Costs Immunity: Banishing the 'Bane' of Costs from Public Interest Litigation

Martin Twigg
Supreme Court of British Columbia

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For litigants raising a matter of public interest, the possibility of facing an adverse costs award if unsuccessful may act as a deterrent to pursuing their legal claim. The author evaluates a form of costs order called "costs immunity," referred to as "protective costs orders" (PCOs) in the U.K., as a means of removing the deterrent effect of costs on public interest litigants. Part I provides an overview of costs law in Canada. Part II reviews the various types of costs orders employed by Canadian courts to facilitate access to justice in public interest litigation. Part III explores the English experience with PCOs in public interest litigation, tracking the development of PCOs at common law. Part IV addresses the decision in Farlow v Hospital for Sick Children, the first case to articulate a test for costs immunity orders in Canada.

La possibilité pour une partie à un litige qui soulève une question d'intérêt public d'être condamnée à payer les dépens de la partie adverse si elle n’a pas gain de cause peut être un élément dissuasif et la décourager d'aller de l'avant et de poursuivre sa réclamation. L'auteur évalue une forme d'ordonnance en matière de dépens appelée « ordonnance d'exemption de dépens » (protective costs order) au R.-U., comme moyen de supprimer l'effet dissuasif des dépens sur une partie qui fait valoir l'intérêt public. La partie I de l'article est un survol des lois sur les dépens au Canada. La partie II passe en revue divers types d'ordonnances en matière de dépens utilisées par les tribunaux canadiens pour faciliter l'accès à la justice dans les litiges d'intérêt public. La partie III examine l'expérience, au R.-U., en matière d'ordonnances d'exemption de dépens dans les litiges d'intérêt public et suit le développement de ces ordonnances en common law. La partie IV se penche sur l'arrêt Farlow c. Hospital for Sick Children, premier cas au Canada où un critère pour déterminer s'il y a lieu de prononcer une ordonnance d'exemption de dépens a été articulé.

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Costs are the bane of the public law lawyer's existence. So many great cases; so expensive and so little money to do them with.1

Introduction

Access to justice is widely recognized as one of the most fundamental challenges facing the Canadian legal system.2 For an increasing number of Canadians, the rising costs of litigation have become prohibitively expensive, putting the price of justice beyond their reach. Speaking at the David Hall Memorial Lecture, Lord Justice Brooke, formerly of the English Court of Appeal, identified three sources of financial hardship currently

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facing litigants. Although his remarks were directed at the English legal system, his concerns resonate throughout the Commonwealth:

What are the obstacles to public access? Three are immediately obvious. The cost of the courts (in terms of high court fees); the cost of lawyers (in terms of even higher professional fees) and, above all, the risk of having to pay one’s opponent’s costs if one loses, and the uncertainty at the outset of litigation as to how large those costs will be.3

The third obstacle described by Lord Justice Brooke—the prospect and attendant uncertainty of having to pay costs to one’s opponent—is the subject of this paper. Specifically, I will examine the negative impact of costs on litigants raising a matter of public interest and evaluate a measure called “costs immunity,” referred to as “protective costs orders” (PCOs) in the U.K., as a potential solution.

Under the law of costs, courts generally require the unsuccessful party in a legal proceeding to indemnify the opposing party for a proportion of their legal expenses. The amount of the contribution can be substantial, in some cases surpassing the value at stake in the dispute.4 For this reason, the spectre of an adverse costs award looms large in many legal proceedings and may cause litigants to think twice before attempting to vindicate their rights in court.5 The deterrent effects of costs can be particularly harmful in the context of public interest litigation.

It should be stated at the outset that the concept of “public interest” is an elusive one. Definitions of "public interest litigation" and "public interest litigant" abound in the costs literature and case law. For the purposes of this paper, “public interest litigation” will refer to cases where the issue at stake is of importance to the broader community and the public has an interest in promoting access to justice in order to achieve judicial resolution of the issue.6 Generally speaking, the parties involved will be some combination of: “(a) a government, a public authority, or a regulator;

4. See Erik S Knutsen, “The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada” (2010) 36 Queen’s LJ 113 at 115: “The cost to litigate today can quickly eclipse the value of what is at stake in the dispute—for example, a summary judgement motion may now be more expensive than a family car.”
5. In some circumstances, the threat of a potential adverse costs award can produce positive outcomes for the judicial system. For a discussion of costs as a filter for wasteful or vexatious litigation, see the discussion of traditional costs principles at pages 196-198 below.
(b) a public interest litigant; (c) a private interest litigant; (d) a private interest intervenor; and (e) a public interest intervenor.”

Identifying a workable definition of “public interest litigant” poses greater difficulties, a problem discussed in Part II. Where debates over competing criteria are not otherwise mentioned, this paper assumes that a public interest litigant will often (though not necessarily always) be a member of or act on behalf of a marginalized or under-represented group, usually without the benefit of significant financial resources. Conversely, the opposing party will often (though not necessarily always) be a private interest litigant, government or public authority of comparatively greater means. An adverse costs award will therefore tend to place a greater financial burden on the public interest litigant in many cases.

Since public interest litigation tends to engage “constitutional rights and other issues of broad social significance”—everything from aboriginal land claims to environmental regulation to the scope of fundamental rights and freedoms guaranteed by the Charter—the societal consequences of a public interest litigant abandoning a claim over an inability to pay costs can be far-reaching and severe. The public has an interest in obtaining a legal resolution of such issues, regardless of the outcome, and the traditional law of costs threatens to deprive the public of that benefit.

