *supra*, footnote 10. In Australia, a similar requirement (referred to as the “something more” test), has been proposed in considering public interest costs applications: see *Caroona*, *ibid*. For further discussion see Part III.

Federal Court based on a public interest rationale an applicant does not need to persuade the court to depart from the “ordinary” order. This would seem to suggest that that such orders should be more readily available in Federal Court than in jurisdictions that maintain a statutory or common law English Rule as to costs.

### **Part III: A Consideration of the Public Interest Costs Case Law**

In this part, I propose to discuss the main forms of “public interest costs orders” that have been made in Canadian courts. The focus here will be on the high-level issues and trends that appear to be emerging from the leading cases. By no means should what follows be regarded as a comprehensive statement of what is a large and rapidly expanding case law.

To date, the Canadian costs case law in the context of public interest litigation has dealt with three main scenarios:<sup>37</sup>

- *ex post* applications for special costs;
- *ex post* applications for relief/immunization from adverse costs liability; and
- *ex ante* applications advance/interim costs.

A fourth form of public interest costs order, which has in recent years come to play an important role in Australian and especially U.K. jurisprudence, is the protective costs order (PCO). Like the advance costs order, the PCO is by definition an *ex ante* order. To date, there is only one reported Canadian decision involving an application for a PCO.<sup>38</sup> In the remainder of this part, I will consider the case law on special costs and costs immunity, then turn to the advance costs case law, and conclude with a discussion of the PCO jurisprudence.

#### **(1) Ex Post Claims for Special Costs and Relief from Adverse Costs Liability**

In relation to applications by public interest litigants for special costs and relief from adverse costs, Canadian courts are increasingly applying a set of principles derived from what has proven to be a

36. See Rule 400.

37. As recognized and catalogued by the B.C.C.A. in *Victoria (City) v. Adams*, *supra*, footnote 28, at para. 182.

38. *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847, 100 O.R. (3d) 213, 83 C.P.C. (6th) 290 (S.C.J.).

highly influential report authored by the Ontario Law Reform Commission (OLRC).<sup>39</sup>

In its 1989 *Report on the Law of Standing*, the OLRC bluntly observed that “costs rules . . . pose a formidable deterrent to litigation of the kind that our proposals [on standing] are intended to facilitate, and thus may fatally undermine our recommendations for the law of standing”.<sup>40</sup> The report went on to set out a series of five criteria for determining whether a special public interest costs award is warranted:<sup>41</sup>

- The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
- The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
- The issues have not been previously determined by a court in a proceeding against the same defendant.
- The defendant has a clearly superior capacity to bear the costs of the proceeding.
- The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

These five factors have been approved by various trial and appellate courts including the B.C. Court of Appeal and the Federal Court.<sup>42</sup>

The most sustained judicial consideration of the OLRC test is *Victoria (City) v. Adams*.<sup>43</sup> In this case, the court noted that several

39. Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

40. *Ibid.*, at p. 137.

41. *Ibid.*, at p. 179.

42. See *Guide Outfitters Assn. of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2005 BCCA 368, 353 W.A.C. 158 *sub nom. British Columbia (Minister of Water, Land and Air Protection) v. Information and Privacy Commissioner (B.C.)*, 30 Admin. L.R. (4th) 166; *Victoria (City) v. Adams*, *supra*, footnote 28; *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, [2002] 1 C.T.C. 243 and *Georgia Strait Alliance v. Minister of Fisheries and Oceans*, [2011] F.C.J. No. 587, 59 C.E.L.R. (3d) 103, 2011 CarswellNat 1510 (F.C.) (April 26, 2011 *per Russell J.*). See also *Vancouver (City) v. Zhang*, [2011] B.C.J. No. 469, 2011 BCCA 138 and *Ahousaht Indian Band v. Canada (Attorney General)*, [2011] B.C.J. No. 2032, 2011 BCCA 425.

