

TOWARDS A COSTS JURISPRUDENCE IN PUBLIC INTEREST LITIGATION

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In this article the authors contend that the most critical variable affecting the long-term health of public interest litigation in Canada is “whether, and to what extent, we are committed to developing a coherent and distinct costs jurisprudence in public interest litigation.”

In British Columbia (Minister of Forests) v. Okanagan Indian Band, the authors suggest that the Supreme Court of Canada has recently taken a significant step in this direction. This decision exhorts trial courts to take “public benefit” and “access to justice” concerns into account when crafting costs orders in public interest cases. While the decision breaks important new ground, the authors contend that it can also be seen as a logical elaboration of established Canadian costs law principles, and one that is consistent with existing and emerging public interest costs jurisprudence in the United States and various Commonwealth jurisdictions.

The article also grapples with a variety of doctrinal issues that await judicial consideration in this context including attendant procedural reforms, challenges associated with defining “public interest litigation”, and the applicability of public interest costs principles in litigation involving private parties.

Dans cet article, les auteurs soutiennent que la variable la plus importante de la santé à long terme des poursuites d'intérêt public au Canada est liée à la question de savoir « si nous souhaitons ou non, et dans quelle mesure, élaborer une jurisprudence des coûts d'intérêt public cohérente et distincte ».

D'après les auteurs, la Cour suprême du Canada vient de franchir un pas important dans cette direction dans l'affaire Colombie Britannique (Ministre des Forêts) c. Bande indienne Okanagan : dans sa décision, elle exhorte les tribunaux de première instance à tenir compte du « bien

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public » et de l'« accès à la justice » lorsqu'ils rendent des ordonnances sur les coûts dans des affaires de ce genre. Les auteurs soutiennent que la décision n'est pas seulement fondée sur un cadre théorique et jurisprudentiel bien établi, mais qu'elle correspond à la jurisprudence des coûts d'intérêt public qui se dessine aux États-Unis et dans divers territoires du Commonwealth.

L'article traite également de différents points de vue de la doctrine qui attendent un examen judiciaire dans ce contexte, notamment les réformes procédurales connexes, les contestations soulevées par la définition des « poursuites d'intérêt public » et le caractère applicable des principes des coûts d'intérêt public aux poursuites visant des particuliers.

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I: Introduction

As the tariff amounts increase to keep up with rising legal costs, more and more litigants will be shut out of the system because cost risks are simply too high.

Thus, some consideration should be given to allowing the court greater discretion to relieve parties of costs consequences in circumstances where a costs award following the event would have the overall effect of reducing access to justice.¹

[I]n cases of public importance...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.²

As the cost of litigation soars, access to justice suffers. This axiom particularly holds true in the case of public interest litigants.³ While such litigants typically do not stand to gain financially from pursuing court action, they risk significant economic consequences if their suits are ultimately unsuccessful and they are ordered to pay the victor's legal costs. This is problematic because our civil justice system presumes that plaintiffs are motivated by rational self-interest, typically financial, in making decisions respecting the initiation and conduct of litigation.⁴

Of late, it would appear that the legal profession is taking more seriously its responsibility to provide *pro bono* representation in public interest cases.⁵ Government initiatives, such as the Court Challenges

¹ B.C. Attorney General Rules Revision Committee, "Discussion Paper on the Tariff of Costs" (2003) 61 *The Advocate* 669.

² *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 BCSC 1135, var'd (2001), 95 B.C.L.R. (3d) 273, aff'd [2003] 3 S.C.R. 371. per LeBel J. at para 38 [*Okanagan Indian Band*].

³ For the purposes of this article, we propose to adopt the definition of "public interest litigation" employed by the majority in *Okanagan Indian Band*. Under this approach, this definition would apply to cases where there is a public benefit to be served through judicial resolution of issues presented, and in which there is a public interest in promoting access to justice. As such, following the majority's approach, we would not necessarily exclude from the definition cases in which the proponent has a personal, proprietary or pecuniary interest in the outcome: see our discussion of this definitional issue *infra* in Parts II and V.

⁴ Larry M. Fox, "Costs in Public-Interest Litigation" (1989) 10 *Advocates' Q.* 385 at 402.

⁵ For example, the Canadian Bar Association recently passed a resolution encouraging the provision of *pro bono* legal services, and recognizing the utility of delivering *pro bono* legal services through partnerships between law firms and low-income and disadvantaged individuals and the communities and charitable organizations that serve them. In response to the CBA Resolution, the Ontario Bar Association established ProBono Law Ontario ("PBLO") to provide for the delivery of legal services on a *pro bono* basis and to encourage and support Ontario law firms in the provision of *pro bono* legal services. To this end, PBLO recently held its first conference, called "Building the Public Good: Lawyers, Citizens and Pro Bono in a Changing Society" on 6-7 May, 2004.

program that funds public interest *Charter* litigation, are also part of the answer. However, in our view, 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.

Calls to reform how costs rules apply to public interest litigants are by no means new. In a landmark article published in this journal over twenty years ago, Raj Anand and Ian Scott characterized funding litigation costs as the “central design feature” in an effective public participation regime.⁶ In the intervening years, the right of public interest litigants to pursue their claims through judicial avenues has greatly expanded. Much of this expansion is, of course, attributable to the enactment of the *Charter*, in particular its equality guarantees. However, in other contexts (perhaps most notably in public interest environmental litigation) the key factor was the Supreme Court’s decision in *Finlay v. Canada (Minister of Finance)* to broaden public interest standing to encompass non-constitutional cases.⁷

Yet, while courts have opened their doors to public interest litigants they have, at times, shown a reluctance to accommodate the growing phenomenon of public interest litigation in other ways.⁸ One area in which there has been a judicial reticence to engage in doctrinal innovation, aimed at adapting established private law principles to exigencies of the public interest context, concerns the availability of interim injunctive relief.⁹ Another doctrinal realm in which this reticence has sometimes been in evidence is the realm of costs.¹⁰ Thus, when crafting costs orders in public interest cases, while some courts exhibited a concern for the access to

⁶ Raj Anand and Ian G. Scott, “Financing Public Participation in Environmental Decision Making” (1982) 66 Can. Bar. Rev. 81.

⁷ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [*Finlay*].

⁸ See generally Chris Tollefson, “Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation” (2002) 51 U.N.B.L.J. 175.

⁹ See *ibid.* Stewart A.G. Elgie, “Injunctions, Ancient Forests and Irreparable Harm: A Comment on *Western Canada Wilderness Committee v. AG (B.C.)*” (1991) 25 U.B.C.L.Rev. 387; and David R. Boyd, “Seeing the Forest Through the Trees: A Case Comment on *Algonquin Wildlands League v. Northern Bruce Peninsula* and related cases” (2001) 38 C.E.L.R. (N.S.) 61.

¹⁰ See, for example: Fox, *supra* note 4; Anand and Scott, *supra* note 6; 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; Carolyn McCool, “Costs in Public Interest Litigation: A Comment on Professor Tollefson’s Article; When the ‘Public Interest’ Loses.” (1996) 30 U.B.C. L.Rev. 309; Benjamin L. Berger, “Putting a Price on Dignity: The Problem of Costs in *Charter* Litigation” (2002) 26 Advocates Q. 235; J. Arvay and K. Chapman, “Costs in *Charter* Litigation” (2003) [unpublished, on file with the authors].

justice implications of the awards they are called upon to make, others have displayed a reluctance to depart from the indemnification rationale that has traditionally driven costs determinations in the private law context.

Given the somewhat inconsistent judicial treatment public interest litigants have received with respect to costs, the recent Supreme Court of Canada decision in *B.C. (Minister of Forests) v. Okanagan Indian Band* is to be welcomed, even applauded.¹¹ Although the Court could have framed the issue to be determined quite narrowly (as raising costs principles in relation to the adjudication of constitutionally-protected aboriginal rights) it chose instead to take the opportunity to pronounce much more broadly on “costs as an instrument of policy” in the broader context of public interest litigation.¹²

According to LeBel J. (for the majority) judicial discretion over the awarding of costs is both ancient in origin and broad in scope.¹³ Traditionally, the overriding objective of costs awards has been to indemnify the prevailing party in the litigation. However, in public interest litigation, different considerations apply and should inform how courts exercise their power to award costs. The most notable of these, in the Court’s opinion, is “...ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of social significance.”¹⁴

The significance of the Court explicitly distinguishing between considerations that apply in private litigation as opposed to those that apply in public interest litigation is hard to overstate. In no prior decision has the Court embarked on an extended reflection on this distinction and its implications for the exercise of judicial discretion. It is a decision that clearly signals to lower courts that, when making costs orders in relation to public interest litigants, access to justice concerns are a mandatory consideration.

¹¹ *Okanagan Indian Band*, *supra* note 2. See also: *Tsilhqot’in Nation v. Canada* (Attorney General) (2002), 3 B.C.L.R. (4th) 231 (C.A.).

¹² *Okanagan Indian Band*, *ibid.* at para. 21. Bennett J. recently applied *Okanagan Indian Band* in awarding interim costs in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)* [2004] B.C.J. No. 1241 (S.C.). [*Little Sisters No. 2*]. The appellant in this case is challenging, on administrative law grounds, detention orders made by Canada Customs with respect to several specific publications it has sought to import and, more generally, the legality of Custom’s classification procedures. A related *Charter* challenge is also being mounted with respect to the constitutionality of the prevailing judicial definition of “obscenity” under s. 163(8) of the Criminal Code. Interim costs were awarded with respect to the administrative law arguments but not the constitutional challenge. An appeal by the Crown is expected to be heard in January 2005.

¹³ *Okanagan Indian Band*, *supra* note 2 at para. 26.

¹⁴ *Ibid.* at para. 38.

However, while the *Okanagan Indian Band* case is an important milestone, the journey towards the ultimate goal of developing a coherent costs jurisprudence in public interest litigation is far from over. This article aspires to contribute to the development of this jurisprudence. It is in six parts. Part II addresses the substance and significance of the *Okanagan Indian Band* decision for Canadian public interest costs jurisprudence. While a landmark decision, when assessing the case and its implications we would argue that it is important to be mindful of the extent to which it builds on, reflects and represents an elaboration of scholarly and judicial thinking in the area. To this end, Part III explores the antecedent Canadian scholarship and jurisprudence. Part IV explores related public interest costs law developments in the United States and in various Commonwealth jurisdictions. In Part V, we consider a variety of issues in public interest costs law jurisprudence touched on in *Okanagan Indian Band* including: the procedural implications of implementing special costs rules in public interest cases; the definition of ‘public interest litigation’; the application of these emerging principles in litigation involving ‘private parties’; and the availability of costs to public interest litigants receiving services on a *pro bono* or reduced fee basis. Finally, in Part VI we offer some concluding thoughts on the challenges that lie ahead in the recognition and development of a public interest costs jurisprudence.

II: Costs and Public Interest Litigation: The Implications of Okanagan Indian Band

It is rare for courts to opine at length on the subject of costs, a matter that is often dealt with as a short footnote to the main event. In this regard, the Supreme Court of Canada is no exception. As a result, prior to *Okanagan Indian Band*, while it was possible to speculate as to the Court’s underlying views on the relationship between costs rules and public interest litigation, by and large the Court had said very little on the subject.¹⁵

Given the facts of the *Okanagan Indian Band* case, it is perhaps surprising that the Court took this opportunity to offer what amounts to a rather substantial exegesis on the topic of public interest litigation. The case arose as a result of a longstanding land claim dispute between the Band and the federal and provincial governments. In support of this claim, the Band commenced logging on provincial Crown forestland they claimed as traditional territory without securing permission from the

¹⁵ This is in contrast to the attention that has been paid to the related but distinct issue of interveners who are generally exempt from costs awards: see discussion in J. Koshan, “Dialogue or Conversation? The Impact of Public Interest Intervenors on Judicial Decision Making” (Annual Conference: Canadian Institute for the Administration of Justice: *Participatory Justice in a Global Economy: The New Rule of Law?* 17 October 2003) [unpublished].

