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## Habermas, Legal Legitimacy, and Creative Cost Awards in Recent Canadian Jurisprudence

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*Access to justice continues to be a live issue in Canadian courtrooms. While state-sponsored initiatives that promote access continue to flounder in Canada or, in some cases, are cancelled altogether, the pressure is mounting to find creative solutions that facilitate greater participation in formal dispute resolution processes. The price of failing in this regard is very high. To truly flourish, both social cohesion and individual liberties require a more participatory and inclusive legal system than the one that currently precludes all but the wealthiest from accessing our courts. Drawing on the legal philosophy of Jürgen Habermas, the author examines access problems from the perspective of the civil litigant who is facing the unmanageable financial burden of having her legal rights recognized and adjudicated in a Canadian courtroom. Specifically, this paper considers the role which creative costs orders can play in advancing the goal of fuller legal participation. The traditional justifications given for costs awards (most importantly, indemnity) continue to dominate the jurisprudential dialogue. However, recent developments in Canadian law have suggested – if not wholeheartedly embraced – a more instrumental justification for costs awards. The instrumental view, considered here, has the advantage of not assuming that litigants are equal in their ability to access justice. Although suffering from recent setbacks, this approach has the potential to assist in addressing the inequalities of participating in the Canadian justice system.*

*L'accès à la justice reste un problème épineux pour les tribunaux canadiens. Alors qu'au Canada, les projets financés par l'État et visant à faciliter l'accès aux tribunaux accumulent les échecs ou sont carrément éliminés, les pressions se font de plus en plus fortes pour trouver des solutions novatrices qui favoriseraient une participation accrue aux procédures formelles de règlement des différends. Le prix de ces échecs est très élevé. Pour vraiment s'épanouir, la cohésion sociale et les libertés individuelles ont besoin d'un système judiciaire plus favorable à la participation et à l'inclusion que le système actuel qui interdit à tous sauf aux mieux nantis l'accès à nos tribunaux. S'inspirant de la philosophie juridique de Jürgen Habermas, l'auteur examine les obstacles à l'accès de la perspective d'un justiciable aux prises avec l'insoutenable fardeau financier de défendre et de faire reconnaître ses droits par un tribunal canadien. L'article étudie particulièrement le rôle que peuvent jouer des ordonnances novatrices sur les dépens pour progresser vers l'objectif de la participation accrue des particuliers au système juridique. Les motifs traditionnellement avancés pour justifier l'attribution des dépens (surtout les indemnisations) continuent de dominer le dialogue jurisprudentiel. Toutefois, les développements récents en droit canadien laissent entrevoir – même si ce point de vue n'est pas accepté sans réserve – une justification plus instrumentale pour l'attribution des dépens. Le point de vue instrumental étudié dans cet article offre l'avantage de ne pas présumer que les parties jouissent d'une capacité égale d'accéder à la justice. Malgré les échecs récents qu'elle a essuyés, cette approche a le potentiel d'aider à combler les inégalités qui empêchent beaucoup de Canadiens de recourir au système judiciaire.*

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*Introduction*

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*Introduction*

In a recent speech presented to the Empire Club of Canada, Chief Justice Beverley McLachlin eloquently stated one of the fundamental problems of the Canadian justice system:

The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up.<sup>1</sup>

Yet what has been notable in the Supreme Court's recent jurisprudence has not been the promotion of meaningful access to justice, but rather a significant narrowing of Canadians' access to legal counsel. While government funding for legal aid continues to founder, a unanimous Court recently refused to recognize a constitutional right to participate in Canada's legal system with the assistance of counsel, except on a case-by-case basis where exceptional circumstances warrant judicial intervention.<sup>2</sup> The decision in *British Columbia (Attorney General) v. Christie* was released mere months after Chief Justice McLachlin's speech to the Empire Club. Mr. Christie argued that a provincial tax on legal services prevented his poor and low income clients from retaining him to pursue their legal claims. His claim was for a constitutionally recognized right to access courts and tribunals with the assistance of legal counsel.<sup>3</sup> The government of British Columbia, on the other hand, denied that such a

1. The Right Honourable Madam Chief Justice Beverley McLachlin, P.C., "The Challenges We Face" (Remarks delivered at the Empire Club of Canada, Toronto, 8 March 2007) [unpublished].

2. *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at paras. 23-27 [*Christie*].

3. *Ibid.* at paras. 5, 10.

constitutional right existed and contended that the purpose of the tax was to promote access to justice by providing funding for legal aid programs and other access initiatives. However, the tax collected went into the general revenues of the province and there was no evidence led that it was ever devoted to such initiatives.<sup>4</sup> Evidence was also not led by either party from which the exact financial burden of striking down the tax could be assessed. Because of this lack of evidentiary foundation, the court held that imposing “a not inconsiderable burden on taxpayers” may go beyond the scope of a claim proceeding by application.<sup>5</sup> Although the Court found that Mr. Christie’s position was not supportable, the Court’s decision left open the possibility for a future challenge based on a stronger evidentiary record.

While the positive claim for funding for legal services was not embraced, the Court’s own recent jurisprudence provides some middle ground between the litigants’ positions that remains sadly unexplored in the *Christie* decision. Instead of ruling on the basis of the positive claim for funding, the Court could have relied on the subtle principle from Bastarache J.’s majority decision in *Dunmore v. Ontario (Attorney General)*<sup>6</sup> (one that has increasingly found support in recent Supreme Court decisions).<sup>7</sup> That is, there may at times be a positive obligation on governments to act where vulnerable groups’ ability to exercise their constitutional rights meaningfully (in *Christie*, to ensure the rule of law is maintained) is threatened by government inaction.<sup>8</sup> While this positive obligation may not extend to a system of judicially imposed legal aid, it may go so far as to restrict government’s authority to legislate greater barriers to meaningful participation in the Canadian legal system, such as the tax on legal services at issue in *Christie*.

As Chief Justice McLachlin recognizes, it should be a fundamental principle of any functioning democracy that a party with a legitimate legal claim will have access to a court to have their dispute resolved without the added anxiety of taking on an unmanageable financial burden.<sup>9</sup> This paper considers some of the reasons why this should be the case, as well as the novel method embraced (with reservations) by Canadian courts

4. *Ibid.* at para. 1.

5. *Ibid.* at paras. 14, 28.

6. 2001 SCC 94, [2001] 3 S.C.R. 1016 [*Dunmore*].

7. See, for instance, *Baier v. Alberta*, 2007 SCC 31.

8. *Dunmore*, *supra* note 6 at paras. 23-29.

9. Similar concerns were raised by David Scott, Keynote Address (Remarks presented to “Building Bridges to Justice: 1<sup>st</sup> National Pro Bono Conference, Toronto, 16 November 2006) [unpublished]) as well as by the Chief Justice of Ontario (as he then was), Roy McMurtry (see Tracey Tyler, “The dark side of justice” *Toronto Star* (3 March 2007) A1).

in specific cases for encouraging the judicial resolution of legal disputes. Traditionally in Canada, the legal profession has met this concern through two major sources of low-cost or no-cost legal services: provincial legal aid programs and services performed by counsel on a *pro bono* basis. Neither of these sources has ever fully met the very large need that exists for affordable legal services in Canada, particularly in the area of civil litigation. Yet, as the Manitoba Law Reform Commission's *Report on Costs Awards in Civil Litigation* notes, numerous studies in the last fifteen years have demonstrated that the high cost of civil litigation has now far outpaced the rate of inflation. This expense has become a significant barrier for many potential litigants to access the courts.<sup>10</sup> With the historic pattern of cuts to provincial legal aid budgets<sup>11</sup> and the recent elimination of the federal Court Challenges Program,<sup>12</sup> this reduction in government funded, affordable legal services has become critical in Canada. In response, the legal profession and the judiciary have recently undertaken new initiatives—both on an organized and an *ad hoc* basis—to promote access to the courts in Canada. These innovations have included the work of the Canadian Bar Association in advocating for the constitutional recognition of a right to publicly funded legal aid,<sup>13</sup> the development of large-scale *pro bono* initiatives like Pro Bono Law Ontario,<sup>14</sup> and targeted advocacy aimed at re-examining the traditional justification for costs awards in Canada. This final initiative of targeted advocacy forms the subject matter of this paper.

10. Manitoba Law Reform Commission, *Costs Awards in Civil Litigation*, Report No. III (Winnipeg: Publications Branch, Office of the Queen's Printer, September 2005), online: <<http://www.gov.mb.ca/justice/mlrc/reports/111.pdf>> at 1 [MLRC]. See, e.g., *Ontario Civil Justice Review: First Report* (1995), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>>; Alberta Summit on Justice, *Final Report* (1999), online: <<http://www.justice.gov.ab.ca/publications/justicesummit/rec/final.htm>>; and Canadian Bar Association, *Access to Affordable and Appropriate Law Related Services in 2020* (1999), online: <<http://www.cba.org/cba/pubs/pdf/windsorpaper.pdf>>.

11. See, e.g., "Legal Aid cuts back on family cases" *CBC News Manitoba* (9 January 2003), online: <[http://www.cbc.ca/canada/manitoba/story/2003/01/09/mb\\_legalaidcut20030108.html](http://www.cbc.ca/canada/manitoba/story/2003/01/09/mb_legalaidcut20030108.html)>; "Lawyers plan court battle over Legal Aid access" *CBC News Canada* (12 August 2002), online: <[http://www.cbc.ca/canada/story/2002/08/11/legal\\_aid020811.html](http://www.cbc.ca/canada/story/2002/08/11/legal_aid020811.html)>; and "Dal legal aid faces closure" *CBC News Nova Scotia* (13 June 2000), online: <[http://www.cbc.ca/news/story/2000/06/13/ns\\_dalaid000612.html](http://www.cbc.ca/news/story/2000/06/13/ns_dalaid000612.html)>.

12. "Government cuts to 66 programs announced in September 2006" *CBC News In Depth* (27 September 2006), online: <<http://www.cbc.ca/news/background/parliament39/budgetcuts-list.html>>.

13. See generally, Vicki Schmolka *et al*, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002), online: <[http://www.cba.org/CBA/pdf/2002-02-15\\_case.pdf](http://www.cba.org/CBA/pdf/2002-02-15_case.pdf)>. The CBA's case has effectively been overruled by *Christie*, *supra* note 2.

14. See, e.g., "About PBLO" *Pro Bono Law Ontario*, online: <<http://www.pblo.org/about.cfm>> and "Vision Statement" *Pro Bono Law of BC*, online: <<http://probononet.bc.ca/>>. Pro Bono Law Alberta is currently a project in development.