Courts have attempted to address this problem by adopting special rules in favour of public interest litigants. For instance, courts will sometimes exempt an unsuccessful litigant from paying costs if they are found to

7. This taxonomy was proposed by Perell J in Incredible Electronics Inc v Canada (AG), [2006] OJ No 2155 at para 86, 80 OR (3d) 723 (Sup Ct) [Incredible Electronics].
8. See Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 SCR 524 [Downtown Eastside Sex Workers], stating that one of the ideas animating public interest litigation is “access to justice for disadvantaged persons” at para 51.
9. Ibid, speaking in regards to the Attorney General of Canada involved in public interest litigation, Perell J described the respondent as “[b]acked by the financial resources of the state” and therefore “an empowered litigant” at para 87.
10. See The Honourable Mr. Justice John H Osler, Report of the Ontario Task Force on Legal Aid (Ontario: Ministry of the Attorney General, 1974) [Ontario Task Force on Legal Aid], cited in Raj Anand & Ian Scott, “Financing Public Participation in Environmental Decision Making” (1982) 60:1 Can Bar Rev 81 at 100, n 82 [Anand & Scott]: noting that costs “operate unequally” on parties involved in litigation against a government, public authority or large corporation, including public interest litigants with no individual or private interest at stake at 99.
11. Okanagan, supra note 6 at para 38.
have raised a legitimate issue of public importance. In rare situations, courts may even order a victorious party to pay costs to the losing public interest litigant. However, the issue of costs is largely a matter of judicial discretion and the allocation of costs liability is traditionally reserved until the end of the proceeding. Faced with such uncertainty, public interest litigants still undertake a significant degree of financial risk when pursuing a claim.

In the landmark case of British Columbia (Minister of Forests) v Okanagan Indian Band, the Supreme Court of Canada recognized a new form of costs order aimed at facilitating access to justice in public interest cases. Litigants may apply at the outset of a proceeding for an order of “advance costs” requiring the opposing party to fund the applicant’s legal expenses over the course of litigation. While advance costs orders provide a powerful tool for ensuring that matters of public importance are not abandoned due to a lack of financial resources, such orders are viewed as exceptional by courts and rarely available in practice. As a result, most public interest litigants must take their chances with the usual costs determination made at the end of trial.

Due to the exceptional nature of advance costs and the uncertainty inherent in the traditional costs approach, the deterrent effect of costs remains an on-going problem in public interest cases. Proponents of reform have suggested that courts should more regularly address the issue of costs at the outset of litigation. In addition to an order for advance costs, public interest litigants could apply for a lesser measure of costs immunity, ensuring that they would not be held liable for costs in the event that they are unsuccessful. A preliminary determination of costs immunity would provide a reasonable middle ground in the public interest costs jurisprudence, offering litigants an enhanced degree of certainty over costs without imposing significant hardship on the opposing party.

The English approach to public interest costs stands as a potential model for Canada. In the U.K., public interest litigants have for a number of years been able to apply to a court for protective costs orders. Obtainable in advance of trial, PCOs exempt the applicant from costs in one of two ways: 1) the applicant may receive costs in the event that they are successful, but only for a modest amount, while the opposing party will be ineligible for costs; or 2) neither party will be eligible for costs. In either case, the threat of an adverse costs award is removed.

The Supreme Court of Canada endorsed the English approach as a reasonable alternative to advance costs in Little Sisters Books and Art

13. Supra note 6.
Emporium v Canada (Commissioner of Customs and Revenue), providing lower courts with an opportunity for judicial innovation in the realm of public interest costs. This invitation was recently taken up by an Ontario trial court in Farlow v Children’s Hospital, the first case to consider seriously the availability of costs immunity in Canada (an equivalent to English PCOs) and develop an analytical framework for making the order. While the decision is far from comprehensive and leaves a number of significant legal issues unresolved, Farlow has opened a new avenue for courts and litigants to pursue in public interest litigation.

This paper is divided into five parts. Part I provides an overview of costs law in Canada. The default rule and traditional theory of costs are explained, followed by the modern conception of costs as an instrument of policy. Part II reviews the various types of costs orders employed by Canadian courts to facilitate access to justice in public interest litigation. The current approach is shown to suffer from a number of shortcomings, highlighting the need for reform to more adequately address the deterrent effects of costs. Part III explores the English experience with PCOs in public interest litigation, tracking the development of PCOs at common law. The section ends with a number of considerations for adapting the English approach to the Canadian context. Part IV addresses the decision in Farlow, the first case to articulate a test for costs immunity orders in Canada. The basis for the decision is evaluated, followed by a discussion of its consequences for the future of Canadian public interest costs jurisprudence. A conclusion follows.

I. An overview of costs law in Canada

1. The default rule: costs follow the event

The basic rule of the law of costs states that costs follow the event. That is, a successful party in a legal proceeding is entitled to recover a portion of their expenses from the opposing party after judgment has been rendered in their favour. This approach, sometimes referred to as “two-way” costs, is derived from the English model and stands in opposition to the American “no-way” costs rule, which leaves all parties to a proceeding responsible for their own legal expenses regardless of the outcome. Despite the predominance of the two-way costs rule in Canada, an award

15. [2009] OJ No 4847, 100 OR (3d) 213 (Sup Ct) [Farlow].
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of costs is ultimately a matter of judicial discretion, the source of which can be traced back to the English Court of Chancery. According to the Supreme Court of Canada, "in the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion." Thus, a successful litigant will typically expect to receive costs, but a judge may depart from that presumption where necessary in the circumstances or where a civil procedure rule so requires. For example, Rule 77.03(2) of the Nova Scotia Civil Procedure Rules establishes a general presumption that costs follow the event unless a judge orders or a rule provides otherwise, while Rule 77.02(1) preserves the general discretion of the judiciary, stating that "[a] presiding judge may, at any time, make any order as to costs as the judge is satisfied will do justice between the parties."