Ministry of Forests. When the Ministry sought to enjoin the logging under provincial forest practices legislation, the Band defended by asserting aboriginal title to the logged areas. In response, the Ministry applied to have the matter moved from the chambers to the trial list. The Band opposed this application, leading detailed evidence that trial costs would far outstrip its available resources.¹⁶ In the alternative, if the matter was ordered onto the trial list, the Band sought an order requiring the Crown to pay the Band's legal fees and disbursements in advance and in any event in the cause.

Sigurdson J. of the B.C. Supreme Court remitted the matter to trial and, in the process, dismissed the Band's application for costs in advance. However, the B.C. Court of Appeal held that Sigurdson J. had erred in failing to hold that this was an 'exceptional and unique case' in which it would be appropriate to make the costs order sought. In the result, the Supreme Court of Canada (Iacobucci, Major and Bastarache JJ. dissenting) upheld the Court of Appeal's judgment. In doing so, however, it underscored that the principles it enunciated should be regarded as not merely applying in constitutional cases or cases involving aboriginal rights but as being generally applicable to public interest litigation.

The reasons of the majority commence with a strong affirmation of the historical jurisdiction courts exercise in relation to costs. They also emphasize it is a jurisdiction that, by its nature, is highly discretionary; is recognized and reflected in "various provincial statutes and rules of civil procedure."; and is largely unfettered in terms of "when and by whom costs are to be paid."¹⁷

Traditionally, the principal and overarching purpose of costs orders has been to indemnify the successful party for expenses sustained in the litigation process. According to LeBel J., however, the dominance of the indemnification rationale has gradually given way as courts have increasingly come to regard costs as an instrument to further competing policy goals. These goals, in his view, include encouraging negotiated settlements, sanctioning unreasonable conduct, ensuring that the justice system works fairly and efficiently, and promoting access to justice. This lattermost purpose is of particular relevance in the context of public interest litigation.

According to LeBel J., 'public interest litigation' embraces cases in which "ordinary citizens [seek] access to the courts to determine their

¹⁶ The Band led evidence that its members were impoverished and in dire need of housing that the lumber milled from the timber that was harvested would be used to build. The Band claimed that its legal fees and disbursements for at trial with respect to the title issue would exceed \$800,000.

¹⁷ *Okanagan Indian Band*, *supra* note 2 per LeBel J. at paras. 18, 35.

constitutional rights or other issues of broad significance.” An important feature of cases of this kind is 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.”¹⁸ It is these two characteristics – the need to preserve access to justice for ordinary citizens and the public benefits that accrue from ensuring this access – that, in LeBel J.’s opinion, distinguish public interest litigation “as a class... from ordinary civil disputes” and that provides a judicial basis for departing from the traditional approach to costs allocation.¹⁹

The majority observes that “as litigation over matters of public interest has become more common,” courts have “on numerous occasions” adverted to the need to be mindful of access to justice concerns when awarding costs.²⁰ Particular reliance is placed on the trial court decision in *B.(R) v. Children’s Aid Society of Metropolitan Toronto*.²¹ In that case, the parents of a child to whom a blood transfusion had been given over their religious objections commenced a *Charter* challenge. The trial judge ordered the intervening Attorney General to pay the parents’ costs in any event in the cause, an order that was upheld by the Court of Appeal and the Supreme Court of Canada. According to the majority, this case illustrates the principle that “in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side’s costs, but may actually have its own costs ordered to be paid by a successful intervenor or party.”²²

Having regard to the foregoing, the majority prescribes three necessary criteria for an application for an award of interim costs to succeed:

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.

¹⁸ *Ibid.* at para. 38.

¹⁹ *Ibid.*

²⁰ *Ibid.* at para. 5, 27-28.

²¹ [1989] O.J. No. 205 QL; aff’d in part (1992) 96 D.L.R. (4th) 45; aff’d [1995] 1 S.C.R. 315.

²² *Okanagan Indian Band*, *supra* note 2 per LeBel J. at para. 30.

3. The issues raised transcend the individual interests of the individual litigant, are of public importance, and have not been resolved in previous cases.²³

The majority goes on to caution that the existence of these conditions will not necessarily create an entitlement to an interim costs award (also known as an “advance costs order” or “costs advance”). In particular, in considering whether to make such an order courts must be “sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes... [involving] the relationship between the claimants and certain public authorities, or the effect of laws of general application.”²⁴

While the dissenting Justices concur that a discretion to order interim costs existed, in their view the common law does not justify the breadth of the discretion reflected in the criteria posited by the majority. In their view, to qualify for such an order the applicant must demonstrate that “there is a special relationship between the parties” (akin to that which prevails in family or matrimonial assets cases) and also establish that they “will win some award from the other party.”²⁵ In their view, the case at bar did not bear either of these characteristics. Moreover, they warn, courts should be “careful in the exercise of [their] inherent powers on costs in cases involving the resolution of controversial public questions.”²⁶ According to the dissenters, in this case “the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.”²⁷ Furthermore, whether and how to broaden the availability of interim costs is “more appropriately a question for the legislature.”²⁸

A key distinction between the majority and the dissent concerns whether and to what extent courts should undertake the task of adapting doctrine to accommodate evolving and emerging social purposes. As the majority underscores, in the realm of costs Canadian courts have traditionally exercised an extraordinarily broad discretion. The breadth of this judicial discretion, largely unfettered by legislative constraints, is virtually unrivalled by any other analogous area of judicial lawmaking. In this sense, judicial discretion with respect to costs is akin only to judicial discretion over another mechanism that ostensibly exists to allow courts to exercise control over the litigation process: namely, contempt of court.

Bearing this in mind, to what extent, therefore, should the Supreme Court seek to structure this discretion with a view to accommodating

²³ *Ibid.* at para. 40.

²⁴ *Ibid.* at para. 41.

²⁵ *Ibid.* per Major J. at para. 77.

²⁶ *Ibid.* at para. 78.

²⁷ *Ibid.*

²⁸ *Ibid.* at para. 86.

public interest litigation? As the majority observes, this emergence of public interest litigation has led many courts to question and re-evaluate the appropriateness of traditional rationales that have guided judicial discretion in costs allocation. As we shall discuss, in this process of re-evaluation courts have increasingly recognized that in certain cases other rationales for allocating costs – including access to justice and public benefit – are compelling. In this regard, the significance of *Okanagan Indian Band* is therefore not that it has blurred the distinction between traditional and emerging purposes served by costs awards (as the dissenters suggest) but rather that it has rendered this distinction more explicit.

Let us now consider whether and to what extent the majority succeeded in providing guidance to trial courts concerning the task of identifying “how” and “in what circumstances” these emerging purposes should be driving judicial decision-making. In grappling with how to define “public interest litigation”, and to distinguish it from “private litigation”, the majority fastens on two key characteristics: the need to ensure that “ordinary citizens” have access to the courts in cases involving “issues of broad social significance” and the benefits to the public interest that accrue through “proper resolution of those issues.” Where a case presents these characteristics, according to the majority, it is a “special case” for costs purposes that can properly be considered as falling within the “public interest” category.²⁹ Once a case is determined to fall within this category, the majority contends that it is then the role of the trial judge to determine whether the case is “*special enough*” to rise to the level where [an interim costs order] would be appropriate.”³⁰

Leaving aside for the moment the question of how the majority defines “public interest litigation”, let us initially consider the procedural implications of the approach they propose. This approach seems to contemplate that, when assessing an application for interim costs, courts must undertake a three-stage analysis. The first two steps in this analysis are explicitly mandated by the majority’s reasons; the third step arises, in our view, by necessary implication.

The first step in this analysis is to ask the question: is this public interest litigation? To answer this question, a court must consider the circumstances of the litigation from the perspectives of “access to justice” and “public benefit.” If, in applying these metrics, a court determines that the proceeding fits the general profile of public interest litigation, it then has discretion to depart from the usual approach to costs. The second step is to consider whether the case is “special enough” to justify an interim costs award. Here a court must look more closely at the applicant’s

²⁹ *Ibid.* per LeBel J. at para 38.

³⁰ *Ibid.* [emphasis added].

circumstances, and at the merits of the legal issues presented by the case, applying the three-fold test set out above. If the applicant can satisfy the court that all three conditions are met, and the court is satisfied that such an order would not place an unfair burden on third parties, it has discretion to make an interim costs award if it considers it in “the interests of justice” to do so.³¹

However, if a court decides not to exercise its discretion to make such an order we would argue that the inquiry should proceed to a third and final stage. At this juncture, the court would assess, having regard to the conclusions reached in stages one and two, whether it is appropriate to leave the matter of costs to the discretion of the trial court or, alternatively, to make some other form of advance order as to costs. Given the scope of the judicial discretion as to costs a broad range of potential orders could be made. These could include an order designating the litigation as being subject to a ‘one-way costs regime’ (immunizing the applicant from an adverse costs award while preserving its right to recover costs if successful); an order designating the litigation as being subject to a ‘no-way costs regime’ (under which parties would bear their own costs); or, alternatively, an order that applicants receive their costs in any event in the cause. To take account of the particular circumstance of the case, such a designation could be final or conditional. Moreover, such an order could apply to the litigation in its entirety or to selected issues or parties.

This brings us back to the question of the definition of ‘public interest litigation’ that the majority has chosen to employ. As has been noted, this approach focuses on whether the litigation presents issues of access to justice and will confer a public benefit if it were to proceed to judicial resolution. To a significant extent, this approach overlaps with the considerations a court must apply in determining whether to grant public interest standing as set out in *Finlay*.³² There, the Court held that the test to be met by the applicant was threefold: (1) that the action raises a serious legal question; (2) that the applicant had a genuine interest in the resolution of the question; and (3) that there was no other reasonable and effective way for the question to be adjudicated. It bears noting that, under the “genuine interest” arm of the test, a party seeking standing does not need to establish that it has a direct personal, proprietary or pecuniary interest in

³¹ *Ibid.* per LeBel J. at para. 41. The first trial level application of the approach set out in *Okanagan Indian Band* is *Little Sisters No.2* (*supra* note 12) where Bennett J. awarded interim costs with respect to two of the three arguments being advanced. In doing so, she did “note a caution” with respect to the need to establish the factual matrix of the case and to assess in a preliminary way the merits of the case while being mindful of the assigned trial judge. To this end (at paras. 11-12), she explicitly avoided prejudging the case or foreclosing arguments at trial.

³² *Finlay*, *supra* note 7.

the litigation. Conversely the fact that such a party might possess an interest of this kind, particularly one that is modest in nature, does not preclude standing from being granted.³³

In *Okanagan Indian Band*, of course, the applicant did not appear before the court under the *Finlay* test. Indeed, in many cases conventionally regarded as public interest litigation the applicant will have a direct personal, proprietary and pecuniary interest in the outcome³⁴ the existence of which in no way diminishes the public interest value presented by the issues or circumstances of the case.³⁵ Therefore, it is safe to assume that the majority was mindful of the danger of circumscribing the ambit of cases that a trial court might choose to treat as public interest litigation for costs purposes. Having chosen to adopt a flexible definition of public interest litigation, their primary task was to elaborate a test capable of identifying which cases from within this definition were “special enough” to justify an order of interim costs. What is absent from their reasons, however, is an elaboration of the principles that should guide the exercise of judicial discretion with respect to costs in cases where the applicant falls short of meeting this test. This omission virtually ensures that the Court will soon be called upon to revisit the issue given the likelihood that in many public interest cases the applicants for interim costs orders will find themselves in precisely this situation.