In this paper, I examine two interrelated issues. First, I look at the reasons why a functioning democracy should emphasize access to justice as a core principle lying at the heart of a deliberative society. This analysis is indebted to Jürgen Habermas's work in developing a proceduralist theory of law and democracy in his influential text, *Between Facts and Norms*. I will examine some of the central assumptions of rational legal discourse as identified by Habermas, namely, that a functioning legal system requires that "conditions of communication obtain that"

- (1) prevent a rationally unmotivated termination of argumentation, (2) secure both freedom in the choice of topics and inclusion of the best information and reasons through universal and equal access to, as well as equal and symmetrical participation in, argumentation, and (3) exclude every kind of coercion—whether originating outside the process of reaching understanding or within it—other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized.<sup>15</sup>

After a brief excursus that concerns a recent attempt by the Manitoba Law Reform Commission to revisit the traditional purposes for costs awards, I look at two developments in the law of costs that the legal profession and the judiciary assert will promote access to justice in Canadian courts. Primarily, I am concerned with the Supreme Court of Canada's 2003 decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*.<sup>16</sup> In this decision, the Supreme Court for the first time recognized that promoting access to the courts should be an important consideration when a court chooses to exercise its inherent discretion to award costs in advance of the matter and without regard for its outcome. Despite having considered this important costs issue in 2003, the Supreme Court has already revisited its decision in its 2007 judgment in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) (No. 2)*,<sup>17</sup> a consideration of which will form the conclusion of my argument. A second development in the area of access to justice and the law of costs, which I consider more briefly, arises from the unanimous decision of the Ontario Court of Appeal in *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*

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15. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, MA: MIT Press, 1996) at 230 [Habermas].

16. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 [*Okanagan Indian Band*].

17. *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 [*Little Sisters (No. 2)*].

(*Cavaliери*) awarding costs to a party whose counsel had acted *pro bono*.<sup>18</sup> In *Cavaliери*, both litigants were private parties and, unlike *Okanagan Indian Band*, neither party raised a significant public interest issue. In awarding costs to the party whose counsel was acting without receiving fees, Feldman J.A. expressly accepted the position of the *amicus curiae*, Pro Bono Law Ontario, that access to justice must be a fundamental consideration when Ontario courts fashion costs orders in the future.

When taken together, these two decisions represent a significant development in expanding the range of purposes for costs awards in Canada, although this development has been narrowed by the Supreme Court of Canada's subsequent decision in *Little Sisters (No. 2)*. These decisions conceive of costs awards as tools for the judiciary to promote litigants' access to justice, rather than simply as a means of indemnifying a successful party in litigation. As such, these judgments are a significant departure from the traditional justification for costs awards in Canada, a justification that places the greatest emphasis on ensuring that the vindicated party is "made whole." This development is significant for those who see democracy as an institutionalized deliberative process that creates feelings of social legitimacy by facilitating the equal participation of diverse parties in state-sponsored discourse. By promoting access to the courts through costs awards, as well as by other, more traditional means such as legal aid, parties with limited financial resources are better able to contribute their voices to public debate. Before discussing Habermas's work on law and democracy, to see more clearly how these recent decisions have revitalized the law in this area, I briefly consider the traditional purpose for an award of costs in Canadian jurisprudence. This purpose, indemnity, I argue, helps to justify the paternalistic imposition of state power rather than facilitating broad discussion on issues of general or private significance.

#### I. *The traditional justification for an award of costs*

Prior to their amalgamation, the common law and the equitable courts in England did not have the same power to award costs *inter partes*. The common law courts had no inherent jurisdiction to grant costs to a meritorious party. They were granted that authority by the *Statute of Gloucester* in 1278. According to Mark M. Orkin, the general rule after the statute came into force was that the common law courts had no authority to withhold such costs as were allowed by law, and that such costs as were allowed would always follow the event. In other words, costs were

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18. 1465778 *Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757, [2006] O.J. No. 4248 (C.A.) (QL) [*Cavaliери* cited to O.R.].

conceived of as a legal response that was triggered mechanically by a court's decision as to who was meritorious on a given set of facts. Equitable courts, on the other hand, had an absolute discretion to award costs in any matter within their jurisdictions based on conscience alone.<sup>19</sup> The Supreme Court of Canada in *Okanagan Indian Band* held that this equitable discretion to award costs remains a residual power inherent to Canadian courts that "is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion."<sup>20</sup> Thus, in Nova Scotia, Rule 63.02(1) places "the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid," in the discretion of the court.<sup>21</sup>

Rule 63.03(1), however, while reiterating this discretion, also stipulates that "unless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event."<sup>22</sup> In other words, Rule 63.03(1) establishes a presumption that an award of costs will follow the outcome of the matter at issue, as was historically true in the common law courts. That costs will generally follow the decision is a logical manifestation of the traditional purpose for an award of costs, which is to indemnify, fully or partially, the party for whose benefit the costs order is made, for the costs that that party is obliged to pay to her counsel for publicly defending her rights. LeDain J., writing for a unanimous Supreme Court of Canada in *Bell Canada v. Consumers' Association of Canada*, has given this traditional justification for costs awards a broad affirmation, stating that "the word 'costs' must carry the general connotation of being for the purpose of indemnification or compensation."<sup>23</sup> In limited circumstances, the courts have also recognized other justifications for costs, such as a punitive award against a party for fomenting unnecessary litigation burdens; however, indemnification continues to be by far the most common rationale for costs orders in Canada. In *Little Sisters (No. 2)*, a majority of the Supreme Court once again reiterated that it is proper for indemnity to remain the primary justification for a costs award in Canada.<sup>24</sup>

This general position, nevertheless, has been nuanced by several recent decisions by Canadian courts, cited approvingly by the Supreme Court of

19. Mark M. Orkin, *The Law of Costs*, looseleaf (Aurora, ON: Canada Law Book, 2006) at 1-1.

20. *Supra* note 16 at para. 19.

21. Nova Scotia, *Civil Procedure Rules*, r. 63.02(1).

22. *Ibid.* r. 63.03(1).

23. *Bell Canada v. Consumers' Association of Canada*, [1986] 1 S.C.R. 190 at 207, [1986] S.C.J. No. 8 (QL).

24. *Supra* note 17 at para. 34.



Canada in *Okanagan Indian Band*. In *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al.*, for example, Macdonald J. canvassed both English and Canadian law on the principles underlying costs awards, and suggested that the strict purpose of indemnifying a party for the costs associated with retaining counsel may now be "outdated."<sup>25</sup> In *Fellowes*, the successful litigant was a lawyer acting on behalf of his own law firm, without billing his time, in an action against a former client for non-payment of legal fees. In awarding costs, Macdonald J. treated the successful litigant as if they had been represented by outside counsel,<sup>26</sup> suggesting that a costs order may be appropriate in circumstances where a litigant expends significant time and effort regardless of there being no direct pecuniary loss in legal costs due to the proceeding. In *Skidmore v. Blackmore*, the British Columbia Court of Appeal reached a similar conclusion with respect to a self-represented lay litigant.<sup>27</sup> In both of these cases, costs are still notionally awarded on the basis of indemnification, as the award was intended to compensate a party for their expended efforts of time and energy; however, the logic of these cases suggests that indemnification is no longer a concept strictly limited to recovering a party's actual out-of-pocket legal expenses, as costs awards traditionally have been.

While the justification for an award of costs in *Fellowes* and *Skidmore* is still connected to the principle of indemnification, as a majority of the Supreme Court of Canada has now recognized, these decisions, and others like them, have expanded the range of possible justifications available for an award of costs. According to a majority of the Court in *Okanagan Indian Band*, the principles that animated the award of costs in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* should still generally prevail in Canadian courts,<sup>28</sup> namely, that:

- (1) [Costs] 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

25. *Fellowes, McNeil v. Kansa General International Insurance Co.*, 37 O.R. (3d) 464 at 475, [1997] O.J. No. 5130 (QL) (Ct. J. (Gen. Div.)) [*Fellowes*].

26. *Ibid.*

27. See generally *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330, [1995] B.C.J. No. 305 (QL) [*Skidmore*].

28. *Supra* note 16 at para. 20.

services incurred relevant to the case or proceeding.

(4) *They are not payable for the purpose of assuring participation in the proceedings.*<sup>29</sup>

However, a majority of the Supreme Court affirmed in *Okanagan Indian Band* that other considerations besides these four might also influence an award of costs, such as the penalization of a party who has refused to accept a reasonable offer or as a sanction for behaviour that unnecessarily creates additional expense in litigation.<sup>30</sup> In other words, costs awards can also be used as an important policy tool for courts to discourage litigation which is frivolous or vexatious, rather than simply as an award mechanically ordered in favour of a successful party at the conclusion of litigation. Costs are therefore a more dynamic tool in contemporary Canada than they had originally been conceived of by the common law courts in England.

Most importantly for the current development of costs law in the area of access to justice, the decision in *Okanagan Indian Band* also recognized that costs orders might be an important instrument of social policy other than by discouraging litigation. As LeBel J., writing for the majority of the Court, indicates:

the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.<sup>31</sup>

Although the majority still affirms the traditional purpose of costs articulated in *Hamilton-Wentworth*—a case that expressly precluded the use of costs to facilitate legal participation—in the same decision this majority also extends the range of possible uses for costs awards by suggesting

29. *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23 at 32, [1985] O.J. No. 1881 (QL) (Ct. J. (Gen. Div.)) [*Hamilton-Wentworth* cited to O.R.] [emphasis added].

30. *Supra* note 16 at para. 25.

31. *Ibid.* at para. 26.

that costs may actually have a role in promoting participation, as a policy objective related to efficiency and indemnity. Thus, awards for costs in Canada may now serve a broader range of instrumental purposes, not the least of which, as I consider more fully in the final sections of this paper, is promoting litigants' opportunities to have their rights recognized publicly by a court. This decision does not represent a radical transformation of the law. Indeed, Bastarache and Lebel JJ., writing for a majority in *Little Sisters (No. 2)*, describe the Court's decision in *Okanagan Indian Band* as an "evolutionary step, but not a revolution, in the exercise of the courts' discretion regarding costs."<sup>32</sup> However, by reframing the purpose for costs awards incrementally so as to directly and explicitly implicate access to justice concerns, these recent decisions, as I will argue, may, if not interpreted too narrowly, have an important impact on the popular legitimacy of our current legal system by affording more opportunities for participation in formal legal processes. If access is recognized by the courts as a related policy objective for costs awards, then diverse communities in Canadian society will have an enhanced opportunity to influence the development of Canadian law. Canadian legal norms will then ideally reflect this spirited dialogue, rather than remaining a soliloquy spoken solely by those who currently possess the financial means to avail themselves of the courts. Before considering more fully the role of these recent developments in sustaining the continued legitimacy of Canadian courts, it is first necessary to consider how legal legitimacy in a post-metaphysical and pluralist society such as Canada is established and maintained. I will do this through a necessarily brief examination of Habermas's reconstructive approach to law advanced in *Between Facts and Norms*. Habermas's model of a proceduralist democracy is incredibly rich and is saturated by his deep appreciation for the development of modern political thought. Unfortunately, it will only be possible here to provide an outline of his major arguments most relevant to the current issue.

## II. *The legitimacy of legal discourse in a procedural democracy model*

As is suggested by the theorists upon whom he relies—notably Plato, Aristotle, Kant, Rousseau and Hegel—Habermas's theory of communicative reason is an attempt to justify the continued, albeit significantly attenuated importance of reason in social and political thought, originally afforded centrality by traditional metaphysical systems. In the classical modern tradition of thought, typified by Hegel's philosophy of history, Habermas argues that philosophical systems drew a "link between practical reason

32. *Supra* note 17 at para. 34.

and social practice [that] was too direct."<sup>33</sup> According to Habermas, within these systems, a unitary vision of the good life was thought to motivate the individual actor who could ultimately be identified with a macro-subject that operated on a global scale through the medium of the state. However, the increasing complexity of social reality makes this claim for a metaphysical political order less convincing. In light of the diversity of contemporary societies, it is difficult now for us to find convincing the leap from a single person's vision of the good life to a single principle that could motivate an entire state.