43. *Supra*, footnote 28. The approach set out in this case has since been applied by the court in other cases most notably *Morton v. British Columbia (Minister of Agriculture and Lands)*, [2010] B.C.J. No. 2373, 2010 BCCA 435, [2011] 3 W.W.R. 677, where the court upheld an award of special costs made by the trial judge in a successful constitutional test case challenging provincial jurisdiction over marine-based salmon aquaculture operations.

years previously in its *Guide Outfitters Association* decision, it had approved use of the OLRC test to determine whether a party claiming to be a public interest litigant should be excused from adverse costs liability. In the present case, it dealt with the opposite situation, one in which a successful public interest litigant was seeking an order for special costs.

Despite this difference, however, the court concluded that in principle the two cases were not all that dissimilar. Both in *Guide Outfitters* and this case, the court was being asked to derogate from the normal rule as to costs. However, “not all forms of departure” from the normal rule “are of equal magnitude”.<sup>44</sup> Conceived as a spectrum of potential costs awards, an award of advance (or interim costs) or an award of costs to an unsuccessful party are significantly more exceptional orders and would thus require the claimant to mount a more compelling justification. Here, the court concluded, a lesser form of justification might well suffice.

In the result, therefore, the B.C.C.A. in *Victoria (City) v. Adams* concluded that a similar (or even identical), slightly modified test can be applied in all cases where the court is being asked to depart “from the normal rule” as to costs.<sup>45</sup> The extent of the justification, in its view, will depend on the “magnitude of derogation from the usual cost structure of the award being considered”.<sup>46</sup> Its modified and distilled version of the OLRC test has four elements.<sup>47</sup>

- the case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
- the [claimant] has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
- [the party opposing the claimant] has a superior capacity to bear the costs of the proceeding; and
- the [claimant] has not conducted the litigation in an abusive, vexatious or frivolous manner.<sup>48</sup>

It would appear based on the case law that a claimant in a public interest case seeking to either recover special costs or be relieved of adverse costs liability must satisfy all four elements of this “bundled” test. And, of course, a claimant’s prospects for success will be

44. *Victoria, ibid.*, at para. 190.

45. *Ibid.*

46. *Ibid.*

47. For convenience, I have inserted the word “claimant” to denote the public interest party that is invoking the claim for public interest costs treatment.

48. *Victoria (City) v. Adams, supra*, footnote 28, at para. 188.

significantly enhanced if, in addition to satisfying the above test, there are other factors in the litigation that tend to favour the order they are seeking.

A good illustration of this is a recent judgment of Russell J. in *Georgia Strait Alliance v. Minister of Fisheries and Oceans* (also known as the *Consolidated Orcas*).<sup>49</sup> In this case, a complicated piece of litigation under the *Species at Risk Act*<sup>50</sup> involving two petitions that were ultimately heard together, the applicant prevailed on the merits and later sought its solicitor-and-client costs. Applying the OLRC test, as approved by the Federal Court in *Harris v. Canada*, Russell J. concluded that public interest considerations militated in favour of the order sought.<sup>51</sup> In addition, however, he concluded that such an order was justified as the result of the “unjustifiably evasive and obstructive approach” undertaken by the respondents that “unnecessarily lengthened and complicated the proceedings”.<sup>52</sup>

What I have termed the “bundled” approach to assessing *ex post* costs claims made by public interest litigants (inspired by the OLRC, applied in the *Harris*, *Georgia Strait Alliance* and *Guide Outfitters* decisions, and most recently distilled by the B.C.C.A. in *Victoria (City) v. Adams* as discussed above) has much to commend it. Through this bundling, three key aspects or rationales for exercising a judicial discretion to make a costs order designed to take account of the special realities of public interest litigation are each given expression. The first element of the test is a metric of the public benefit associated with the case being litigated; the second and third elements address access to justice considerations at play in the litigation; the final element recognizes the residual judicial discretion to consider other factors relating to the carriage of the litigation, including the applicant’s own conduct.

While B.C. and federal courts are supportive of this bundled

49. See *Georgia Strait Alliance v. Minister of Fisheries and Oceans*, *supra*, footnote 42 (costs decision); and [2010] F.C.J. No. 1471, 2010 FC 1233, 379 F.T.R. 183 (F.C.) (merits decision).