III: Where We've Been: A Retrospective Look at Costs and Public Interest Litigation in Canada

Recognition of the considerations identified by the majority in *Okanagan Indian Band* as militating in favour of a *sui generis* approach to awarding costs in public interest litigation date back over thirty years. In this Part, we offer a review of the costs reform proposals, relevant legislative developments, and costs jurisprudence.

A. Calls for Reform

One of the earliest evocations of the need for costs law reform is the

³³ June M. Ross, “Standing in *Charter* Declaratory Actions” (1995) 33 *Osgoode Hall L. J.* 151.

³⁴ The facts of the recent litigation in *Little Sisters No.2* (*supra* note 12) are illustrative of this point. In this case, the bookstore possessed a pecuniary interest in challenging customs seizures targeting materials it was seeking to import. However, this interest was trifling relative to the estimated \$1 million cost of the litigation strategy its lawyers advised was necessary to effectively redress its ongoing difficulties with Canada Customs.

³⁵ McCool, *supra* note 10 at para 15. McCool refers to the *NWAC* decision to support this position; see text accompanying note 143.

1974 Report of the Ontario Task Force on Legal Aid. In its final report, the Chair of the Task Force, Mr. Justice Osler stated:

[W]e are emboldened to suggest at this point that it is no longer self evident that cost should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against the losing party operates unequally as a deterrent...[particularly] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore [recommend]...casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious.³⁶

Less than a decade later this passage was quoted in an article by Anand and Scott.³⁷ Their article surveyed the barriers created by prevailing costs principles for public participation in environmental decision-making. They contended that, in this context, "the routine application of traditional cost rules leads to results that are not only severe, but inappropriate."³⁸ What was needed, they argued, was a fuller appreciation of the tangible social benefits of encouraging public participation in environmental decision-making. Taking steps to encourage public participation in such processes, in their view would not only promote the goal of access to justice, it would also serve as a highly efficient way to protect public rights, and would pay significant dividends in terms of the ultimate quality of administrative and judicial decision-making.

Once these benefits were properly understood and valued, Anand and Scott contended that the need to develop special costs rules for public interest cases became undeniable. The centerpiece of the reform package they proposed was the adoption of a so-called "one-way" costs rule in public interest cases. Under such a rule, at an early stage in the litigation a court would decide whether a public interest litigant should be deemed eligible to benefit from a one-way costs order. If so designated, the party would then be exempted from the potential of facing an adverse costs award if their claim were to fail. If their claim succeeded, however, they would still be able to recover their costs as a prevailing party.

This "one-way" rule departs from the "two-way" approach to the

³⁶ *Task Force on Legal Aid* (Report, Part I, 1974), at 99, cited in Anand and Scott, *supra* note 6 at 88 fn 26.

³⁷ Anand and Scott, *supra* note 6 at 100.

³⁸ *Ibid.* at 81.

allocation of costs that prevails in most Commonwealth jurisdictions, where a litigant's liability for or entitlement to costs depends on whether their legal claim is judicially deemed to have been successful. It similarly departs from the American approach to costs allocation. In the U.S., the prevailing approach is a "no-way" rule that presumes, absent statutory direction to the contrary, the parties shall bear their own costs regardless of the outcome of the litigation.³⁹

To secure recovery under the one-way rule, an applicant would have to establish, among other things, that its participation was necessary to a fair determination of the legal issues presented, and that it was impecunious. According to Anand and Scott, such a model would have two distinct advantages:

Firstly, it would clearly provide greater certainty to environmental groups and to their opponents that meritorious proceedings, and no others, could be carried on in this way. Second, by moving the cost award decision ahead to an early stage in the proceedings, the focus of costs would be diverted from eventual success "in the result" to its proper place as a measure of the merits of public participation.⁴⁰

In support of this proposal, the authors argued that the "damages theory of costs" rationale (referred to as the indemnification rationale in *Okanagan Indian Band*) underpinning the "loser pays" approach to costs allocation discouraged "meritorious claims, particularly those of public interest and importance."⁴¹ Such a rationale, in their view, is founded on an erroneous presumption that parties to litigation will be "evenly matched...in economic terms" and that therefore the deterrent effect of such a rule would operate "evenhandedly."⁴² Moreover, they contended that the indemnification rationale also presumes that the losing party is somehow "at fault" for having commenced the litigation; a presumption that, especially in novel or "close cases", will not be borne out.⁴³

Several years later, Anand and Scott's recommendations were echoed by the Ontario Law Reform Commission (OLRC)⁴⁴ in its 1989 *Report on Standing*.⁴⁵ According to the OLRC, "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

³⁹ For further discussion of these competing approaches to costs allocation, and their underlying rationales, see C. Tollefson, *supra* note 10.

⁴⁰ Anand and Scott, *supra* note 6 at 115.

⁴¹ *Ibid.* at 99, citing G.D. Watson, S. Borins and N.J. Williams, *Canadian Civil Procedure*, 2nd ed. (Toronto: Butterworths, 1977) 2-5.

⁴² *Ibid.* at 99.

⁴³ *Ibid.*

⁴⁴ The OLRC was created by the *Ontario Law Reform Commission Act*, R.S.O.

recommendations for reform of the law of standing.”⁴⁶ To harmonize liberalized public interest standing with the law of costs, the OLRC also recommended the implementation of a statutory one-way costs rule in public interest litigation. Under this proposal, courts would be empowered to designate that such a rule would apply where it was established that:

1. the litigation would need to raise issues of importance beyond the immediate interests of the parties;
2. the plaintiff would not have any personal, pecuniary or proprietary interest in the outcome of the litigation or, if such an interest did exist, it would not justify the litigation economically;
3. the litigation could not present issues previously judicially determined against the same defendant; and
4. the defendant would need to have a clearly superior capacity to bear costs of the proceeding.⁴⁷

Mindful, like Anand and Scott, of the desirability of providing certainty to public interest litigants with respect to their potential liability for an adverse costs award, the OLRC recommended that a litigant be entitled to seek a ruling with respect to its eligibility for costs immunity at any time during the proceeding.⁴⁸

B. Legislative Initiatives

In general, Canadian governments have done relatively little to assist public interest groups to participate in the litigation process. One of the few government initiatives that do support public interest test case litigation is the federal Court Challenges Program (CCP). Originally established in 1978, the CCP currently provides \$2.75 million annually to promote access to justice for minority linguistic and disadvantaged litigants. Funding from the CPP has been used to defray litigation costs associated with language and equality rights test cases. Apart from litigation funded under CPP, most public interest litigation in Canada (including virtually all public interest environmental litigation and a significant portion of civil rights litigation) is funded by private donations.

1990, c.O.24, with a mandate that ended in December 1996.

⁴⁵ Ontario Law Reform Commission, *Report on the Law of Standing*, (Toronto: Ministry of the Attorney General, 1989).

⁴⁶ *Ibid.* at 137.

⁴⁷ *Ibid.* at 153-54, 161, and 184-185.

⁴⁸ *Ibid.* at 163, 185.

Not only have Canadian governments largely eschewed funding public interest litigation directly, they have also been relatively timid in pursuing legislative reforms to this end. To date, no Canadian laws contain “private attorney-general” or “citizen-suit” provisions modeled on those prevalent in American law.⁴⁹ Federally, while the *Canadian Environmental Protection Act* contemplates the right of a citizen to commence an environmental protection action, due to the limited and constrained nature of this right it has never been used. Likewise, while in some provincial jurisdictions similar statutory causes of action exist, these provisions have been used only rarely.⁵⁰ The same is true with respect to private prosecutions of environmental laws despite the existence, in some jurisdictions, of provisions allowing courts to award legal fees to successful citizen-prosecutors. The paucity of citizen-led private prosecutions is likely the result of a cluster of factors. Private prosecutors in Canada must establish guilt beyond reasonable doubt whereas American citizen suits are governed by a civil standard of proof. Private prosecutions frequently also impose much more daunting legal and scientific challenges than do citizen suits, in part due to the differing burden of proof and the strictness with which American courts have interpreted many of the obligations citizen suits exist to enforce. Finally, in several provinces, the potential to pursue private prosecutions has effectively been nullified by the government policies that oblige the Attorney General, as a matter of course, to assume conduct of all such cases; a practice that almost invariably culminates in the prosecution being stayed.⁵¹

⁴⁹ Note our discussion below at pp 504-506.

⁵⁰ In Ontario, for example, under the *Environmental Bill of Rights, 1993* S.O. 1993, c. 28 citizens are given statutory standing to enforce environmental laws under two distinct procedures. Section 84 gives a private citizen the right to commence an action to protect a public resource in Ontario from harm caused by a violation of environmental legislation. This provision, however, has only been used twice in the past ten years. One of those actions is still at the discovery stage, and the other was dismissed without costs when the plaintiffs discontinued their action. Likewise, section 103 gives an individual the right to bring an action on the basis of having suffered individual harm caused by a public nuisance. Only six actions have been brought under section 103; most of these have been class actions that have not made it past the certification stage; see correspondence from the Environmental Commissioner [on file with the authors]. In assessing costs with respect to actions brought under either of these provisions, courts are given discretion to consider “any special circumstance”, including whether or not a case is a test case or raises a novel point of law: see s. 100 of the *EBR*. Similar citizen suit provisions with analogous costs provisions are also in place in the Northwest Territories (*Environmental Rights Act*, R.S.N.W.T. 1988 c. 83 (Supp.), s. 5) and the Yukon (*Environment Act*, S.Y. 1991, c. 5, s. 1). To date, however, neither of the provisions has been utilized.

⁵¹ See Keith Ferguson, “Challenging the Intervention and Stay of an Environmental Private Prosecution” (2004) 13 *Journal of Environmental Law and Practice* 153 at 153.

Indeed, recent amendments to the *Federal Court Rules* have arguably made litigation more risky for public interest groups. Prior to these amendments, in federal judicial review proceedings, the position with respect to costs was a no-way presumption: in other words, costs were only awarded where there were special reasons to do so. The rationale for this no-way model was “to assure to a person who is adversely affected by the decision of a federal administrative tribunal the right to challenge the decision...without running the risk of being ruined by costs if he loses.”⁵²

In 1998 the Rules were amended to codify judicial discretion regarding the determination and allocation of costs for all types of proceedings before the Federal Court, including public interest cases.⁵³ These new Rules now provide that, in determining costs awards, courts shall consider a variety of factors including the result of the proceeding, the importance and complexity of the issues, whether the public interest in having the proceeding litigated justifies a particular award of costs, and any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

Arguably, the new Rules are less hospitable to public interest litigation than was the regime they replaced. This is because, from the perspective of many public interest litigants, the disincentive to litigate arising from the potential of an adverse costs award is stronger than the incentive effect of securing costs in the cause. The net benefit of the reformed Rule is thus debatable, insofar as it now simply lists factors to be considered, without starting with a default position of no costs. To date, jurisprudence under the new Rule has tended to reinforce these concerns.⁵⁴

⁵² *Silk v. Canada (Umpire Constituted under s. 92 of the Unemployment Insurance Act, 1971)* (1981), [1982] 1 F.C. 795 at para. 18 (C.A.).

⁵³ *Fed. Ct. Rules, 1998*, Rule 400 (SOR/98-106).

⁵⁴ In *Canadian Environmental Law Association v. Canada (Minister of the Environment)* [2001] F.C.J. No. 1110 (C.A.) (Q.L.), the Trial Judge made the following comments:

I consciously made the order of costs because counsel for the respondent had sought same in his written submissions, even though no oral submissions were made.

Prior to the recent changes in the *Federal Court Rules*, costs were not awarded in these cases. The Rules now provide, however, that they should be awarded. I must admit that my preference was not to award costs against a public interest group in circumstances such as those existing in [here], but I felt that with the change in the Rules I had to apply the usual rule and award costs to follow the event.