In opposition to these metaphysical theories, Habermas proposes a model of *communicative* reason, which can be distinguished from *practical* reason primarily through the theory's emphasis on the inter-subjectivity of rationality. In a communicative model, rationality is not a transcendent norm. Rather it is immanent in the mutual understanding of communicating parties and within the enabling and limiting conditions that arise in discourse because of the presuppositions speaking actors make in the course of meaningful communication. As Habermas contends, "what makes communicative reason possible is the linguistic medium through which interactions are woven together and forms of life structured."<sup>34</sup> Instead of a system of substantive normative claims that inform speakers of what they *ought* to do and what language *ought* to mean, Habermas's theory of communicative reason is a destabilized *process* that allows for the formulation by actors of contingent validity claims, while not dictating these claims' substantive content.

Habermas explains that in order for inter-subjective communication to be effective, speakers "must undertake certain idealizations—for example, ascrib[ing] identical meanings to expressions, connect[ing] utterances with context-transcending validity claims, and assum[ing] that addressees are accountable, that is, autonomous and sincere with both themselves and others."<sup>35</sup> However, because these idealizations merely facilitate an orientation, or process, intended to ease speakers' capacity to reach counter-factual validity claims through negotiation and consensus, these speaker-generated validity claims must always necessarily be vulnerable to change by the community of speakers' future deliberations. Because validity claims are formulated through language, rather than with reference to transcendental norms, any normative claims made by an individual speaker are inherently contestable by other speakers who have the freedom

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33. Habermas, *supra* note 15 at 3.

34. *Ibid.* at 3-4.

35. *Ibid.* at 4.

to advance their own competing claims in response. There is therefore no coercive force internal to this communicative system, but only the weak force of speakers trying to achieve rational consensus, a consensus that stands to be overturned at any time if another speaker's validity claims are found to be more acceptable to a broader range of speakers.

William Rehg and James Bohman argue in their article "Discourse and Democracy: The Formal and Informal Bases of Legitimacy in *Between Facts and Norms*," that Habermas's account of democracy and law seen through the lens of communicative reason offers "an attempt to hold onto a strongly normative account of legitimacy in the face of the complexity inherent in functionally differentiated, pluralist societies."<sup>36</sup> Traditional justifications for normative politics reflect a tension that exists between the concepts of popular sovereignty and political rightness. Two competing theoretical accounts of political behaviour—communitarianism and liberalism—can be roughly associated with these values. On the one hand, liberalism can be characterized, according to Cass R. Sunstein, as a model where

[s]elf-interest, not virtue, is understood to be the usual motivating force of political behavior. Politics is typically, if not always, an effort to aggregate private interests. It is surrounded by checks, in the form of rights, protecting private liberty and private property from public intrusion.<sup>37</sup>

Communitarianism, on the other hand, places considerably more emphasis on political participation and public virtues, rather than on a system of individual rights protecting the private interests of privately conceived individuals. According to Kenneth Baynes, the communitarian sees law as "an expression of the common praxis of the political community," of pure social will.<sup>38</sup> Habermas's conception of procedural democracy is important because it is a reconstructive approach to these two divergent models. In other words, his vision of democracy attempts to mediate the tension between these two positions by focusing on the best features of both political models, while also attempting to limit each of the models' shortcomings. For example, Habermas specifically rejects a model of the political process motivated primarily by an aggregation of private

36. William Rehg & James Bohman, "Discourse and Democracy: The Formal and Informal Bases of Legitimacy in *Between Facts and Norms*" in René von Schomberg & Kenneth Baynes, eds., *Discourse and Democracy: Essays on Habermas's Between Facts and Norms* (Albany, NY: State University of New York Press, 2002) 31 at 32 [Schomberg & Baynes].

37. Cass R. Sunstein, "Preferences and Politics" (1991) 20:1 *Philosophy and Public Affairs* 3 at 4.

38. Kenneth Baynes, "Deliberative Democracy and the Limits of Liberalism" in Schomberg & Baynes, *supra* note 36, 15 at 16.

preferences as incapable of accounting for social integration. Yet, he is equally sceptical of the communitarian notion that a non-self-reflexive, shared social purpose exists, common to all actors, since this view does not accord with our lived reality of difference and dispute. As political discourses involve bargaining as well as moral argumentation, the liberal and communitarian perspectives are too limited to account for the complexities of modern societies. Habermas suggests another way:

[a]ccording to discourse theory, the success of deliberative politics depends not on a collectively acting citizenry but on the institutionalization of the corresponding procedures and conditions of communication, as well as on the interplay of institutionalized deliberative processes with informally developed public opinions.<sup>39</sup>

In other words, central to Habermas's attempt at political mediation is neither a shared nor an isolated moral claim, but rather an institutionalized space for the formation of rational, mutually acceptable political opinions. Instead of relying on an undifferentiated social will that fails to account for social diversity or, alternatively, on a system of rights that atomistically isolates each individual, the deliberative politics that Habermas theorizes provides a forum for individuals to define their own private moral claims through public argument and consensus-building, rather than by imposing from above a unitary or solitary vision of the good life on individual speakers.

To summarize, legitimacy through communicative reason is a product of rational speakers with shared assumptions, but different interests, identities and values, achieving normative consensus through discourse. Rather than impose substantive moral claims on a community, Habermas's notion of communicative reason establishes a process for validity claims to be reached inter-subjectively and changed as future negotiations dictate. These validity claims have a contingent, but still motivational force, directing a community's actions by providing a weak standard against which to judge behaviour, while at the same time fostering social integration through a procedure that encourages consensus building rather than coercion. However, such a conception has obvious limitations, most notably the difficulty that arises when this theory is transposed onto a community with a substantial population spread over a large geographical expanse, the conditions of the modern nation state. Communicative processes such as these seem primarily suited to a community more intimate than late-capitalist societies where personal interaction between a

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39. Habermas, *supra* note 15 at 298.

critical mass of citizens has become virtually impossible (or, at least, only possible virtually through political representation in legislatures and the media). However, while communicative reason may have purer sources in the coffeehouses of the eighteenth century where Habermas originally envisioned its development,<sup>40</sup> if his theory is to be compelling, Habermas must also be able to justify the superiority of his democratic model on the ground, in the midst of the social reality of the modern nation state.

Habermas does this through a legal theory which conceives of law as a form of *institutionalized* communicative reason. Ultimately, for Habermas, only law is able to resolve the problematic relationship that exists between the boundedness of the processes of communicative reason and the expanse of our contemporary social landscape by combining state power with the popular sovereignty of communicating subjects. Law performs this role by channelling state power into defined outlets, while at the same time facilitating greater social integration amongst diverse actors by fostering their equal participation in formal legal development. Habermas argues that law alone “represents ... the medium for transforming communicative power into administrative power.”<sup>41</sup> Instead of coercing speakers, reasoning, relying on the weak force of consensually derived validity claims, persuades other speakers to treat a position as contingently valid, thus for a time suspending their own communicative freedom through the medium of agreement.<sup>43</sup> The legal form itself is essential for a properly functioning democracy because only law can accomplish a related process of argumentation on a national scale.

Law, in the context of constitutional law, both defines and allows for the exercise of the state's power and establishes its confines, while the authorization of state power poses the threat of sanctions that makes law socially effective. However, at the same time, law only gains its authority to sanction insofar as it transcends its construction as a discrete system and allows for input from diverse public discourses. State power is only legitimate where it is developed and exercised consensually. The legal medium therefore provides the vital link between the formal decision-making institutions of the state and the communicative power of various informal discourses. Legal discourse is therefore not simply an exercise in the accurate description of the law. It mobilizes communicative reason, extending its reach with the force of consensual state power. In other

40. See generally Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*, trans. by Thomas Burger with the assistance of Frederick Lawrence (Cambridge, MA: MIT Press, 1989).

41. Habermas, *supra* note 15 at 169.

43. *Ibid.* at 225-26.

words, legal legitimacy is a combination of state power acting through institutions that are blessed with popular assent and that are, importantly, open to public input. As Richard Devlin and Dianne Pothier describe Habermas's view of legal legitimacy, "law, as the instantiation of justice, can be legitimate only if citizens are both the authors and addressees of the legal regimes that prevail."<sup>42</sup> It is only through the influence of informal public discourses that formalized state power can escape the charge of paternalism by facilitating a legal system where diverse social actors influence the development of the law, rather than the state imposing the law on actors unilaterally.

In the complex public sphere of the modern state, deliberative legal discourse has its outlets in the formal institutions of the constitutional state. Each of these formal centres of communicative reason produces and reproduces the legitimacy of the system as a whole so long as the law maintains an attitude of openness to informal public discourses generated from outside of the system's own internal, formal coherence. One obvious source of legal legitimacy is the open courts. Only if the state and other formal centres of power promote and maintain general access to the courts can legal legitimacy succeed by investing informal public discourses with the state power associated with formalized institutions. Unlike a liberal model, which sees government's role as merely protecting the private individual from unreasonable public intrusions in the form of vexatious litigation, or a communitarian model, which imagines that litigation is the realization of an unproblematized social will rather than an adversarial process, a proceduralist model of the democratic state places its primary emphasis on fostering deliberative institutions, like the courts, so that no lone individual's will can ever be identified with a comprehensive vision of the good life. As William Rehg suggests,

[o]n a proceduralist view, only the state, as a political system invested with decision-making power, can "act." But its action is legitimate only if the formal decision-making procedures within the constitutional state have a discursive character that preserves, under conditions of complexity, the democratic sources of legitimacy in the public at large.<sup>43</sup>

Only the state has the power to enforce popular will across diverse populations and over the geographical expanse of contemporary nations. However, the source of that power is not the state itself, but the continuing common assent and input of diverse communicative actors. Insofar as the

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42. Richard Devlin & Dianne Pothier, "Dis-citizenship" in Law Commission of Canada, ed., *Law and Citizenship* (Vancouver: UBC Press, 2006) 144 at 163.

43. William Rehg, "Translator's Introduction" in Habermas, *supra* note 15 at xxxi.



formal manifestations of state power are divorced from informal discursive practices, the legal process risks losing its legitimacy in the Habermasian sense by acting without the input of the governed.

At the end of this paper, I evaluate two recent developments in the law surrounding costs awards from this proceduralist perspective. My contention is that the judiciary has begun to exercise its discretion to award costs in a manner that systematically encourages the rational resolution of disputes through the courts by encouraging litigants' equal and symmetrical participation in the legal system. This development, arguably, has been put in jeopardy by the Supreme Court's recent decision in *Little Sisters (No. 2)*. However, before considering these developments, it is helpful to consider a recent account of the purposes behind costs awards authored by the Manitoba Law Reform Commission to see if the traditional goal of indemnification has really made way for the more instrumental justification for costs awards articulated in *Okanagan Indian Band*, and if not, what a revised yet still traditional account of costs awards can tell us about the assumptions underlying indemnity as a justification for costs.

