
Costs and the Public Interest Litigant

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With its decisions in *Thorson*, *MacNeil*, *Borowski*, and *Finlay*, the Supreme Court of Canada ushered in a new period of liberalized standing rules. These cases, known collectively as the "standing quartet", expanded the categories of parties with a right to challenge a law beyond persons with a strictly personal or private interest. This development has provided an impetus for litigation in the public interest. The author argues, however, that while standing rules have been relaxed, costs rules remain inflexible. This rigidity is the most significant practical barrier to those who, in the public interest, seek to challenge legislation.

The American system, which represents a "no-way" costs rule, with each side paying its own costs, and the English system of "costs-in-the-cause", in which the losing party pays most of the costs of the winning party, are contrasted with the prevailing Canadian costs regime. The Canadian system is based on a partial indemnity of the winner by the loser according to a tariff of costs. The Canadian "party-and-party" costs approach is intended to encourage settlement without hindering access to the courts. Nonetheless, costs awards may still act as a disincentive to some risk-averse individuals or groups. Moreover, new statutory costs regimes in British Columbia and Nova Scotia could result in an increase in party-and-party costs awards. The author suggests that a no-way costs rule be applied to public interest cases in concert with a statutory scheme that would fund public interest litigants. This approach would give practical effect to the important principles implied by the standing quartet and encourage public participation in the judicial process.

La Cour suprême, dans les affaires *Thorson*, *MacNeil*, *Borowski* et *Finlay* est entrée dans une nouvelle période de libéralisation des règles d'intérêt. Ces arrêts, qui sont connus collectivement sous le nom de «quatuor sur l'intérêt», ont élargi le droit de contester une loi au-delà des personnes ayant un intérêt strictement personnel ou privé. Ce développement a donné un élan aux poursuites liées à l'intérêt public. Selon l'auteur, alors que les règles sur l'intérêt ont été assouplies, celles relatives aux coûts sont demeurées inflexibles. Cette rigidité constitue la barrière la plus importante pour ceux qui, dans l'intérêt public, tentent de contester une loi.

Le système américain, où chaque partie paie ses propres coûts, et le système anglais, où la partie perdante paie la plupart des coûts de la partie gagnante, sont comparés au régime canadien sur les coûts. Ce dernier est fondé sur une indemnité partielle du gagnant par le perdant, établie selon des tarifs de coûts. L'approche canadienne «party-and-party» est conçue pour encourager les ententes sans entraver l'accès aux tribunaux. Toutefois, l'imposition des coûts peut encore décourager quelques individus ou groupes qui craignent le risque. De plus, les nouveaux régimes statutaires sur les coûts de la Colombie-Britannique et de la Nouvelle-Écosse pourraient entraîner une augmentation de ces coûts fondés sur l'approche «party-and-party». L'auteur suggère que la règle en vigueur aux États-Unis, en vertu de laquelle chaque partie paie ses coûts, soit adoptée lorsqu'il s'agit d'affaires où l'intérêt public est en cause et que l'on y ajoute un système statutaire qui financerait les parties ayant un intérêt public. Cette approche contribuerait à mettre en pratique les principes fondamentaux qu'impliquent le «quatuor sur l'intérêt» et encouragerait la participation publique au processus judiciaire.

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Introduction

Canada's new approach to standing has marked a profound transformation of the perception of the role of the courts in this country. The quartet of standing cases, *Thorson*, *MacNeil*, *Borowski* and *Finlay*,¹ has increased access to the courts, a right previously limited to persons with personal or private interests.² The quartet provided Canadians with a new opportunity to litigate in the public interest. Much of Canadian law had previously been immune from legal challenge because of stringent standing rules or other barriers to access for potential litigants, such as lack of funds, lack of access to legal services or fear of reprisal. The standing quartet addressed some of these problems by recognizing the value of public interest litigation. *Finlay*, for example, was hailed by some as "a new beginning" in this respect.³ Yet liberalized standing rules address only part of the problem facing potential public interest litigants. Costs, the most formidable barrier to participation, remain a powerful disincentive to public interest litigation.

This article examines the appropriate relationship between costs rules and public interest litigation. We will first survey traditional costs rules and then comment on the impact of these rules on public interest litigation. The following section will survey the common law treatment of public interest cases and examine some new statutory costs regimes. In addition, we will discuss some existing funding schemes and evaluate the arguments in favour of different costs rules for public interest litigation. Finally, we will advance a "no-way" rule for public interest cases in combination with a statutory funding regime.

¹ *Thorson v. Canada (A.G.) (No. 2)* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 [hereinafter *Thorson*]; *MacNeil v. Nova Scotia (Board of Censors)*, [1976] 2 S.C.R. 265, 12 N.S.R. (2d) 85 [hereinafter *MacNeil*]; *Canada (A.G.) v. Borowski*, [1981] 2 S.C.R. 575, [1982] 1 W.W.R. 97 [hereinafter *Borowski*]; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, (*sub nom. Canada (Minister of Finance) v. Finlay*) 33 D.L.R. (4th) 321 [hereinafter *Finlay*].

² See discussion of standing accompanying notes 170ff, below.

³ L.M. Fox, Case Comment on *Canadian Civil Liberties Association v. Canada (Attorney-General)* (1991) 45 Admin. L.R. 107.

A. *Introduction to the Common Law of Costs in Public Interest Litigation*

In the early history of the common law, a successful litigant did not have a right to costs.⁴ By the late thirteenth century, successful litigants were entitled to costs in common law courts while courts of equity had discretion with respect to costs awards. Today, Canadian courts have unlimited discretion in this regard. This discretion is codified in provincial statutes, such as Ontario's *Courts of Justice Act*⁵ which states

131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

As a general rule, a successful litigant has a reasonable expectation to be awarded costs, and such an expectation will be satisfied unless there is a compelling reason to do otherwise.⁶ This rule is called the "costs-in-the-cause" rule or the "English rule".

Costs in Canada are awarded on a party-and-party basis which means that the successful party is entitled to a partial indemnity. Costs will occasionally be awarded on a solicitor-and-client basis, a higher scale of costs, in cases of misconduct by one of the parties or by their solicitors.⁷ The judge may choose

⁴ Much of this section is derived from M. Orkin, *The Law of Costs* (Aurora, Ont.: Canada Law Book, 1993). See also N. Gold, "Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority" (1977) 9 Ottawa L. Rev. 44; G.D. Watson & P. Lantz, "Bringing Fairness to the Costs System — An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings" (1981) 19 Osgoode Hall L.J. 447.

⁵ S.O. 1992, c. 7. An example of a statutory provision imposing costs is found in subsection 178(2) of the *Income Tax Act*, S.C. 1970-71-72, c. 63 which requires the Minister of National Revenue to pay the costs of an appeal from a decision of the Tax Review Board where the amount of tax in issue is less than \$2,500. See *R. v. Creamer*, [1977] 2 F.C. 195, [1977] C.T.C. 20 (T.D.); *R. v. Sills*, [1985] 2 F.C. 200, [1985] 1 C.T.C. 49 (C.A.); *LeClerc v. R.*, [1983] 2 F.C. 231, [1982] C.T.C. 338 (C.A.); *Dresden Farm Equipment Ltd. v. M.N.R.*, [1989] 1 C.T.C. 99, 91 N.R. 325 (F.C.A.).

⁶ See Orkin, *supra* note 4 at 1-1.

⁷ Gold, *supra* note 4. See also P. Lantz, "Costs as a Regulatory Device" (1981) 2 Advocates' Q. 396; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, 78 D.L.R. (4th) 666; *Mobil Oil Canada, Ltd. v. Canadian Superior Oil Ltd.* (1979), 21 A.R. 111, 105 D.L.R. (3d) 355 (Q.B.). Some cases refer to a third level of indemnification, "solicitor-and-own-client" costs, which can be considered a variation on solicitor-and-client costs. See *McCarthy v. Calgary Roman Catholic Separate School District No. 1 (No. 2)* (1980), 30 A.R. 208 (*sub nom.* *McCarthy v. Calgary Roman Catholic Separate School District No. 1*), [1980] 5 W.W.R. 524 (Q.B.).

to award costs in a lump sum or may have them taxed according to tariff schedules. Tariff schedules set out costs of each aspect of litigation (for example, the cost of a statement of claim) and establish various levels of cost determinations based on the amount in issue.⁸

The party-and-party costs rule in Canada is a compromise position between the English and American systems. In England, courts follow the costs-in-the-cause rule, but award almost complete indemnification for costs. By contrast, the United States follows a “no-way” or “American rule” by which each party pays its own costs regardless of the outcome of the litigation. The English approach is a “damage theory of costs” which views costs as compensation for the expense of vindicating a legal right:

[A] successful plaintiff has been put to a legitimate and necessary expense in order to pursue its claim, and so he should be made whole by recovering not only the amount of the claim but the additional expenses as well. The requirement that the unsuccessful defendant pay these expenses arises directly from the findings of fault made by the courts on the substantive issues.⁹

An important consequence of this approach is its ability to limit unmeritorious litigation and encourage settlement.¹⁰ Furthermore, it is an appropriate way to decrease the case load of an overburdened system, at least when the purpose of a lawsuit is to settle a private dispute rather than to establish a principle.

In contrast to the English rule, the American rule originated from the concept that all citizens have a right of access to the courts, a right that some have argued is guaranteed by the Fourteenth Amendment.¹¹ Monroe argues that the purpose of the rule was not to encourage frivolous litigation but “to fulfil the unique American concern that an individual’s basic rights never be diminished. Unfettered access to the courts was deemed an essential element in

⁸ For a description of the functioning of tariffs, see R.C. Stevenson, “Party-and-Party Costs: The New Approach” (1993) 14 *Advocates’ Q.* 129, which describes the new tariff system in New Brunswick.

⁹ R. Anand & I. Scott, “Financing Public Participation in Environmental Decision Making” (1982) 60 *Can. Bar Rev.* 81 at 98. See also *London Scottish Benefit Society v. Chorley* (1884), 13 Q.B.D. 872 at 875: “I should have thought that a person wrongfully brought into litigation ought to be indemnified against the expenses to which he is unjustly put.”

¹⁰ Gold, *supra* note 4 at 59.

¹¹ See *ibid.* at 57, although some authors have traced the American Rule back to “a pervasive antipathy towards attorneys as a class, together with the suspicion that they charged oppressive fees” (P.A. Monroe, “Comment: Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access” (1981) 46 *Albany L. Rev.* 148 at 151 [references omitted]).

the protection of such rights.”¹²

B. The Canadian Costs Rule and Public Interest Litigation

Canada’s partial indemnity rule is said to encourage settlement without destroying the accessibility of the courts. However, as Anand and Scott point out, the English and Canadian approaches presume

that the individual who is pursuing or protecting his private economic interest will be properly influenced and guided by the economic impact of legal costs and that only claims that are justifiable on economic grounds will be litigated.¹³

Clearly this assumption is not always true in public interest litigation, where different motivations hold sway.

Public interest litigation defies precise definition, although Fox defines it as

litigation having a wide impact, either because of the importance of the issues raised or due to the extent of the practical impact of the proceedings on others, especially where the plaintiff or applicant does not stand, personally, to achieve a financial or economic benefit from the proceedings.¹⁴

It has also been described as “any action in which a plaintiff who individually has no protected interest seeks to represent the public interest whether or not the challenged ... action affects him differently than any other person,”¹⁵ and more simply as “proceedings which are or may be recognised as having a public element.”¹⁶ Anand and Scott define public interest litigation as “comprising those views which are not otherwise adequately represented by parties with a significant personal or economic stake in the outcome of the

¹² Monroe, *ibid.* at 153 [references omitted].

¹³ Anand & Scott, *supra* note 9 at 98. For models that predict the incidence of civil litigation based on economic incentives, see S. Shavell, “Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs” (1982) 11 J. Legal Stud. 55; W.M. Landes, “An Economic Analysis of the Courts” (1971) 14 J. of L. & Econ. 61; R.A. Posner, “An Economic Approach to Legal Procedure and Judicial Administration” (1973) 2 J. Legal Stud. 399; J.P. Gould, “The Economics of Legal Conflicts” (1973) 2 J. Legal Stud. 279.

¹⁴ L.M. Fox, “Costs in Public Interest Litigation” (1989) 10 Advocates’ Q. 385.

¹⁵ A. Homburger, “Private Suits in the Public Interest in the United States of America” (1973-74) 23 Buff. L. Rev. 343 at 387.

¹⁶ Law Reform Commission of Australia, *Standing in Public Interest Litigation* (Canberra: Australian Government Publishing Service, 1985) at 26.

proceeding.”¹⁷ Although we will adopt Anand and Scott’s definition of public interest litigation, it is clear that all definitions lead to one conclusion: public interest litigation will not frequently produce significant financial gain for the plaintiffs and the risks of litigating are therefore increased.¹⁸ The use of the English Rule (costs-in-the-cause) to discourage cases in which the possibility of pecuniary gain is insufficient to counterbalance the costs of litigating means not only that all types of litigation will be reduced, but also that public interest cases will be discouraged in a manner disproportionate to other types of litigation. This will be due to the minimal likelihood that potential success will offset financial risk.