Despite the Trial Judge’s evident confusion about the nature of the new Rules, the Federal Court of Appeal (2000), 34 C.E.L.R. (N.S.) 159 (F.C.A.) upheld the costs award against the appellant: “as for the costs matter, even if the learned Motions Judge

One of the few Canadian provinces to grapple directly with the question of how costs rules might be reformed to promote access to justice for public interest litigants is British Columbia. In 2002, a sub-committee of the Attorney General Rules Revision Committee of British Columbia (the “Committee”) was formed to consider and recommend changes to B.C.’s Tariff of Costs (the Tariff).⁵⁵ A core feature of the Committee’s mandate is to investigate ways that a Tariff increase could be implemented without adversely affecting access to justice.⁵⁶

Since 1990, the “overall purpose” of the Tariff has been “to partially indemnify the successful litigant for [approximately] 50% of actual legal costs.”⁵⁷ The Tariff was set at this level “to ensure that the public is not discouraged from pursuing lawsuits that are reasonably believed to be justified...”⁵⁸ According to the Committee, however, there may be cases where even a partial indemnity will deter legitimate claims from being pursued: including *Charter* challenges; test cases involving novel points of law; and environmental or local government cases brought in the general public interest or cases where a person is catastrophically injured.⁵⁹ If the Tariff is increased to keep up with rising legal costs, “more and more potential litigants will be shut out of the system because cost risks are simply too high.”⁶⁰ Consequently, the Committee recommends consideration be given to “allowing the court greater discretion to relieve parties of costs consequences in circumstances where a costs award following the event would have the overall effect of reducing access to justice.”⁶¹

As a result, the Committee is presently considering an amendment to the Rules of Court that would create Canada’s first statutory one-way costs

might be thought to have wrongly fettered her discretion with respect to costs, we see no reason to disturb her award in favour of the respondent.” (at para. 6).

⁵⁵ According to Mark M. Orkin *The Law of Costs*, 2nd ed., looseleaf (Toronto: Canada Law Book, 1987) a tariff of costs is intended to fix amounts for services rendered in the conduct of actions and proceedings in the courts that will be allowable as part of an assessment of costs (para. 702). Costs or disbursements not provided for by the relevant tariff cannot be reimbursed. Tariffs of costs have traditionally followed a simple formula, with the Ontario tariff often taken to be the paradigm (para. 703). By way of example, there are three tariffs applicable to proceedings in the Ontario Superior Court of Justice: Tariff A (“Solicitors’ Fees and Disbursements Allowable under Rule 58.05”); Tariff B (“Solicitors’ Fees in Divorce Actions Allowed under Rule 69.26”); and Tariff C (“Solicitors’ Costs Allowed on Passing of Accounts without a Hearing”).

⁵⁶ Discussion Paper on the Tariff of Costs, *supra* note 1.

⁵⁷ *Ibid.* at 1.

⁵⁸ *Ibid.* at 2.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

regime. Under this proposal, a party could apply at any time during the litigation for “relief from costs where the risk of costs would operate as a serious impediment to a party’s access to the courts.”⁶² Such orders would be conditional in nature, allowing a court the opportunity to evaluate its appropriateness at the conclusion of the case taking into account a party’s conduct in the litigation and any other relevant changes in circumstances. The Committee suggests that the proposed amendment would contain guidelines prescribing factors to be weighed in deciding whether an advance costs relief order should be made. Proposed considerations include: the significance of the issue to be resolved to the individual or to the public at large; the necessity of commencing or defending the proceedings; extraordinary personal hardship; and prejudice to the opposing party.⁶³

C. Developments in Public Interest Costs Caselaw

While Canadian legislators have arguably been slow off the mark in addressing the challenge of costs law reforms aimed at accommodating and promoting public interest litigation, the judicial record has been considerably more encouraging, particularly in recent years, as the following discussion suggests.

1. Costs Liability of Unsuccessful Public Interest Litigants

In the early days of the *Charter*, it was not unusual for unsuccessful public interest litigants to be ordered to pay costs. For example, in *Operation Dismantle Inc. v. Canada*,⁶⁴ the Supreme Court of Canada, without offering reasons, ordered costs to follow the event in favour of the federal government. There are also more recent illustrations of this approach. These include *Lavoie v. Canada*,⁶⁵ (a section 15 challenge to preferential hiring rules in the federal civil service) and *Eaton v. Brant County Board of Education*,⁶⁶ (an equality rights claim by parents seeking integration of their disabled daughter into the public school system). As we have noted previously in our discussion of the new *Federal Court Rules* there have also been several cases in which unsuccessful public interest litigants have been held liable for costs.⁶⁷

⁶² *Ibid.* at 2-3.

⁶³ *Ibid.* at 3.

⁶⁴ [1985] 1 S.C.R. 441.

⁶⁵ [2002] 1 S.C.R. 769.

⁶⁶ [1997] 1 S.C.R. 241.

⁶⁷ See, for example, *Canadian Environmental Law Association*, *supra* note 54; *Inverhuron & District Ratepayers’ Assn. v. Canada (Minister of the Environment)* (2001), 273 N.R. 62 (F.C.A.); and *Lavoie v. Canada (Minister of the Environment)* (2002), 46 C.E.L.R. (N.S.) 13 (F.C.A.).

The more dominant trend, however, particularly in the *Charter* litigation context, has been for courts to excuse unsuccessful litigants from costs liability. Almost invariably the rationales offered for this outcome track the factors identified in *Okanagan Indian Band* as being the hallmarks of public interest litigation: namely access to justice concerns and the correlative need to recognize the public benefits that attend proper judicial resolution of legal issues of broad social significance. Cases in which these rationales have been relied upon include: *Allman et al. v. Commissioner of the N.W.T.*⁶⁸ (a challenge to voter eligibility requirements); *Harrison v. U.B.C.*⁶⁹ (a challenge to mandatory retirement); *Hogan v. Newfoundland (Attorney-General)*⁷⁰ (a challenge seeking to protect funding for denominational schools); and *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*⁷¹ (a challenge to Criminal Code provisions authorizing the physical disciplining of children).

A similar trend can be discerned in non-*Charter* cases. Again, in this context courts have tended to justify exercising their discretion not to impose adverse costs awards based on concerns about access to justice and the need to give recognition to the public benefits derived from such litigation. For example, in *Valpy v. Ontario (Commission on Election Finances)*, (an unsuccessful petition seeking disclosure of election finance records), the court opined that a costs award would be inappropriate in that the suit “concerned a matter of considerable public interest and as both parties [had] acted in complete good faith...”⁷² Another elections case with a similar outcome involved a claim by several British Columbian voters that certain government MLAs had fraudulently misled the electorate as to the government’s record in violation of provincial election laws.⁷³ In the result, Humphries J. held that the petitioners should not be liable for costs insofar as the case was of public importance, was not frivolous and could properly be characterized as “public interest litigation.”⁷⁴

The same pattern is emerging in public interest environmental cases. For example, in *Save the Rouge Valley System v. Ontario (Attorney-*

⁶⁸ [1983] N.W.T.R. 231 (S.C.).

⁶⁹ (1986), 30 D.L.R. (4th) 206 (B.C.S.C.); additional reasons on costs, [1987] 2 W.W.R. 378 at 378 (B.C.S.C.); rev’d (1988), 21 B.C.L.R. (2d) 145 (C.A.) aff’d [1990] 3 S.C.R. 451.

⁷⁰ (2000), 189 Nfld. & P.E.I.R. 183 (Nfld. C.A.).

⁷¹ [2004] 1 S.C.R. 76.

⁷² (1989) 67 O.R. (2d) 748, at p. 753 (Div. Ct.).

⁷³ The respondents’ legal fees were paid by the provincial New Democratic Party. The respondents claimed that the petitioners’ legal fees were covered by the National Citizens’ Coalition, an allegation the petitioners denied.

⁷⁴ *Friesen v. Hammell*, [2002] B.C.J. No. 1717 at paras 33, 34 (Q.L.).

General), the Court declined to order costs due to the petitioner's status as a public interest group; the fact that it did not stand to gain financially; and that its application was not frivolous.⁷⁵ Two oft-cited B.C. Supreme Court decisions are even more explicit in addressing access to justice and public benefit rationales. In his 1991 decision in *Sierra Club of Western Canada v. B.C. (A.G.)*, Curtis J. observed:

Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside of the law. In my opinion it would not be conducive to the proper and legal resolution of this case which is one of significant public interest, to penalize the petitioners who have acted responsibly by attempting to resolve the issues according to law, through awarding costs against them.⁷⁶

This passage was cited with approval by Kirby J. of the Australian High Court in *Oshlack v. Richmond River Council*.⁷⁷

To a similar effect is *Valhalla Wilderness Society v. B.C. (Ministry of Forests)*. In this case, Paris J. declined to award costs against an environmental group, observing that its suit "raised serious legal issues...of unquestionable public interest", that the financial consequences of such an award would be "significant", and that it had "at all times acted responsibly and within the law, in particular by attempting to vindicate its position through the courts."⁷⁸

2. Costs Awards to Unsuccessful Public Interest Litigants

Judicial innovation is even more in evidence in the emerging caselaw under which public interest litigants are increasingly securing their costs even when they have been unsuccessful in whole or in part. An early illustration of this trend is the *B.(R) v. Children's Aid Society* case that was relied on by the majority in *Okanagan Indian Band*.⁷⁹ Here, in a ruling ultimately upheld by the Supreme Court of Canada, the trial judge ordered a government intervenor (the A.G. for Ontario) to pay the parents' costs on

⁷⁵ (2001), 41 C.E.L.R. (N.S.) 295 (Ont. Div. Ct.). See also: *Ecology Action Centre Society v. Canada (Attorney General)*, [2004] F.C.J. No. 1318 (F.C.) at para. 95.

⁷⁶ *Sierra Club of Western Canada v. B.C.(A.G.)* (1991), 83 D.L.R. (4th) 708 at 716 (B.C.S.C.).

⁷⁷ See discussion of *Oshlack v. Richmond River Shire Council* (1998) 193 CLR 72(1994), 82 LGERA 236 (N.S.W. Ct.), rev'd (1996), 91 LGERA 99 (N.S.W.C.A.), rev'd (1998), 96 LGERA 173 (H.C.A.), below at 503 [*Oshlack*].

⁷⁸ *Valhalla Wilderness Society v. B.C. (Ministry of Forests)*, (1997), 25 C.E.L.R. (N.S.) 197 (B.C.S.C.).

⁷⁹ *Okanagan Indian Band*, *supra* note 2 at para 29, citing *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, *supra* note 21.

the ground that they were responding to state action, on the basis of genuine religious beliefs, on a matter of national importance. There are at least five subsequent cases in which analogous orders have been made, all in the context of *Charter* litigation.

Three of these decisions have been made or affirmed by the Supreme Court of Canada. In *Schacter v. Canada*,⁸⁰ the Court ordered the federal government to bear the petitioner's costs in an equality rights challenge to unemployment insurance regulations. The two other Supreme Court cases involved litigation in which the plaintiffs could claim partial success on other issues but whose *Charter* claims ultimately failed: see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*⁸¹ and *Blencoe v. B.C. (Human Rights Commission)*.⁸² The *Little Sisters* litigation is particularly instructive in that, while the plaintiff's main *Charter* claim failed, the trial judge took into account the importance, the complexity and the financial demands of presenting the case in ordering the federal government to pay the plaintiff's costs on an increased tariff basis. Even though the plaintiff was only partially successful at the Supreme Court of Canada, it affirmed the trial judge's costs ruling and ordered party and party costs throughout the appeal.