2. Traditional costs principles

a. Indemnification

Costs are generally employed to serve three primary purposes: 1) indemnification; 2) encouraging settlement; and 3) sanctioning misconduct. The first purpose, indemnification, constitutes the most fundamental and long-standing principle of costs. A successful party, having vindicated their rights in court, is entitled to compensation from the losing party for legal expenses reasonably incurred in the process of pursuing or defending their claim. This view is reflected in the rule that costs follow the event. However, while indemnification is the primary justification for most orders as to costs, rarely will such awards entirely cover the costs of litigation. The usual award of "party-and-party" costs is intended to provide only partial indemnification, although the exact amount varies according to the particular method of calculation employed in each jurisdiction. For instance, the general approach in British Columbia is to set party-and-party costs at roughly one half of the winning party’s

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18. See Mark Orkin, Law of Costs, loose-leaf (consulted on 8 March 2013) (Toronto, ON: Canada Law Book, 2012) [Orkin, Law of Costs]: "the Court of Chancery had an absolute discretion as to all costs within its jurisdiction, proceeding not from any authority but from conscience and its inherent power to deal with arbitrio boni vir" at 1-1.
20. See Fong v Chan, [1999] OJ No 4600 at para 22, 46 OR (3d) 330 (CA) [Fong].
22. See Okanagan, supra note 6 at para 21.
23. This approach sets Canada apart from the English two-way costs regime, where complete indemnification is the norm. See Incredible Electronics, supra note 7: “a difference between Canada and England is that the benefit in Canada is a partial indemnity for the costs incurred and in England the benefit is a complete indemnity” at para 65.
legal fees, while in Nova Scotia the aim of the “tariff” set out in the Civil Procedure Rules is to “provide a ‘substantial contribution’ towards a party’s reasonable expense” without resulting in complete indemnity. Although courts have refrained from establishing an exact proportion of legal expenses appropriate for party-and-party costs in all circumstances, amounts awarded generally range from 50 per cent to 75 per cent.

The partial indemnification approach can be viewed as a compromise in light of the significant influence—both positive and negative—that costs exert on a litigant’s behaviour. The spectre of a potential adverse costs award acts as a deterrent against those who might otherwise have little to lose bringing a lawsuit that is frivolous or of questionable merit, while those on stronger legal footing will conversely be encouraged to pursue their claim. From this point of view, the indemnification rationale, in addition to its intuitive appeal as providing just compensation to the victorious party, also has the fortunate consequence of preserving judicial resources by acting as a filter for wasteful or vexatious litigation.

However, an element of risk is inherent in all legal proceedings and there is a danger that wholly legitimate claims may be abandoned if the threat of an adverse costs award becomes too great. Partial indemnification through “party-and-party” costs seeks to mitigate this negative outcome:

The expense of litigation is a matter of concern for all those interested in the administration of justice, but one must have regard for the burden which such costs place on all parties. Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser.

25. Landymore v Hardy, 112 NSR (2d) 410, [1992] NSJ No 79 (SC) at para 10 [Landymore].
27. This proposition, along with a number of other hypothesized effects of the indemnification rationale, were tested empirically by Hughes and Snyder when Florida substituted the English two-way costs rule for the American no-way costs rule for medical malpractice lawsuits from 1980-1985. Among their findings was the conclusion that “[t]he English rule likely reduces the frequency of low-merit claims and lessens the overall probability of litigation.” See James Hughes & Edward Snyder, “Litigation and Settlement Under the English and American Rules: Theory and Evidence” (1995) 38:1 J L&Econ 225 at 249.
28. Saunders J (as he then was) put the matter rather bluntly: “Parties who sue one another do so at their peril. Failure carries a cost. There are good reasons for this approach. Doubtful actions may be postponed for a sober second thought. Frivolous actions should be abandoned. Settlement is encouraged.” See Landymore, supra note 25 at para 17.
Thus, even the traditional view of costs in Canada is tempered by a concern for financial disincentives to litigation.

Despite the apparent moderation of the partial indemnity approach, costs awards remain substantial, exposing all but the wealthiest of litigants to significant financial risk. Under the Nova Scotia tariff, a five-day trial where the amount involved in the dispute is approximately $100,000 produces a costs award of more than $22,000 under the “basic” scale. When the reality for many Canadians is that the cost of legal fees can readily surpass the value at stake in a dispute, the possibility of incurring further expenses upon losing has a significant impact on behaviour. Moreover, the deterrent effect of costs is only made worse by the large scope of judicial discretion, making it difficult to predict the amount likely to be awarded in each case.

b. Sanctioning misconduct

Although indemnification has traditionally been the primary rationale for costs awards, courts have long used costs as a punitive measure to sanction misbehaving litigants. Where the conduct of the unsuccessful party is deemed to merit judicial reproval, it is within the court’s discretion to depart from the partial indemnity approach and award costs to the successful party on either a substantial indemnity or full indemnity basis. Sometimes referred to as “solicitor and client” costs and “solicitor and his own client” costs respectively, such awards are intended to more closely approximate the actual dollar value of the successful party’s legal expenses. In contrast, misconduct on behalf of the successful party may result in a reduced costs award or, in extreme cases, a complete denial of costs (deviating entirely from the general rule that costs follow the event).