50. S.C. 2002, c. 29.

51. The Federal Court’s decision in *Harris*, *supra*, footnote 42, in adopting the OLRC approach, has found broad judicial approval: see, for example, *R. v. Griffin*, 2009 ABQB 696, [2009] A.J. No. 1445, [2010] 6 W.W.R. 657; *Hastings Park Conservancy v. Vancouver (City)*, 2007 BCSC 147, 51 Admin. L.R. (4th) 165, 30 M.P.L.R. (4th) 60; *Miller v. Boxall*, 2007 SKQB 9, [2007] 3 W.W.R. 119, 291 Sask. R. 113; *Palmer v. Port Moody (City)*, 2006 BCSC 1137, 28 M.P.L.R. (4th) 191, 151 A.C.W.S. (3d) 780; *MacDonald v. University of British Columbia*, 2004 BCSC 412, 26 B.C.L.R. (4th) 190, 45 C.P.C. (5th) 251; *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253, 242 D.L.R. (4th) 420, [2005] 1 W.W.R. 12.

52. *Georgia Strait*, *supra*, footnote 49, at para. 14.

approach, in other jurisdictions somewhat different tests have evolved. In Ontario, for example, in answering the question of whether a litigant should be relieved from adverse costs liability, courts have tended to distill the inquiry into a single question: namely, whether the applicant seeking relief is a “genuine” public interest litigant.<sup>53</sup> According to Perell J., in his detailed judgment in *Incredible Electronics*, where a court concludes that this question should be answered in the affirmative, the litigant in question should not be subject to the normal two-way costs regime.

Perell J.’s single question approach entails asking initially whether the litigation raises issues that are important to the public at large: as such, the threshold requirement of being a genuine public interest litigant is, in his view, that they are “a partisan in a matter of public importance”.<sup>54</sup> The next stage of the analysis considers how and why the litigation has been commenced. In this regard, Perell J. is critical of the “conventional view” in the case law and literature “that a public interest litigant must, to some extent, manifest unselfish motives”.<sup>55</sup> He contends that:<sup>56</sup>

altruism and having little to gain financially work better as indicia than criteria for qualification as a public interest litigant . . . altruism may be a sufficient, but is not a necessary, criterion for qualification as a public interest litigant. Perhaps, other virtues such as courage, loyalty, patriotism, dedication to a worthy cause and the pursuit of justice may qualify the litigant as a public interest litigant . . . sometimes a relevant but not determinative feature is that the public interest litigant is either the “other”, a marginalized, powerless or underprivileged member of society, or the public interest litigant speaks for the disadvantaged in society, even if he or she has his or her own selfish reasons for litigating.

Perell J. is also critical of the assumption that to merit relief from the ordinary two-way costs regime a public interest litigant must establish (as per the OLRC test) that it is impecunious or that there is a significant disparity between the parties in terms of economic resources. Here again, while he acknowledges that this feature of the litigation may militate in favour of the conclusion that the applicant is a genuine public interest litigant, it should not be regarded as a “determinative measure”. In his words:<sup>57</sup>

53. See *Incredible Electronics*, *supra*, footnote 1, followed and applied in *Greenspace Alliance of Canada’s Capital v. Ottawa (City)*, [2008] O.J. No. 5152, 52 M.P.L.R. (4th) 155, 170 A.C.W.S. (3d) 646 (Div. Ct.).

54. *Incredible Electronics*, *supra*, footnote 1, at para. 91.

55. *Ibid.*, at para. 95.

56. *Ibid.*, at paras. 98-99.

A few public interest litigants may be affluent and prepared to use their wealth to be a litigant in public interest litigation. A few public interest litigants may be subsidized by government programs or lawyers willing to provide their services pro bono. It seems to me the point is not so much whether the public interest litigant is affluent or impecunious but whether having regard to the benefit of ensuring their participation, they ought to be immunized from an adverse costs consequence.