### III. *A modification of the traditional justification for the award of costs*

I suggested in the introductory section of this paper that the legal profession and the judiciary have paid increasing attention to the purposes and underlying rationales for costs awards because of a well-founded anxiety that a large number of legitimate legal disputes are not reaching the courts. This renewed interest has led both practitioners and the judiciary to advance different considerations as possible rationales for costs awards that might help to increase the legitimacy of Canadian court processes by promoting access to justice. Yet, as E.T. Spink has suggested:

Searching for the 'philosophy' of costs is a challenging task. It is relatively easy to describe the different approaches used in various jurisdictions, but the reasons for those differences are elusive. Under close examination, it sometimes appears that there is no underlying philosophy, or that the philosophy may have changed without reason or explanation. Certain approaches to costs seem to have developed unconsciously or accidentally, as a product of certain extraneous factors, only to be later described and justified as reflecting a particular philosophical objective.<sup>44</sup>

In my opinion, the current uncertainty with respect to the proper rationale for costs awards in the Canadian legal system is a function largely of

44. E.T. Spink, *Party and Party Costs* (Alberta Law Reform Institute, 1995) at 1 [unpublished paper cited in MLRC, supra note 10 at 3].

the now theoretically attenuated connection that exists between these awards and the purpose of indemnification that has traditionally justified the court's exercise of this power. In other words, recent decisions, such as *Fellowes*, have led to a legitimacy crisis in this area of the law, as the traditional purpose for cost awards seems no longer suited to the contemporary realities of the high costs assumed by parties to civil litigation and the resulting exclusion of many others from legal processes altogether. Indemnity serves only a limited purpose when, for instance, self-represented litigants, who do not have actual legal fees for which they require indemnification, are in the courtroom. As the judiciary sees increasing numbers of self-represented litigants arguing cases, even at the appellate level, the correlative assumption must be that even more cases that might benefit from a judicial resolution are not being heard by the courts at all.<sup>45</sup>

As indicated in the introductory section of this paper, the Manitoba Law Reform Commission's *Report on Costs Awards in Civil Litigation* provides one recent and thorough analysis of the purposes of costs awards in a Canadian jurisdiction. In that report, the Commission identified six "desirable goals" for appropriate costs rules to accomplish. These were:

1. Indemnification;
2. Deterrence;
3. Simplicity and Clarity;
4. Encouragement of Settlement;
5. Facilitation of Access to Justice; and
6. Flexibility.

As the authors of the Manitoba *Report* suggest, two broad purposes animate this list: equity and incentive.<sup>46</sup> However, the only principle expressly associated by the authors with equity is indemnification. According to the Commission, it is equitable that successful litigants should be "made whole" after defending their claims, while those who bring unmeritorious actions or the defenders of indefensible positions should be obligated to compensate the successful litigant who was thereby forced to respond publicly to a challenge.<sup>47</sup> Although not expressly acknowledged by the authors, this list appears to be arranged hierarchically, with indemnification, the principle

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45. The Canadian Judicial Council is undertaking research with respect to these concerns. See Canadian Judicial Council, *2004-2005 Annual Report* (Ottawa: 2005), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/cjc0405-e1.pdf>> at 20.

46. MLRC, *supra* note 10 at 4.

47. *Ibid.* at 4-5.

that is supposed to guarantee an equitable resolution of disputes, at the top, followed by secondary principles that promote costs awards as incentives (or, rather, disincentives) to undertaking litigation in unmeritorious cases. Indemnification, identified as the sole equitable justification for costs awards by the authors, is therefore the primary consideration that stabilizes the Commission's view of the legitimate purposes for costs awards in general. Hence, the authors' first recommendation to the Manitoba government is that the "default rule should continue to be that a successful party is entitled to an award of costs to indemnify him or her partially against costs incurred."<sup>48</sup> In the authors' view, the secondary goals of costs awards perform merely a supplementary role for the primary equitable goal of indemnification by creating disincentives to needless litigation and are not as immediately necessary to the system for them to warrant the same degree of protection.

However, as the authors make clear, appropriate costs rules should accomplish all six of these goals to the greatest degree possible, while recognizing that some of these goals are simply mutually incompatible.<sup>49</sup> For example, the position of the authors is that "people should be forced to think twice before engaging the civil justice system on behalf of a claim that is unmeritorious" or vexatious.<sup>50</sup> This is the rationale behind the second goal, that of deterrence. However, if costs awards are substantial enough to have a deterrent effect, the authors also recognize that these same awards may impede access to justice as litigants may actually "think twice" before proceeding to court, even with a *prima facie* meritorious case, if they "may [still] be bankrupted by an adverse decision."<sup>51</sup> As Chris Tollefson's research has indicated, at least anecdotally, concern for a potential adverse costs award is a major factor in dissuading litigants with an environmental claim from proceeding with an action. Although this deterrent effect might not be so pronounced amongst other groups of public interest litigants, Tollefson's research suggests that costs awards may have a differential impact in distinct contexts, and this should provide the motivation for research into and implementation of other creative variations on cost awards outside of the scope of this paper, such as creating barriers to recovery in specific legal contexts.<sup>52</sup> Protective costs orders and other creative alternatives have recently been endorsed by Binnie and Fish

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48. *Ibid.* at 31.

49. *Ibid.* at 5.

50. *Ibid.* at 5.

51. *Ibid.* at 6.

52. Chris Tollefson, "Costs and the Public Interest Litigant: *Okanagan Indian Band* and Beyond" (2006) 19 *Can. J. Admin.L. & Prac.* 39 at 49-54 [Tollefson].

JJ., in dissent in the Supreme Court's decision in *Little Sisters (No.2)*, as an appropriate means of promoting access where specific facts merit such an exercise of the Court's discretion.<sup>53</sup>

Yet, even as the *Report* provides an illustration of the rationale for costs awards as a balancing of different competing interests, the authors maintain a heavy emphasis on a proper costs law being one that indemnifies the successful party. To do so, the authors rely on some problematic and untested assumptions. For instance, the *Report's* clear emphasis is on a costs law that attempts to circumscribe the potential for purely vexatious or unmeritorious claims from proceeding and thereby drawing the private litigant into the glare of the public courtroom to defend her rights. The problem is that it is entirely unclear whether this fear is defensible. For one thing, the exceptionally high costs of litigation, acknowledged at the very beginning of the *Report*,<sup>54</sup> might already effectively deter the possibility of adjudication in all but the most exceptional of cases. The same conditions would presumably be at least equally discouraging to those litigants whose claims are patently vexatious or unmeritorious. Moreover, for many purely vexatious litigants, the threat of an adverse costs award is meaningless compared to the perceived importance of the vendetta that they hold against other parties or the legal system as a whole. The vexatious litigant may also simply be impecunious or have no intention of ever satisfying a judgment awarded against them.

With the current high costs of litigation, it is an increasingly less persuasive argument that parties regularly intend to make frivolous use of the courts' resources. More significantly, it is difficult to imagine litigation being a relevant resolution mechanism in a scenario where potential claims can be easily categorized as meritorious or unmeritorious, frivolous and justifiable, as the *Report* seems to suggest they can be even before the litigation commences. This binary opposition does not reflect the experiences of the majority of litigants who often have no idea if they have an actionable claim, especially without the benefit of legal advice, let alone a slam-dunk case or a loser on their hands. Not even the sophisticated litigant is self-aware enough to know in advance that their claim will definitely be successful and one certainly hopes that most courts do not proceed on the assumption that many of the cases before them will reveal an entirely unambiguous resolution in advance of hearing the case. While the merits of a case may easily be identified when a case has been heard and a decision rendered, it is unclear how litigants could

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53. *Supra* note 17 at para. 135.

54. *Supra* note 10 at 1.

know in advance even of discovery the relative merits of their case and proceed with the matter accordingly.

A counter-argument might be raised that the usual practice of awarding partial indemnification to the successful litigant is in recognition of this central ambiguity in the litigation process. However, the *Manitoba Report* does not identify this as a possible justification for party-and-party awards, but rather emphasizes that the current tariffs for costs awards in Manitoba are out of date and produce results that are too low, thus diminishing their overall deterrent effect.<sup>55</sup> The authors also present as a justification for costs awards, the views of Gordon Turriff who supports the use of costs awards as a case management tool that will be most effective when the "costs stakes are relatively high."<sup>56</sup> While Turriff positions his argument as experiential, it is at least arguable that his anxiety is the result of a common misconception arising from a fear that canny lawyers will manipulate the legal process, rather than on well-founded evidence that incidents of such abuses are currently at a critical level. While the litigation process in the mind of some lawyers may resemble *Jarndyce v. Jarndyce*, it is now at least as likely that the high cost of litigation precludes all but a few tenacious and exceptionally wealthy litigants from enduring legal disputes that they believe could actually be successful, let alone encouraging those who are confident from the start that their cases are bound to fail. Rather than combating public misconceptions about the frivolousness of most litigation, it may now be time to persuade the public that the courts in Canada are not solely for the wealthy or the very poor accused of serious crimes, something that a more creative costs law could go some way towards promoting, even if the barriers remain largely the reality.

There is a deeper problem with the assumptions made by the authors of the *Manitoba Report*. By relying principally on indemnification to justify costs awards, their position assumes that legal rights are appropriately conceived of as privately instantiated instead of the result of a mutual recognition amongst diverse social actors. While ostensibly recognizing the competing interest of promoting access to justice, the authors of the *Manitoba Report* still conceive of the public nature of the legal system as an unfortunate necessity required to mediate disputes in the otherwise private world of individual citizens. Acting on this assumption, the exercise of judicial discretion can only have a very limited role. Its only purpose is to limit public intrusions into the lives of citizens as much as possible. As

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55. *Ibid.* at 29.

56. Gordon Turriff, "Exploiting the Cost Symbiosis" (2000) 58 *Advocate* (Van.) 699 at 702, cited in MLRC, *supra* note 10 at 31.

a result, state power is deployed in a manner that respects the belief that the private individual should be let alone. While there is some merit to this position, in that citizens should not be asked routinely and arbitrarily to defend their rights publicly because of the personal costs attached to litigation, with the prohibitive monetary costs currently associated with civil litigation the likelihood of widespread nuisance litigation is probably more fear than reality. More fundamentally, however, this perception of the relationship between private and public autonomy, as Habermas has demonstrated, fails to recognize the equiprimordial origins of both public and private life.<sup>57</sup> While the negative liberties do facilitate individual autonomy, without equivalent rights to public participation any exercise of state power to protect these liberties is merely a paternalistic imposition rather than an expression of genuine self-governance.<sup>58</sup> Public participation allows citizens to shape and define the rights that they enjoy privately and helps to establish and maintain a symbiotic, rather than a hierarchical relationship between state power and informal popular discourses. On the other hand, a model that privileges indemnification as a guiding purpose for costs awards suggests that legitimacy only flows in one direction—from the state, whose power is manifested through the exercise of judicial discretion.