Under the present system in Canada, there are two major financial barriers to public interest litigation. First, public interest litigants must obtain funding to cover their own legal costs and possibly those of the other side should they lose. Although some financial aid is available to public interest litigants from organizations such as Women’s Legal Education and Action Fund (“LEAF”) and the Canadian Environmental Defence Fund (“CEDF”), these resources are limited in application to both subject matter and quantum.¹⁹ For example, groups such as the Center for Equality Rights in Accommodation may be able to offer the services of a staff lawyer and some administrative help without charge to the plaintiff, yet will be unable to absorb an adverse cost award. It is sometimes possible to obtain prior indemnification from a government source, but this is difficult when the amount of the award is not only unknown but unpredictable.²⁰ If the winning party is the Attorney General, it may be possible to bargain down an adverse cost award, but this is an unpredictable route.²¹ The risk of an adverse cost award is increased in complex cases such as *Charter*²² challenges where public interest litigants may plead against a large and expensive law firm or well-funded corporate legal department.

Second, public interest litigation is also discouraged by the potential obligation to provide security for costs. As with other cost orders, the court has

¹⁷ Anand & Scott, *supra* note 9 at 82.

¹⁸ Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989) at 153 [hereinafter *Report on Standing*].

¹⁹ For a brief description of these two organizations, see Fox, *supra* note 14 at 399-402.

²⁰ Interview with M. Truemner, staff lawyer for the Centre for Equality Rights in Accommodation (13 August 1993) Toronto.

²¹ For example, in the spring of 1994 Elizabeth Symes was in the process of negotiating costs with the Attorney General’s office. Symes challenged the non-deductibility of child care expenses from business income in *Symes v. M.N.R.*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470.

²² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

absolute discretion with regard to security for costs. Rule 56.01 of Ontario's *Rules of Civil Procedure* states:

In a proceeding where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs,

the court, on motion by the defendant or respondent, may make such order for security for costs as is just.

The obligation to provide security for costs may bring impending litigation to a halt if the plaintiff does not have adequate financial resources. Defendants may thus ask for security as a stalling tactic.²³

In *Kennett v. Health Sciences Centre*,²⁴ the plaintiffs intended to challenge the constitutionality of certain provisions of Manitoba's *Child and Family Services Act*²⁵ which allowed the hospital to apprehend a young Jehovah's Witness to give him a blood transfusion. The defendants requested security for costs on the grounds that the plaintiffs were not residents of Manitoba. The trial judge denied the security request on the grounds that the issues were important,

²³ L.A. Vador, "Security for Costs: Stopping Plaintiffs in Their Tracks" (1988) 7:2 *Advocates' Soc. J.* 26 at 29.

²⁴ (1991), 76 *Man. R. (2d)* 47, 83 *D.L.R. (4th)* 744 (C.A.) [hereinafter *Kennett* cited to *D.L.R.*].

²⁵ *S.M.* 1985-86, c. 8.

the family was unable to pay costs, and the family had not gone to a Manitoba hospital by choice but by virtue of an arrangement between the governments of Ontario and Manitoba. The Court of Appeal reversed the trial judgment, finding that “[t]he right to involve the individual defendants in this constitutional challenge must be counter balanced with the responsibility of securing their costs”²⁶ and ordered the Kennetts to pay a total of \$46,000 in security for costs. This case clearly illustrates the potential power of security for costs as a litigation strategy.

The case law also provides, however, counterexamples to *Kennett*. For example, in *John Wink Ltd. v. Sico Inc.*,²⁷ the Court took a more sympathetic view. The defendant demonstrated that the plaintiff did not have the financial resources to bear costs if unsuccessful. The plaintiff did not dispute this, but argued that to stop the action because of the inability to bear costs would be a “gross injustice”. Reid J. agreed:

[U]nless a claim is plainly devoid of merit, it should be allowed to proceed ... While the adoption of this standard might allow some cases to go to trial and that the trial will prove should not have proceeded, nevertheless the danger of injustice resulting from wrongly destroyed claims that should have been permitted to go to trial is to my mind a greater injustice.²⁸

A more recent Nova Scotia case directly considered the impact of security for costs on public interest litigation. In *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*,²⁹ the plaintiffs challenged the constitutionality of a waste incinerator on the grounds that the resulting damage to public health and to the environment would contravene sections 7 and 15 of the *Charter*. The defendant requested security on the basis that the citizens’ group was a “nominal plaintiff”. Glube J. stated that there is “apparently no case law supporting the position that a public interest group is a ‘nominal plaintiff’ and therefore should provide security for costs.”³⁰

To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have “serious and chilling results”. It would affectively [*sic*] end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for

²⁶ *Kennett*, *supra* note 24 at 749.

²⁷ (1987), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187 (H.C.J.) [hereinafter *John Wink* cited to O.R.].

²⁸ *Ibid.* at 708-709.

²⁹ (1993), 122 N.S.R. (2d) 1, 103 D.L.R. (4th) 409 (S.C.T.D.) [hereinafter *Coalition of Citizens* cited to N.S.R.].

³⁰ *Ibid.* at 22.

costs at this time.³¹

The disparate impact of security for costs on low-income plaintiffs has caused at least one court to find that orders for security violate section 15 of the *Charter*.³² However, the weight of the jurisprudence supports the constitutionality of security for costs,³³ the rationale being that it creates equality between the litigants because both sides can enforce judgment for costs without additional expense and inconvenience.³⁴ The result is that public interest litigation can be diverted by strategic manoeuvres on the part of the defendants.

Third, costs also affect intervention strategies. In most Canadian jurisdictions, intervenors may participate as friends of the court (*amicus curiae*) or as parties to litigation.³⁵ Friends of the court usually present only written submissions, whereas parties are entitled to present evidence and to conduct cross-examination.³⁶ The degree of participation in the proceedings usually

³¹ *Ibid.*

³² *Kask v. Shimizu* (1986), 69 A.R. 343, 28 D.L.R. (4th) 64 (Q.B.) [hereinafter *Kask* cited to A.R.].

³³ See e.g. *Crothers v. Simpson Sears Ltd.* (1988), [1988] 4 W.W.R. 673, 51 D.L.R. (4th) 529 (Alta. C.A.); *Kiyon v. Gagnon* (1988), 67 Sask. R. 238, 25 C.P.C. (2d) 242 (Q.B.); *Garnett v. Zurich Insurance Co.* (1987), 83 N.B.R. (2d) 121 (Q.B.).

³⁴ *Kask*, *supra* note 32 at 355.

³⁵ The relevant sections of Ontario's *Rules of Civil Procedure* are:

- 13.01(1) Where a person who is not a party to a proceeding claims,
- (a) an interest in the subject matter of the proceeding;
 - (b) that he or she may be adversely affected by a judgment in the proceeding; or
 - (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
- the person may move for leave to intervene as an added party.

- 13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

³⁶ For more on these two types of intervention, see K. Busby, "Interventions Under the New Manitoba Rules: *Merry v. Manitoba* and *Law Society of Manitoba v. Lawrie*" (1990) 11 *Advocates' Q.* 372; P. Muldoon & D. Scriven, "Intervention as Added Party: Rule 13 of The Ontario Rules of Civil Procedure" (1985) 6 *Advocates' Q.* 129; D. Scriven & P. Muldoon, "Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1986) 6 *Advocates' Q.* 448.

determines whether or not an intervenor will be liable for costs.³⁷ As a general rule, parties to the litigation will be liable for and may be awarded costs, while friends of the court are neither liable for costs nor can they be awarded costs.³⁸ In *Sunburst Coaches Ltd. v. Romanchuck*,³⁹ where Ocean Accident and Guarantee Corporation was a third party, Egbert J. said:

The third party, on its own application, became a party to and actively defended the action, and by so doing made itself subject to costs. I see no reason why the plaintiff should not have judgment against the third party as well as against the defendant, for its costs.⁴⁰

There is little indication that costs rules for intervenors are applied differently in the context of public interest intervention.⁴¹ Davison J. in *Hines v. Nova Scotia (Registrar of Motor Vehicles)*⁴² stated that a court would consider whether an intervenor's interest was public or private in awarding costs,⁴³ but the implications of this statement are not apparent in the judgment. In *Hines*, Judge Davison awarded costs to a successful intervenor, the Canadian Diabetes Association, on the ground that "it had a very real concern about the outcome."⁴⁴ It is unclear whether this "real concern" refers to the degree of the intervenor's participation in the proceedings, its motive, or some other factor. It is also unclear whether this concern would have led the trial judge to award costs against the intervenor had the plaintiff lost the case. In *Hi-Fi Novelty Co.*

³⁷ Orkin, *supra* note 4 at 2-9.

³⁸ P. Muldoon, *The Law of Intervention: Status and Practice* (Aurora, Ont.: Canada Law Book, 1989) at 108, 153. See e.g. *Beard v. Darmouth (City of)* (1981), 49 N.S.R. (2d) 465, 23 C.P.C. 161 (S.C.T.D.); *Milina v. Bartsch* (1985) 63 B.C.L.R. 122, 1 C.P.C. (2d) 269 (S.C.).

³⁹ (1953), 9 W.W.R. (N.S.) 385 (Alta. T.D.).

⁴⁰ *Ibid.* at 392.

⁴¹ See e.g. *Re Lavigne & O.P.S.E.U. (No. 2)* (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86 (H.C.J.) [hereinafter *Lavigne* cited to O.R.], discussed *infra* note 57 and accompanying text; *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1992), 10 O.R. (3d) 321, 96 D.L.R. (4th) 45 (C.A.) [hereinafter *B.(R.) v. Children's Aid Society* cited to O.R.], discussed *infra* note 90 and accompanying text. This case was appealed to the Supreme Court of Canada. The appeal was dismissed, as was the cross-appeal regarding costs (*B.(R.) v. Children's Aid Society of Metropolitan Toronto* (27 January 1995), Ottawa 23298 (S.C.C.)). Cost issues are also relevant to motions to intervene. In *John Doe v. Ontario (Information & Privacy Commissioner)* (1992), 53 O.A.C. 236, 7 C.P.C. (3d) 33 (Div. Ct.), the Canadian Civil Liberties Association's application for status as an added party as a friend of the court was dismissed with costs on the grounds that it was acting partly in the public interest and partly in its own interest.

⁴² (1990), 99 N.S.R. (2d) 167, 78 D.L.R. (4th) 162 (S.C.T.D.).

⁴³ Costs ruling: (1992), 105 N.S.R. (2d) 240 at 247, 284 A.P.R. 240 (S.C.T.D.) [hereinafter *Hines* cited to N.S.R.].

⁴⁴ *Ibid.*

v. *Nova Scotia (A.G.)*,⁴⁵ the trial judge agreed with the “very real concern” test formulated in *Hines*, yet still awarded a decreased level of costs to the intervenors on the ground that they did not participate in the proceedings to the same extent as did the parties.

Thus, the jurisprudence on costs for public interest intervenors provides little practical guidance. To the extent that predictability exists, individuals or groups intervening in the public interest will have to significantly curtail their participation if they do not have the financial resources to risk an adverse cost award.⁴⁶

⁴⁵ (1993), 121 N.S.R. (2d) 63, 335 A.P.R. 63 (S.C.T.D.).

⁴⁶ The use of costs as a litigation strategy is also well-illustrated by the SLAPP (Strategic Lawsuits Against Public Participation) suit, an American phenomenon which could spread to Canada. A SLAPP counter-suit is “a meritless action ... whose primary goal is not to win the case but rather to silence or intimidate citizens or public officials who have participated in proceedings regarding public policy or public decision making” (J.E. Sills, “SLAPPS (Strategic Lawsuits Against Public Participation): How Can the Legal System Eliminate Their Appeal?” (1993) 25 Conn. L. Rev. 547 at 548-49). SLAPP suit plaintiffs, who are typically defendants in suits involving public interest litigants, usually base their actions on common law torts of defamation, malicious prosecution, abuse of process, interference with contractual relations or interference with prospective advantage (Note, “Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions” (1975) 74 Mich. L. Rev. 106 at 107).

The kind of intimidation produced by a SLAPP suit serves to persuade the public interest plaintiff to drop the original lawsuit, to dissuade other potential plaintiffs from bringing similar lawsuits, and to drain the resources of public interest groups. Although SLAPP counter-suits rarely reach trial (*ibid.* at 108), they deter participation through the threat of large damage awards, sometimes running into the tens of millions of dollars (*ibid.*). They also deter participation because plaintiffs often cannot afford the expense of defending protracted SLAPP counter-suits in addition to the initial public interest suit. Even if the public interest plaintiff is likely to win the lawsuit, the expenses incurred along the way may either be too high for the organization to absorb or may result in diversion of resources from other activities (T.A. Waldman, “SLAPP Suits: Weaknesses in First Amendment Law and in the Courts’ Responses to Frivolous Litigation” (1992) 39 U.C.L.A. L. Rev. 979 at 993-94). As a result, according to some commentators, SLAPP suits are a threat to political expression, and possibly a violation of the First Amendment. See also S.A. McEvoy, “‘The Big Chill’: Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights” (1990) 17 Hastings Constitutional L.Q. 503; F. Schauer, “Fear, Risk and the First Amendment: Unravelling the ‘Chilling Effect’” (1978) 58 Boston U. L. Rev. 685.