Other decisions in which costs have been awarded to wholly unsuccessful *Charter* claimants include *Horsefield v. Ontario*⁸³ (a challenge to an administrative driving suspension program) and *Singh v. Canada (A.G.)*⁸⁴ (a challenge to disclosure immunity under federal law with respect to Cabinet documents). In *Horsefield*, the Ontario Court of Appeal laid particular emphasis on the financial consequences of the litigation on the plaintiff, "a private citizen of modest means." In *Singh*, in a decision upheld by the Federal Court of Appeal, the trial judge concluded the plaintiffs were entitled to their costs in recognition that "the testing of the constitutional principles involved in this matter is clearly in the public interest, since they are at the heart of our constitutional democracy."⁸⁵

3. *Interim Costs Awards to Public Interest Litigants*

Another area in which a judicial appetite to take account of the realities of public interest litigation has been in evidence is in relation to interim costs awards. In this context, an overarching concern is the spectre that in

⁸⁰ [1992] 2 S.C.R. 679.

⁸¹ [2000] 2 S.C.R. 1120 [*Little Sisters No. I*].

⁸² [2000] 2 S.C.R. 307.

⁸³ (1999), 44 O.R. (3d) 73 (C.A.).

⁸⁴ [1999] 4 F.C. 583 at para. 87 (T.D.); appeal dismissed with original costs order undisturbed, [2000] 3 F.C. 185 (C.A.).

⁸⁵ *Ibid* (T.D.) at para. 87.

some circumstances, unless the court makes an order providing immediate litigation funding, the case will be abandoned: a concern to which the approach adopted by the majority in *Okanagan Indian Band* is directly responsive. To date, cases in which such orders have been made have involved *Charter* litigation or aboriginal rights and title claims.

In *Spracklin v. Kichton*,⁸⁶ the plaintiff sought an interim costs order to enable her to retain counsel to pursue an equality rights challenge to a newly enacted definition of “spouse” under provincial law. In granting the order, Watson J. noted that her claim was not frivolous, she could not afford counsel and, in the circumstances, such an award would ensure the matter was properly litigated.⁸⁷ More recently, in *Rogers v. Greater Sudbury (City) Administrator, Ontario Works*, a case relied on by the majority in *Okanagan Indian Band*, the plaintiff secured an interlocutory injunction reinstating her social assistance benefits and thereupon applied to have the costs of this application paid forthwith.⁸⁸ Epstein J. granted the motion. In making this order, she observes that the principle of indemnification is no longer the pre-eminent consideration in ordering costs. Indeed, in her view, “costs can be used as an instrument of policy and that making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective.” In support of this view, she opines as follows:

I start with two realities. First, so-called ordinary citizens generate a significant amount of Charter litigation. Secondly, Charter litigation tends to be long, complicated and expensive and, therefore, financially prohibitive for most people. The result of these two realities is that to the extent that Charter litigation does go forward, applicants, particularly those such as Ms. Rogers who are experiencing financial hardship, are represented by lawyers acting pro bono. Such retainers obviously involve a financial sacrifice on the part of lawyers or law firms prepared to take on such work. This is so because the lawyers are not paid for their work as the file moves through the system. They are paid, if at all, by the ‘other side’ at the conclusion of the litigation. It may take years before those who accept pro bono retainers are reimbursed for their expenses and compensated for the time spent on the file. Accordingly, larger

⁸⁶ (2001), 96 Alta. L.R. (3d) 96 (Q.B.)

⁸⁷ *Ibid.* at para. 81. On appeal, the trial judge’s decision was reversed: (2003), 9 Alta. L.R. (4th) 51 (C.A.). Costigan J.A. held that the costs award at trial should be set aside on the basis that “[i]t would rarely be the case that a costs award could properly be made, at such an early stage of the proceedings, which would fetter the discretion of the trial judge.” (at p.769), leaving the matter of costs to be determined by the trial judge on the rehearing. It should be noted, however, that this decision must now be read in light of the Supreme Court’s subsequent decision in *Okanagan Indian Band*, *supra* note 2.

⁸⁸ (2001), 57 O.R. (3d) 467 (Sup. Ct. J.) at para. 19.

firms who can more easily “carry the file” accept more pro bono retainers. By limiting the type and number of firms who are able to assume this type of financial obligation, the public’s access to counsel who will act for them in Charter challenges is similarly limited.

Through granting, when appropriate, cost awards payable forthwith during the course of what is frequently protracted litigation, the financial burden assumed by the lawyers doing pro bono work is reduced. Orders of this nature would allow more lawyers to accept this kind of retainer thereby increasing the opportunity for people, such as Ms. Rogers, to have access to justice. As well, applicants who may suffer irreparable harm as a result of the application of a law that is the subject of a legitimate Charter challenge have increased opportunity to seek interlocutory relief since counsel acting for them have a chance of being paid promptly for the often very expensive process of preparing for and arguing a motion for an interlocutory injunction.⁸⁹

A further decision of note arises in an aboriginal title claim case currently at trial in the B.C. Supreme Court: *Tsilhqot’in Nation v. Canada (A.G.)*.⁹⁰ In the wake of the decision of the B.C. Court of Appeal in *Okanagan Indian Band* ordering interim costs, the plaintiff Tsilhqot’in Nation made an analogous application prior to the commencement of this trial, the first land claim trial since *Delgamuukw v. B.C.*⁹¹ in the mid-1990s. The court ordered the federal and provincial governments to pay reasonable disbursements as well as interim legal fees as increased costs at 50% of special costs.⁹² In January 2004, on an appeal of this decision, the Supreme Court of Canada remanded the matter of costs to the B.C. Supreme Court to be dealt with in accordance with its decision in *Okanagan Indian Band*.⁹³

4. Costs in Public Interest Litigation Involving Private Parties

A final strand of current Canadian caselaw that deserves attention is the judicial treatment of public interest cases in which the interests of private parties are implicated. With very few exceptions, public interest litigation in Canada directly involves government as a party. Government is necessarily a party to all public interest litigation under the *Charter*.⁹⁴ Similarly, some arm or agency of government is almost inevitably involved in non-*Charter* public interest litigation insofar as such litigation

⁸⁹ *Ibid.* at paras. 20-21.

⁹⁰ *Supra* note 11.

⁹¹ [1997] 3 S.C.R. 1010.

⁹² J.Arvey and K.Chapman, *supra* note 10 at 28.

⁹³ [2002] S.C.C.A. No. 295. See also *Little Sisters (No. 2)* as discussed *supra* note 12.

⁹⁴ C. Tollefson, *supra* note 10, fn 93 at para. 77.

is often framed as a challenge (typically by means of judicial review) of a governmental decision affecting the allocation of public resources. However, in litigation of this latter type, private interests frequently seek and are granted party status by virtue of their proprietary or pecuniary interest in the outcome. The involvement of private interests in what is ostensibly public interest litigation puts the traditional indemnification rationale for awarding costs on a collision course with competing concerns about promoting access to justice and lending recognition to the benefits frequently associated with litigation of this kind. To date, how, if at all, these competing values should be reconciled remains unresolved.

A prime illustration of how private interests can become implicated in a public interest challenge to governmental action is *Sierra Club of Western Canada v. British Columbia (Chief Forester)*.⁹⁵ In this case, the plaintiff challenged the means by which the office of the Chief Forester set the rate of cut in a tree farm licence area allocated to MacMillan Bloedel (then, one of the province's largest forest companies). The company applied and was granted party status for the purposes of the judicial review. When the challenge failed, the company sought an order as to costs. Although the trial judge affirmed that the petitioner had a long and respected record of involvement in forest and land use decision-making, had raised a "novel" argument of public importance, and had yielded a consequent "public benefit" by clarifying the applicable law, he concluded that nonetheless a costs order should be made. In reaching this conclusion, the trial judge invoked the indemnification rationale: that the company had "no practical choice" but to be joined in the litigation and that "as a private citizen, not a public agency" it was therefore entitled to its costs.⁹⁶

A contrasting approach was adopted in a suit that sought a declaration that a major cable company was in violation of federal regulations governing fee increases: *Re: Mahar v. Rogers Cablesystems Limited*.⁹⁷ The sole respondent in the case was the cable company. In the result, Sharpe J. dismissed the claim on jurisdictional grounds. In considering the issue of costs, he concluded that it was "fair to characterize the proceeding as a public interest suit."⁹⁸ In declining to order costs, he invoked the public benefit rationale, noting that the suit was "brought in good faith for the

⁹⁵ (1994), 94 B.C.L.R. (2d) 331 (S.C.). For an extended discussion of this case see *ibid.* See also: *Western Canada Wilderness Committee v. Kennah*, [2004] B.C.J. No. 1175 (S.C.).

⁹⁶ *Ibid.* To a similar effect is *Reese v. Alberta* (1992), 5 Alta. L.R. (3d) 40 (Q.B.), in which the trial judge awarded costs not only to a forest company that had joined in litigation challenging the allocation of a forest management licence, but also to the government ministry that issued the licence.

⁹⁷ *Re: Mahar v. Rogers Cablesystems Limited* (1995), 25 O.R. (3d) 690 (Gen. Div.).

⁹⁸ *Ibid.* per Sharpe J. at 703.

genuine purpose of having a point of law of general public interest resolved.”⁹⁹ In addition, it was important, in his opinion, to be mindful of access to justice considerations. In his words

...the incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interests. An unrelenting application of those rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants.¹⁰⁰

Finally, while acknowledging that the respondent company was ostensibly a private entity this status at law did not mean that it should automatically be entitled to its costs. It was significant in his view to recognize that it “does enjoy the substantial benefit and protection of a statutory monopoly in the provision of its services to the public, and this application was brought in relation to an important aspect of the terms on which this monopoly is enjoyed.”¹⁰¹

IV: Costs and Public Interest Litigation in Comparative Context

Recent developments in Canadian caselaw have important parallels in the costs jurisprudence of a variety of other jurisdictions. In this Part, we offer an overview of developments in American and Commonwealth law.

A. The American Experience

Recognition of the benefits associated with encouraging private litigants to enforce public rights has been a central feature of the American legal tradition since at least the New Deal era.¹⁰² Over sixty years ago, Judge Jerome Frank is said to have coined the term “private Attorney General” to describe the mantle taken on by citizens who are statutorily empowered to initiate enforcement action.¹⁰³ The private attorney general mechanism has emerged, over the last quarter century, as a primary instrument for securing compliance with federal law. It plays a key role in a variety of important U.S. laws including: all (but one) of the major anti-pollution laws enacted by Congress since 1970; virtually all modern civil

⁹⁹ *Ibid.* at 704.

¹⁰⁰ *Ibid.* at 704-705.

¹⁰¹ *Ibid.* at 704.

¹⁰² For a useful discussion of this history see Kent Roach and Michael J. Trebilcock, “Private Enforcement of Competition Laws” (1996) 34 *Osgoode Hall L.J.* 461.

¹⁰³ *Ibid.* at para. 25. See *Associated Indus. of N.Y. Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943) (“Such persons, so authorized,” the court wrote, “are, so to speak, private Attorney Generals.”).

rights statutes,¹⁰⁴ most anti-trust and securities laws; and in the *Equal Access to Justice Act* (which governs non-tort suits brought against federal government departments and agencies if there is no other “fee shifting” statute applicable).¹⁰⁵

Private attorney general provisions allow citizens and public interest groups to commence enforcement actions against any person alleged to be in violation of one or more specified provisions of a designated statute or regulation or to sue governments alleged to have failed to perform non-discretionary duties. Where such enforcement proceedings culminate in judgment for the plaintiff or otherwise prevail as reflected in a negotiated settlement of the action, courts are empowered to order that the defendant(s) reimburse the citizen attorney-general for their litigation costs including “reasonable” attorney fees. If a public interest attorney with conduct of the matter has been acting *pro bono*, courts have held that they should be compensated at the rate their services would have been billed in a private law firm.