While a costs sanction has the potential to increase the quantum of costs awarded against a losing party, the behaviour of a litigant is generally a matter within their control. As a result, the substantive effect of the punishment rationale is unlikely to impact the decision of whether to pursue a claim in court. However, both the traditional view of costs as indemnification, as well as the use of costs as punishment, support the notion that the determination of costs is best left to the end of a proceeding.

31. See Knutsen, supra note 4: “[f]or a middle-income Canadian who loses even a fairly standard contract or personal injury case, such costs can be unbearable” at para 2. Although some litigants may be motivated by factors that are not strictly monetary (e.g. revenge, the search for truth, the pursuit of justice, etc.), damages is the primary driver for most litigation. Moreover, simply because a litigant enters into a legal contest for a reason other than the recovery of damages does not mean that the costs associated with litigation are of no concern to the litigant and do not shape litigant behaviour.

32. See Fong, supra note 20 at para 22.
Only then can the conduct of the parties be fully considered and a victor ascertained.

c. Encouraging settlement

A third purpose of costs widely recognized by courts is encouraging settlement between parties. Where a party turns down an offer to settle and receives a judgment at trial that is less favourable than the terms of the rejected offer, the court may adjust the amount of costs awarded for or against the party in light of their decision to pursue litigation unnecessarily. For example, according to Rule 10.09 of the Nova Scotia Civil Procedure Rules, an unsuccessful party who rejects a favourable settlement offer after setting down for trial but before the finish date is liable to a 50 percent increase in costs awarded against them. If the offer is made less than 25 days after pleadings close, then the increase is 100 percent. While the settlement Rules may influence behaviour in a conventional civil dispute where most parties engage in a simple cost-benefit analysis, cost incentives to settle have significantly less impact in the public interest context. Not only are the positions of parties more likely to be entrenched with matters of public policy at stake, but public interest litigants commonly undertake litigation to establish a particular legal precedent, a goal which is not attainable through settlement.

3. Costs as an instrument of policy

Despite the continuing influence of the traditional indemnification rationale, it is now widely recognized that costs are intended to serve a variety of policy goals. Indeed, reliance solely on indemnification has been referred to as “outdated” by numerous courts and commentators. According to the Supreme Court of Canada, the modern approach views costs “as a tool in the furtherance of the efficient and orderly administration of justice.” This conception of costs is comparatively broad, encompassing the long-standing uses of costs to sanction misbehaving litigants and provide incentives to litigate based on the relative merit of the claim, as well as the more recent goal of avoiding trial by facilitating settlement agreements. One area of costs that has received considerable attention in recent years is in the context of public interest litigation.

33. Ibid at para 22.
34. See Okanagan, supra note 6 at paras 22-24 citing: Mark Orkin, The Law of Costs, 2d ed (loose-leaf) at 2-24.2; Fellowes, McNeil v Kansa General International Insurance Co., [1997] OJ No 5130, 37 OR (3d) 464 (Gen Div), MacDonald J accepted the indemnification principle generally, but called it “outdated” in relation to the case before him at 475; Skidmore v Blackmore, [1995] BCJ No 305, 2 BCLR (3d) 201 (CA): “the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated” at para 28.
35. Okanagan, supra note 6 at para 25.
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Increasingly, Canadians courts have been willing to depart from the general rule that costs follow the event in order to facilitate access to justice where an issue of public importance is at stake. The Supreme Court of Canada endorsed this particular use of costs as an "instrument of policy" in Okanagan, a case involving a request by four Indian bands for an award of costs in advance of trial in litigation over an aboriginal land claim.6 The bands were experiencing significant financial hardship and would likely have been unable to shoulder the enormous legal expenses of the trial (estimated at more than $800,000) without the assistance of an advance award of costs.37 In granting the order, the Court took the opportunity to expound upon the unique considerations that apply when dealing with issues of costs in public interest litigation. The Court stressed that concerns regarding access to justice may necessitate a departure from the traditional approach. In the words of Lebel J., writing for the majority:

The more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues.38

The Okanagan decision was eagerly received by public interest advocates. For some, the principles enunciated by the Court represented an important step toward a coherent and effective doctrine of public interest costs in Canada.39 First, on a simply practical level, Okanagan was seen to provide a baseline definition of "public interest litigation," a contested term that complicated discussions of costs in the public interest context. Justice Lebel's dual characteristics of access to justice for "ordinary citizens" and the presence of legal issues that are "of significance not only to the parties

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37. Ibid at para 5.
38. Ibid at para 38.
39. See Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's LJ 139 at 148: "[P]ublic interest lawyers saw Okanagan as providing the basis on which to build a comprehensive and progressive doctrine of public interest costs, with the purpose of facilitating access-to-justice for those who would not otherwise be able to litigate issues of fundamental public importance."
but to the broader community” could now be used to distinguish public interest litigation from “ordinary civil disputes.”

As for the issue of costs specifically, Okanagan was perceived as placing an obligation upon courts to consider the financial barriers that costs may pose to public interest litigants and adapt the rules of costs accordingly. As one group of commentators proclaimed: “[i]t is a decision that clearly signals to lower courts that, when making costs orders in relation to public interest litigants, access to justice concerns are a mandatory consideration.” While optimism surrounding Okanagan has dampened somewhat in the years since the decision, a matter discussed below, the general notion that costs in public interest litigation are driven in part by concerns for access to justice remains a guiding principle.