I will consider in the next section of this paper a less hierarchical model which refuses to distinguish between a privileged principle of indemnification given the blessing of equity in the *Manitoba Report*, and other uses for costs awards, conceived of as instrumental, so long as all uses promote equal and symmetrical participation in institutionalized deliberative processes. As I will demonstrate, the recent decisions in *Okanagan Indian Band* and *Cavaliere* suggest that a proper role of costs awards is to increase public participation and create the conditions for a more genuine sense of Canadian legal legitimacy amongst diverse actors, as citizens become the authors of the laws to which they are also subject. This democratic model, I suggest, can only truly come to fruition where access to open courts is actually a value embedded deeply in the costs process itself. In the opinion of the entire Supreme Court of Canada in *Okanagan Indian Band*, indemnification remains an important consideration when awarding costs and continues to be recognized by the Court as the most common justification for these awards in *Little Sisters (No. 2)*. Yet, significantly, in my opinion, the majority in *Okanagan Indian Band* ultimately chose not to accord indemnification the normative status

57. Habermas, *supra* note 15 at 121-22.

58. *Ibid.* at xxvii.

of an equitable principle, a status that it held in the *Manitoba Report*, but instead chose to see costs awards as serving a general instrumental role in promoting access, as well as other policy objectives. While the Court's recent decision in *Little Sisters (No. 2)* goes some way towards undermining the liberation of costs law from the principle of indemnity, the arguments raised by counsel in *Little Sisters (No. 1)*, as I will argue, meant that an advance costs award would not have been appropriate if the wishes of the litigants themselves were to be respected by the court.

#### IV. *Costs, legal legitimacy and the public interest litigant*

The decision in *Okanagan Indian Band* arose from a dispute over logging rights in British Columbia. Members of four Indian Bands began logging on Crown land in an attempt to secure lumber to build much needed housing on reserves. The Minister of Forests served the Bands with cease and desist orders and commenced proceedings to have these orders enforced. On their side, the Bands claimed aboriginal title to the lands, alleging that they were entitled to log there, and filed a constitutional challenge to ss. 96 and 123 of the *Forest Protection Act of British Columbia* claiming that these sections interfered with their constitutionally recognized rights under s. 35 of the *Constitution*. The provincial Crown applied to have the matter heard at trial, instead of having it dealt with summarily by a judge in Chambers. However, the Bands argued that the matter should not go to a full trial as they lacked the financial means to assert their rights through extensive litigation. They argued in the alternative, that if the matter were to go to trial, the court should exercise its discretion to order the Crown to pay for the Bands' costs and disbursements in advance and in any event of the cause.<sup>59</sup> Sigurdson J., in chambers, held that, although a line of cases from Ontario had recognized the authority of courts to award costs in such a manner, special circumstances were required to justify the exercise of this discretion,<sup>60</sup> and these did not arise on the facts of this case. Sigurdson J. found that if the honour of the Crown were at stake then an exercise of his discretion might have been justified. However, finding that this obligation was not in fact engaged,<sup>61</sup> and finding that documentary and affidavit evidence would not be sufficient to resolve the dispute,<sup>62</sup> he refused to

59. These facts are as reported by LeBel J. in *Okanagan Indian Band*, *supra* note 16 at paras. 2-5.

60. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2000 BCSC 1135 at para. 53, 98 A.C.W.S. (3d) 310.

61. *Ibid.* at para. 92.

62. *Ibid.* at para. 23.

order costs against the Crown in advance of the case, and remitted the matter to trial.<sup>63</sup>

The Bands successfully appealed Sigurdson J.'s decision not to award advance costs to the British Columbia Court of Appeal. After upholding the chambers judge's decision to remit the matter to trial,<sup>64</sup> Newbury J.A., writing for a unanimous Court, distinguished between a superior court's discretion to award costs, and a constitutional imperative to do so. She found that there was no constitutional obligation on the Crown to facilitate the Bands' prospective litigation, even where a constitutionally protected right was in play.<sup>65</sup> However, the constitutional nature of the question raised by the Bands, as well as the unique relationship that existed between aboriginal peoples and the Crown, while not justifying an automatic award of advance costs, were important background considerations that the Court believed should have informed Sigurdson J.'s decision. In these circumstances, and because the land claims issue had not yet been decided by any other court in British Columbia, Newbury J.A. held that this was an appropriate situation for the court to have exercised its discretion. Furthermore, she found that Sigurdson J. had placed too much emphasis on the prejudicial effect of an award of advance costs.<sup>66</sup> In sending the matter back to the chambers judge to fashion an award, Newbury J.A. also emphasized that strict conditions should be placed on the costs order to encourage the parties to minimize unnecessary steps in the litigation process as well as to encourage the speedy resolution of the dispute.<sup>67</sup>

The Crown subsequently appealed this decision to the Supreme Court of Canada. LeBel J. wrote the Court's majority opinion. After canvassing the historical development of costs awards, as well as recent Canadian jurisprudence, he found that the Court of Appeal had properly reviewed the decision of the Chambers judge, and upheld the finding that the trial judge should have awarded costs in advance to the Bands regardless of the matter's outcome.<sup>68</sup> As I earlier indicated, he also found that the traditional goal of indemnification for costs awards might now be outdated, at least in its most extreme form, and held that superior courts in Canada retain an absolute and inherent discretion to award costs based on the dictates of

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63. *Ibid.* paras. 129-30.

64. *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2001 BCCA 647 at para. 39, 208 D.L.R. (4th) 301.

65. *Ibid.* at para. 36.

66. *Ibid.* at para. 37.

67. *Ibid.* at para. 39.

68. *Supra* note 16 at paras. 45-47.



their conscience. In choosing to exercise that discretion, LeBel J. identified factors derived from two strands of Canadian costs jurisprudence that posed relevant considerations and could provide assistance to chambers judges when deciding whether to order such an award in the future. Further, he expressly recognized that an important "consideration relevant to the application of costs rules is access to justice."<sup>69</sup>

LeBel J. began his decision by considering those cases where a substantial public interest issue had influenced a court's decision to award costs in untraditional ways. In this respect, the Supreme Court of Canada's judgment in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* proved extremely important. In that decision, the appellant Jehovah's Witnesses who were parents of a child that had received a blood transfusion unsuccessfully argued that their *Charter* rights had been violated when the transfusion was administered to their child over their protests. Notwithstanding the outcome, Whealy Dist. Ct. J. ordered the intervening Attorney General to pay costs to the parents on the basis that legal matters of such general public importance should be encouraged to go to trial because of their profound significance for Canadian society.<sup>70</sup> While insisting that the decision of the lower court was "unusual," a majority of the Supreme Court subsequently upheld the costs decision in *B. (R.)* because, as La Forest J. noted, the case "raised special and peculiar problems" that were of sufficient importance that litigation should not have been discouraged through either an adverse costs award or even by allowing the unsuccessful litigant to bear the burden of their entire legal costs.<sup>71</sup> In *Okanagan Indian Band*, LeBel J. remarked that the decision in *B. (R.)* should be understood as standing for the more general principle that

in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervener or party.<sup>72</sup>

While LeBel J. notes the exceptional nature of this decision, his conclusion suggests that the Supreme Court now sees costs awards as a tool not simply

69. *Ibid.* at para. 27.

70. *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1989] O.J. No. 205, Addendum to Reasons for Judgment (Released June 9, 1989) (QL) (Dist. Ct.).

71. *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 122, [1994] S.C.J. No. 24 (QL).

72. *Supra* note 16 at para. 30.

to discourage frivolous litigation, but also to encourage the litigation of matters of general significance in order to bring these issues to a formal legal resolution. As Tarnopolsky J.A. suggested for the Ontario Court of Appeal in affirming the costs decision, and LeBel J. quoted approvingly, *B. (R.)* was a case of national, even international significance, because of the role assumed by the parents who “rose up against state power because of their religious beliefs.”<sup>73</sup> While ultimately the parents’ case was unsuccessful, the costs award against the Attorney General points to the important role that courts can play in facilitating discussion between diverse communities rather than allowing the state to impose its will on minorities, without public deliberation of the critical issues at stake. Some private matters, LeBel J. suggests obliquely by quoting the decision of Tarnopolsky J.A., deserve to be heard publicly, particularly those where the state uses its power, perhaps illegitimately, to impose its will paternalistically onto private citizens.<sup>74</sup>

In addition to significant public interest cases that justified exceptional costs awards, LeBel J. also relies heavily on instances of civil litigation between private parties where courts awarded advance costs to litigants who had a *prima facie* meritorious case, but who would not otherwise have had the opportunity of advancing their claim because of a lack of financial resources.<sup>75</sup> However, before considering LeBel J.’s reasoning respecting this second strand of Canadian costs jurisprudence, it is helpful to analyze Major J.’s dissenting opinion in order to contrast it with the majority’s decision. To begin with, Major J. concludes that it is of fundamental significance that most of the cases relied on by LeBel J. in this second stream of authority were family disputes. Where the dissolution of a marriage is at issue, advance costs awarded in favour of the party with fewer resources may be justified, according to Major J., because of the provisions in matrimonial property regimes that establish a statutory presumption in favour of the equal distribution of assets upon a marriage’s dissolution.<sup>76</sup> In this very specific context, Major J. contends that it is reasonable to assume that the party awarded advance costs may retain a legal right to the property held by the other party. Because “awarding costs in advance could be seen as prejudging the merits” of the case, advance costs awards should be restricted to impecunious parties in family disputes, in Major J.’s opinion, or to other parties who benefit from

73. *B. (R.) v. Children’s Aid Society of Metropolitan Toronto* (1992), 10 O.R. (3d) 321 at 354-55, [1992] O.J. No. 1915 (QL) (C.A.).

74. Quoted approvingly in *Okanagan Indian Band*, *supra* note 16 at para. 29.

75. *Ibid.* at paras. 32-35.

76. *Ibid.* at para. 69.

similar legal presumptions in their favour, or, finally, to those who benefit from a special legal relationship such as a fiduciary duty. "It is logical," argues Major J.,

that the party who must pay [advance costs] and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.<sup>77</sup>

In the family law context, these compelling reasons exist by virtue of the particular statutory regime, but in an aboriginal land claims dispute, there is no similar presumption available to justify such an exceptional order. In these circumstances, an advance costs award would amount to prejudging the case on its merits because Major J. views costs as always following the event since they are awarded on the basis of indemnification to the victorious party.

A further consideration of note for Major J. is "that the honour of the Crown is not at stake in this appeal [and so] there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs."<sup>78</sup> If the honour of the Crown were at stake, one presumes, this appeal may have qualified as one of those exceptional cases where a court could have awarded advance costs, in Major J.'s opinion, because of the existence of a quasi-fiduciary relationship between the parties. In other words, in future cases the honour of the Crown could constitute a compelling enough reason for the court to exercise its discretion to award costs in advance. However, the logical basis of Major J.'s position is not entirely clear. The Crown's unique relationship with aboriginal peoples does not presuppose a legal right in the same way that a statutory presumption of the equal distribution of assets does in family law, or where a shareholder sues a director of a company and retains a right to that company's property, or where a beneficiary sues a trustee for property to which she holds equitable title. In these non-s. 35 cases, the party awarded costs has a greater anticipated right to a legal outcome than the aboriginal claimant who may only have a limited right to be *consulted* by the Crown in cases where a decision affects her constitutionally protected rights. A substantive legal outcome is not guaranteed merely by virtue of the Crown's honour.<sup>79</sup> It is therefore highly ambiguous in his decision whether any reason short of a

77. *Ibid.* at para. 62.

78. *Ibid.* at para. 68.

79. See generally, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

statutorily established presumption in favour of one party's legal rights or other recognized legal relationship granting a party a substantive right to property in the control of another party, will ever qualify as a compelling enough reason for a court to award advance costs. For Major J., any costs award necessarily involves prejudgment on the merits of the case and this danger can only be relieved where a case can reasonably be expected to succeed because of a pre-existing, exceptional legal circumstance.