Perell J.'s observations provide a useful reminder of the need, as the public interest cost jurisprudence evolves, for courts to avoid categorical assumptions about the nature of public interest litigation and more specifically the identity and motivations of being treated for costs purposes as public interest litigants.

Another judicial attempt to untangle and distill public interest costs law has recently been offered by Justice Preston, Chief Judge of the New South Wales Land and Environment Court.<sup>58</sup> In *Caroona Coal Action Group Inc. v Coal Mines Australia Pty Limited and Minister for Natural Resources No 3*,<sup>59</sup> he offered yet another methodology for, as he put it, "the principled exercise of costs discretion" in public interest cases.<sup>60</sup> He argues that a careful review of the public interest costs case law reveals that courts "have used, in effect, a three step approach in determining whether to depart from the usual costs rule" in such cases. He describes these three steps as follows:<sup>61</sup>

. . . first, can the litigation be characterized as having been brought in the public interest?; secondly, if so, is there "something more" than the mere characterization of the litigation as being brought in the public interest?; and thirdly, are there any countervailing circumstances, including relating to the conduct of the applicant, which speak against departure from the usual costs rule?

The sequential approach advocated by Preston C.J., among other things, recognizes that not all cases raising public interest issues can or should be dealt with using distinct public interest costs principles. Sorting out the exceptional cases, in his view, can best be achieved in a three-stage process. In the first stage, the modest goal is to determine

57. *Ibid.*, at para. 100.

58. The Land and Environment Court of New South Wales is a specialist superior court of record. Its jurisdiction includes merits review, judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims in planning, environmental, land and mining matters. It was created by statute in 1979.

59. *Supra*, footnote 17.

60. *Ibid.*, at para. 8.

61. *Ibid.*, at para. 13.



if the public interest is served by the litigation; whether, in other words, there are benefits flowing from the case that extend beyond the interests of the applicant. If the applicant surmounts this hurdle, they must still persuade the court that there is “something more” to their case that merits special costs treatment. This something more may relate to the nature of the case (*i.e.* the breadth or nature of public benefits associated with its resolution) or the identity or motivation of its proponent (*i.e.* degree of altruism exhibited). Finally, if the applicant succeeds on both of these grounds, the court must still query whether there are any countervailing factors (including the applicant’s conduct or third party involvement or financing arrangements) that would militate against the order sought.

Intriguingly, these three questions track — at least in a rough and ready way — the four factors bundled into the OLRC test as reformulated by the B.C.C.A. in *Victoria (City) v. Adams*.<sup>62</sup> This is especially true of the first and last elements of the OLRC test that are largely congruent with the first and last steps of the test set out in *Caroona*.<sup>63</sup> Where *Caroona* departs from and potentially adds value to the OLRC approach is in its pragmatic recognition that not all “public interest” cases will necessarily justify special costs treatment. While judicial elaboration of the OLRC test has for the most part underscored this, it may well be that the bundled test derived from its principles is still too coarse a filter to reliably identify cases where this standard is met. As such, the approach in *Caroona* could prove to have significant value by articulating an approach that can rein in the “erratic and unpredictable” nature of judicial decision-making in this area.

## (2) Ex Ante Claims for Advance Costs

The form of public interest costs order that has prompted the most judicial and academic musings over the last decade is also the most exotic; a species of judicial order that, at least in the public interest setting, would appear to be unique to Canada.

The genesis of this form of order is *Okanagan Indian Band*, a 2003 decision of the Supreme Court of Canada.<sup>64</sup> In this landmark case, the court expounded at length on the role of costs as a vehicle in public interest litigation. In this setting, according to Lebel J. for the majority, “the more usual purposes of costs awards are often superceded by other policy objectives” notably ensuring access to

62. *Supra*, footnote 28.

63. *Supra*, footnote 59.

64. *Supra*, footnote 10.

justice for ordinary citizens.<sup>65</sup> To safeguard this goal, it holds that in exceptional cases courts should be prepared to order the opposing side to pay its public interest opponent's costs in advance and in any event in the cause.