II. Costs awards in public interest litigation

Costs awards in public interest litigation can be divided procedurally into two overarching categories. The first category, ex post facto cost orders, refers to the assessment of costs at the conclusion of proceedings. This approach represents the norm for costs generally and constitutes the vast majority of awards in public interest cases. The second category, termed “anticipatory” costs orders by commentators, refers to the determination of certain costs issues at the outset of litigation. These two approaches have resulted in a wide range of potential outcomes relating to costs in public interest cases. The following analysis provides an overview of the various costs awards utilized by courts under each procedural category to promote the concerns for access to justice discussed in Okanagan. As we will see, Canadian public interest costs jurisprudence suffers from a number of serious shortcomings that undermine the effectiveness of costs awards as a means of ensuring that issues of public interest proceed to trial.

1. Ex post facto cost orders

Incredible Electronics Inc v Canada (AG), a decision on a motion for costs, contains perhaps the most comprehensive review of case law to date dealing with ex post facto costs awards in public interest litigation. A group of eighteen applicants brought a Charter challenge against legislation prohibiting the reception of foreign satellite television. However, the

40. Okanagan, supra note 6 at para 38. For an interpretation of Lebel J’s comments as a definition of public interest litigation, see Tollefson et al, “Costs Jurisprudence,” supra note 6 at 479-480.
41. Ibid at 477.
42. See Chris Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009) 35 Advocates’ Q 181 at 183 [Tollefson, “Public Interest Litigation”].
43. Supra note 7.
application was abandoned and ultimately dismissed for failure to prosecute, prompting the respondent Attorney General and several intervenors (collectively “Bell ExpressVu”) to claim a total of $2.2 million in costs on a substantial indemnity basis. In dispensing with the issue, Perell J. made a number of insightful observations and pronouncements regarding the special treatment of public interest litigants on matters of costs.

Justice Perell began his analysis by explaining the nomenclature of different costs regimes. As previously mentioned, Canada and England traditionally employ a “two-way” regime. Parties are either entitled to receive costs or liable to pay costs depending on their success or failure in the litigation. The U.S., in contrast, employs a “no-way” regime. Parties must generally bear their own legal costs and will never have to pay costs to their opponent. Perell J. also discussed a third approach called “one-way” costs, which is sometimes employed in the context of public interest litigation:

Under this approach, a public interest litigant will recover costs if he or she succeeds but will not be liable to pay costs if he or she fails. This approach retains the incentive of a costs award for successful litigation but removes the deterrent effect of an adverse costs award as factors in a litigant’s decision about whether to prosecute or defend a claim.

The altered incentives of the one-way regime are particularly advantageous for public interest litigants, many of which may be subject to serious financial constraints. Since the opposing party in public interest litigation is often a government, public authority or large corporation with comparatively deep pockets, the deterrent effect of an adverse costs award can have a disproportionate impact on public interest litigants. This is further the case where the public interest litigant has no personal or

44. Ibid at paras 65-66.
45. Ibid at para 67.
46. As the Supreme Court of Canada has acknowledged, public interest litigation often concerns access to justice for disadvantaged members of society, most of whom by definition lack financial resources. See Downtown Eastside Sex Workers, supra note 8 at para 51.
47. Ontario Task Force on Legal Aid, supra note 10 cited in Anand & Scott, supra note 10 at 100, n 82: “[s]o much of today’s litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against the losing party operates unequally as a deterrent” at 99.
pecuniary interest in the outcome of the dispute. One-way costs can help remedy this imbalance.

Justice Perell identified a number of circumstances in which courts have adopted the one-way costs approach. For example, courts have held that an unsuccessful party raising important matters of public interest may be relieved of paying costs to a successful government or public authority. This reasoning has also been applied in cases that involved an element of private interest, but where the unsuccessful party raised an important legal point or test case. In some cases, a successful government or public authority (sometimes acting as an intervenor) in a proceeding involving matters of public interest has even been ordered to pay costs to the losing party.

While these cases indicate a willingness on behalf of some courts to depart from the traditional rule that costs follow the event and adopt a one-way regime in favour of public interest litigants, all of the precedents highlighted by Perell J. in Incredible Electronics address the issue of costs at the end of trial. In every case where the unsuccessful public interest litigant was exempted from paying costs, the decision of whether or not to pursue a claim had already been made. Minimizing the expenses incurred by public interest litigants after the fact is certainly laudable, but leaving the issue of costs to the conclusion of proceedings negates one of the major benefits of a one-way regime—providing public interest litigants with the opportunity to better predict and plan for costs in advance of litigation.

48. Ibid, noting that the deterrent effect of costs is especially pronounced "against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual or private interests at stake" at 99.
49. Incredible Electronics, supra note 7 at paras 67-69.
50. Ibid at para 74.
52. Incredible Electronics, supra note 7 at para 74, citing Gombu v Ontario (Assistant Information and Privacy Commissioner), [2002] OJ No 2570, 163 OAC 185 (Div Ct); Sutcliffe v Ontario (Minister of the Environment), [2004] OJ No 4494, 191 OAC 370 (CA); Dickason v Governors of the University of Alberta, [1992] 2 SCR 1103, 95 DLR (4th) 439.
this reason, the impact of one-way costs on a litigant’s decision to pursue a claim is severely hindered when applied in an *ex post facto* manner.\(^\text{54}\)

The inability of public interest litigants to plan properly for costs is further made difficult by a lack of consistency in the jurisprudence. In the words of Perell J., the case law is both “erratic and unpredictable.”\(^\text{55}\) For every case supporting a costs regime favourable toward public interest litigants, there seems to be an authority adopting a contrary position. For example, Perell J. identifies instances in which unsuccessful parties have been held accountable for costs to a public authority regardless of the fact that an unresolved issue of public importance was raised.\(^\text{56}\) Courts have also held public interest intervenors liable for costs on some occasions, a departure from the general rule that intervenors neither receive nor pay costs in public interest litigation.\(^\text{57}\)