As I have already suggested, the justification for Major J.'s position is that an award of costs in advance creates a real potential for a reasonable apprehension of bias to arise. In my view, this fear only has strength when specific presumptions are made about the purposes for costs awards. Major J.'s dissenting judgment provides what proves to be a circular justification for withholding the courts' discretion to award advance costs. Major J. expressly acknowledges that, in his opinion, the most pressing public policy concern when awarding costs is the indemnification of the successful party.<sup>80</sup> A secondary concern is the availability of an important tool for judges to manage their caseloads.<sup>81</sup> These purposes, like those identified in the *Manitoba Report*, assume that state power can only be justifiably exercised if its purpose is to preserve the private freedom of individuals from the public intrusion of litigation. While Major J. recognizes that the common law should evolve "to adapt prevailing principles to modern circumstances,"<sup>82</sup> he continues to view the role of costs awards as a means of judicially imposing limits on litigation that prevent the private disputes of individuals from entering the public domain. In such a narrow context, an award of costs in advance would always mean that the court has prejudged the merits of a case, since costs are only justifiable when an award is ordered either to indemnify a successful party or to discourage unmeritorious claims from proceeding. However, the issue of bias only arises because these same reasons are also marshalled to justify the awarding of costs after the event. In other words, Major J. clings to the view that costs are awarded to make the successful party "whole," and because costs are so intimately connected with the identity of the successful party, in his view, awarding costs in advance cannot help but reveal a bias on the part of the presiding judge. By virtue of this retrospective logic, it is almost inescapable that ethical overtones become associated with costs awards since costs are implicated inextricably with merit. This strong normative dimension is captured

80. *Supra* note 16 at para. 62.

81. *Ibid.* at paras. 55, 63.

82. *Ibid.* at para. 55.

equally by the Manitoba *Report's* characterization of indemnification as "equitable" and Major J.'s heavy reliance on "tradition." By contrast the majority decision of LeBel J. relies on a different logic: when avoiding the inconvenience of publicly defending one's rights is no longer the primary justification for awarding costs, the charge of bias becomes a less persuasive rationale for justifying courts' continuing refusal to order costs where such an award would promote litigants' access to justice, as opposed to a particular outcome.

Where a court expressly justifies an award of advance costs as a means of facilitating access to the courts, it is difficult to see how such a decision could raise Major J.'s fears that a case has been prejudged. While LeBel J. accepts that costs should only rarely be awarded in advance, he also contends that costs awards can be used to achieve other important purposes besides indemnification. These include the accommodation of "concerns about access to justice and the desirability of mitigating severe inequality between litigants."<sup>83</sup> LeBel J. notes that these are also the same concerns that had motivated earlier courts to award costs against a successful party or intervener in public interest cases,<sup>84</sup> and so it is understandable for him to conclude that, in exceptional circumstances, these same reasons might justify an award of costs both in advance and in any event of the cause. Where the legitimacy of the legal system is at risk of losing input from all but the wealthiest parties or the very poorest criminally accused, then compelling reasons exist for the courts to facilitate the public discussion of important social issues on a case-by-case basis by awarding parties their costs in advance to allow litigants a realistic opportunity to access the courts. Relieving such litigants from the threat of assuming a substantial financial burden, even if they are ultimately unsuccessful, improves access to justice and enhances the legitimacy of the legal system as a whole by allowing different voices to be heard.

The majority decision holds that a decision to award costs in such a manner should not be made lightly as the costs to the state can be quite substantial.<sup>85</sup> LeBel J. presents three factors for consideration of the issue. First, a court should consider whether "the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial."<sup>86</sup> Second, a court should decide whether "the claim to be adjudicated is *prima facie* meritorious."<sup>87</sup>

83. *Ibid.* at para. 31.

84. *Ibid.*

85. The initial award of costs to Little Sisters was \$410,454.21 before it was overturned on appeal. See *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2005 BCCA 94 at para. 11, 249 D.L.R. (4th) 695 [*Little Sisters* BCCA].

86. *Supra* note 16 at para. 40.

87. *Ibid.*

Finally, the court should inquire whether “the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.”<sup>88</sup> Interestingly, the order of these inquiries is reversed in Bastarache and LeBel JJ.’s majority decision in *Little Sisters (No. 2)*, placing the emphasis of the legal inquiry firmly on whether the issue advocated is *prima facie* meritorious and of sufficient public significance before the judge is instructed to consider the issue of impecuniosity.<sup>89</sup> Although the subject matter of these inquiries remains constant, this change in the order of the analysis affects the tone of the court’s inquiry, a matter to which I will return in the conclusion to this paper.

While an element of prejudgment on the merits still exists in the three-part test articulated in *Okanagan Indian Band*, this consideration is oriented to prevent the litigation of entirely frivolous claims. The express purpose of a costs award of the exceptional type ordered in *Okanagan Indian Band* is not to indemnify a party deemed successful in advance of the cause, but rather to facilitate equal and symmetrical participation in the legal system. Much of the force of Major J.’s dissent is lost when costs are re-conceptualized in this manner. In LeBel J.’s purely instrumental view, the fear of bias becomes a less pervasive concern, since a costs award is based on an institutional responsibility to foster deliberation rather than on the retrospective merits of a particular case. By consciously accommodating differences in parties’ financial resources, advance costs awards have the benefit of opening up judicial decision making to input from diverse communities. Significantly, as Tollefson notes, LeBel J. chose not to limit the exercise of this discretion to any particular group,<sup>90</sup> a decision reinforced with respect to for-profit corporations by the majority in *Little Sisters (No. 2)*.<sup>91</sup> In marked contrast to the opinions expressed in the lower courts, as well as Major J.’s dissenting opinion, there is no indication in the majority decision that advance costs awards should only be available in the context of aboriginal law, or even that these awards should be restricted to litigation advanced by quasi-public bodies, such as non-governmental organizations or non-profits. Rather, for LeBel J., it is equally within a court’s discretion to award advance costs against the Crown where a purely private but impecunious litigant raises an issue of general public significance that has *prima facie* merit. The justification for

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88. *Ibid.*

89. *Supra* note 17 at para. 46.

90. *Supra* note 52 at 55.

91. *Supra* note 17 at para. 68.

awarding costs in the majority's decision in *Okanagan Indian Band* does not rely on the nature of the actor bringing the claim, but rather on the nature of the claim itself, as well as on the overarching goal of promoting meaningful public discussion. In other words, the majority's emphasis is ultimately on promoting the legitimacy of legal discourse in the face of the high cost of litigation, not solely on indemnifying the worthy.

By establishing a process that accommodates an expanded range of speakers, rather than focusing on any particular group's right to be heard in the courts, LeBel J.'s conclusion places a priority on expansive community involvement in legal discourse and encourages people generally to become the authors of the laws that govern them, rather than merely the law's addressees. Drawing on conventional anxieties that the problem is too much litigation, rather than not enough, Major J., on the other hand, is anxious that advance costs orders will prove to be a "potent incentive to litigation."<sup>92</sup> However, the response of the majority of the Court is that these awards can and should encourage the litigation of legitimate claims, at least those of general significance, or private disputes where legal rights can be anticipated in advance. Rather than withholding an important tool for case management from the judiciary, LeBel J. considers his decision to be resolutely "connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner."<sup>93</sup> Efficiency and justice are equivalent values in this context. They need not be in opposition with each other, although at times they will be. While indemnification and deterrence are encouraged as valid principles in the right circumstances, these traditional values must also accommodate contemporary concerns about access to justice.

Rather than conclude that any single principle is of paramount importance for every situation, LeBel J.'s decision suggests that a more instrumental and contextual approach to costs awards that will serve a wide range of purposes, including deterrence, should be embraced in Canadian jurisprudence. In the wake of *Okanagan Indian Band*, the emphasis when developing costs law in the courts should now be on establishing a systematic analysis that allows more speakers to participate meaningfully in the development of Canadian law. The collateral benefit is that by facilitating access from a wider range of groups than those who can currently afford the high costs of litigation, the judiciary also encourages amongst these actors the perception that Canadian courts are legitimate vehicles of state power, informed by a wide range of informal

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92. *Supra* note 16 at para. 63.

93. *Ibid.* at para. 26.

discourses. This perception may even extend to those who are not directly affected by our courts, but who may view our legal system through the media, or otherwise, as a more symmetrical forum for resolving disputes. By institutionally accommodating participation in public processes, at least where issues of general importance are at issue, legal legitimacy can be encouraged because speakers have a better opportunity to participate in the rational resolution of their disputes through the courts, rather than through other available, but antisocial avenues, such as violence.

*V. Costs and the purely private dispute*

While *Okanagan Indian Band* set the stage for a more instrumental role for costs awards, the limitations of the decision are also equally clear. The judgment's impact is largely limited to those cases raising significant issues of public importance. Although his emphasis is on public interest litigants, it is important to recall that LeBel J.'s decision also comments approvingly on the decisions of lower courts that awarded costs in advance between purely private litigants who raised no issues of general public importance, but where there were special circumstances, such as upon the dissolution of marriage.<sup>94</sup> This view was also endorsed in the concurring judgment of McLachlin C.J. and Charron J. in *Little Sisters (No. 2)* as a general principle for grounding advance costs awards.<sup>95</sup> However, while access to the courts is an important democratic value regardless of the nature of the issue raised, it is easy to see how a regular practice of awarding advance costs between private litigants in cases not raising significant public policy concerns, like those in most family disputes, may take access too far. Regular advance costs awards against private litigants could have the potential to lead to a system of judicially imposed private legal aid, which might have a serious impact in and of itself on the potential for cases to be brought forward to the courts. If private litigants are routinely expected to cover the legal costs of their impecunious opponents, regardless of the merits of each party's arguments, this might eventually discourage the formal resolution of legal issues, as parties with financial resources might choose to avoid the courts entirely in order to lessen the potential burden of an adverse costs award even when they believe their case will be ultimately successful.

However, there are other means available for creative courts to facilitate access without imposing unjustifiable burdens on private parties. In this respect, the Ontario Court of Appeal's recent decision in

94. *Ibid.* at para. 35.

95. *Supra* note 17 at paras. 86-8.



*Cavalieri* builds on the logic of *Okanagan Indian Band* by reaffirming in a different context the principle that encouraging symmetrical participation in the Canadian legal system may sometimes justify a formally unequal approach to awarding costs. Unlike the land claims dispute in *Okanagan Indian Band*, the matter before the court in *Cavalieri* was not especially noteworthy. *Cavalieri* successfully appealed three court orders: an order refusing to allow the appellant to represent his company; an order requiring the appellant to post security for costs; and, finally, an order dismissing an application.<sup>96</sup> His counsel in these matters was acting under the auspices of the Advocates' Society *pro bono* program. Despite this, *Cavalieri* was awarded costs by the Court, although for an amount lower than the normal party-and-party rates. In reaching their unanimous conclusion, the Ontario Court of Appeal invited submissions from a variety of organizations as *amici* representing the legal profession—the Advocates' Society, the Ontario Trial Lawyers' Association, and Pro Bono Law Ontario—on policy considerations that the profession believed should be taken into account by the Court when reaching a decision on whether costs were justified in these circumstances. Although each of the *amici* raised similar concerns in more or less “radical”<sup>97</sup> terms, the position that was ultimately embraced by the Court was that of Pro Bono Law Ontario, who argued that “the court should recognize access to justice as a fifth purpose underlying an award of costs.” However, in order to reach this conclusion, the Court once again had to depart from a normative interpretation of costs law in ways novel even from those animating the Supreme Court's majority decision in *Okanagan Indian Band*.