I. Responses to Public Interest Cases

A. *The American Rule*

The Canadian common law response to public interest cases has been one of uncertainty with few articulated principles. However, if a general position can be identified, it is that the American, or no-way, rule will be applied to cases litigated in the public interest. Many judges will decide not to award costs when an issue is novel⁴⁷ or of importance to the public.⁴⁸ The jurisprudence gives some clues as to the rationale for this general tendency. The most frequently cited reason is that costs would discourage potential litigants from bringing forward claims the resolution of which would benefit the public.

A classic example of such an order is the trial judgment in *Allman v. Northwest Territories*.⁴⁹ In this case, Allman unsuccessfully challenged the constitutionality of voter eligibility under a statute purporting to regulate the vote regarding the possible division of the Northwest Territories. De Weerd J. noted that costs-in-the-cause was the general rule but chose instead to order that each side pay its own costs. The novelty of the issues was somewhat responsible for the judge's order, but the thrust of his reasoning was that the applicants should not be penalized for attracting judicial consideration to a question of significant interest to the general public. According to Justice De Weerd, the "issues were entirely novel and of possibly far-reaching public importance. And they clearly deserved to be submitted for judicial consideration."⁵⁰ It was particularly significant that the issues at stake implicated the *Charter*:

⁴⁷ *E.g. Jensen v. Canadian National Railways*, [1943] 2 W.W.R. 209, 56 C.R.T.C. 89 (Sask. C.A.); *Poizer v. Ward* (1947), 55 Man. R. 214, [1947] 4 D.L.R. 316 (C.A.); *Abramovic v. Canadian Pacific Ltd.* (1989), 69 O.R. (2d) 487 (H.C.J.); *Re Rizzo & Rizzo Shoes Ltd.* (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246 (Ont. Ct. (Gen. Div.)); *Columbos v. Carroll* (1985), 50 O.R. (2d) 593, 1 C.P.C. (2d) 59 (S.C.); *Re Blainey & Ontario Hockey Association* (1985), 52 O.R. (2d) 225, 21 D.L.R. (4th) 599 (Div. Ct.); *Stewart v. Mississauga (City of) Fire Marshal* (1988), 64 O.R. (2d) 403, 28 O.A.C. 29 (Div. Ct.) [hereinafter *Stewart*].

⁴⁸ *Dalhousie University v. Halifax (City of)* (1976), 9 N.S.R. (2d) 643, 53 D.L.R. (3d) 610 (S.C.A.D.); *Chater v. Dartmouth (City of)* (1975), 20 N.S.R. (2d) 34, 62 D.L.R. (3d) 122 (S.C.T.D.); *Re Lochhead & Minister of Correctional Services* (1978), 22 O.R. (2d) 673, 94 D.L.R. (3d) 274 (Div. Ct.); *Stewart, ibid.*; *Ozog v. Ontario (Registrar of Motor Vehicles)* (1979), 26 O.R. (2d) 178, 102 D.L.R. (3d) 147 (H.C.J.).

⁴⁹ [1983] N.W.T.R. 32, 44 A.R. 170 (S.C.); costs ruling: [1983] N.W.T.R. 231, 46 A.R. 61 (S.C.) [hereinafter *Allman* cited to N.W.T.R.].

⁵⁰ *Ibid.* at 232.

I do not intend to go so far as to suggest that costs should be denied to a government or its representative in all cases where a citizen has unsuccessfully, and yet in good faith and reasonably, sought a remedy from the court on the basis of the Canadian Charter of Rights and Freedoms, or on other constitutional grounds. But at this stage in the life of the Charter, given its wide impact on all facets of our legislation, it is at least incumbent upon the court to consider whether, in all the relevant circumstances, costs should follow the event.⁵¹

The Court then took guidance from the Supreme Court's treatment of *Borowski*, where leave was granted on the condition that Borowski's solicitor-and-client costs be paid by the Crown regardless of the outcome of the case. Therefore, in *Allman*, the argument for the no-way rule rested not on an equality rationale but on the principle that *Charter* interpretation is of benefit to Canadians in general. As De Weerd J. said, "a citizen acting in the general interest and not merely on his own behalf should not have to bear the burden of costs where he has reasonably and in good faith brought before the courts a question as to the validity of legislation which is the subject of public controversy."⁵² An appeal from the judgment was dismissed by the British Columbia Court of Appeal⁵³ but the Court was not in agreement with the opinion of the trial judge regarding costs. It did not discuss costs directly as this was not the subject of the appeal; but the Court did award appeal costs to the government.

In *Harrison v. University of British Columbia*,⁵⁴ the plaintiff sought to challenge the constitutionality of the university's mandatory retirement policy. The defendants were successful at trial and requested costs. However, Taylor J. stated:

The plaintiffs have facilitated the prompt and economic disposition at trial of issues of very wide national concern and in so proceeding with this matter have rendered a service to the public at large. The matters raised can only be resolved by the higher courts, and must be resolved there, and I do not believe that the trial decision will be of particular significance in the ultimate resolution of these issues. To burden the plaintiff and petitioner with the university's costs, in addition to their own, would serve only to impede them in proceeding with this important litigation and would not, in my view, serve the interests of justice.⁵⁵

⁵¹ *Ibid.* at 234.

⁵² *Ibid.*

⁵³ *Allman v. Northwest Territories*, [1984] N.W.T.R. 65, 50 A.R. 161 (C.A.).

⁵⁴ [1986] 6 W.W.R. 7, 30 D.L.R. (4th) 206 (B.C.S.C.).

⁵⁵ *Harrison v. University of British Columbia*, [1987] 2 W.W.R. 378 (B.C.S.C.): application by defendant for costs at trial.

Again, the Court seems motivated by the desire to facilitate the interpretation of the *Charter* for the benefit of Canadians in general. Although Taylor J. did not present any evidence on this point, the judge seemed reluctant to order costs for fear of jeopardizing the suit. The case eventually reached the Supreme Court of Canada; however, as in *Allman*, the costs ruling by the trial judge was not affirmed. The Supreme Court gave costs to the successful party, the University of British Columbia.⁵⁶

In *Lavigne*⁵⁷ the Court emphasized the importance of access to justice for potential *Charter* litigants. In that case, the appellant alleged that his freedom of association had been violated by a compulsory union dues check-off provision. The High Court of Justice, deciding in favour of the plaintiff, ordered that he should receive sixty per cent of his costs as he was sixty per cent successful. Costs were to be paid not only by the OPSEU but also by the Canadian Labour Congress, the Ontario Federation of Labour and the National Union of Provincial Government Employees, all of whom were acting as intervenors.

The respondent made two arguments regarding the imposition of costs. First, Lavigne should not recoup costs as he had not spent any of his own money. The Court had found as fact that “[s]ubstantially all of the costs of the applicant in bringing this application have, to date, been paid for by the National Citizens Coalition [“NCC”]”, that the “arrangement between the applicant and the NCC is such that any costs ordered against the applicant would be discharged by the NCC as far as the NCC is able” and that “[a]ny proceeds of a costs award to the applicant would be paid over by the applicant to the NCC.”⁵⁸ The respondent also argued that the important and novel nature of the case precluded a costs order.

White J. held that a costs order for Lavigne, the successful applicant, was appropriate and rejected the idea that support from an interest group should affect cost awards:

In my view, it is desirable that *Charter* litigation not be beyond the reach of the citizen of ordinary means. The citizen of ordinary means is a term that covers, of course, the vast bulk of Canadians. There are few individuals, regardless of their walk of life, who could afford *Charter* litigation of the

⁵⁶ [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55.

⁵⁷ See also *Southam v. R.* (1985), 1 W.D.C.P. 254 (Ont. H.C.J.).

⁵⁸ *Lavigne*, *supra* note 41 at 523.

type experienced in this application.⁵⁹

I prefer to rest the exercise of my discretion on the principle that individual Canadians, who would otherwise find the costs of *Charter* litigation beyond their means, should not be discouraged from asserting their *Charter* rights simply because, if they accept third party financial assistance, they will be deprived of the costs of the litigation. I, therefore, have determined that costs may be awarded in this case.⁶⁰

Lavigne was appealed to both the Ontario Court of Appeal and the Supreme Court of Canada.⁶¹ At the Court of Appeal, the majority ruled against *Lavigne* and ordered him to pay costs to the OPSEU and to the intervenors. The Supreme Court denied the appeal and affirmed the costs order of the court below without further discussion. Thus, not only did the Supreme Court refuse to consider White J.'s analysis of interest group funding as a reaction to the deterrent effect of costs, but it increased the harshness of its costs order by ordering *Lavigne* to pay intervenor costs as well. The case represents a valuable but missed opportunity to lay down basic costs principles, especially since the lower courts had already explored the issue.

Development of the law is not the only motivation for the use of the no-way rule in public interest litigation. In *Sierra Club of Western Canada v. British Columbia (A.G.)*,⁶² the Sierra Club wished to make representations to the Chief Forester before a new forest management plan was approved. The respondents had already granted permits to logging companies, permits which the Sierra Club requested be set aside. The respondents won and asked for costs. The Court refused to order costs against the environmental group as it was concerned that costs orders in controversial public cases would bar such disputes from the courtroom. The Court stated:

Disputes involving environmental issues, such as this one, are all too liable to provoke confrontations outside 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.⁶³

⁵⁹ *Ibid.* at 526.

⁶⁰ *Ibid.* at 528.

⁶¹ *Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536, 56 D.L.R. (4th) 474 (C.A.), aff'd [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545.

⁶² (1991), 83 D.L.R. (4th) 708 (B.C.S.C.).

⁶³ *Ibid.* at 716.

Here, the Court recognized the need for access to justice for all individuals and groups on the ground that such access is needed to encourage legal resolution of conflicts and to preserve law and order. The court is seen as an institution which serves to aid the proper functioning of the democratic process.

B. The English Rule

Some courts have abandoned the no-way rule and awarded costs in public interest cases. There are various reasons for this. Sometimes costs-in-the-cause belies the difference between public interest litigation and other types of litigation. In other instances, judges have wished to avoid perceived unfairness to the defendant. Use of costs-in-the-cause may also reflect the court's discomfort with a distributional role, as will be discussed below.

In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*,⁶⁴ the Court was required to determine the validity of agreements between the Canadian Commercial Bank ("C.C.B.") and other institutions. The C.C.B., through various agreements, had divided its loans between various institutions; it was subsequently put into liquidation. The Canada Deposit Insurance Corporation ("C.D.I.C.") challenged the agreements and lost. Wachowich J. noted that the situation was analogous to *Allman* in that "both cases involve important legislation and the issues are of possibly far-reaching public importance," yet the judge refused to deny costs to the C.C.B. and "penalize the successful participants, who have been innocent of any wrongdoing."⁶⁵

Allman was also considered in *Welk v. Saskatchewan Social Services Appeal Board*⁶⁶ where the applicant requested judicial review for the termination of social assistance. The applicant was successful, but Saskatchewan Social Services argued that costs should not be awarded because the litigation was in the public interest. Grotsky J. disagreed. Subsequent jurisprudence has interpreted this case as a rejection of *Allman*,⁶⁷ yet the Court decided to award costs in this case precisely because, unlike in *Allman*, Saskatchewan Social Services could not be seen as operating in the public interest.⁶⁸ Furthermore, the Court may have been influenced by the fact that the

⁶⁴ (1986), 44 Alta. L.R. (2d) 285, [1986] 4 W.W.R. 451 (Q.B.); costs ruling: (1987), 50 Alta. L.R. (2d) 1, [1987] 3 W.W.R. 160 (Q.B.) [hereinafter *C.D.I.C.* cited to Alta. L.R.].

⁶⁵ *C.D.I.C.*, *ibid.* at 5.

⁶⁶ (1986), 44 Sask. R. 252, [1986] 2 W.W.R. 333 (Q.B.) [hereinafter *Welk* cited to Sask. R.].

⁶⁷ *R. v. Allen* (1987), 87 A.R. 332 (Q.B.).

⁶⁸ In *Welk*, *supra* note 66 at 261, Grotsky J. wrote: "I am satisfied that in bringing the application, the applicant was not motivated by a desire to have s. 10(2) of the *Regulations* interpreted as

no-way rule would deny costs to a social assistance recipient, whereas, in *Allman*, use of the rule denied costs to the government.

Comments on costs in public interest litigation are also found in *obiter dicta* in *Turner-Lienaux v. Nova Scotia (A.G.)*.⁶⁹ In this case a laboratory technician challenged the results of a job competition conducted by the Civil Service Commission and the Victoria General Hospital in Halifax. The Court rejected all arguments made by the plaintiff, including the suggestion that costs not be awarded in a case where the issues are novel. Madam Justice Roscoe held that the issues were neither in the public interest, nor were they novel, and that even if they were, the Crown would still have been entitled to costs.⁷⁰

The leading case rejecting differential treatment of public interest litigants is perhaps *Reese v. Alberta (Minister of Forestry, Lands and Wildlife)*.⁷¹ In this case, the applicants (individuals and public interest groups advocating environmentalism) requested judicial review of forest management agreements between Alberta and Daishowa Canada Corporation. The applicants were denied judicial review and the respondents requested costs. The applicants argued that their request was of public benefit as no one else would have challenged the agreements. Furthermore, they argued that the threat of adverse costs awards would effectively undermine the possibility of public interest standing.