A key design feature of the private attorney-general model is its adoption of a one-way costs rule (also known as fee-shifting). As we have noted, this represents a fundamental departure from the common law-based, no-way American costs rule that ordinarily governs judicial costs allocation. In its place is substituted a regime under which a private attorney-general pursues enforcement actions on the expectation of being rewarded if they succeed, without risk of costs liability if they do not.

In the environmental law context, these so-called “citizen suits” have been hailed as “a defining theme of the modern environmental era.”¹⁰⁶ According to one commentator, the existence of environmental citizen suits has “brought competition, with its attendant virtues, to the business of environmental enforcement.”¹⁰⁷ As a result, the robustness and quality of environmental law enforcement has been significantly enhanced. The spectre of private enforcement has reportedly had a salutary effect in terms of governmental accountability for prosecutorial policy and compliance with environmental regulations by public and private bodies. It has also been credited with promoting broader democratic values including facilitating citizen involvement in environmental policy making, influencing judicial interpretation of key environmental provisions, and

¹⁰⁴ Pamela S. Karlan, “Disarming the Private Attorney General” (2003) *Illinois L.Rev.* 183 at 186 (describing how the U.S. Supreme Court has undercut, through successive decisions, “one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general”).

¹⁰⁵ *Equal Access to Justice Act*, 5 U.S.C. 504; 28 U.S.C. § 2412.

¹⁰⁶ Barton H. Thompson, “The Continuing Innovation of Citizen Enforcement” (2000) *U.Ill.L. Rev.* 185 at 185.

¹⁰⁷ *Ibid.* at 198.

enhancing the legitimacy of environmental laws and law-making processes.

Not all commentators are as unequivocally supportive of private attorney general suits as a policy instrument.¹⁰⁸ Some argue, for instance, that state enforcement is more efficient and that private enforcement can disrupt or conflict with state compliance strategies. However, in an article reviewing the state of this debate in the context of competition law enforcement, Roach and Trebilcock conclude that, on balance, the benefits of the American private attorney general model outweigh its drawbacks.¹⁰⁹ In their view, many of the putative disadvantages identified with the model can be largely addressed or mitigated through design measures. As such, they argue that the Canadian federal government should break from tradition, and follow the lead of the United States in allowing for private enforcement of competition laws.

Although from time to time there have been legislative initiatives aimed at curtailing or eliminating the citizen suits and private attorney general provisions,¹¹⁰ these have almost invariably failed. In part, this result may in part be attributable to the fact that such provisions have a strong appeal to a variety of political constituencies:

Liberals promote the private attorney general, in part, as an antidote to what they view as a conservative administration's reluctance to aggressively enforce various regulatory laws. Conservatives find virtue in the private attorney general concept because of its function in 'privatizing' law enforcement pursuant to the ideals of economic efficiency.¹¹¹

B. Commonwealth Jurisdictions

Recent years have also seen growing judicial and extra-judicial recognition of the need to reflect on the relationship between prevailing costs allocation principles and the phenomenon of public interest litigation.

¹⁰⁸ See K. Roach and M.J. Trebilcock *supra* note 102; see also Matthew D. Zinn, "Policing Environmental Regulatory Enforcement: Cooperation, Capture and Citizen Suits" (2002) 21 *Stan. Env'tl L.J.* 81.

¹⁰⁹ Roach and Trebilcock, *ibid.*

¹¹⁰ See ALRC 75, "Costs Shifting – Who Pays for Litigation" (1995), online: The Australian Law Reform Commission, online: <<http://www.austlii.edu.au/au/other/alc/publications/reports/75/ALRC75.html#ALRC75>>, "Appendix C" at note 5 referencing the *Common Sense Legal Reforms Bill*, 1994, a bill tabled in Congress to introduce a "loser pays" rule for certain federal litigation (date accessed: 6 July 2004).

¹¹¹ See K. Roach and M.J. Trebilcock, *supra* note 102, fn 50 at para. 25, quoting B.W. Garth, I.H. Nagel & S.J. Player, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Actions" (1988) 61 *S. Cal. L. Rev.* 353 at 353.

The experience of Commonwealth jurisdictions is especially instructive given our shared, “English” approach to costs.

1. Australia

Apart from Canada, the Commonwealth jurisdiction that has seen the most sustained and rigorous discussion of the applicability of traditional costs principles in the realm of public interest litigation is Australia. Triggered by concerns about the impact of prevailing costs rules on access to justice, the federal government mandated the Australian Law Reform Commission (the “ALRC”) to undertake a comprehensive review of relevant law and practice in the realm of public interest litigation and beyond. To this end, the ALRC published an issues paper¹¹² and, later, a consultation paper containing draft recommendations¹¹³ before issuing its final report entitled “Costs Shifting – Who Pays for Litigation” in 1995.¹¹⁴

In relation to costs in public interest litigation, the ALRC’s point of departure was an affirmation of the benefits of public interest litigation.¹¹⁵ These, in its view, included promoting greater certainty, equity, access and confidence in the legal system; creating economies of scale; enhancing market regulation and public sector accountability by facilitating private enforcement; and reducing social costs associated with market and governmental failure. It concluded that existing costs rules could, in many instances, thwart the realization of these benefits. It therefore recommended that courts and tribunals be directed to entertain an application for a “public interest costs order.” Such an order, in its view, would be appropriate where the proceedings would: “determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community”; assist in the “development of the law generally or reduce the need for further litigation”; or “otherwise have the character of [a] public interest or test case....”¹¹⁶

¹¹² Australian Law Reform Commission, “*Who should pay? A review of litigation costs rules*” (Sydney: ALRC, 1994).

¹¹³ Australian Law Reform Commission, “*Litigation cost rules*” (Sydney: ALRC, 1994).

¹¹⁴ ALRC, *supra* note 110.

¹¹⁵ *Ibid.* In chapter 13 of its Final Report, the ALRC grapples with the question of defining “public interest litigation.” Acknowledging that “no clear definition” of the concept “exists in legislation or the caselaw,” the ALRC opines that a “widely accepted approach” equates public interest litigation with cases that affect “the community or a significant sector of the community or involves an important question of law”; an approach that is consistent with the broad definition adopted by the Supreme Court in *Okanagan Indian Band*.

¹¹⁶ *Ibid.* at para. 13.13, 13.19, recommendation 45.

The ALRC emphasized that legislation confirming the jurisdiction to make such orders should make clear that the object of such orders “is to assist the initiation and conduct of litigation that affects the community or a significant sector of the community or will develop the law.”¹¹⁷ In making such orders, it recommended that consideration be given to the respective resources of the parties, their ability to participate in the litigation, and the extent of “any private or commercial interest” they may have in the subject matter of the litigation. That a party possessed “a personal interest in the matter” would, therefore, not preclude an order being made. A broad discretion to tailor the order to the circumstances would remain with the court or tribunal in question. As such, a public interest costs order could stipulate, among other things, a no-way costs rule (each party bearing their own costs), a full or partial immunity from adverse costs (a one-way costs rule), or a full or partial indemnification for costs in any event.

According to the ALRC, a public interest costs order will “facilitate public interest litigation most effectively if made at the start of proceedings...[by ensuring] the parties to know their position throughout the proceedings.”¹¹⁸ To this end, it recommended that public interest litigants be allowed to apply for such an order at any juncture in the proceedings.

There has, as yet, been no Parliamentary response to the ALRC’s recommendations. However, particularly in the environmental context, there appears to be a considerable measure of judicial sympathy for the concerns it addresses, if not the substance of the remedies it proposes. For example, in a 1989 speech delivered at an international conference on environmental law, Justice Toohey stated:

There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that ‘costs follow the event’ is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a governmental instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.¹¹⁹

The adverse access to justice implications of the two-way costs rule have also been the subject of continuing judicial commentary in the years following the ALRC report. Most notable of these is the High Court of

¹¹⁷ *Ibid.* at para. 13.21.

¹¹⁸ *Ibid.* at para. 13.27.

¹¹⁹ *Ibid.* at para 13.9, also cited in *Oshlack v. Richmond River Shire Council*, *supra* note 77 (N.S.W. Ct.) at 238.

Australia's judgment in *Oshlack v. Richmond River Council*.¹²⁰ The petitioner in this case unsuccessfully challenged a development permitting decision based on concerns about its impacts on endangered fauna. However, the trial judge had declined to award costs having regard to the character of the proceeding as public interest litigation, and the fact that the "prime motivation" for the challenge had been upholding the "public interest and the rule of law."¹²¹

The High Court affirmed the trial judge's decision. Justices Gaudron and Gummow held that although characterizing a case as "public interest litigation" was not a sufficient basis to support a departure from the normal rule that costs follow the event, there were adequate "special circumstances" in the case to justify the manner in which the trial judge exercised his discretion. These included the "worthy motives" of the petitioner; the fact that his environmental concerns were shared by many members of the public; and that the challenge resolved significant legal issues relating to the interpretation of federal environmental laws.

In a concurring judgment, Kirby J. emphasized that in enacting these laws, Parliament had sought to encourage public participation in their enforcement by, among other things, assigning adjudicative responsibility to the Land and Environment Court, where the trial had been heard. Although the legislation in question did not expressly address how, in such cases, costs should be allocated, the public interest character of such litigation deserved careful consideration. In this context, "a rigid application of the compensatory principle...[was] completely impermissible": to do so would "discourage, frustrate or even prevent achievement of Parliament's particular purposes."¹²² While recognizing the definitional difficulties associated with the concept of "public interest litigation", in his view, emerging jurisprudence in a variety of jurisdictions revealed that courts were increasingly taking a "discrete approach" to costs allocation in cases where "a litigant has properly brought proceedings to advance a legitimate public interest, has contributed to the proper understanding of the law in question and has involved no private gain."¹²³

In the wake of *Oshlack*, various unsuccessful attempts to push the doctrinal envelope have been aimed at securing a blanket judicial exemption from adverse costs liability for public interest litigants. Judicial resistance to such proposals is a function of at least two factors: the inherently open-ended nature of the "public interest" category, and the related desire to retain judicial discretion to tailor cost determinations to

¹²⁰ *Oshlack v. Richmond River Shire Council*, *ibid.* per Kirby J.

¹²¹ *Ibid.* at 243-44, cited in *Oshlack*, *supra* note 77 (H.C.A.) per Gaudron and Gummow JJ. at para. 20.

¹²² *Oshlack*, *supra* note 77 per Kirby J. at para 134.

¹²³ *Ibid.* at para 136.

the “special circumstances” of the litigation.¹²⁴ At the same time, there is growing authority to support the proposition that public interest litigation can give rise to special circumstances that will justify a departure from the traditional “loser pays” costs rule, particularly having regard to underlying rationales governing costs allocation.¹²⁵

The recent decision of the Federal Court of Appeal in *Ruddock v. Vadarlis* is apposite.¹²⁶ In this decision the Court observes that in public interest litigation, the rationales upon which the general compensatory principle rests may not always justify costs following the event. According to the Court, in many such cases, the notion that costs should be awarded as a form of damages “is not always tenable”, particularly in the absence of the “element of fault on the part of the loser” as will often be the case in public interest litigation where the relief sought is declaratory in nature.¹²⁷ Nor, in its opinion, does it make sense to advance the goal of ensuring that the winner “should not have to suffer for vindicating its rights” by invariably making the loser pay. This may be a particularly unfair result where the unsuccessful party had good legal ground for their arguments, where the case is close or difficult, and where the party has conducted the litigation in a reasonable way. Citing Canadian academic authority,¹²⁸ the court observes that in these circumstances the costs following the event

may set up a significant barrier against parties of modest means even if the contemplated claim has substantial merit...These criticisms will not justify a global modification, in public interest cases, of the usual rule that costs follow the event. They do however indicate the desirability of avoiding calcification of the discretion with rigid rules governing its exercise.¹²⁹

2. Other Commonwealth Jurisdictions

Costs jurisprudence in the rest of the Commonwealth is evolving in a direction similar to that observed in Australia. Perhaps the most frequently cited public interest case in this regard is the Privy Council decision in an appeal from the New Zealand Court of Appeal: *New Zealand Maori Council v. AG (N.Z.)*.¹³⁰ In this case, the issue was whether legislation, which the appellant claimed threatened the Maori language (taonga), was

¹²⁴ See for example *Ruddock v. Vadarlis* (2001), 110 F.C.R. 452 (Aust. Fed. C.A.), also [2000] F.C.A. 1865.