Feldman J.A., writing for a unanimous Court of Appeal, began her decision by recognizing that *pro bono* work has typically been considered charitable work, performed for the social good and without expectation of reimbursement. Arguably, as she recognized, costs have no place in such a regime. There is no reason to indemnify a party who has no legal costs and no expectation of recovery, since counsel is acting on behalf of the client for free in furtherance of the public good. However, Feldman J.A.'s decision suggests that in practice this might be too restrictive an interpretation of charity to meet the pressing needs of litigants with limited financial resources. Instead, by subjecting *pro bono* parties to the regular costs regime, Feldman J.A. indicates that other important purposes besides altruism can be achieved by developing a legal environment where a

96. *Supra* note 18 at para. 1.

97. *Ibid.* at para. 16. Feldman J.A. is referring to the position of Pro Bono Law Ontario that is ultimately embraced by the Court.

greater number of counsel are encouraged to act on a *pro bono* basis. For example, the threat of an adverse costs award might discourage parties with greater financial resources from misusing the litigation process. If in cases where a party has *pro bono* representation the party with greater resources might ultimately be subjected to a punitive costs award where their behaviour is vexatious, this threat may discourage more powerful litigants from abusing their superior resources to discourage claims from being advanced. For similar reasons, by limiting the potential for time-consuming abuses by the other side, the opportunity for favourable costs awards might encourage lawyers to take on more *pro bono* files if they knew that their time would not be spent defending against fruitless claims. Perhaps most importantly, however, costs awards might also encourage counsel who cannot readily absorb the costs associated with acting *pro bono* to take on more such cases.<sup>98</sup>

It is generally true that lawyers take on cases *pro bono* that they think hold some merit. The potential that counsel might be awarded costs in *pro bono* cases, however, accommodates the fact that lawyers working on these files may assume costs independent from their own loss of billable time that might justifiably be recoverable even if the lawyer's time were not, such as administration and disbursement costs. Therefore, instead of restricting *pro bono* work to a narrow definition of charity, Feldman J.A. concludes that costs awards should make functional allowances that ideally will encourage more counsel to undertake cases that they think are meritorious on a *pro bono* basis. In this sense, Feldman J.A.'s decision subverts a dogmatic notion of charity and instead re-conceptualizes costs awards as powerful tools to eliminate existing barriers to the performance of *pro bono* work within the profession.

An important issue that the Court identifies, however, is whether there is any danger in establishing an asymmetrical costs regime where parties represented by *pro bono* counsel are essentially immune from an adverse costs award because of their inability to pay.<sup>99</sup> While Feldman J.A. recognizes that this may be an important concern in some circumstances, she also acknowledges that "concern for levelling the playing field for *pro bono* and non-*pro bono* litigants does not require, however, that the parties be placed in equal positions in every case." Rather the goal of facilitating access to the courts, Feldman J.A. indicates, is a substantial enough policy objective to justify placing the *pro bono* litigant, in some circumstances,

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98. *Ibid.* at para. 35.

99. *Ibid.* at para. 40.

in a more favourable position than her opponent.<sup>100</sup> Instead of excluding the *pro bono* litigant from the current costs regime, the Court recommends that other avenues, such as a reduced award of costs, as was awarded in this case, should be explored by courts where appropriate.<sup>101</sup> However, the formal equality of litigants in assuming the risk of an adverse costs award is ultimately less significant to the Court than facilitating more parties' potential to participate in rational dispute resolution processes. More than simply encouraging formal legal resolutions to problems, Feldman J.A.'s decision suggests that judicial power can and should be used in a manner that allows private litigants greater freedom to choose the topics that they want publicly debated. By emphasizing access, rather than indemnity, and by removing from the system functional barriers that discourage lawyers from advancing *pro bono* causes, the *Cavalieri* decision expands the emphasis on access earlier identified in *Okanagan Indian Band* to include even commonplace private disputes. Although policy considerations may be different where solely private disputes are concerned, this does not mean that access should not remain an important value even in cases where an issue does not transcend the individual litigants' private interests. Rather by encouraging the legal resolution of personal disputes, the judiciary becomes less involved in deciding from on high what issues are important for parties to resolve. This choice is left instead to the litigants themselves. The judiciary, Feldman J.A. suggests, plays its most important role when it creates the conditions that allow disputes to be framed by the parties, rather than by the exigencies created by cost. In other words, Feldman J.A.'s decision in *Cavalieri* suggests that only where the highest degree of control over debatable topics is located in the individual parties can the legal system truly be said to be authored by the public, rather than by the state. Effectively, this can only be the case where cost is eliminated as much as possible as a barrier to the litigation of legitimate legal claims.

#### VI. *Costs awards, control over litigation and deliberation*

LeBel J.'s decision in *Okanagan Indian Band* received nearly unanimous support from the Supreme Court of Canada less than four years ago. It was therefore surprising to see the issue of advance costs reconsidered by the Court in such short order in *Little Sisters (No. 2)*, a decision that proved to be more fractious than the earlier precedent upon which it rests. This surprise is only reinforced when one considers that existing empirical research contradicts any judicial or academic concern that public interest

100. *Ibid.* at para. 42.

101. *Ibid.* at para. 43.

claims for advance funding are swamping the courts or overburdening the public purse. As Tollefson suggests, what is perhaps more worrying for the nascent hope that advance costs awards will promote access to justice is the low rate at which public interest litigants have so far employed this technique.<sup>102</sup> However, notwithstanding this fact, the Court, in a fractured decision, dismissed Little Sisters' appeal from the judgment of the British Columbia Court of Appeal overruling the award of advance costs that had been won by Little Sisters at trial and, at the same time, set the bar higher for public interest litigants to benefit in the future from this emerging doctrine. The Court was divided three ways: LeBel and Bastarache JJ. (who, notably, had dissented in *Okanagan Indian Band*) writing the majority judgment on behalf of themselves, as well as Deschamps, Abella, and Rothstein JJ.; McLachlin C.J., dismissing the appeal but for separate reasons supported by Charron J.; and Binnie J. dissenting, supported by Fish J. in his judgment.

The concurring judgment of McLachlin C.J. sought to create a uniform standard for advance costs awards for both private and public litigants by adopting the test in *Okanagan Indian Band*, but importing the criteria of special circumstances into the third step of the test. In the original decision, this step was focussed on inquiring into the public importance of the issue to be resolved. For McLachlin C.J., what was intended by the public importance inquiry in *Okanagan Indian Band* was sufficiently similar to the common law recognition of special circumstances for private litigants that the two principles should be collapsed into a third step applicable to all litigants seeking advance costs awards. This is an unsatisfactory conclusion for two reasons. First, as I have previously identified, the concerns of the litigant raising issues of public importance are different from those of the purely private litigant. The burden that society is willing to bear to have a matter of general significance decided is a valid basis upon which to distinguish the awarding of advance costs in a purely private matter, such that recognition of these two separate contexts within the test itself is prudent. Second, even if this criterion is sufficiently sensitive to the nature of the claim being raised, as Binnie J. suggests in dissent, the standard of "special circumstances" provides little guidance to either litigants or the judiciary when determining whether an exceptional award is justified in a particular case.<sup>103</sup> Arguably, as Binnie J. suggests, all the notion of special circumstances does is signal to the judiciary the fact that an award of advance costs should be exceptional and rare. However, the reason

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102. *Supra* note 52 at 50.

103. *Supra* note 17 at para. 154.

for a court's inquiry into a matter's degree of public significance is that this general importance provides the justification for the advance award. In other words, more important for the legitimacy of the legal system as a whole is that the claim by the public interest litigant for advance costs should be seen to be of enough general significance to justify what will perhaps be a large outlay of public resources. The divorced spouse grounds her claim for advance costs in the near certainty that she is entitled to some portion of the matrimonial estate. The public interest litigant, on the other hand, justifies their claim, as in *B.(R.)*, by its general importance to Canadian society as a whole. In this context, allowing the public interest litigant to justify their claim not under the rubric of special circumstances, but rather as a matter of public importance, has an important rhetorical advantage for that litigant.

Applying the test from *Okanagan Indian Band* with these slightly modified criteria, McLachlin C.J. dismissed the appeal. Having found that Little Sisters was sufficiently impecunious, and that their case had *prima facie* merit, McLachlin C.J. ultimately found that the issues raised were not special enough to justify the exercise of the Court's exceptional power to award advance costs in this instance.

The majority decision, written by LeBel and Bastarache JJ., is, however, more problematic from an access to justice perspective than is McLachlin C.J.'s concurring opinion. While the majority adopts the same test as in *Okanagan Indian Band* for awarding advance costs, the tone of the test has been significantly altered by the manner in which the majority rules that it is to be applied in future cases. Rather than inquiring into the impecuniosity of a litigant first, this inquiry is instead to come at the conclusion of the analysis.<sup>104</sup> A bare majority of the Court preferred this method, while McLachlin C.J. and Binnie, Fish and Charron JJ. opted for the order of application previously articulated in *Okanagan Indian Band*.<sup>105</sup> It is easy to see why. While superficially, the order of the inquiries should not have an impact on the results of a court's application, when applying the test according to this new formulation the emphasis of the analysis shifts the court's attention from the impecuniosity of the party to the claim's *prima facie* merit and public significance. As LeBel and Bastarache JJ. state, "the question of impecuniosity will not even arise where a case is not otherwise special enough to merit this exceptional award."<sup>106</sup> However, this results in significant problems for the public interest litigant when attempting to

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104. *Ibid.* at para. 46.

105. *Ibid.* at paras. 88, 140.

106. *Ibid.* at para. 46.

justify their claim for advance costs. By restricting the judicial inquiry into whether a party claiming advance costs has insufficient resources to commence or pursue an action, the majority's decision in *Little Sisters (No. 2)* means that in many cases the need for an express judicial consideration of the critical problem of access will be eliminated from the legal analysis. Impecuniosity is at the centre of concerns about access, and is the single most important basis for disrupting the merely mechanical application of the indemnity principle that has until recently dominated costs law. Because it is manifestly unjust, if in practice unavoidable, to routinely allow litigants with legitimate claims to be denied access to the courts, by shifting or eliminating altogether the need for the court to inquire openly into whether the litigants before them can actually afford access to legal dispute resolution processes without creative costs orders, the majority simply masks this problem. Unfortunately, although unnecessary for them to have done so since they found the case not to be of sufficient importance to justify an advance costs award, or even *prima facie* meritorious, this same bare majority compounds this access problem by concluding that *Little Sisters* was not in fact impecunious, as the company had not made every effort to explore other funding options.<sup>107</sup> What the majority means by this is unclear. Although earlier in their decision *LeBel and Bastarache JJ.* had invoked legal aid and community fundraising as options for parties to explore in general when confronted by legal fees beyond their capacity to afford,<sup>108</sup> it is clear that these were not realistic options for this particular litigant. As *Binnie J.* indicates, civil matters are now rarely funded by legal aid.<sup>109</sup> Moreover, the Vancouver gay, lesbian and trans-identified community had already supported *Little Sisters* throughout their initial litigation to have their rights vindicated in *Little Sisters (No. 1)*.<sup>110</sup> It is unfair to conclude that *Little Sisters* had not both pursued and exhausted its funding needs from within *Little Sisters'* own community. It is noteworthy, at least, that unlike in the British Columbia Court of Appeal, the majority does not suggest that the inability of the Vancouver queer community to finance *Little Sisters'* second round of litigation is a

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107. *Ibid.* at para. 68.