Justice McDonald considered the economic implications of using the no-way rule:

[T]he successful party here — the Crown, or, “Alberta” — has a purse the contents of which are raised from the taxpayers of Alberta. If the court were to decide that no costs be recovered by the Crown from the unsuccessful applicants, that would amount to requiring the taxpayers to foot the entirety of the bill of successfully defending the validity of an act of government.⁷²

McDonald J. felt that it would be unfair to impose taxes on ratepayers who had not chosen to proceed with the litigation. However, the judge immediately

a matter of public interest. He had a personal interest, albeit in the result the public interest may too be served.”

⁶⁹ (1992), 115 N.S.R. (2d) 200, 314 A.P.R. 200 (S.C.T.D.) [hereinafter *Turner-Lienaux* cited to N.S.R.].

⁷⁰ *Ibid.* at 214.

⁷¹ (1992), 85 Alta. L.R. (2d) 153, 87 D.L.R. (4th) 1 (Q.B.); costs ruling: (1992), 5 Alta. L.R. (3d) 40, [1993] 1 W.W.R. 450 (Q.B.) [hereinafter *Reese* cited to Alta. L.R.].

⁷² *Ibid.* at 45-46.

backtracked, stating that funding burdens should not be the “paramount consideration”, but should merely be a factor in costs decisions. McDonald J. seemed willing to use the no-way rule in “close cases” but was adamant that the case at bar was not such a case.

The second branch of Justice McDonald’s analysis was the perception that the courts were being used as a political forum:

To the extent of such extraneous and essentially political, non-judicial elements of the applicants’ case, the applicants’ plea that no order that they pay costs be made, if accepted, would encourage such public interest groups to use the court as a forum to make what would be essentially a political statement. The proper forum for such groups to do so is in the political process — through advocacy within and outside political parties, and to government and the legislature.⁷³

This view is not uncommon.⁷⁴ The costs ordered by McDonald J. in *Reese* were, nevertheless, a compromise. The appellants requested no costs and the respondents requested costs at the level of Column 6 of Alberta’s tariff schedules. McDonald J. awarded costs at Column 3 (a less expensive level), and thus clouded the significance of the judgment. Andrea Moen, representing the Crown, said that the decision would force public interest groups to “think very carefully before they take a case to court.”⁷⁵ Yet Eric Groody, representing the appellants, said that the case was merely an affirmation of the general rule in costs awards.⁷⁶

Once the no-way rule has been rejected in these cases, the focus shifts from whether or not to award costs at all to the question of the applicability of solicitor-client costs. A classic example of this debate occurred in *Canadian Newspapers Co. v. Canada (A.G.)*.⁷⁷ The applicants deliberately contravened a new *Criminal Code*⁷⁸ search and seizure provision so as to facilitate a review of its constitutionality. The applicants were successful in their legal challenge and argued for solicitor-and-client costs on the basis that high legal fees impede the use of the courts to vindicate *Charter* rights. Osler J. considered that the

⁷³ *Ibid.* at 48.

⁷⁴ See *e.g.* the discussion *infra* notes 159-61 and accompanying text.

⁷⁵ M. Zapf, “Alta. Judge Orders Group to Pay Gov’t’s Costs” 12:21 *The Lawyers Weekly* (2 October 1992) 9.

⁷⁶ M. Zapf, “Suit Was ‘Paper Thin’,” 12:21 *The Lawyers Weekly* (2 October 1992) 1.

⁷⁷ (1986), 55 O.R. (2d) 737, 32 D.L.R. (4th) 1992 (H.C.J.); costs ruling: (1986), 56 O.R. (2d) 240, 12 C.P.C. (2d) 203 (H.C.J.) [hereinafter *Canadian Newspapers* cited to O.R.].

⁷⁸ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

Attorney General of Canada had admitted to a *prima facie* Charter violation and that the issue “had wider implications for the community at large and that there was nothing of a frivolous nature about the challenge.”⁷⁹ However, the Court maintained that solicitor-and-client costs should be used only in the case of misconduct by one of the parties and that “the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged.”⁸⁰

A similar view was expressed in *Reform Party of Canada v. Canada (A.G.)*.⁸¹ The Reform Party alleged that several provisions of the *Canada Elections Act*⁸² were in violation of subsection 2(b) of the *Charter*. They were successful at trial and requested solicitor-and-client costs because the issue was of public importance. Again the Court held that solicitor-and-client costs were to be reserved for cases of misconduct by one of the parties. Moshansky J. did, however, award the plaintiffs increased party-and-party costs due to the “fundamental importance to the Canadian public of the issues raised by the plaintiffs and ... the very real complexity of the litigation.”⁸³

C. *The One-Way Rule: Costs Awards to Unsuccessful Litigants*

Cost awards to unsuccessful litigants are extremely rare and are usually provoked by misconduct on the part of the successful party.⁸⁴ However, there is some jurisprudence that indicates a shift in this approach. *Schachter v. Canada (Minister of Employment and Immigration)*⁸⁵ is perhaps the most promising case regarding costs jurisprudence, not only because the cost award was somewhat radical, but also because it is one of the few cases in which the Supreme Court laid out its reasoning regarding costs. Schachter had challenged the constitutionality of a benefits package for mothers and adoptive parents under the *Unemployment Insurance Act*.⁸⁶ The Federal Court declared the plan a violation of section 15 of the *Charter* that could not be saved by section 1. The Court gave a declaration of relief and extended the benefits package. The Legislature changed the provision while the Supreme Court was deliberating

⁷⁹ *Canadian Newspapers*, *supra* note 77 at 241.

⁸⁰ *Ibid.* at 242.

⁸¹ (1992), 7 Alta. L.R. (3d) 1, 13 C.P.C. (3d) 344 (Q.B.) [hereinafter *Reform Party* cited to Alta. L.R.].

⁸² R.S.C. 1985, c. E-2.

⁸³ *Reform Party*, *supra* note 81 at 58.

⁸⁴ Orkin, *supra* note 4 at 2-20ff.

⁸⁵ [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1 [hereinafter *Schachter* cited to S.C.R.].

⁸⁶ R.S.C. 1985, c. U-1.

the matter. Lamer C.J.C. wrote:

Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-and-client costs.⁸⁷

This is clearly a radical change from traditional costs rulings both in terms of the content and the reasoning of the judgment. Chief Justice Lamer based his decision on the fact that the claim had been at least partially successful and that it had "brought a deficiency to the attention of Parliament." As well, he awarded solicitor-and-client costs instead of party-and-party costs, perhaps as a reward for having instigated legislative action. Although the Supreme Court of Canada had previously hinted at the possibility of a costs order rewarding public interest litigants who facilitate the settlement of a point of law,⁸⁸ *Schachter* is the only Supreme Court case to have addressed the issue directly. It has yet to be seen whether other courts will follow the *Schachter* approach or whether its effects will be limited to appeals on the remedy alone.⁸⁹

The other Canadian case which contemplates an award of costs to an unsuccessful litigant is *B.(R.) v. Children's Aid Society*. The key issue in this

⁸⁷ *Schachter*, *supra* note 85 at 726. For commentary on the remedial aspects of the case, see N. Duclos & K. Roach, "Constitutional Remedies as "Constitutional Hints": A Comment on *R. v. Schachter*" (1991) 36 McGill L.J. 1.

⁸⁸ In *R. v. Trask*, [1987] 2 S.C.R. 304, 59 C.R. (3d) 179 [hereinafter cited to S.C.R.], McIntyre J. remarked that:

from time to time, when the Crown wishes to appeal a summary conviction matter in order to settle a point of law, [the Court] will require the Crown to pay the respondent's costs. This is because it is the public-at-large who are the beneficiaries of such a step and it is not considered just that one individual should be put to substantial expense when it is the Crown that seeks to effect a valid social purpose by taking the appeal (*ibid.* at 307).

The Supreme Court of Canada has also awarded costs to the applicant prior to hearing the case in order to ensure continued participation in the action. See *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161 [hereinafter *Skapinker* cited to S.C.R.] discussed *infra* note 148 and accompanying text; *Borowski*, *supra* note 1.

⁸⁹ K. Roach, *Constitutional Remedies in Canada* (Aurora, Ont.: Canada Law Book, 1994) at 11-44.

case was the constitutionality of sections of the *Child Welfare Act*⁹⁰ which permitted the Children's Aid Society to assume wardship of a child over the parents' objections. The Society had obtained a court order granting wardship for a child of Jehovah's Witnesses. During the wardship, the child had received a blood transfusion as treatment for glaucoma. At the district court level, Whealy J. found against the parents but ordered the Attorney General of Ontario to pay costs.⁹¹

The costs award was cross-appealed by the Attorney General who argued the following points: the Attorney General was the successful party; it had exhibited no misconduct; available resources are irrelevant, and even if they are relevant, that no evidence had been adduced; the award would encourage marginal applications; and the case was brought for the benefit of the parents and of other Jehovah's Witnesses. Justice Tarnopolsky, writing the majority judgment on the merits, upheld the lower court's costs order and did not order any costs on the appeal. First, he stated that there was nothing either in the *Courts of Justice Act 1984*⁹² or the *Rules of Civil Procedure* to preclude such an order.⁹³ He then affirmed and elaborated on what he perceived to be the three reasons for the lower court decision. Tarnopolsky J.A. also noted that the parents had not initiated the action but had merely been responding. This, however, was not held to be determinative of the costs order, the emphasis being placed instead on the importance of the issue. The judge stated that the parents "rose up against state power because of their religious beliefs," and that as the *Charter* presents religious freedom as a "fundamental freedom", the issue is "important" as defined by Rule 57.01(1)(d).⁹⁴ He emphasized that the issue in the case was of national, and not merely provincial, importance. Finally, Tarnopolsky J.A. characterized the appeal to the district court as essentially a re-trial with new evidence and he rejected the idea that this type of cost award would encourage marginal litigation.

Goodman J.A. agreed with Tarnopolsky J.A. and allowed the costs order to stand because he was reluctant to override the discretion of the lower court judge. He stated that some exceptional cases might call for a costs award to an unsuccessful litigant, and that he remained unconvinced that this was not such a

⁹⁰ R.S.O. 1980, c. 66.

⁹¹ *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1988), 63 O.R. (2d) 385, 47 D.L.R. (4th) 388 (Dist. Ct.).

⁹² S.O. 1984, c. 11.

⁹³ *B.(R.) v. Children's Aid Society*, *supra* note 41 at 354-56.

⁹⁴ This rule allows a court to consider the "importance of the issues" when determining costs.

case.⁹⁵ This cannot be interpreted, however, as a clear endorsement of the view of Mr. Justice Tarnopolsky. Houlden J.A. disagreed vehemently with the majority, saying that such an order would provide a “dangerous precedent”.⁹⁶ It is unclear whether “dangerous precedent” refers to the precedent of awarding costs to unsuccessful litigants in general or awarding costs against an Attorney General defending legislation.

The cautious approach of Goodman and Houlden J.A. will make it easier for other courts to avoid careful consideration of *B.(R.) v. Children's Aid Society*. Furthermore, although the judgment of Tarnopolsky J.A. appeared to endorse a radical approach to costs in public interest litigation, the scope of his judgment remains unclear. Under Justice Tarnopolsky's regime, would all unsuccessful *Charter* applicants be awarded costs? Or would costs be justified only for applicants whose arguments rested on “fundamental freedoms”? Would such an award include any applicant with a case of national importance? Although the judgment is laudable for its attempt to design a costs award reflecting the unique nature of public interest litigation, it failed to set out clear principles to guide the application of costs awards.

II. New Statutory Regimes

The above survey demonstrates the murky nature of the principles for costs awards in public interest cases. Although it appears that the majority of judges endorses a no-way rule for public interest cases, significant case law exists that supports the use of the costs-in-the-cause rule. It is this second line of jurisprudence that seems to have inspired the new statutory regimes in British Columbia and Nova Scotia. Although the increase in public interest litigation was hardly the impetus for these new tariffs,⁹⁷ the likely result of the new rates will be an increase in party-and-party costs awards rather than a rejection of them.

⁹⁵ *B.(R.) v. Children's Aid Society*, *supra* note 41 at 356.

⁹⁶ *Ibid.* at 360.

⁹⁷ The British Columbia tariffs were in part a reaction to criticisms that the level of indemnification for all cases was inadequate under the previous rules. See *Metchosin (District of) v. Metchosin Board of Variance* (1992), 11 M.P.L.R. (2d) 165 (B.C.S.C.) [hereinafter cited to M.P.L.R.]; costs ruling: (1992), 11 M.P.L.R. (2d) 180, 9 C.P.C. (3d) 241 (B.C.S.C.).

A. *The British Columbia Rules*

Prior to September 1, 1990, the costs regime in British Columbia was similar to that in the rest of Canada. Tariffs were updated every few years to reflect inflation and rising legal costs, yet these rates inevitably fell behind current costs and resulted in low compensation.⁹⁸ British Columbia now has three types of costs: ordinary, increased and special. Under "ordinary costs" there are five scales. The court is to have regard to the following when determining the applicable scale:

- (a) Scale 1 is for matters of little difficulty
- (b) Scale 2 is for matters of less than ordinary difficulty
- (c) Scale 3 is for matters of ordinary difficulty or importance
- (d) Scale 4 is for matters of more than ordinary difficulty or importance
- (e) Scale 5 is for matters of unusual difficulty or importance.⁹⁹

The rules further state that:

In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.¹⁰⁰

Scale 3 is the default scale. Further, if the court feels that an order under scales 1 through 5 would be "unjust", it may order "increased costs" under section 7 of Appendix B. These costs are a proportion of special costs. "Special costs" refers to "those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate." The registrar is to consider the complexity, difficulty and novelty of the issues, the skill of the solicitor, the amount at stake in the proceeding, the time expended, the conduct of the parties, the importance of the proceeding to the party and the benefit of the solicitor's service to the party.¹⁰¹ Special costs are considered the

⁹⁸ *Ibid.* at 165.