¹²⁵ *Ibid.*; see also *North Australian Aboriginal Legal Aid Service Inc. v. Bradley* (No. 2), [2002] F.C.A. 564; *Mees v. Kemp* (No 2), [2004] F.C.A. 549.

¹²⁶ *Ruddock*, *supra* note 124 (F.C.A.).

¹²⁷ *Ibid.* at para. 13.

¹²⁸ C. Tollefson, *supra* note 10 at 309-11 and C. McCool, *supra* note 10 at 309.

¹²⁹ *Ruddock*, *supra* note 124 (F.C.A.) at para. 13.

¹³⁰ [1994] 1 AC 466 per Lord Woolf (P.C.).

inconsistent with a treaty between the Crown and the Maori people. While dismissing the appeal, Lord Woolf underscored that the appellants had not been motivated by personal gain, that taonga was an important part of New Zealand's heritage, and that the case served to clarify the law.

English courts have also been grappling with the question of whether and to what extent public interest litigants should be entitled to advance orders as to costs. In *Lord Chancellors Department ex parte Child Poverty Action*, the High Court was asked to make a "pre-emptive order for costs" that would have served to insulate from adverse costs liability two public interest groups that had commenced test case litigation against the Director of Public Prosecutions (DPP).¹³¹ Counsel for the DPP contended that no special jurisdiction to make such a pre-emptive order in public interest cases existed. Dyson J. disagreed, although he conceded that such jurisdiction only arose in exceptional cases. In defining the nature of this jurisdiction, he made reference to the test proposed by the Ontario Law Reform Commission (discussed *infra*). In his view, such an order should only be made where: (1) the issues raised are ones of general public importance; (2) the court is able to sufficiently appreciate the merits of the claim so as to decide it is in the public interest; and (3) an assessment of the respective resources of the applicant and respondent can be made. According to Dyson J., a pre-emptive order would be especially appropriate where the evidence suggests that the respondent "clearly has a superior capacity to bear the costs" and that if such an order is not made the applicant "will probably discontinue the proceedings, and will be acting reasonably in so doing."¹³²

Developments in South African law also reveal a concern to mitigate the potential harshness of the English two-way costs rule in public interest litigation. In the post-apartheid era, discretion to depart from the English Rule has been repeatedly affirmed in the jurisprudence interpreting the new South African Constitution.¹³³ Access to justice has been a dominant rationale for this emerging practice.

More recently, a one-way rule has been judicially interpreted to apply in public interest cases heard by the Land Claims Court. In the foundational decision in this area, the Court opines that cases falling under

¹³¹ *R. v. Lord Chancellor Department ex P. Child Poverty Action Group*, [1998] 2 All E.R. 755 (Q.B.).

¹³² *Ibid.* at para 44.

¹³³ See *SABC and others v. Public Protector* (2001), SACLR LEXIS 122 (High Court, Transvaal Div); *Christian Lawyers Assoc of SA v. Minister of Health* (1998), SACLR LEXIS 58 (High Court, Transvaal Div); *City Council of Pretoria v. Walker* (1998), SACLR LEXIS 27 (Constitutional Court); *De Beer NO v. North Central Local Council and South Central Local Council and others* (2001), SACLR LEXIS 134 (Constitutional Court).

the jurisdiction of this court can be regarded as “falling under a new area of public interest litigation.”¹³⁴ Thus, even though these cases typically involve disputes between private parties (often landlords and their rural, black tenants), the court’s jurisdiction is imbued with a public interest character that mandates an approach to costs that promotes access to justice. In reaching the conclusion that adverse costs immunity is an appropriate way to achieve this objective, the Court invokes Canadian authority in deciding that, notwithstanding the fact that the parties to the litigation were both private parties, a public interest-based, one-way rule should apply. In this regard, the Court relies on Sharpe J.’s reasons in *Mahar v. Rogers Cablesystems Ltd* (discussed above), a public interest case also involving litigation between private parties.¹³⁵

V: Awaiting Challenges in Public Interest Costs Law Reform

When assessing the meaning and implications of the Supreme Court’s decision in *Okanagan Indian Band*, context is critical. This admonition is relevant both retrospectively and prospectively. In the Canadian context, it is a decision that reflects longstanding concerns about access to justice and the ‘public’ value of public interest litigation. It is also a decision that builds upon a legal foundation, largely but by no means exclusively judicially-built, that increasingly evinces an awareness of the realities so eloquently posed by Epstein J. in *Rogers v. Sudbury*.¹³⁶ Context, broadly conceived, can also provide reassurance that we are on the right path. We would argue that the preceding comparative analysis supports this conclusion. However, an awareness of context underscores that there are many questions about the future of public interest costs law reform that *Okanagan Indian Band* does not resolve. It is to these questions we now turn.

A. Procedural Issues in Public Interest Costs Reform

Proponents of costs law reform have long argued that a relatively easily accomplished reform of immeasurable benefit to public interest litigants would be to move forward, in the litigation process, the judicial assessment of costs. Such an innovation would provide such litigants with a much-enhanced ability to assess the costs and risks of proceeding. By facilitating submission of costs issues for judicial determination early in the proceeding, potentially as part of a hearing on standing, public interest litigants could argue for – and in appropriate cases be granted – an immunity from adverse costs liability if their suit is ultimately unsuccessful. By making this grant of immunity conditional, to be

¹³⁴ *Hlatshwayo v. Hein*, [1997] S.A.J. No. 24 at para 18.

¹³⁵ *Ibid.* at para 24.

¹³⁶ *Rogers v. Sudbury*, *supra* note 88.

revisited at the conclusion of litigation, the judicial ability to use costs as a means of overseeing, and potentially disciplining, litigation conduct would remain unimpaired. As we have noted, this simple but effective reform has been advocated or proposed for consideration by a long line of commentators and advisory bodies including, most recently, the British Columbia Attorney General Rules Revision Committee.¹³⁷

Not only would such a reform give public interest litigants the ability to make more reliable assessments about the ultimate cost of litigation (an ability that is particularly important where the litigation holds out no prospect of personal enrichment), as the Ontario Law Reform Commission underscores there are compelling practical and policy reasons to harmonize standing and costs principles, with a view of ensuring that doctrine in these two areas is not working at cross-purposes. As such, there is considerable logic, particularly where the litigant's standing arises under the *Finlay* test, for the courts to entertain submissions on standing and costs at the same juncture.¹³⁸

Seen in this context, the *Okanagan Indian Band* decision is important in three respects: for its affirmation of the broad social utility of addressing costs issues in public interest cases early in the course of such proceedings; for its unequivocal assertion of the judicial jurisdiction to undertake this task; and for its recognition that, in certain exceptional public interest cases, only an interim costs award will satisfy the interests of justice. As we have noted in our earlier discussion of the case, because of the majority's concern to define the exceptional circumstances in which such an award would be justified, their reasons do not fully elaborate the procedural implications of their approach in public interest cases.

We would argue, however, that what emerges from this decision is that courts must now be prepared to engage in a three-stage inquiry with respect to costs where public interest litigants are involved. The trigger for this obligation would be an application, made at any time after commencement of a proceeding, by the putative public interest litigant for a special advance order as to costs. Particulars of this procedure are discussed at greater length in Part II. The stages of this inquiry would entail posing three successive questions: (I) is this public interest litigation? (II) if so, does it meet the exceptional requirements of the test set out in

¹³⁷ See, for example: Anand and Scott, *supra* note 6; the Ontario LRC, *supra* note 45; the Australia LRC, *supra* note 110; and the B.C. Attorney General Rules Revision Committee, *supra* note 1.

¹³⁸ It is recognized that many public interest cases proceed without the need for public interest standing under the *Finlay* test while others are brought under the *Finlay* test, but without any challenge to the litigant's standing by the responding party. In these situations, where there is no preliminary standing hearing, interim costs could be dealt with alone or with any other preliminary matters that arise.

Okanagan Indian Band ? (III) if not, what form of order as to costs will adequately address access to justice/public benefit concerns inherent in the circumstances of the case? In assessing this final question, courts should be encouraged to approach from a broad, remedial perspective. This may justify, in some instances, resort to a one-way order and in others to a no-way order. It may also be appropriate to designate, in some cases, that only a certain proportion of costs will be recoverable. Ordinarily, in keeping with the judicial interest in retaining some discretion during the course of litigation, it is presumed that most such orders will be made on a conditional basis and subject to variance at the conclusion of litigation.

B. Defining the Public Interest Litigation Category

This substantive question is also addressed in *Okanagan Indian Band*, and is likewise discussed earlier in Part II, but merits revisiting. It will be recalled that in *Okanagan Indian Band* the majority deliberately steers away from incorporating into the definition a requirement that the litigant have no ‘personal, proprietary or pecuniary interest in the litigation’. In our view, the Court is on the right track in adopting this approach.

First of all, one may be granted public interest standing under *Finlay* and still have an interest (even quite a substantial one) falling into one or more of these categories.¹³⁹ So, when developing a working definition of ‘public interest litigation’ for costs purposes, it is important to start with a definition that is at least as broad as that employed in *Finlay*. Second, not all public interest litigants secure standing under the *Finlay* public interest test. The *Finlay* test exists to afford standing to litigants who cannot otherwise secure standing otherwise, usually due to the lack of “personal, proprietary or pecuniary interest in the litigation.” However, the fact that a litigant possesses such an interest in the subject matter of a lawsuit does not mean that the proceeding should be treated as “private litigation”.¹⁴⁰ McCool illustrates this simple point by reference to the *Native Women’s Ass’n of Canada v. Canada*,¹⁴¹ a case in which NWAC sought a declaration that the federal government’s decision to fund male-dominated aboriginal organizations in constitutional negotiations preceding the Charlottetown Accord violated the *Charter*. In her words:

Both NWAC and its individual member constituents had personal, proprietary and pecuniary interests in the outcome of the constitutional debate, as well as similar interests in the outcome of the litigation itself. That does not diminish

¹³⁹ J. M. Ross, *supra* note 33.

¹⁴⁰ See for example the overlap of public and private interests in *Little Sisters No.2*, *supra* note 34.

¹⁴¹ [1994] 3 S.C.R. 627, cited in C. McCool, *supra* note 10 at 314.

the public interest significance of the litigation or the significance of the issues that were at stake.¹⁴²

Therefore, by equating ‘public interest litigation’ with the presence of indicators suggesting the case has access to justice and public benefit implications, and eschewing an approach that, in addition, demand that indicators of private interest (personal, proprietary or pecuniary) be absent, the Court in *Okanagan Indian Band* has adopted a sensible approach. This said, there will likely be those who worry that this approach is overly broad and that it in turn may lead to an over-compensation of claimants able to cloak themselves in the public interest mantle. We would argue that this concern conflates two distinct issues: whether, for costs purposes, a suit should be deemed to be ‘public interest litigation’, and what, if any, consequences should flow from this characterization.

Okanagan Indian Band makes it clear that these are distinct matters to be addressed sequentially and discretely by the reviewing court. As we have elaborated above, in our view, the characterization issue is to be addressed in stage I of the analysis. So characterized, the only immediate implication is that the presumption that the indemnification rationale should hold sway is rebutted. The remedial consequences of such a characterization in terms of costs then falls to be addressed in stages II and III. These would include whether there are factors or circumstances present that would make it inappropriate to extend preferential costs treatment to the claimant.