To secure an advance costs order under *Okanagan* an applicant must initially satisfy the following three requirements:

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.<sup>66</sup>

The applicant must then establish that the case is “sufficiently special” such that it would be contrary to interests of justice to deny the application. In *Little Sisters*, writing for the majority, Bastarache and Lebel JJ. elaborated on this requirement. In their view this requires the applicant *inter alia* to show that if the advance order is not made, an “injustice” to the public at large is possible; that they have exhausted all other funding sources; and that there is no prospect of settling or resolving the matter without such an order.<sup>67</sup>

The Supreme Court of Canada has addressed the question of advance costs in public interest litigation on three occasions. In two cases — *Okanagan* (2003) and *Caron* (2011) — it upheld funding orders made by courts below; in the third case — *Little Sisters No. 2* (2007) — it held that the funding order had been made in error. In absolute terms, the number of advance costs funding applications in public interest cases that have been made since 2003 is relatively small; my research suggests that only three or four such applications are made each year in Canadian courts. In addition to *Okanagan* and *Caron*, successful applications have been made in several aboriginal law cases.<sup>68</sup>

65. *Ibid.*, at para. 38.

66. *Ibid.*, at para. 40.

67. *Ibid.*, at paras. 39-41.

68. *William v. Riverside Forest Products Ltd.*, 2001 BCSC 1641, 95 B.C.L.R. (3d) 371 *sub nom.* *Xeni Gwet'in First Nations v. British Columbia*, *aff'd* 2002 BCCA 434, 279 W.A.C. 257 *sub nom.* *William v. British Columbia*, 3 B.C.L.R. (4th)

Reported cases of unsuccessful applications for advance costs in the public interest context include: *Charkaoui (Re)*,<sup>69</sup> *Robertson v. Canada*,<sup>70</sup> *Roberts v. Canada*,<sup>71</sup> and *H. (D.W.) v. R. (D.J.)*.<sup>72</sup>

A key topic requiring further judicial elaboration concerns the “special circumstances” requirement, discussed at some length by the Supreme Court in *Little Sisters No. 2*.<sup>73</sup> I have already noted comments made by the majority (*per* Bastarache and Lebel JJ.) on this point where they posit that to meet this requirement the applicant must demonstrate that a failure to provide the funding sought may well cause an “injustice” to occur. McLachlin C.J.C., in concurring reasons, addresses this question in the following way:<sup>74</sup>

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).

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231, affd 237 D.L.R. (4th) 754, [2004] 6 W.W.R. 252, 317 W.A.C. 67 (B.C.C.A.); *R. v. Fournier*, [2004] OTC 260, 116 C.R.R. (2d) 253, 61 W.C.B. (2d) 110 (S.C.J.), revd 209 C.C.C. (3d) 58, 70 W.C.B. (2d) 215 (C.A.); *Xeni Gwet'in First Nations Government v. Riverside Forest Products Ltd.* (2004), 240 D.L.R. (4th) 547, [2004] 3 C.N.L.R. 356, 131 A.C.W.S. (3d) 818 (S.C.); *Keewatin v. Ontario (Minister of Natural Resources)* [2006] O.J. No. 348, 32 C.P.C. (6th) 258, 152 A.C.W.S. (3d) 23 (S.C.J.); *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574, [2008] 3 C.N.L.R. 136, 328 F.T.R. 215; *C. (L.) v. Alberta*, 2011 ABQB 42, 197 A.C.W.S. (3d) 55, supp. reasons 200 A.C.W.S. (3d) 975, 2011 ABQB 237; and *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2011 FC 230, 199 A.C.W.S. (3d) 383, [2011] F.C.J. No. 281. This compilation of the case law is set out in *Rex v. Dish Network LLC*, *supra*, footnote 12, at para. 47 *per* Walker J.

69. [2004] F.C.J. No. 1090, 256 F.T.R. 93, 43 Imm. L.R. (3d) 17 (F.C.).

70. [2011] T.C.J. No. 175, 2011 TCC 83, 2011 GSTC 31.