⁹⁹ British Columbia, *Rules of Court*, appendix B, s. 2.

¹⁰⁰ *Ibid.*, s. 2(2).

¹⁰¹ *Ibid.*, s. 3.

equivalent of solicitor-and-client costs.¹⁰²

The rules are producing new jurisprudence on the subject of costs. One of the earliest cases under the new rules was *Bradshaw Construction Ltd. v. Bank of Nova Scotia*. Bradshaw Construction alleged that the Bank of Nova Scotia had cancelled its loan too soon and forced the company into bankruptcy. Bradshaw won damages of \$450,000 for breach of contract. It requested a higher scale of damages on the ground that the issues had been difficult. Bouck J. interpreted "importance" in the new rules to mean that "the litigation must be important to the public at large or at least to other litigation of a similar nature. It does not mean important to the individual litigant since every litigant considers his or her case important."¹⁰³ The judge held that the case was not "important" under the new rules. Nevertheless, Justice Bouck did award increased costs.¹⁰⁴ The reasoning for the award is, however, somewhat unclear. One rationale appears to have been the level of difficulty of the case, yet Justice Bouck also noted the comparative resources of the law firms involved, indicating that this may be an additional factor to consider:

[The plaintiff and his lawyer] were up against the power and resources of a national bank ... With all its resources, the bank retained a large and competent Vancouver law firm. The litigation was hard fought on both sides. Nonetheless, Mr. Taylor and his client persevered and ultimately prevailed. In all the circumstances, there would be an unjust result if the plaintiff only recovered ordinary costs on Scale 3 or 4.¹⁰⁵

One commentator asks whether the decision is

[a] harbinger of a future judicial propensity to use the provision for "increased costs" in s. 7 of Appendix B as a remedial device to correct the perceived unfairness of certain aspects of the operation of the adversarial litigation process, especially as it concerns the great disparity in the resources available to parties to finance litigation.¹⁰⁶

The author further remarks that the decision could betray "an unarticulated policy of punishing national banks through an award of increased costs against them where they are the losing party."¹⁰⁷

¹⁰² *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at 323, 48 C.P.C. (2d) 74 (S.C.) [hereinafter *Bradshaw* cited to B.C.L.R.].

¹⁰³ *Ibid.* at 317.

¹⁰⁴ *Ibid.* at 325.

¹⁰⁵ *Ibid.* at 324.

¹⁰⁶ F.M. Irvine, *Annotatiou* (1991) 48 C.P.C. (2d) 76 at 79.

¹⁰⁷ *Ibid.*

Several cases have affirmed the proposition that the importance of an issue must be determined objectively.¹⁰⁸ This rule was further interpreted in *Ter Neuzen v. Korn*,¹⁰⁹ which was the first case in Canada to examine an allegation that an individual had become HIV-positive due to medical negligence. The plaintiffs wanted costs on Scale 5, but the Court only allowed costs on Scale 4. The Court noted that jury awards are not an effective precedent and that *Bradshaw* seemed to “require importance to a class or body of persons and a determination which sets no precedent does not seem to fit within that definition.”¹¹⁰ However, the Court seemed dissatisfied with this reasoning and awarded the plaintiffs costs on Scale 4, stating: “I cannot think the rules were drafted to prevent parties to a jury trial from ever being awarded costs on Scale 5. On that basis, it is difficult to see why the test of importance should be entirely objective and not subjective in any way.”¹¹¹

B. The Nova Scotia Rules

Similar developments have occurred in Nova Scotia since the 1989 implementation of new tariffs. Under Nova Scotia’s *Civil Procedure Rules*, the Court shall consider the following factors in determining the applicable tariff:

- (a) where the main issue is a monetary claim which is allowed in whole or in part, an amount determined having regard to
 - (i) the amount involved
 - (ii) the complexity of the proceeding, and
 - (iii) the importance of the issues;

- (b) where the main issue is a monetary claim which is dismissed, an amount determined having regard to
 - (i) the amount of damages provisionally assessed by the court, if any,
 - (ii) the amount claimed, if any,
 - (iii) the complexity of the proceeding, and
 - (iv) the importance of the issues;

- (c) where there is a substantial nonmonetary issue involved and whether or not the proceeding is contested, an amount determined having regard to
 - (i) the complexity of the proceeding, and
 - (ii) the importance of the issue;

¹⁰⁸ See *Lankenau Estate v. Dutton* (1991), 57 B.C.L.R. (2d) 327 (S.C.).

¹⁰⁹ (1991), 64 B.C.L.R. (2d) 125, [1992] 3 W.W.R. 469 (S.C.) [hereinafter cited to B.C.L.R.].

¹¹⁰ *Ibid.* at 127.

¹¹¹ *Ibid.*

(d) an amount agreed upon by the parties.¹¹²

One of the first cases to interpret the new rules was *Hines*. At issue was a section 15 *Charter* challenge to provisions of the *Motor Vehicle Act*¹¹³ which effectively prohibited individuals with diabetes from operating large trucks. Davison J. held that, in determining costs for a non-monetary issue, the Court should emphasize complexity of the proceedings rather than importance of the questions, because the time spent by counsel on the case is the most important factor in determining the cost of representation. Thus in *Hines*, Davison J. noted that, although the issue was of considerable importance, the complexity of the proceedings was not exceptional and therefore a moderate tariff was appropriate.¹¹⁴

In *Landymore v. Hardy*,¹¹⁵ the Court rejected the *Hines* formula and held that equal weight should be given to complexity and importance of the issues. In *Hawker Siddely Canada Inc. v. Nova Scotia (A.G.)*¹¹⁶ and *Nova Scotia (Minister of Community Services) v. Keeble*,¹¹⁷ the importance of the issues was also a significant factor in costs awards.

C. Analysis of the British Columbia and Nova Scotia Rules

Courts in British Columbia and Nova Scotia are still attempting to adjust to these new costs regimes; the new rules have not been in place long enough to predict, in any confident manner, the direction of costs awards in public interest litigation. However, the language of the provisions, as well as some of the case law, suggests that costs awards will be higher in cases which are important to the public. In fact, in light of Davison J.'s comments in *Hines*, that complexity is more determinative of the actual cost of litigation than is its importance to the public, we may infer that the legislatures inserted the importance factor to address the growth of public interest litigation by providing potentially higher cost awards for successful public interest litigants.

These new statutory regimes may, however, punish as much as they reward public interest litigants. Increased costs awards for important and complex

¹¹² Nova Scotia, *Civil Procedure Rules*, s. 63.04.

¹¹³ R.S.N.S. 1989, c. 293.

¹¹⁴ *Hines*, *supra* note 43 at 246.

¹¹⁵ (1992), 112 N.S.R. (2d) 410, 307 A.P.R. 410 (S.C.T.D.).

¹¹⁶ (1991), 110 N.S.R. (2d) 426, 299 A.P.R. 426 (S.C.T.D.).

¹¹⁷ (1992), 114 N.S.R. (2d) 155 (Fam. Ct.).

cases will provide financial compensation to successful public interest litigants but will also increase the risk of adverse costs awards. Increased risk may be avoided if courts adopt the approach of Bouck J. in *Bradshaw* and consider the comparative resources of the parties before ordering costs. This appears unlikely given that both statutes exclude financial position as a relevant factor, and that the judiciary is frequently reluctant to engage in a directly distributional role.¹¹⁸ A more plausible way to free public interest litigants from the danger of large adverse costs awards is to use the statutes to *decrease* rather than *increase* costs awards based on the importance of the issues at stake. The present case law, however, gives no indication that British Columbia and Nova Scotia courts will follow this alternative approach.

III. Other Models

Before providing an analysis of costs rules in public interest litigation, a brief survey of government funding mechanisms is in order. Class actions are a means of increasing access to justice by allowing representative litigants to bring forward claims on behalf of a group of people.¹¹⁹ Although class actions are not possible under the common law in Canada,¹²⁰ Ontario¹²¹ and Quebec¹²² have, however, enacted legislation allowing class action suits. Ontario's *Class Proceedings Act* results in partial subsidization of public interest litigants.

Class action suits and public interest litigation are not identical. Class actions serve to bring together many individuals with the same claim. This claim, by itself, may have no impact on the public interest. Sometimes, as in the case of Canadians who contracted HIV from contaminated blood, class action claims may overlap with public interest litigation. As a result, public interest litigants may find funding under the *Class Proceedings Act*.

Class actions have the following benefits:

¹¹⁸ See text accompanying note 209, below.

¹¹⁹ See Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Queen's Printer, 1982); A.C. Hutchinson, *Access to Civil Justice* (Toronto: Carswell, 1990); G. Watson & M. McGowan, *Guide to Case Management and Class Proceedings* (Toronto: Carswell, 1993).

¹²⁰ *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385.

¹²¹ S.O. 1992, c. 6.

¹²² *Act respecting the Class Action*, R.S.Q. 1977, c. R-2.1. Some commentators say the Ontario Act is "more liberal" than the Quebec legislation. See e.g. A. Roman, "The Role of Public Interest Litigation and Other Alternatives" (1991) 17 Can.-U.S. L.J. 387 at 390.

achieving a result that is good for the community as a whole, delivering widespread compensation, scrutiny or “policing” of the marketplace and even satisfying certain needs that the community may have for “justice” where widespread harm has been caused.¹²³

The *Class Proceedings Act* allows one or more members of a class of persons to litigate for the entire class.¹²⁴ The litigants are required to file a motion for certification at which time the court will consider whether there is a cause of action, the class is identifiable, the claims raise a common issue, and whether a class proceeding is the preferable procedure to resolve the issues. At this time the court will also determine whether the representative plaintiff or defendant fairly and adequately represents the interests of the class, has a plan to represent and notify the members of the class, or has any conflict of interest with other members of the class.¹²⁵

When a costs order is at issue, subsection 31(1) of the *Class Proceedings Act* specifically allows the court to consider “whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.” Furthermore, subsection 31(2) prohibits a cost order for an individual to exceed that individual’s claim.¹²⁶ Therefore, although the court retains discretion to award costs-in-the-cause, the fact that the legislation invites argument on the issue indicates that courts may be more willing to abandon the rule in the face of persuasive argument.

The legislation does not adopt the recommendations of the Ontario Law Reform Commission (“O.L.R.C.”) with respect to costs in class action suits. The O.L.R.C. argued that the costs recoverable in a class action would either be too small to risk an adverse costs ruling or would induce the plaintiff to initiate an individual rather than a class action suit. In contrast to the stance taken in its *Report on Standing*, discussed above,¹²⁷ the O.L.R.C. recommended that the traditional party-and-party rule be replaced by a no-costs rule for class actions.¹²⁸ This is particularly meaningful in light of a more significant reform: the establishment of the Class Proceedings Fund.¹²⁹

¹²³ M.G. Cochrane, *Class Actions* (Aurora, Ont.: Canada Law Book, 1993) at 6.

¹²⁴ *Class Proceedings Act*, *supra* note 121, s. 2(1).

¹²⁵ *Ibid.*, ss. 2(1), 5(1).

¹²⁶ As Cochrane, *supra* note 123 at 79, points out, subsection 31(2) requires that if an amount falls within the jurisdiction of Small Claims Court, the cost award must be calculated according to the tariffs of that court.

¹²⁷ See *supra* note 18ff and accompanying text.

¹²⁸ Ontario Law Reform Commission, *supra* note 119 at 704.

¹²⁹ *Law Society Amendment Act (Class Proceedings Funding)*, S.O. 1992, c. 7.

The Fund, administered by the Law Society of Upper Canada, will provide funding for litigation expenses and indemnification for unsuccessful plaintiffs, although it will not provide for solicitor's fees.¹³⁰ The Class Proceedings Committee of the Law Society considers applications for funding, having regard to factors such as the merits of the case, the plaintiff's effort to find funding and the financial responsibility exhibited by the plaintiff with regard to the disbursement and administrative control of the funds.¹³¹ The representative plaintiff, however, is responsible for reimbursing the Fund for disbursements used and for transferring ten per cent of a successful settlement or judgment.¹³² The legislation also allows the use of contingent fees on a non-percentage basis.¹³³

A. *Legal Aid Test Case Funding*

Since 1977, the Ontario Legal Aid Plan has provided legal certificates for "test cases", a subset of public interest litigation.¹³⁴ The Plan is administered by the sub-committee of the Legal Aid Committee of the Law Society of Upper Canada. The sub-committee is an advisory body composed of volunteers from the legal community and the public. In deciding whether to grant a legal aid certificate, it considers factors such as availability of private funding, efforts to obtain private funding, novelty, importance and benefit of the case to others. It can recommend total or partial assistance. Parties who receive funding from the sub-committee can apply to the Director for reimbursement of costs in case of unsuccessful litigation.¹³⁵ Reimbursement is not automatic, however.¹³⁶ In the 1990 fiscal year, the sub-committee received forty applications; it recommended certificates for twenty-nine cases.¹³⁷

Legal aid certificates are only available to potential litigants who meet financial eligibility criteria. Efforts to expand the test case program to encompass all public interest litigation, regardless of the financial status of the applicants, crystallized into a proposal for a two-year pilot project; funding for

¹³⁰ *Ibid.* ss. 59.1(2), 59(3).