The issue of consistency is partly attributable to the fact that there is no authoritative test to qualify for special costs treatment as a public interest litigant in the *ex post facto* context. There are two tests that appear most frequently in the case law and academic commentary. In *Incredible Electronics*, Perell J. proposes a two-stage inquiry centred on the public importance of the issue at stake and the characterization of the party seeking special costs treatment as a public interest litigant.\(^\text{58}\) In comparison, Justice Ducharme in *St. James’ Preservation Society v Toronto (City)* establishes a five-step test aimed at answering essentially the same two questions:

1. The nature of the unsuccessful litigant.
2. The nature of the successful litigant.
3. The nature of the *lis*—was it in the public interest?
4. Has the litigation had any adverse impact on the public interest?
5. The financial consequences to the parties.\(^\text{59}\)

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54. Tollefson, “Public Interest Litigation,” *supra* note 42 at 185: “[f]rom a public interest litigant’s perspective, *ex post facto* adjudication of costs, even under a regime that recognizes the existence of a public interest costs exception, generates a significant and ever-increasing deterrent to proceeding, particularly for parties that are risk averse or of modest means.”

55. *Incredible Electronics*, *supra* note 7 at para 74.


58. Chris Tollefson terms the two stage inquiry developed by Perell J the “public importance” test and the “public interest litigant eligibility test.” See Tollefson, “Public Interest Litigation,” *supra* note 42 at 190-191.

While it is beyond the scope of this paper to evaluate either test in detail to reconcile the competing approaches, both tasks already undertaken elsewhere, it should be noted that the differences are not merely formalistic. There is considerable debate concerning the essential qualities that make up the public interest litigant and, to a lesser extent, public interest litigation generally. This debate is the ultimate cause of the "erratic and unpredictable" case law cited by Perell J. While it is not my intention to resolve all such issues definitively, it is helpful for the subsequent discussion of anticipatory costs orders to identify a number of areas that have proved particularly contentious.

**Outstanding issues in the law**

In a seminal article on public interest costs in Canada, "Financing Public Participation in Environmental Decision Making," authors Raj Anand and Ian Scott proposed one of the earliest definitions of "public interest litigation." According to Anand and Scott, their approach was both "intuitive" and "neutral." Rather than aligning with any particular political or policy orientation (such as "pro-industry" or "anti-development" in environmental cases), Anand and Scott argued that public interest litigation should encompass all points of view that are not adequately represented by parties with a significant personal or economic interest in the outcome of the proceeding. This would exclude issues backed by an "industry or other well-organized constituency."

Although the Anand and Scott definition is relatively broad, some courts have adopted an even lower threshold, focusing solely on a lack of adequate representation regardless of whether the view is being advanced by parties with a personal or economic interest in the proceeding. In *Canadian Bar Association v British Columbia,* the B.C. Court of Appeal dismissed an action brought by the Canadian Bar Association claiming various inadequacies of the legal aid system in B.C. on the basis of insufficient pleadings. In dealing with the issue of costs, the Court found that the case qualified as public interest litigation because the lawsuit was "prompted by concern for those unable to obtain representation or legal advice." This finding was made despite the fact that a successful action

64. *Ibid* at para 58.
would have “increase[d] the quantum of legal fees paid to lawyers, many if not most of whom are members of the Association.”

On the surface, the above definitions focus primarily on a single factor—lack of representation—while overlooking a more obvious requirement: public interest litigation must be in the interest of the public. It is difficult to imagine a true public interest case where the issue at stake does not transcend the interests of the parties involved in the dispute. It is possible that this criterion is simply treated as self-evident by some courts and commentators and therefore goes unstated. This might explain the finding in Canadian Bar Association that the case was of a public interest nature, especially as the court acknowledged the potential benefits to the public of enhanced legal aid elsewhere in the decision. With this in mind, the concept of public interest litigation laid down by the Supreme Court of Canada in Okanagan offers a more complete definition. As discussed earlier, commentators have interpreted Lebel J.’s remarks as identifying two characteristics: public interest litigation must 1) provide access to justice for ordinary citizens (a requirement functionally similar to “inadequate representation”) and 2) resolve a legal issue of significance to the broader community. However, while Okanagan may help to clarify the concept of public interest litigation, the decision stills leaves a number of questions unanswered that continue to be a source of disagreement. Many of these issues relate to the criteria a party must meet to qualify as a “public interest litigant” entitled to special costs treatment.

First, to what extent can a public interest litigant have a personal, proprietary or pecuniary interest in the outcome of a decision? This question looms large in nearly every discussion of public interest costs because the concept’s scope acts as a major limiting factor for entitlement.

65. *Ibid* at para 3. The court nonetheless refused to take into account the public interest nature of the proceeding due to defective pleadings, resulting in an award of costs against the Canadian Bar Association.

66. *Incredible Electronics*, supra note 7 at para 91: “[O]ne trait of a public interest litigant seems obvious. A public interest litigant, at a minimum, must, in a dispute under the adversary system, take a side the resolution of which is important to the public.”

67. *Supra* note 63, noting that success in the action would “enhance[e] legal aid to members of the community” at para 3 and that “the action is intended to assist low-income members of the public and its spirit is commendable” at para 58.