71. 2011 TCC 205, 2011 D.T.C. 1157, 2011 CCI 205.

72. 2011 ABQB 119, [2011] A.J. No. 252. See also C. Tollefson, “Costs and the Public Interest Litigant: *Okanagan Indian Band* and Beyond” (2007), 19 Can. J. Admin. L. & Prac. 39 where a detailed examination of the early advance costs jurisprudence is offered.

73. *Supra*, footnote 11.

74. *Ibid.*, at para. 104.

McLachlin C.J.C. (with Charron J.) differed from the majority by suggesting that the “special circumstances” inquiry be dealt with under the third arm of the test (as opposed to as a residual consideration, as favoured by the majority). Regardless of where in the analysis it is considered, however, it seems likely in future to play a decisive role in determining the outcome of advance costs applications.

In a careful analysis of decided cases where courts have made such orders, Walker J. in *Rex v. Dish Network* suggested that the following factors may well tip the balance in demonstrating “special circumstances”:<sup>75</sup>

- the potential effect of the litigation is widespread and significant;
- the outcome of the litigation would resolve continued legal uncertainty;
- the outcome of the litigation may reduce the need for related litigation, and thereby reduce public and private costs;
- the issue would not be resolved but for the litigation;
- the litigation involves scrutiny of government actions;
- determination of the issue is an urgent matter;
- the applicant was forced into the litigation or had no choice but to resort to litigation to assert their rights; and
- one party controls all of the funds that are at issue in the litigation (*e.g.* trust and matrimonial litigation).

Walker J. went on to suggest that, conversely, courts will not find “special circumstances” to exist “where the issues do not transcend the applicant” and will be reluctant to do so “where the issues affect only a small group of people”, citing the *Roberts*, *Robertson* and *Charkaoui* cases.<sup>76</sup>

### (3) Ex Ante Protective Costs Orders

While advance costs orders have generated considerable judicial and academic attention in Canada, the same cannot be said of protective costs orders. This is surprising given the prominent role they have come to play in U.K. and Commonwealth public interest litigation. It is also surprising given comments made by the majority in *Little Sisters No. 2*. There, in discussing the judicial approach to considering costs applications in the public interest context, Bastarache and Lebel JJ. state that

<sup>75</sup>. See *Dish Network*, *supra*, footnote 12, at para. 68.

<sup>76</sup>. See *Dish Network*, *ibid.*, at para. 69.

. . . different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or “protective orders”) can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 WLR 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach (para 40).

In Part I, I briefly discussed the recognition under U.K. law of the power to order PCOs. The leading case remains *Corner House Research*<sup>77</sup> though its principles must now be read in light of *Morgan v. Hinton Organics (Wessex) Ltd.*<sup>78</sup> and *R (on the application of Garner) v. Elmbridge BC.*<sup>79</sup>

The Court of Appeal in *Corner House* affirmed the existence of a discretion to order a PCO where:

- (1) the issues were of general public importance;
- (2) the public interest required resolution of these issues;
- (3) the applicant had no private interest in the outcome of the case;
- (4) having regard to the financial resources of the parties and the amount of costs likely to be involved, it was fair and just to make the order; and
- (5) if the order was not made, the applicant would likely discontinue proceedings and, in so doing, be acting reasonably.<sup>80</sup>

Where a trial judge decided to make such an order, *Corner House* stipulated two further requirements. First, that where the order allowed the applicant to recover its costs if successful, it should be limited to “solicitor’s fees and a fee for a single advocate of junior counsel status”.<sup>81</sup> As well, the decision required, as a *quid pro quo* in all cases except where a “no way” costs order is made, that the order

77. *Supra*, footnote 20.

78. *Supra*, footnote 21.

79. *Supra*, footnote 21.

80. *Corner House*, *supra*, footnote 20, at para. 74.