¹³¹ *Ibid.* s. 59.3(4); O. Reg. 771/92, s. 5.

¹³² O. Reg. 771/92, s. 10.

¹³³ *Class Proceedings Act*, *supra* note 121, s. 33.

¹³⁴ Much of this description is taken from Fox *supra* note 14 at 393-96.

¹³⁵ R.R.O. 1990, Reg. 710, s. 118(1).

¹³⁶ See *e.g. MacFarland v. Law Society of Upper Canada* (1973), 2 O.R. (2d) 704 (Div. Ct.).

¹³⁷ Ontario Legal Aid Plan, *Annual Report* (Toronto: Law Society of Upper Canada, 1990) at 14.

the project was denied by the Law Foundation in May 1989.¹³⁸

Legal Aid certificates for test cases and the class actions regime in Ontario demonstrate that government funding can effectively and fairly encourage public interest litigation.¹³⁹ The programs have enunciated guidelines and have enacted formalized application procedures. They enable decision-makers to compare the relative merits of various applications while retaining judicial neutrality.¹⁴⁰ These qualities are essential to the argument below that a no-way costs rule coupled with government funding is the best way to encourage public interest litigation.

IV. Analysis

The above survey of responses to public interest cases demonstrates confusion over the desired level of public interest litigation in Canada and over the most effective means to achieve that desired level. The following analysis will address those two issues.

Public interest litigation can be said to serve the following purposes: to enhance the quality of judicial decision-making and the development of the law, to supplement the democratic process, and to vindicate individual and social rights. These three functions present different and perhaps conflicting conceptions of the role of costs awards.

First, public participation benefits the development of the law by bringing different types of cases to court and by providing otherwise unavailable legal argumentation. As Prichard suggests,

[i]f differential incentives to litigate under different systems of cost, fee, and financing rules do systematically affect the substantive law, the process and pace of legal change, the nature of legal reasoning, and the role of judges and their relationship to other law-making institutions then the debate on fee shifting and related issues takes on a new significance.¹⁴¹

¹³⁸ Fox, *supra* note 14 at 396.

¹³⁹ See also Part V.A, below.

¹⁴⁰ See Part IV.A, below on the *Intervenor Funding Project Act* where intervenor funding becomes a "cost of doing business" rather than a normative pronouncement on the merits of the arguments.

¹⁴¹ J.R.S. Prichard, "A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law" (1988) 17 J. Legal Stud. 451 at 474.

If disincentives to wider public participation exist, it is foreseeable that those who are able to bear the costs of litigation will have an exaggerated impact on judicial decision-making. Business groups, for example, will be able to present their arguments in court more frequently than will other groups, thus heightening judicial awareness of business concerns.¹⁴² If other concerns are not articulated, judges may be more inclined to view business' claims with favour. Public interest litigants and intervenors can provide the court with the evidence and arguments necessary for a full consideration of all the issues.¹⁴³ The ever-present threat of an adverse costs award may, however, deter stakeholders from participating in the litigation.

The changing nature of litigation emphasizes the need to expand the information available to judges. In his seminal article, Chayes argues that litigation has begun to move away from its traditional bi-polar, party-centered roots. Litigation frequently implicates many parties; it is no longer "confined to the persons at either end of the right-remedy axis."¹⁴⁴ It may even be described as a process of negotiation.¹⁴⁵ This is particularly true in public interest cases where remedies must be fashioned to take account of all stakeholders. For example, a judge considering a structural injunction to respond to sexism in a workplace must have information regarding the effects of the injunction on employees and management, both female and male, in order to make a fair decision. Accurate information on this point may not be available from the parties themselves.

Public interest litigants are particularly important to this information gathering process as they represent interests that are important to society yet that would not otherwise be represented in court. For example, although many Canadians are concerned about the environment, these concerns are diffused throughout the population. Many environmental problems seldom affect individuals enough to spur litigation. Public interest litigants are necessary to counteract this dearth of collective action. Without public interest litigants, some significant issues will never be brought to court.

The judiciary has not been oblivious to the potentially beneficial effect of

¹⁴² A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 473 at 487.

¹⁴³ J. Welch, "No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada" (1985) 43 U.T. Fac. L. Rev. 204 at 226-27.

¹⁴⁴ A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1289.

¹⁴⁵ *Ibid.* at 1299.

public participation on the development of the law. As noted above, judges have frequently refused to order costs in cases where a novel or important point has been brought forward.¹⁴⁶ In some cases, courts have tailored costs orders specifically to reflect the value of the participation of the party or the intervenor. For example, in *Schachter* the Court expressed its thanks to the applicants for bringing the issue of discriminatory parental benefits "to the attention of Parliament."¹⁴⁷

Skapinker v. Law Society of Upper Canada,¹⁴⁸ one of the earliest *Charter* cases, could have been the springboard for a comprehensive judicial strategy on the subject of costs.¹⁴⁹ The Supreme Court might have used the opportunity to decide that public interest litigants could present arguments for costs before the commencement of the next stage of litigation. Public interest litigants might be more willing to bring cases forward if they knew the risk of an adverse costs award before committing to continuing litigation. For example, if the Court decided that one of the conditions of leave to appeal was that no costs would be awarded, then the public interest litigant might be more willing to continue the action.

Skapinker alleged that the Law Society's requirement that members be Canadian citizens was contrary to subsection 6(2)(b) of the *Charter*. Since he became a Canadian citizen during the proceedings, he was given leave to withdraw, which he declined. By the same order, Richardson, an American citizen making the same allegations, was granted intervenor status. Skapinker's continued participation in the action enabled it to proceed uninterrupted. The alternative would have been to initiate another action, this time with Richardson as plaintiff, which would have taken several years to reach the Supreme Court. Thus the Court gave costs to Skapinker, and also to the intervenor, on the motion for application for leave to appeal, and in the Ontario Court of Appeal. That order essentially required each party to pay its own costs at the motion and in the Court of Appeal.

It is clear that public interest litigants help ensure healthy development of

¹⁴⁶ See *supra* notes 47, 48.

¹⁴⁷ *Schachter*, *supra* note 85 at 726.

¹⁴⁸ *Supra* note 88.

¹⁴⁹ B. Crane & H.S. Brown, *Supreme Court of Canada Practice: 1991-1992* (Scarborough, Ont.: Carswell, 1991) at 75, state that "it is not unusual for the Court to order costs ... to one of the parties in any event as a condition of granting leave", although according to anecdotal evidence, this is not a common occurrence in *Charter* cases. See *Borowski*, *supra* note 1, for a well-known example of this phenomenon.

the law. The question to be determined, then, is the degree to which costs awards should encourage public interest litigation with a view to the development of jurisprudence.

The participation of public interest litigants is necessary to solidify the courts' role in a democratic society. On one hand, the role of the courts as the protector of democracy has long been recognized. Since the eighteenth century¹⁵⁰ courts have been assigned the role of protector, ensuring that legislatures do not abuse the power given to them by the electorate. In Canada the courts are expressly required by section 1 of the *Charter* to determine what is justifiable in a free and democratic society. They are expected to protect the classical liberal foundations of democracy in Canada, particularly freedom of expression, freedom of association and liberty, as well as the more modern requirements of protection against discrimination. As Shilton explains, "groups litigate to force government to address directly the issues raised by the litigation, to examine government policies, and to bring them into line with *Charter* standards."¹⁵¹

Monahan, building on the work of John Hart Ely,¹⁵² argues that the very function of judicial review is "to ensure that the political process is open to those of all viewpoints on something approaching an equal basis."¹⁵³ Monahan states:

The judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. To put the matter simply, constitutional adjudication should be in the name of democracy, rather than right answers.¹⁵⁴

In a society where big government can choke or even defy input from voters, opportunities for public debate and collective action through the court system

¹⁵⁰ See J. Locke, *The Second Treatise of Government* (New York: Bobbs-Merrill, 1952); C. Montesquieu, *De l'esprit des lois* (Paris: Flammarion, 1961).

¹⁵¹ E.J. Shilton, "Charter Litigation and the Policy Processes of Government: A Public Interest Perspective" (1992) 30 Osgoode Hall L.J. 653 at 655. See also C.K. Rowley, *The Right to Justice: The Political Economy of Legal Services in the United States* (Aldershot, England: Edward Elgar, 1992); D. Wittman, "Why Democracies Produce Efficient Results" (1989) 7 J. of Pol. Econ. 1395.

¹⁵² J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

¹⁵³ P.J. Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87 at 89.

¹⁵⁴ *Ibid.*

become increasingly important.¹⁵⁵ If one of the functions of the judiciary is to ensure the proper functioning of democracy, it must hear from those individuals who have been excluded from or ignored by political discourse.

Furthermore, exposure to litigation can render political decisions legitimate. So long as the public perceives the judicial process as fair, controversial legislation, which may not meet with widespread social approval despite its endorsement by the House of Commons, is more likely to engender public acceptance. This type of legitimacy requires public participation. Courts are an attractive arena in which to bring forward policy arguments because judges are perceived as deciding the merits of the case without regard for the financial resources or social connections of the litigants. Canadian judges are not responsible to voters, but rather to the legal community. We view judges as intelligent, experienced individuals charged with considering the impact of policies not only on society as a whole but also on individuals. As Bryden has pointed out: "Everyone knows that judicial decisions create winners and losers. And nobody likes to lose. At the same time we have a strong sense that losing is not quite so bad if we have had a fair chance at playing the game."¹⁵⁶

Conversely, courts were not designed as mini-legislatures but rather as a venue for the settlement of disputes between private parties. In Canada's adversarial system, it is the responsibility of the parties to define the dispute. The judge then decides the dispute on the basis of the evidence and arguments presented by the parties.¹⁵⁷ Bryden points out that "[p]eople have a right to come to court to resolve disputes expeditiously and at a minimum cost."¹⁵⁸ The courts are thus structured to decide disputes as between parties, yet are also implicitly charged with deciding social policy. Perhaps this dilemma represents a flaw in traditional liberalism; liberal philosophers rely on the courts to serve as a limit on abuse of power by the executive, yet courts were structured as vehicles for the settlement of private disputes or for criminal law enforcement.

It is therefore not surprising that courts are reluctant to act as alternative legislatures, existing primarily to provide a forum for those who have been, or

¹⁵⁵ L.L. Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968) 116 U. Pa. L. Rev. 1033 at 1044.

¹⁵⁶ P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490 at 508.

¹⁵⁷ For a commentary, see N. Brooks, "The Judge and the Adversary System" in A.M. Linden, ed., *The Canadian Judiciary* (Toronto: York University, 1976) 89.

¹⁵⁸ Bryden, *supra* note 156 at 514. See also *Canada (A.G.) v. Aluminium Co. of Canada*, [1987] 3 W.W.R. 193 (B.C.C.A.); W.A. Bogart, "Understanding Standing, Chapter IV: *Minister of Finance of Canada v. Finlay*" (1988) 10 Sup. Ct. L. Rev. 377 at 394.

feel that they have been shut out of the political system. In *Everywoman's Health Centre Society v. Bridges*,¹⁵⁹ the plaintiff, the first free-standing abortion clinic in British Columbia, sought an injunction to prevent the obstruction of access to their premises by the defendants. The plaintiffs won at trial and on appeal, and asked for special costs. They argued that the defendants put forward arguments "clearly beyond this Court's domain ... without laying the factual basis for these arguments," and that the appeal "was an attempt to use the Court to wage a political battle."¹⁶⁰ The Court agreed with the plaintiffs' submissions, and awarded special costs. According to Southin J.A., "[t]he Court was being used as a political forum. Debates on political issues are the stuff of democracy but the courtroom is not the place for such debates."¹⁶¹

These statements demonstrate the temptation to use costs as a device to shield the court from being engulfed by political rhetoric. It is indisputable, however, that Canadian courts confront issues which require an examination of political interests, particularly in the context of *Charter* litigation. Increasingly, courts are engaging in a dialogue with legislatures on issues at which politics and law intersect.¹⁶² Duclos and Roach argue that the concept of courts supplying "constitutional hints" to legislatures is already built into Canadian law through the reference system, and through sections 1 and 33 of the *Charter*.¹⁶³ Courts must therefore make political judgments; it can even be said that those judgments are an inherent part of the courts' mandate. An appropriate costs regime recognizes the inevitability and necessity of political argumentation in the courts without stripping the judiciary of the tools with which to control abuse of process.

Finally, the participation of public interest litigants and intervenors in litigation facilitates the vindication of individual and group rights. These participants are necessary to ensure that all members of society have the opportunity to be represented in court. Public interest organizations may represent groups in society that do not ordinarily have access to the court system due to language barriers, lack of awareness of legal opportunities, fear, or lack of financial resources. For example, advocacy groups representing refugees or children may realistically be the only parties to bring forward

¹⁵⁹ (1991), 54 B.C.L.R. (2d) 294, 47 C.P.C. (2d) 97 (C.A.) [hereinafter *Everywoman's Health Centre* cited to B.C.L.R.].