The majority’s reasons in *Okanagan Indian Band* specifically describe how this is to occur under stage II by means of the requirement that the applicant show the litigation will not proceed unless the order is made, that the legal issues raised transcend the applicant’s individual interests, and that there are no overriding concerns about the adverse impact of such an order on the interests of the private litigants who are “caught in the crossfire” of the dispute in question.

We would argue that a similar process of assessment should occur at stage III entailing a weighing of a somewhat broader range of factors. In addition to access to justice and public benefit-related concerns, factors that have been identified in the literature as being relevant at this juncture include: the respective resources of the parties; their respective ability to participate in the litigation; the necessity of commencing or defending the proceedings; the extent and nature of any “private or commercial interest” parties may have in the litigation; the novelty and public importance of the issue(s) presented; and the desirability of avoiding re-litigating issues that have previously been determined.¹⁴³

¹⁴² C. McCool, *ibid.* at 314-15.

¹⁴³ This list of factors draws on recommendations made by the Ontario LRC,

C. Applicability of Public Interest Costs Principles in Litigation Involving Private Parties

Both in identifying cases that merit characterization as ‘public interest litigation’ and in deciding, in those cases, how the discretion to order costs should be exercised, the approach in *Okanagan Indian Band* is one that is careful not to draw *a priori* legal conclusions from the external appearance of a lawsuit or the ostensible legal status of the parties involved. Instead, as we have noted, the inquiry recommended by the case is one that looks more broadly at the issues and concerns arising from the case from a “public benefit” and an “access to justice” perspective. Applying the approach set out in *Okanagan Indian Band*, whether an aboriginal rights claim is ‘public interest litigation’, let alone whether it gives rise to an entitlement to interim costs, will be a highly fact-specific determination. This determination will turn on an admittedly discretionary assessment by the trial court of the access to justice and public benefits implications of the particular claim being brought. If that assessment leads to an affirmative conclusion, this simply means that the presumption that for costs purposes the indemnification rationale should determine the result is suspended. It is then open to a court to consider a range of factors (as just discussed) in determining what type of costs order might be appropriate.

It will be noticed that those factors do not include the formal legal status of the party involved. It would be just as wrong, in our view, to draw legal conclusions about where costs should lie in public interest litigation from whether a party commencing or defending public interest litigation is ostensibly “private”, as it would be to decide that a case should not be considered public interest litigation because one of the parties had a “personal, pecuniary or proprietary” interest in the outcome. In private litigation, a party’s status as a private citizen or private corporation may well be enough in itself to lead to the inexorable conclusion that they are entitled to be indemnified when they succeed in litigation. However, we would contend that adopting this approach in public interest litigation is now clearly inconsistent with the law as set out in *Okanagan Indian Band*. This is because, once it is decided that a suit is public interest litigation the indemnification rationale is no longer to be regarded as a stand-alone justification for ordering costs.

This means that after *Okanagan Indian Band*, it will no longer be open for a trial court in a public interest case to award costs to a private, for-profit entity (as was done by Smith J. in *Sierra Club v. Chief Forester*) on the basis that it is a private citizen. On the other hand, it is clear that the

supra note 45, ALRC 75, *supra* note 110 at chapter 13, and the B.C. Attorney-General’s Rules Revision Committee Discussion Paper on the Tariff of Costs, *supra* note 1 at p. 3.

Supreme Court in *Okanagan Indian Band* was very much alive to the reality that private interests can be drawn into the fray of public interest litigation through no fault of their own, as this is an explicit factor to which they advert as a reason why an interim costs order might not be appropriate in some cases. Accordingly, we would argue that trial courts must now adopt an approach akin to that employed by Sharpe J. in *Mahar v. Rogers Cablesystems*. Here the court was careful not to fall into a trap of taking a categorical approach to the question of costs based on status-based presuppositions. Thus, not only was Sharpe J. able to find that this was public interest litigation despite the absence of a challenge to state action, he also concluded that the defendant's market position, and obligations to the public that came with that position, meant that its claim to indemnification was less compelling than other competing considerations.

This approach to assessing the costs claims of private parties that find themselves engaged in public interest litigation is consistent with American legal doctrine relating to the regulation of public goods and services. In *Munn v. People of State of Illinois*, the U.S. Supreme Court observed that:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the public at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.¹⁴⁴

This 'nature of the interest' test has been relied on by American courts as the basis for deciding whether to award costs against an ostensibly "private" defendant. In such cases, it is the "interest that the plaintiff seeks to protect and not the public or private character of the defendant that is the touchstone."¹⁴⁵ In short, as McCool has contended when approaching

¹⁴⁴ 94 U.S. 113 (1876) at 126.

¹⁴⁵ *Ibid.*, see also: *Southeast Alaska Conservation Council Inc. v. State*, 665 P. 2d 544 (Alaska Supreme Court 1983). Alaska is the only U.S. state that adopts the "English" loser pays rule with respect to costs in civil cases. Courts have mitigated the impact of this rule on unsuccessful public interest litigants by developing a "public interest exception" to this general loser pays rule. In 2003, the Alaska Legislature passed a law (U.S., H.B. 145 *Attny Fees/Bond: Public Interest Litigant*, 2003 Reg. Sess., Alaska, 2003 {enacted}) aimed at eliminating the public interest costs exception which it characterized as having "created an unbalanced set of incentives for parties litigating issues that fall under the public interest litigation exception." In April of 2004, a coalition of conservation organizations, Native groups, and other interested parties challenged the new law (*Native Village of Nanapitchuk v. State of Alaska* (Alaska Super. Ct. 2004) available online at: <http://www.alaskabar.org/opinions/ACF2178.mht>). The Superior Court upheld the challenge on the grounds, *inter alia*,

costs determinations in public interest cases involving private actors:

... the question then is not whether MacMillan Bloedel or Roger Cable systems are more like individual human beings or more like governments, but whether or not they own or control something that is of public consequence and must therefore submit to being controlled for the public good.¹⁴⁶

In summary therefore, the appropriate approach to costs in public interest cases involving private parties is one that avoids status-based determinations and engages instead in a more nuanced assessment of the relative interests and resources of the parties. In particular, where the party responding to the claim occupies a dominant market position, or otherwise owns or controls something of public consequence, it may well be argued that that party should be deemed to have submitted to oversight in the public interest. Where this is the case, trial courts should strive to make costs orders that promote the efficacy of this supervisory function.

D. Recoverability of Costs Where Counsel is Acting Pro Bono

A final issue that *Okanagan Indian Band* addresses in *obiter* is the question of whether and to what extent costs are recoverable in circumstances in which legal counsel is acting on a *pro bono* or reduced fee basis. In public interest litigation, where the client is frequently in no position to pay for counsel's legal fees or disbursements, the viability of taking on such cases *pro bono* from a prospective lawyer's perspective will be very much influenced by whether there is a potential to recover any of these expenses from the other side.

In the past, some doubt existed as to whether a party represented under a *pro bono* retainer was able to sustain a claim as to costs. The reason for this was directly related to the indemnification rationale for costs. As Epstein J. puts it in *Rogers*:

...historically, a party who was not liable to pay costs to his or her own solicitor could not have judgment to recover them against the opposite party... Costs not incurred could not be recovered. Thus, where a solicitor was acting gratuitously or *pro bono*, the party, although successful, could not recover costs.¹⁴⁷

As the dominance of the indemnification rationale has waned, so too has the view that costs are only payable where the prevailing party is

that it "impermissibly impedes access to the courts." An appeal of this decision to the Alaska Supreme Court is pending.

¹⁴⁶ McCool, *supra* note 10 at 316.

¹⁴⁷ *Rogers v. Sudbury*, *supra* note 88 at para. 22.

actually paying lawyer's bills. For example, in its 1995 decision in *Skidmore v. Blackmore*,¹⁴⁸ the B.C. Court of Appeal held that self-represented lay litigants should be entitled to recover legal fees, overruling its earlier decision in *Kendall v. Hunt*.¹⁴⁹ In referring to this case, the majority in *Okanagan Indian Band* quotes the Court of Appeal to the effect that this reversal represents an incremental change in the common law that accords with the "trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigants."¹⁵⁰

The traditional approach in this area has also been rejected in other provinces.¹⁵¹ An illustration of this arises in *Algonquin Wildlands League v. Ontario (Minister of Natural Resources)*, a case that was successfully litigated by lawyers with Sierra Legal Defence Fund.¹⁵² In this case, the respondent argued that since Sierra Legal provided the petitioners with "free legal services", fees associated with these services were not recoverable. The court rejected this argument and awarded costs on a solicitor and client basis, an award that was upheld by the Ontario Court of Appeal.¹⁵³

The decision in *Okanagan Indian Band* would seem to erase any lingering doubt as to the entitlement of public interest litigants to recover costs in circumstances such as these. This is made clear by the majority's endorsement of the trial court's approach to costs in *Re: Lavigne and Ontario Public Service Employees Union*.¹⁵⁴ In that case the plaintiff Lavigne brought a *Charter* challenge to mandatory union dues. The

¹⁴⁸ (1995), 2 B.C.L.R. (3d) 201 (C.A.).

¹⁴⁹ (1980), 16 B.C.L.R. 295 (C.A.), cited in *Skidmore, ibid.* at paras. 20-28 (QL).

¹⁵⁰ *Okanagan Indian Band, supra* note 2 per LeBel J. at para. 24.

¹⁵¹ See the following cases, cited by Epstein J. in *Rogers v. Sudbury, supra* note 88 at para. 22: *Simpson v. Belleville (City) Local Board of Health* (1917), 41 O.L.R. 320 (H.C.); *Ponton v. Winnipeg (City)* (1909), 41 S.C.R. 366; *Gin v. Somers*, [1996] O.J. No. 2625 (Q.L.) (Gen. Div.); *Re Lavigne and Ontario Public Service Employees Union et. al. (No. 2)* (1987), 60 O.R. (2d) 486 (High Ct.), rev'd (1989), 67 O.R. (2d) 536 (C.A.), aff'd [1991] 2 S.C.R. 211.

¹⁵² (1998), 26 C.E.L.R. (N.S.) 163 (Ont. Ct. Gen. Div.).

¹⁵³ As in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 decision, *Algonquin Wildlands* was a situation where the court awarded costs to the public interest litigants on an increased (solicitor and client) scale. In the context of private litigation, increased costs are usually only awarded as a means of judicially disciplining improper conduct. We would argue that in public interest litigation the power to award increased costs should be deployed more frequently even where (as in the cases just noted) there is no suggestion of improper conduct. In deciding this question, we would propose that courts ask: are there particularly compelling public benefit or access to justice considerations present that would justify such an award?

¹⁵⁴ *Lavigne, supra* note 151.

lawsuit was brought with support from the National Citizens Coalition, a conservative advocacy group. At trial, White J. upheld Lavigne's challenge and, despite the fact that his representation (provided by a large downtown Toronto law firm) had been paid for by a third-party organization, ordered that costs were payable. Although the case was overturned on the merits on appeal, the majority in *Okanagan Indian Band* observes that "neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs."¹⁵⁵

VI. Conclusion

To the extent that we share a commitment to promoting access to justice, particularly in public interest cases, we have a shared interest in the development of a costs jurisprudence that recognizes the realities of public interest litigation. The adverse implications of the traditional indemnification approach to costs allocation in public interest litigation are well documented and long-recognized within our own legal system and analogous ones. In this sense, the Supreme Court's decision in *Okanagan Indian Band* is both timely and builds on an existing jurisprudential framework. Mindful of the broader context in which this decision has been rendered, and of the public interest values that are at stake in this area of the law, we hope that courts and legislators will now turn to the task of building on the framework the Supreme Court has articulated.

¹⁵⁵ *Okanagan Indian Band*, *supra* note 2 at para. 28.