81. *Ibid.*, at para. 76.

contain a “cap” on recoverable costs consistent with the previous requirement.<sup>82</sup>

While applauded for its recognition of the need to respond to growing access to justice concerns (especially prominent under a full indemnification costs model such as exists in the U.K.), *Corner House* also had its share of critics. It has been argued that its requirement that the applicant possess no private interest in the subject-matter of the litigation is unrealistic and unfair (particularly in environmental and land use disputes); that it places applicants in an untenable situation of having to depose that they will terminate extant litigation if not funded; that its capping rules (especially its restrictions with respect to funding at a junior counsel level) do little to level a highly uneven legal playing field; and that in many cases the PCO application process has “ended up in satellite litigation, with witness statements and submissions flying around, costs racked up and the substantive proceedings delayed”.<sup>83</sup>

Of late, public interest lawyers have sought to renovate the *Corner House* principles by arguing that they are inconsistent with the U.K.’s obligations under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (known as the Aarhus Convention after the Danish town where it was negotiated). The Convention was entered into in 1998 by various parties (including the U.K.), and ratified by the U.K. and the European Commission (E.C.) in 2005. For domestic law purposes, the Convention has the status of an unincorporated international treaty. As such, it is not binding on domestic courts except to the extent that it has been implemented by an E.C. Directive.<sup>84</sup> Several such directives have now been issued in the environmental assessment context. As such, the U.K. is bound, among other things, to ensure that its procedures for the review of environmental decision making “provide adequate and effective remedies [that are] fair, equitable, timely and not prohibitively expensive”.<sup>85</sup>

82. See discussion in C. Tollefson, *supra*, footnote 1, at p. 197.

83. See Richard Harwood, “Comment on *Garner v. Elmbridge*”, [2011] J. Plan & Envtl. L. 303. Environmental NGOs have been particularly critical, claiming that the *Corner House* model is so deficient that they do not bother bringing PCO applications: see Jackson Report, *supra*, footnote 24, at pp. 304-311 and the U.K. Environmental Law Association’s claim that proposed plans by the Cameron Government to implement its recommendations by reforming the *Corner House* principles are inadequate to satisfy the Aarhus Convention (online: <<http://www.ukela.org/content/doclib/199.pdf>>) at para 11.

84. *Morgan v. Hinton Organics*, *supra*, footnote 21, at para 22.

As a result of the *Morgan* and *Garner* cases, it is generally considered that little remains of the *Corner House* principles in litigation arising in relation to environmental assessment matters. Whether this liberalization will reach further may depend on the fate of Jackson L.J.'s recommendation that all judicial review proceedings adopt a one-way rule.

In Canada, the only reported case where a PCO has been sought is *Farlow v. Hospital for Sick Children*.<sup>86</sup> In this medical malpractice case, at issue was whether the plaintiffs' suit against the defendant hospital and doctors should be transferred from small claims to superior court. The plaintiffs, who were self-represented, were seeking \$10,000 for the wrongful death of their daughter. They opposed the transfer, taking the position that if it were ordered they would discontinue their suit unless they were awarded advance costs or, alternatively, a PCO protecting from them adverse costs liability in any event in the cause.

In the result Herman J. granted the transfer application and dismissed both of the plaintiffs' costs applications. In reaching this latter result, she applied the *Okanagan* test in relation to both applications. In her reasons, the key considerations in this regard included the adequacy of the evidence relating to the plaintiffs' financial circumstances and their claim that they would not proceed with the case unless the order they were seeking was granted; the extent to which the public had an interest in the issues being litigated; and the potential impact of the costs award on other parties to the litigation. In her view, the evidence was equivocal as to whether the plaintiffs would proceed with their action in the absence of a PCO. Moreover, the action as currently pleaded did not raise questions of interest to the public at large; likewise, she was concerned about the uncertain impact of a PCO that immunized the plaintiffs from adverse costs liability on the "private" parties named in the suit.

Due perhaps to the fact that the plaintiffs were not represented for the purposes of these applications, it would appear that the evidentiary basis for the orders (both PCO and advance costs) they were seeking was less than complete. It would also appear that the applications could have been advanced in a more strategic and persuasive manner that emphasized the access to justice issues involved, and countered concerns about the impact of a PCO (especially one that capped costs in a uniform way on both sides) on

85. See generally discussion in *Morgan v. Hinton Organics*, *supra*, footnote 21, at paras. 19-23; see also *R (on the application of Garner) v. Elmbridge BC*, *supra*, footnote 21.