¹⁶⁰ *Ibid.* at 297.

¹⁶¹ *Ibid.* at 299.

¹⁶² Chayes, *supra* note 144 at 1316.

¹⁶³ Duclos & Roach, *supra* note 87 at 26.

claims for these groups.¹⁶⁴

Although access to justice concerns are rarely discussed in the costs jurisprudence, they are of tremendous importance. It is trite to say that legal protection of poor and disadvantaged groups is only effective if these groups have real access to the justice system. As Tribe suggests, "decisionmaking processes made essential by the government must not simultaneously be denied because of poverty of those who are obliged to rely upon such processes."¹⁶⁵ Liberal standing rules for parties and intervenors, which make it possible for any group with relevant arguments to come before the court, are an effort to increase access to justice. Formidable economic barriers, however, make the argument for subsidization compelling.

V. The Case for Subsidization of Public Interest Litigants

Those who oppose subsidization for public interest litigants argue that subsidization will cause the court system to be frustrated by verbose, self-aggrandizing public interest groups who needlessly consume the time and resources of the court and other litigants.¹⁶⁶ As Justice Cory stated in *Canadian Council of Churches*:

It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their case is all important.¹⁶⁷

However, the costs rules are a rather blunt instrument when applied to decrease caseloads. As Tribe argues, "[a] fee can be an effective screening device only if the decision whether or not to pay it is voluntary, or if inability to pay in itself identifies a quality sought to be screened out."¹⁶⁸ The judiciary has other more effective tools at its disposal to control the incidence of litigation.

¹⁶⁴ *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 [hereinafter *Canadian Council of Churches* cited to S.C.R.].

¹⁶⁵ L.H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978) at 1008.

¹⁶⁶ Bryden, *supra* note 156 at 492. See also *Solosky v. R.*, [1978] 1 F.C. 609 at 612, 7 N.R. 92 (C.A.).

¹⁶⁷ *Canadian Council of Churches*, *supra* note 164 at 252.

¹⁶⁸ Tribe, *supra* note 165 at 1101.

The argument that a costs regime favourable to public interest litigants will result in a litigation explosion is flawed because judges can use standing criteria to prevent frivolous litigation. As previously stated, Canadian courts have historically required private or personal interest as a prerequisite for standing.¹⁶⁹ Since the standing quartet,¹⁷⁰ courts have expanded standing rules to include public interest litigants. According to *Canadian Council of Churches*, in order to qualify as a public interest litigant, a party must demonstrate:

1. that a serious issue of invalidity exists
2. that the party has a genuine interest in the issue
3. that there is no other reasonable and effective way to bring the issue before the courts.¹⁷¹

This test acknowledges that the traditional characterization of civil litigation as an *inter partes* dispute does not apply to the public interest litigant. The willingness of the court to grant standing to the applicant, despite the effect of such a grant on judicial resources, indicates the belief of the court that judicial resolution of the case will benefit the public. It is thus unfair and inappropriately punitive for one party to bear the costs of the entire process when the public (and both parties) benefits from the hearing of the case.

The screening process established in *Canadian Council of Churches* also provides an opportunity for courts to control less worthy litigation apparently spurred by less onerous cost policies. The “serious issue” criterion will screen out the litigant who pursues frivolous litigation. The “genuine interest” criterion will respond to defendants who intend to harass plaintiffs through litigation (for example, by SLAPP counter-suits).¹⁷² Most importantly, the “no other reasonable and effective way” criterion alerts judges to the need for public interest litigation, avoids duplication and ensures that litigation in the public interest is necessary. There are already indications that the Supreme Court of Canada has used these criteria for intervention to contain litigation.¹⁷³ If Canada does see a litigation explosion, the substance-oriented approach in *Canadian Council of Churches* is far superior to an approach contingent on the financial resources of the potential litigants.

¹⁶⁹ B.C. Crane, “Procedural Developments in Administrative Law” (1988) 9 *Advocates’ Q.* 22 at 26-30. See also M. Pickard, “Why Joseph Borowski Has Standing” (1986) 36 *U.T.L.J.* 19.

¹⁷⁰ For commentary on the standing quartet, see J.M. Evans, “Developments in Administrative Law: The 1986-87 Term” (1988) 10 *Sup. Ct. L. Rev.* 1.

¹⁷¹ *Canadian Council of Churches*, *supra* note 164 at 253.

¹⁷² See *supra* note 46.

¹⁷³ H.S. Fairley, “Is the Public Interest Falling From Standing?” (1993) 11 *The Philanthropist* 28. See e.g. *Hy and Zel’s Inc. v. Ontario (A.G.)*, [1993] 3 *S.C.R.* 675, 107 *D.L.R.* (4th) 634.

Manipulation of standing rules to control litigation need only apply to parties seeking public interest standing. Courts can control other types of litigation by manipulating costs in response to traditional abuse of process concerns. This tactic is already a fixture in the costs jurisprudence as solicitor-and-client costs have long been used to control vexatious litigation. For example, in *Everywoman's Health Centre*, the Court awarded special costs in response to perceived abuse of the courts by the defendants. Furthermore, the court can strike out vexatious claims or proceedings by virtue of its inherent power.¹⁷⁴ Moreover, the possibility of an increase in litigation is not in itself a valid reason to limit access to the courts. The O.L.R.C. notes that "arguments of this nature are almost invariably presented in opposition to proposed changes that will improve access by individuals to the courts."¹⁷⁵ Yet there is little evidence to suggest that substantive or procedural changes to access barriers will provoke an explosion of litigation because "most individuals do not find the prospect of litigation enticing."¹⁷⁶ In light of the courts' ability to control litigation with other tools, the threat of increased litigation is not an effective argument against the encouragement of public interest litigation through manipulation of costs awards. The crucial question to be decided is how to best encourage public interest litigation.

A. Ontario's Intervenor Funding Project Act, 1988

Ontario's *Intervenor Funding Project Act*¹⁷⁷ provides funding for intervenors' costs in certain public hearings, particularly in administrative hearings. This is probably due to the great utility and high expense of participation in this context. The potential usefulness of public participation in these hearings has long been acknowledged. For example, in the early 1980s the British Columbia Utilities Commission awarded hundreds of thousands of dollars in costs to intervenors to ensure that the Commission was fully informed before it rendered its decisions regarding hydro-electric dams.¹⁷⁸

¹⁷⁴ Law Reform Commission of Australia, *supra* note 16 at 110-12.

¹⁷⁵ *Report on Standing*, *supra* note 18 at 45.

¹⁷⁶ *Ibid.* at 46.

¹⁷⁷ R.S.O. 1990, c. I.13.

¹⁷⁸ The Alberta Energy Resources Conservation Board, the Porter Royal Commission on Electric Power Planning and the Ontario Environmental Assessment Board have also funded intervenors. See R.W. Shorthouse, "The Demise of Public Funding: Cost Awards to Public Interest Intervenors Before the B.C. Utilities Commission" (1985) 43 *Advocate* 601; J. Keeping, "Intervenors' Costs" (1989) 3 *Can. J. of Admin. L. Prac.* 81; S.J. McWilliams, "Ontario's *Intervenor Funding Project Act*: The Experience of the Ontario Energy Board" (1992) 5 *Can. J. of Admin. L. Prac.* 203 at 222-23.

Evans writes that “[i]t is now widely accepted that well-prepared and presented arguments by ‘public interest’ groups, or competitors, are essential ... to the quality of the agency’s decision.”¹⁷⁹ However, it can be enormously expensive to participate in such hearings as they are often lengthy and demand detailed, comprehensive and costly studies.

Ironically, however, even in the administrative context where public participation is often considered crucial, jurisprudence regarding costs awards has not strayed far from the common law. In the key case on point, *Bell Canada v. Consumers’ Association of Canada*,¹⁸⁰ Bell Canada wished to overturn a costs order for a Canadian Radio-Television and Telecommunications Commission (“C.R.T.C.”) rate hearing in which Bell was ordered to pay approximately \$200,000 in counsel fees to the respondent and to the intervenors, the National Anti-Poverty Association and Inuit Tapirisat.¹⁸¹ Bell argued that the C.R.T.C. had exceeded its jurisdiction as counsel fees for each organization were already paid by other means and therefore a costs order would not serve as indemnification for expenses incurred. At the Federal Court of Appeal,¹⁸² the majority held that costs at C.R.T.C. hearings should be limited by the principle of indemnification, although in this instance there was insufficient evidence to show that the principle had been violated. The dissenting judgment of Urie J.A., however, held that costs of such a hearing are qualitatively different from those of civil litigation and therefore should not be limited by indemnification. He stated that

the purpose of a hearing in such a proceeding is to obtain meaningful reaction from concerned and interested parties affected by the rate fixing, whether adversely or positively ... Such contributions to a better understanding of the issues should, as I see it, be encouraged and rewarded.¹⁸³

At the Supreme Court, Le Dain J. wrote what has been called a “rather disappointing judgment”,¹⁸⁴ where he adopted a compromise position. Justice Le Dain held that costs in such an administrative hearing should be limited by the principle of indemnification: they “cannot be construed to mean ... a subsidy to a participant in proceedings without regard to what may reasonably

¹⁷⁹ J.M. Evans, “Developments in Administrative Law: The 1985-86 Term” (1987) 9 Sup. Ct. L. Rev. 1 at 38.

¹⁸⁰ [1986] 1 S.C.R. 190, 26 D.L.R. (4th) 573 [hereinafter *Bell Canada* cited to S.C.R.].

¹⁸¹ Roman, *supra* note 122 at 389.

¹⁸² *Bell Canada v. Consumers’ Association of Canada*, [1984] 1 F.C. 79, 147 D.L.R. (3d) 37 (C.A.) [hereinafter cited to F.C.].

¹⁸³ *Ibid.* at 84-85.

¹⁸⁴ Evans, *supra* note 179 at 42.

be considered to be the expense incurred for such participation.”¹⁸⁵ Nevertheless, the Court held that reasonable costs could be awarded, regardless of whether they had actually been incurred.¹⁸⁶

In *Bell Canada*, the Supreme Court relied on *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.*¹⁸⁷ in which residents’ groups wished to make submissions regarding the placement of a new road. The intervenors asked for costs before the hearing in order to secure their participation. The Court had to determine whether the tribunal, a Joint Board, had jurisdiction to order costs in advance. The Court set out a now well-known list of the characteristics of legal costs:

- (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
- (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
- (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
- (4) They are *not* payable for the purpose of assuring participation in the proceedings.¹⁸⁸

The Court held that the intervenors’ request for an advance ruling of costs was tantamount to intervenor funding and that the Joint Board had therefore exceeded its jurisdiction.¹⁸⁹

Ontario’s response to these cases was the *Intervenor Funding Project Act*, a statute which specifically allows some tribunals¹⁹⁰ to award costs to intervenors, payable by the funding proponent.¹⁹¹ The intervenor must apply to a panel

¹⁸⁵ *Bell Canada*, *supra* note 180 at 207-208.

¹⁸⁶ *Ibid.*

¹⁸⁷ (1985), 51 O.R. (2d) 23, 19 D.L.R. (4th) 356 (Div. Ct.) [hereinafter *Hamilton-Wentworth* cited to O.R.].

¹⁸⁸ *Ibid.* at 32.

¹⁸⁹ See also *Reference Re National Energy Board Act (Canada)*, [1988] 2 F.C. 196, 48 D.L.R. (4th) 596 (C.A.); *Re Proposed Transmission Plan of Ontario Hydro for Southwestern Ontario* (1987), 1 C.E.L.R. 261 (Ont. Cons. Hearings Brd.). For other cases on indemnification, see *Edmonton v. Public Utilities Board* (1985), 36 Alta. L.R. 37 (C.A.); *Erlendson v. Ashern Freighters Ltd.* (1989), 58 Man. R. 250 (C.A.); *Feldman v. Law Society of Upper Canada* (1989), 68 O.R. (2d) 157, 33 C.P.C. 213 (H.C.J.).

¹⁹⁰ *E.g.* Joint Board hearings under the *Environmental Assessment Act*, R.S.O. 1990, c. E.18; the *Environmental Protection Act*, R.S.O. 1990, c. E.19; or the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40.

¹⁹¹ A funding proponent “means a proponent who has been named by a funding panel as a

(different from the one actually hearing the case) for funding.¹⁹² The panel will award funding if the case will “affect a significant segment of the public”, and if it will “affect the public interest and not just private interests.”¹⁹³ The panel will consider factors such as whether the intervenor represents a clearly ascertainable interest that should be represented at the hearing, whether a separate representation of that interest would contribute substantially to the hearing, whether the intervenor has adequate financial resources to represent the interest, whether the intervenor has made efforts to raise funds, whether the intervenor has an established record of concern for the interest, whether the intervenor has attempted to include related interests in an umbrella group, whether the intervenor has a clear proposal for use of the funds requested, and whether the intervenor has the financial safeguards to enable accountability for the funds.¹⁹⁴ Note however that it is not necessary for the intervenor to meet each of these criteria.¹⁹⁵ The panel may choose to reduce or retract the award should the burden on the funding proponent be too harsh.¹⁹⁶

Although we have argued that judges (or members of tribunals) should not have the authority to subsidize public interest groups, the *Intervenor Funding Project Act* is the exception that proves the rule. Tribunals that regulate public utilities have a mandate to subsidize public intervention. This mandate stems from two facts. First, the cost of subsidizing intervenors will be passed on to the public through utility rates,¹⁹⁷ and therefore the disproportionality of forcing one party to absorb intervention costs is avoided. Litigation costs, including intervenor funding, are merely one of the many expenses of doing business. However, this is not the only argument in favour of subsidization because any government party, including the Attorney-General, can be said to be capable of transferring costs to the public. Moreover, the public utility is different from other public bodies as regulatory tribunals are specifically charged with the responsibility of setting rates in the public interest. Therefore, unlike the Attorney-General who pursues litigation with only the most indirect consent from taxpayers (*i.e.* taxpayers’ implicit consent to defend legislation), these regulatory boards have a direct mandate from the public to hold hearings to ensure that rates are reasonable.

funding proponent.” A funding panel “means an intervenor funding panel appointed under [the] Act” (*Intervenor Funding Project Act*, *supra* note 177, s. 1).