108. *Ibid.* at para. 40.

109. *Ibid.* at para. 161.

110. Concerns with achieving sufficient financing from the community were expressed as early as 1995 (Jane Rule, "Foreword" in Janine Fuller & Stuart Blackley, Nancy Pollak, ed., *Restricted Entry: Censorship on Trial* (Vancouver: Press Gang Publishers, 1995) at xiii [*Restricted Entry*]). Janine Fuller, *Little Sisters'* manager, was acutely aware of the need for community fundraising initiatives as a result of her experience assisting *Glad Day* books in its earlier fundraising efforts (*Restricted Entry* at 17).

sign that the community finds the litigation itself irrelevant.<sup>111</sup> Much like the concern over the nature of the litigant as a for-profit corporation, the majority in their decision correctly abandons this problematic assumption earlier drawn by the Court of Appeal.

As I have already indicated, while the decision in *Little Sisters (No. 2)* is not especially beneficial in addressing access to justice concerns, these are not the only issues central to the flourishing of legitimacy within a legal regime. Two points arise in this regard. The first is that the majority decision of LeBel and Bastarache JJ. provides a clearer basis than had previously been identified for justifying an award of advance costs in public interest cases. As LeBel and Bastarache JJ. state,

Where only one of the possible results on the merits could render the case publicly important, the court should not conclude that the public importance requirement is met. It is in general only when the public importance of a case can be established regardless of the ultimate holding on the merits, that a court should consider this requirement from *Okanagan* satisfied.<sup>112</sup>

This is a valid standard for assessing public importance. Although, as Binnie J. suggests, the majority decision risks conflating the *prima facie* merit standard with the issue of public importance,<sup>113</sup> the symmetry of demanding that a decision be important no matter what its outcome is consistent with the Court's earlier decisions in *B.(R.)* and *Okanagan Indian Band*, while also effectively dislodging the justification for an advance costs award from both the principle of indemnity and the danger of prejudgment. In *B.(R.)*, the matter to be decided was whether the state interest in protecting children or the religious freedom of the parents would prevail. In *Okanagan Indian Band*, the issue was the relationship between the state and aboriginal peoples. Neither of these issues presented the possibility of a merely binary solution, unlike in *Little Sisters (No. 2)* where if the appellant's case were not ultimately successful the matter would be of insufficient importance to have justified the award of costs. The nature of the costs award advocated for in this case and in *Okanagan Indian Band* was an award in advance, no matter the result of the cause. Where litigants ask the courts to exercise an exceptional discretion, it is a reasonable requirement to demand that an issue be of sufficient importance to be of significance no matter what its result on the merits to deserve that special treatment. This, as LeBel and Bastarache

111. *Little Sisters* BCCA, supra note 85 at para. 63.

112. *Supra* note 17 at para. 66.

113. *Ibid.* at para. 145.

JJ. conclude, removes any fear that the case has been prejudged.<sup>114</sup> Where the only decision of importance in a case would be the conclusion that the executive has disobeyed an order of the judiciary, a decision to award costs so that a case can be brought forward where only one alternative is of sufficient importance to justify the award carries with it the implication that the matter *should* be brought forward in the opinion of the judge awarding costs because it will ultimately prove to be a meritorious claim. Otherwise, the award of advance costs would be unjustified since the fact that the executive has in fact complied with a court order would be trite. This does not mean that in these circumstances, other creative costs orders that facilitate access could not be employed, for instance a protective costs order, or even, in the case of *Little Sisters* where a strong *prima facie* case supports the merits of their claim, a partial award in advance to facilitate access. However, it is a persuasive proposition that in a deliberative democracy where the purpose of formal institutions is meaningful, inter-subjective communication, that a decision must have merit as a broad topic of discussion that could support many productive conclusions in order to justify an award of costs in advance.

A second important issue raised by this case is that of control over the litigation where advance costs are awarded to a party. As Habermas suggests, it is of fundamental importance not only that parties have equal access to formal decision-making institutions, but also that speakers are able to “secure ... freedom in the choice of topics”<sup>115</sup> as well. While freedom in the choice of topics to be decided and the manner of proceeding with a case is important, the Court is unanimous in finding that restrictions on the litigation strategy of a party may be necessary where the litigant is using someone else’s money to fund their action.<sup>116</sup> Again, the symmetry of this position is important. While it would be impossible for litigants in some cases to access the courts absent an advance award of costs, it is reasonable to assume that access must still come at some cost; in *Little Sisters (No. 2)*, for example, the structured cost award agreed to by the parties prior to that award being overturned on appeal. Where costs awards are made in advance, it is desirable that any restrictions on a party’s ability to proceed with litigation will be mutually agreed to in order to facilitate both parties’ belief that the system is responsive to their needs.

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114. *Ibid.* at para. 65.

115. Habermas, *supra* note 15 at 230.

116. LeBel and Bastarache JJ. *supra* note 17 at para. 77, indirectly by McLachlin C.J. at paras. 97, 112, directly by Binnie J. at para. 159.



There is, however, another important element of litigant freedom that was not discussed directly in *Little Sisters (No. 2)*.<sup>117</sup> Little Sisters chose to litigate its claim on the basis of the language used by Binnie J. in *Little Sisters (No. 1)* in his opinion that “[t]hese findings should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary.”<sup>118</sup> In the appellant’s view, this passage meant that the Court was endorsing a future claim by Little Sisters, sufficient in potential importance to ground an advance costs award were the problems identified by the majority in *Little Sisters (No. 1)* not resolved.<sup>119</sup> However, the context of this remedial passage in this earlier case should be read more carefully. One of the critical issues dividing the Court in *Little Sisters (No. 1)* was the nature of the appropriate remedy. The dissenting opinion of Iacobucci J. called for a systemic solution to the pervasive problems at Canada Customs.<sup>120</sup> While, in my opinion, this dissenting view was laudable, the problem for the majority in *Little Sisters (No. 1)* was not that a structured remedy targeted to combat these problems was entirely unwarranted, but that Little Sisters chose not to pursue this as an option for the Court to consider. They insisted instead on the Court striking down the impugned provisions as unconstitutional. As Binnie J., writing for the majority, suggested,

the remaining question is whether the Court should attempt to fashion a more structured s. 24(1) remedy. *I conclude, with some hesitation, that it is not practicable to do so.* The trial concluded on December 20, 1994. We are told that in the past six years, Customs has addressed the institutional and administrative problems encountered by the appellants. In the absence of more detailed information as to what precisely has been done, and the extent to which (if at all) it has remedied the situation, I am not prepared to endorse my colleague’s conclusion that these measures are «not sufficient» (para. 262) and have offered «little comfort» (para. 265). *Equally, however, we have not been informed by the appellants of the specific measures (short of declaring the legislation invalid or inoperative) that in the appellants’ view would remedy any continuing problems.*<sup>121</sup>

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117. On this issue, I am deeply indebted in my analysis to conversations with and the insights of RONALDA MURPHY, Professor, Faculty of Law, Dalhousie University, Halifax, Nova Scotia.

118. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 at para. 158 [*Little Sisters (No. 1)*].

119. These problems identified *ibid.* at para. 154.

120. *Ibid.* at para. 253.

121. *Ibid.* at para. 157 [emphasis added].

While Binnie J.'s support for a systemic review in his dissenting opinion in *Little Sisters (No. 2)* may suggest that he now believes his original hesitation about Customs' efforts at reform to have been warranted,<sup>122</sup> it does not change the fact that for the Canadian legal system to remain legitimate the greatest amount of choice over a party's litigation strategy should be located in the individual litigants. Only then can litigants be the authors of the laws to which they are ultimately subject. In *Little Sisters (No. 1)*, despite the misgivings of the majority, the appellants chose not to advance arguments advocating for a structured remedy from the Court. While I have tremendous sympathy for the frustration experienced by *Little Sisters*, it is difficult to justify an award of advance costs in these circumstances. The systemic remedy now sought is in essence the remedy that could have been argued for in the alternative in the original litigation. Unfortunately, it is difficult to justify publicly that what one wants is what one could have requested, but chose not to, now at taxpayer expense.

### *Conclusion*

The legal legitimacy of the state can only be maintained when diverse parties are provided access to institutional forms of power, such as the courts. State power is only legitimate when it reflects as broad a range of opinions as possible, and it should only be exercised when it is consensual. This means that parties should be provided with a realistic opportunity to participate in defining when state power can appropriately be deployed. Recent decisions in Canadian courts have self-consciously refashioned Canadian costs law to include access to justice as an important consideration when awarding costs. As the decisions in *Okanagan Indian Band* and *Cavalieri* demonstrate, in the words of Chief Justice Waite of the United States Supreme Court, "property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large."<sup>123</sup> These recent cases suggest that even ostensibly private concerns about property can assume public significance when parties are denied access to state-sponsored legal discourse. The fewer the number of legitimate legal claims that are resolved rationally through the courts, the less legitimacy the legal process generally has. Costs law is currently developing to accommodate these access concerns, rather than focusing on the narrow normative purpose of indemnifying the successful party. However, the process of making the courts available to litigants of modest means is far from over, and could be seriously affected if too

122. *Supra* note 17 at para. 150.

123. *Munn v. Illinois*, 94 U.S. 113 (1876) at 126.

narrow and legalistic an interpretation is placed on these judgments. Public money may legitimately be used to advance private concerns where they are of exceptional significance, because when costs are awarded to promote access the public ultimately benefits from a vibrant and inspired political discourse in our courts. This in turn encourages diverse communities' sense of belonging in Canadian society. Although the alternatives to access are not entirely clear, what is apparent is that, absent the ability to participate meaningfully in the development of Canadian jurisprudence, potential litigants may feel disenfranchised from a system that operates without either their input or their consent. The results of a widespread failure to resolve disputes rationally through the courts may be more serious than we think. The possibility is certainly there that parties will seek private alternatives to legal dispute resolution when faced with courts too costly to access. These other means may include less socially desirable resolution mechanisms, such as recourse to violence. The situation on the ground in Canada has changed, and the common law must now develop to keep pace with the concerns of contemporary Canadian society. An instrumental costs law employed by the judiciary to promote access, as well as other important values such as indemnity and choice, when appropriate, will meet these concerns. Currently, the critical issue should not be concern that too much litigation might swamp the courts, but rather that there is deep uncertainty surrounding what private methods of dispute resolution may evolve to replace the rule of law and what these might mean for the continued success of the Canadian democratic experience. We should explore these alternatives only with reluctance. The alternative to public confidence in institutionalized rational dispute resolution processes could be very unpleasant if coercion, rather than consensus, were to become the preferred means of solving disagreements in our society.