86. [2009] O.J. No. 4847, 83 C.P.C. (6th) 290, 100 O.R. (3d) 213.

private third parties. One would hope that future PCO applications will be argued in a manner that more fully puts the broad issues and applicable principles before the court.

### Conclusion

The last 15 years have provided, if nothing else, much fodder for judicial ruminations on the topic of costs in public interest litigation. In retrospect this was likely an inevitable function of growing concerns — clearly evident in many Commonwealth jurisdictions — about rising barriers to access to justice confronted by ordinary citizens.<sup>87</sup> Allocating costs in civil litigation is one of the few ways that courts can play a role in leveling the playing field in cases of great public importance or benefit.

Courts in Australia, Canada and the U.K. have all come to engage with this issue, albeit in different ways. As these jurisdictions, and others where the English Rule has roots, work to reconcile this approach with emerging access to justice concerns, it is hoped that we will see an increasing cross-pollination of perspectives, judicial and otherwise.

Perhaps it is still a little premature to declare that a “distinct and coherent” public interest costs jurisprudence has emerged here in Canada. Some would argue that, as yet, we have neither. Admittedly, progress towards this goal has been uneven. Not all Canadian courts have a regular diet of public interest cases, costs issues in such cases present themselves sporadically and often as an after-thought to the main event, and applicable costs rules differ. Moreover, some difficult issues remain. Among these is the one raised in the case that initially sparked my interest in this subject: namely, devising principles to allocate costs in cases that pit compelling access to justice and public benefit considerations against the rights we have traditionally conferred on private interest litigants that become

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87. While this paper has focused on Canada, Australia and the U.K., public interest costs issues have also received judicial consideration in other Commonwealth countries. Perhaps most notable, in this regard, is South Africa where the Constitutional Court has recently unanimously adopted a one-way costs regime for constitutional litigation: see *Trustees for the time being of the Biowatch Trust v. Registrar, Genetic Resources and Others* [2009] ZACC 14, 2009 (6) SA 232 CCC, 209 (10) BCLR 1014 CCC (June 3, 2009) (*per Sachs J*). In this decision, the court holds that main focus of the inquiry in such cases should be on the nature of the litigation, rather than on the identity of the parties, the nature of their interest in the case, or their relative financial situations.



engaged, voluntarily or otherwise, in what we would consider public interest litigation.<sup>88</sup>

This said, Canadian courts — like their counterparts elsewhere in the Commonwealth — are more attuned to the issue of costs in public interest litigation than ever. And there is little to indicate that their interest in and motivation to engage with this undeniably complex and important issue will soon diminish.

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88. Compare the approach adopted by Smith J. in *Sierra Club of Western Canada v. B.C.*, *supra*, footnote 3 and that of Perell J. in *Incredible Electronics*, *supra*, footnote 1. In the former case, Smith J. concluded that a private litigant (MacMillan Bloedel) should be entitled to its costs as a matter of course in litigation that it had joined on its own motion. In the latter, on analogous facts, Perell J. concluded that to adopt this approach would negate the policy imperatives that justify special treatment for public interest litigants. In his view, “not having to pay costs to the Attorney General but having to pay costs to Bell ExpressVu would be similar to avoiding a car only to be hit by a train”: para 110. Walker J.’s recent decision in *Dish Network* *supra*, footnote 12, is also significant in the context. It is the first costs decision of which I am aware that orders a private party (in this case, private broadcasters) to pay advance costs to an opposing party in the context of “public interest” litigation. In *Dish Network*, the Crown and the private broadcasters are ordered to share this burden 50/50: see *Dish Network* at paras. 303-28. It is also significant in that, unlike in the *Sierra Club* and *Incredible Electronics* cases, the private parties that were made the subject of the order were plaintiffs in the originating action.