¹⁹² *Ibid.*, s. 3(1).

¹⁹³ *Ibid.*, s. 7(1).

¹⁹⁴ *Ibid.*, s. 7(2).

¹⁹⁵ *Native Council of Canada v. Environmental Assessment Board* (19 October 1990), Ottawa 18044/90 (Ont. Ct. (Gen. Div.)).

¹⁹⁶ *Intervenor Funding Project Act*, *supra* note 177, s. 8(3).

¹⁹⁷ McWilliams, *supra* note 178 at 221.

B. *Proposals for Reform*

The O.L.R.C. supports the elimination of liability for costs of public interest plaintiffs, but advocates the replacement of the costs-in-the-cause rule with a one-way costs rule. This would mean that if the plaintiff is successful, the defendant would be required to pay party-and-party costs, but if the defendant is successful, each party would pay its own costs.¹⁹⁸ The one-way rule would be applied only if four conditions are met:

- (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties;
- (b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the proceeding economically;
- (c) the issues have not previously been determined by a court in a proceeding against the same defendant; and
- (d) the defendant has a clearly superior capacity to bear the costs of the proceeding.¹⁹⁹

In addition, the one-way rule will not apply if “the conduct of the person who commences the proceeding is vexatious, frivolous or abusive.”²⁰⁰

The O.L.R.C.’s decision to endorse a one-way rule rather than a no-way rule is based on a number of factors. First, the O.L.R.C. determined that government funding for public interest litigants was “a partial solution at best.”²⁰¹ The reasons for this conclusion are threefold. First, despite the existence of funding plans such as the Ontario Legal Aid Plan, the authors of the O.L.R.C. Report doubted that the government would reimburse costs given the expense involved. Second, the costs of implementing a new administrative structure would be prohibitive. Third, reliance on government funding would render the plan vulnerable to budget-trimming.²⁰²

The second factor in the O.L.R.C. decision to endorse a one-way costs rule was that potential public interest litigants would still be deterred from initiating litigation as they would remain liable for their own costs. A no-way costs rule

¹⁹⁸ *Report on Standing*, *supra* note 18 at 157-60. Professor Kent Roach, *supra* note 89 at 11-42 to 11-47, also endorses a variant of this approach.

¹⁹⁹ *Report on Standing*, *ibid.* at 177B.

²⁰⁰ Section 5(1) of the “Draft Act: Access to Courts Act, 19” in *Report on Standing*, *ibid.* at 184-85.

²⁰¹ *Report on Standing*, *ibid.* at 155.

²⁰² *Ibid.*

would not encourage the risk-averse individual who is considering litigation for the first time to begin a lawsuit. The O.L.R.C. argues that a no-way rule affects plaintiffs and defendants unequally because although both parties have to fund expensive litigation, plaintiffs generally have fewer economic resources than do defendants.²⁰³

The O.L.R.C.'s proposal does much to address inequality of access to the court system, yet its advocacy of the one-way rule is perhaps too ambitious. First, in order for plaintiffs to qualify for the one-way rule, they must show the court that they have no personal or pecuniary interest in the outcome of the case. However, many plaintiffs will have mixed motives for pursuing a case; in most public interest litigation the plaintiff will have some, albeit small, personal or pecuniary interest in the outcome. It is difficult to see why a defendant should have to pay costs where a plaintiff has no pecuniary interest, yet should not have to pay costs where a plaintiff has a small pecuniary interest. Furthermore, even if the one-way costs rule is altered to encompass small pecuniary interest, where should the line be drawn between ordinary costs and one-way costs cases? When does lack of pecuniary interest become severe enough to merit the application of a one-way costs rule?

Second, the O.L.R.C. recommendations may not have much impact on public interest litigation due to an increase in uncertainty with respect to costs awards. The requirements of absence of pecuniary interest on the part of the plaintiff, and substantial economic resources on the part of the defendant, would still be subject to the discretion of an individual judge. Additional costs would be incurred as arguments and evidence would have to be adduced to argue these points. The resulting uncertainty might have a deterrent effect, counteracting the incentive engendered by the potential application of a one-way rule.

Third, the O.L.R.C. assumes that a no-way rule will operate unequally between the public interest plaintiff and the defendant. The plaintiff may be "an individual of modest resources or a person who rarely, if ever, engaged in litigation — a so-called 'one shotter'."²⁰⁴ The defendant, in contrast, is characterized as a "repeat player" who is more willing to absorb the costs of litigation.²⁰⁵ These circumstances do not occur universally, however. Public interest litigants are not always lone individuals fighting the big corporation or the government; they may be interest groups with a long history of litigation

²⁰³ *Ibid.* at 160.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

experience. This is particularly true in the case of an intervenor with party status who wishes to help defend legislation, an increasingly prevalent situation.²⁰⁶ These groups may be more familiar with the law in an area and may even have access to superior lawyers. Although they will not have the financial resources of a large corporation, these groups may have enough funding to make them risk-neutral rather than risk-averse.

Fourth, the impossibility of adequate government funding is debatable. Certainly no government will be anxious to spend more taxpayers' dollars on any project, yet Ontario's class action fund and the Ontario Legal Aid Plan evidence the conceivability of the establishment of a costs fund. The O.L.R.C. also contends that the administrative costs of setting up such a plan would be too high, but the existence of the class action fund and the legal aid plan weaken that argument.

Finally, the O.L.R.C. fears the vulnerability of public interest litigation to government cost-saving measures. Yet the response to this vulnerability is not to tax defendants for being the object of public interest litigation. By definition, public interest litigation is beneficial to the public. A defendant's substantial economic resources should not spawn an implication that the defendant is the appropriate party to absorb costs that should arguably be borne by the population as whole.

A desirable alternative to the O.L.R.C. recommendation may be the application of the one-way rule to government or quasi-government bodies only, as these institutions are financed by and responsible to the public. The Supreme Court's record on civil *Charter* cases indicates that the one-way rule is often applied to government defendants.²⁰⁷ However, this is problematic as well. The application of a no-way rule to government bodies entails a lack of equity²⁰⁸ between plaintiffs who sue government or quasi-government bodies and plaintiffs who sue private actors, especially because the identity of the defendant is not a matter of choice. In addition, applying a no-way rule to

²⁰⁶ As Shilton, *supra* note 151 at 658, notes, "[a]s an instrument to promote equality for the disadvantaged, section 15 is getting a far more vigorous workout as a shield than as a sword." A survey of interventions in *Charter* cases between 1988 and 1990 found that interventions in opposition to *Charter* claimants outnumbered interventions in support of *Charter* claimants by almost two to one (F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 Osgoode Hall L.J. 627 at 635).

²⁰⁷ L. Friedlander, "Towards a Cost Awards Policy in Civil Charter Litigation" (1994) Windsor Rev. Legal & Soc. Issues (forthcoming).

²⁰⁸ This is argued by the Law Reform Commission of Australia, *supra* note 16 at 167, in the context of equity between relators and private individuals.

government may produce an “adverse selection” problem. Government departments, which frequently face pressure to cut costs, may choose to reduce enforcement of public rights in order to save money. Consequently, for example, the Attorney General may only consent to relator proceedings when the chance of winning is high.

C. *The Use of the No-Way Rule in Public Interest Litigation*

We therefore propose that a no-way rule is appropriate in public interest litigation. In order to qualify for a no-way rule, a plaintiff, defendant or intervenor will have to request public interest standing, perhaps on the basis of a more relaxed version of the guidelines set out in *Canadian Council of Churches*. Although the no-way rule is currently being invoked much more broadly, this requirement will provide certainty for potential litigants. Once standing is determined, a public interest litigant will not have to fear an adverse cost award. Furthermore, the no-way rule will ensure that differential cost rules are not applied in an overly broad or unduly narrow manner, as standing and costs will be directly connected. Such an approach, in combination with the statutory funding regimes described above, should provide a principled framework for costs in public interest litigation.

The no-costs rule removes decisions regarding public interest litigation funding from the hands of judges. This approach offers several advantages. First, courts are uncomfortable with overtly distributional decisions. Costs-in-the-cause allows a court to legitimately transfer wealth from one party to another because the award is based on the objective and socially accepted basis of success in litigation. However, a costs award based on rewarding public participation in litigation rests on the assumption that the participation of a certain group is good for society. Courts may be reluctant to make that judgment because it is based on normative characterizations. Courts readily acknowledge the utility of the information presented by intervenors, yet explicitly reject the idea that costs can be awarded to encourage participation rather than merely to indemnify litigants. The Divisional Court’s emphasis on “intervenor funding” in *Hamilton-Wentworth*, a phrase with a distinctly political undertone, indicates that the “political” nature of such costs awards makes courts uncomfortable. In *Reese*, the Court noted that an award which required the winning party, the Crown, to pay the costs of *Reese* would be unfair because it would transfer the costs of the action to the taxpayers without their consent or legal justification.²⁰⁹ Similar reasoning also applies to cases

²⁰⁹ *Reese*, *supra* note 71 at 45-46.

between private parties.²¹⁰ The advantages of public participation in the legal process do not outweigh the inappropriateness of allocational decisions made by the courts.²¹¹ A costs award to one party without regard to the legal merits of that party's position (as measured by success in the action), may violate the judiciary's traditional neutrality. Such a costs award could be perceived as favouritism toward one of the parties.

Furthermore it is difficult for a judge to decide in an isolated instance whether a particular plaintiff or defendant should be funded at the expense of other potential litigants. Funding decisions are better left to an independent agency that can review all applications.²¹² This is particularly true for "mixed motive" cases where a plaintiff may gain somewhat from successful litigation, yet is litigating primarily out of interest in a particular issue. As Bryden comments,

[i]t is often true, of course, that people's conception of the public interest coincides conveniently with their own private economic or other interests, and a lively debate can be conducted on the question of whether there is such a thing as a 'public' interest that is distinct from the 'private' interests of the members of society.²¹³

An agency will have the resources and experience to determine if the litigation would be beneficial to the public, whereas a judge might have to conclude that the plaintiff should not qualify for a no-way costs rule due to the possibility of pecuniary gain.

Finally, the combination of a no-way rule and agency funding is proactive rather than reactive, and thereby provides a necessary certainty for public interest litigants. The decision to proceed is facilitated if potential litigants know in advance that they will not be faced with an adverse costs award. Even

²¹⁰ If these parties are companies which provide products to the public, the costs of the litigation could be indirectly borne by the public through increased prices, as McWilliams, *supra* note 178 at 221, notes in the context of public utilities. The exception to this rationale is rate increase hearings for utility companies where it is argued that "if the customers of the utility have to pay the utility's lawyers to argue that the rates should be increased, it is in the interest of these same customers to pay consumer advocates to present the opposite side of the case" (Roman, *supra* note 122 at 389).

²¹¹ Law Reform Commission of Australia, *Grouped Proceedings in the Federal Court* (Canberra: Australian Government Publishing Service, 1988) at 110: "[T]he principle of the 'heads I win, tails you lose' approach to costs is unacceptable." See also P.J. Mause, "Winner Takes All: A Re-examination of the Indemnity System" (1960) 55 Iowa L. Rev. 26.

²¹² Law Reform Commission of Australia, *supra* note 16 at 166-67.

²¹³ Bryden, *supra* note 156 at 490-91.

if potential litigants would have escaped costs due to success or to a one-way rule, the mere risk of an adverse costs ruling could be enough to deter litigation. *A priori* funding means that potential litigants need not risk financial resources on litigation; they need only do preliminary research in order to apply for funding from, for example, the Legal Aid sub-committee on test cases.

Conclusion

Canada is currently witnessing an increase in public interest litigation which has widespread implications. Although the courts have recognized the desirability of this different brand of legal action through rules on standing, they have been slow to adapt costs rules to this new reality. Old assumptions regarding economic incentives to litigate do not apply to the public interest litigant and may ultimately result in inadequate public representation in judicial decision-making. Courts must adopt different principles to encourage the participation of public interest litigants and intervenors.

We have argued that the appropriate costs rule for public interest litigation is a no-way rule where each party pays its own costs regardless of outcome. It is conceded that a no-way rule is not an incentive to litigate; rather, coupled with government funding, it is intended to eliminate the inherent disincentive to litigate created by our costs system. However, given concerns of judicial neutrality, effective allocation of resources as between different litigants and predictability, this proposal will most effectively fulfil the aspirations of the standing quartet.