68. See *supra* note 40 and accompanying text.

69. As the earlier discussion of Anand and Scott’s article “Financing Public Participation in Environmental Decision Making” reveals, some definitions of “public interest litigation” also preclude a certain degree of self-interest in the proceeding. This highlights the overlap of criteria that can exist between the many competing definitions of “public interest litigation” and “public interest litigant.”
Chris Tollefson suggests that comments made by the Supreme Court of Canada in *Odhavji Estate v Woodhouse* are instructive:

[T]he Supreme Court of Canada has opined that the concept of public interest litigant embraces two types of public interest litigants: (a) those that have no direct, pecuniary or other material interest in the proceeding (i.e. non-profit non-government organizations (NGOs)); and (b) those litigants that possess a private or pecuniary interest that is modest in comparison to the costs of mounting the proceeding (i.e. an interest that ordinarily would make it uneconomic to litigate the case).71

However, the decision in *Woodhouse* clearly attributes the proposed definition to the plaintiffs' submissions. Rather than providing an express endorsement of the dual classification, the Court only notes that the plaintiffs, who were seeking millions of dollars in damages, "do not fit their own definition of a public interest litigant." 72 Nonetheless, the Court did deny public interest status to the litigants despite finding that issues of public importance had been raised. As a result, the case supports the notion that a significant private interest will count against a party arguing for special costs treatment as a public interest litigant, especially where the interest entails a large financial reward.

Again, *Incredible Electronics* provides the most comprehensive analysis of the issue. According to Justice Perell, "the conventional view is that a public interest litigant must, to some extent, manifest unselfish motives." 73 This typically translates into a definition of public interest litigant that values altruism and excludes parties pursuing financial gains that are more than minor, such as the situation in *Woodhouse*. However, Perell J. stresses that such factors operate more effectively as indicia than strict criteria. *Okanagan Indian Band* stands as an excellent example. An aboriginal land claim could result in a considerable financial award if successful, yet the Supreme Court of Canada did not find the self-interest of the bands to be problematic in that case.

Other considerations canvassed by Perell J. include whether a party is a member of or acts on behalf of a marginalized or disadvantaged group of society, as well as other, more abstract qualities such as "courage, loyalty, patriotism, dedication to a worthy cause, and the pursuit of justice." 74 In essence, Perell J. espouses a more flexible approach suitable to what

70. 2003 SCC 69, [2003] 3 SCR 263 [*Woodhouse*].
72. *Woodhouse,* *supra* note 70 at para 76.
73. *Incredible Electronics,* *supra* note 7 at para 95.
74. *Ibid* at para 98.
he calls the "je-ne-sais-quoi quality" that appears to characterize public interest litigation in the case law.\textsuperscript{75}

While it could be argued that abstract qualities like courage and patriotism are too vague to act as workable criteria, comments made by the Supreme Court of Canada in the context of public interest standing suggest that representation of marginalized or disadvantaged groups may be a valid characteristic for consideration. In \textit{Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society}, a former sex worker and an organization that advocates on behalf of sex workers applied for public interest standing to challenge the constitutionality of prostitution provisions under the \textit{Criminal Code}. In the process of granting the order, Justice Cromwell wrote on behalf of an unanimous Court that "one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected."\textsuperscript{76}

A second issue, related to the first, is the significance of a party's financial circumstances. Should a public interest litigant receiving funds from a government program or benefiting from \textit{pro bono} legal services be less likely to receive favourable costs treatment? What if the party pursuing a matter in the public interest is quite wealthy? According to Justice Perell, "the point is not so much whether the public interest litigant is affluent or impecunious but whether having regard to the benefit of ensuring their participation, they ought to be immunized from an adverse costs consequence."\textsuperscript{77} As we will see, courts have taken a much more strict approach in the context of anticipatory costs, generally requiring the public interest litigant to demonstrate impecuniosity.

A third unresolved issue concerns whether it is appropriate to depart from traditional costs rules in favour of a public interest litigant where the opposing litigant is a private party. Courts and commentators generally agree that an unsuccessful party raising a genuine issue of public importance should, at a minimum, not be liable to pay costs to government or a public authority.\textsuperscript{78} However, governments already frequently decline to request costs in public interest proceedings.\textsuperscript{79} Although a public interest

\textsuperscript{75.} \textit{Ibid} at para 99.
\textsuperscript{76.} \textit{Downtown Eastside Sex Workers}, \textit{supra} note 8 at para 51 [emphasis added].
\textsuperscript{77.} \textit{Incredible Electronics}, \textit{supra} note 7 at para 100.
\textsuperscript{78.} \textit{Ibid} at para 106: "[i]there is some sense to this outcome when the victorious litigant is a government, a public authority, or a regulator. They are already within the public sector and can be expected to act for the public."
\textsuperscript{79.} \textit{Ibid} at para 74, noting that "governments frequently do not ask for costs in cases of public interest litigation."
litigant genuinely concerned about the impact of an adverse costs award may nonetheless be unwilling to rely on a likely exercise of goodwill by government, much of the utility of a special costs regime for public interest litigation depends upon the willingness of courts to order private parties to subsidize the legal costs of public interest litigants. Unfortunately, many courts have not been overly hospitable to such an approach.\(^{80}\)

In *Re Sierra Club of Western Canada v British Columbia (Chief Forester)*, the Sierra Club unsuccessfully challenged a decision regarding a timber harvesting quota assigned to the logging company MacMillan Bloedel.\(^{81}\) Although the Sierra Club was found to be advancing a position that was clearly in the public interest, Justice Smith held the non-profit organization liable for costs on the basis that MacMillan Bloedel "is a private citizen, not a public agency."\(^{82}\) This view has been strongly criticized by commentators as overly simplistic, failing to consider the vast financial disparities between the parties and the broader context in which the dispute arose. According to Chris Tollefson, Smith J.'s decision ignores the fact that public interest litigation involving private parties often concerns issues of state-conferred entitlements to scarce public resources:

> These cases usually involve challenges to the way government has allocated rights in public resources to private interests for the purposes of profit, whether that “resource” is a right to pollute air, to harvest Crown timber or to dam a river. There is a strong public interest in ensuring that these arrangements are subjected to regular and careful public supervision, including judicial scrutiny.\(^{83}\)

The issue of an opposing private party in public interest litigation also arose in *Incredible Electronics*. Perell J. considered both positions described above and ultimately sided with Tollefson's reasoning.\(^{84}\) As a result, Perell J. ruled that both the respondent Attorney General and the intervenor Bell ExpressVu, which benefited from a state conferred monopoly, should be treated as public authorities subject to the one-way costs award rule. Perell J. also noted the practical point that exempting liability to one party but not the other "would be similar to avoiding a car only to be hit by a train,”

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80. See Tollefson, “Public Interest Litigation,” *supra* note 42 at 193: “[m]any courts have tended to treat as self-evident the notion that a prevailing private litigant in these circumstances should receive its costs.”


82. *Ibid* at para 55.

83. Tollefson, “‘Public Interest’ Loses,” *supra* note 17 at 316.

84. *Incredible Electronics, supra* note 7 at para 109.
effectively defeating the policy justification behind the recognition of public interest status in costs proceedings.\(^{85}\)

2. **Anticipatory costs orders**

In *Okanagan*, the Supreme Court of Canada recognized for the first time an alternative to *ex post facto* cost orders in public interest cases. As previously mentioned, there was a danger that the plaintiffs in the case, four First Nations bands involved in aboriginal land claims, would not be able to proceed to trial due to a lack of financial resources. After acknowledging the need to deviate from traditional costs rules in certain circumstances where access to justice is at stake, the Court endorsed the use of "interim costs"—a costs award made in advance of trial—in public interest litigation. According to Lebel J. writing for the majority, interim costs orders "avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed."\(^{86}\) Lebel J. also noted that the power to make an award for costs in advance of trial is part of the courts' equitable jurisdiction as to cost and exists independently of any express statutory authorization.\(^{87}\)

A party seeking an order for interim costs (sometimes referred to as "advance costs") in public interest cases must satisfy three requirements:

1. The party is unable to pay for the litigation and no other realistic option exists for bringing the issue to trial;
2. The claim is *prima facie* meritorious;
3. The issues raised are of public importance and have not been resolved in previous cases.\(^{88}\)

Finding that all three requirements had been met in the case before them, the Court ordered the provincial government to pay costs to the bands in advance of trial.\(^{89}\) The parties were to agree on a procedure whereby the bands would receive costs on an on-going basis as deemed appropriate by the Chambers judge in light of the complexity of the litigation. The Court also imposed a number of conditions on the order to avoid any "temptation" by the bands to shirk financial responsibility and prolong the dispute unnecessarily.\(^{90}\)

Many public interest lawyers and academics had high hopes for the future of public interest litigation following the decision in *Okanagan*.

\(^{85}\) *Ibid* at para 110.
\(^{86}\) *Okanagan*, supra note 6 at para 34.
\(^{87}\) *Ibid* at para 35.
\(^{88}\) *Ibid* at para 40.
\(^{89}\) *Ibid* at paras 46-47.
\(^{90}\) *Ibid* at paras 17, 47.
For some, the decision was seen as "providing the basis on which to build a comprehensive and progressive doctrine of public interest costs, with the purpose of facilitating access-to-justice for those who would not otherwise be able to litigate issues of fundamental public importance." Critics of the decision, however, raised fears that the judicial system would be overrun by a torrent of interim costs applications. Neither view has proved correct.

While Okanagan enunciated some important principles regarding the role of costs in facilitating access to justice, the practical impact of interim costs orders made available to public interest litigants has been minimal. In a review of interim costs applications brought in the two years following Okanagan, Chris Tollefson found that the ensuing jurisprudence "amounted to little more than a trickle" with a success rate that was "modest at best." Litigants were slow to request interim costs and courts made such orders sparingly.

Enthusiasm among public interest advocates was further dampened when the Supreme Court of Canada revisited the issue of interim costs in Little Sisters. The plaintiff in the case, a gay and lesbian bookstore in Vancouver, B.C., had previously won a constitutional challenge brought against Canada Customs for detaining material at the border deemed to be "obscene." When the plaintiff brought a second lawsuit alleging that the unconstitutional conduct was never properly addressed, a request was made for advance costs. Little Sisters struggled as a business to make a profit and the legal expenses likely to be incurred at trial were estimated at more than $1 million. However, a 7-2 majority of the Court rejected the funding application, ruling that Little Sisters failed to show impecuniosity and sufficient public importance.

Although Little Sisters did not alter the test for advance costs as originally articulated in Okanagan, the language employed by the majority in dismissing the claim appears to marginalize the availability of such orders. Emphasizing the extraordinary nature of advance costs, Bastarache and Lebel JJ. writing for the majority cautioned that Okanagan "was an evolutionary step, but not a revolution." Advance costs should only be

91. Bhabha, supra note 39 at 148.
94. Ibid at 55: "[p]erhaps not unexpectedly, courts have been in no rush to embrace Okanagan. More surprisingly, however, is that neither have public interest litigants."
95. Supra note 14.
96. Ibid at para 34.
awarded in public interest cases as a “last resort” under circumstances that are “rare and exceptional.” The plaintiff, despite raising some legitimate concerns, was unable to meet this high standard.

The decision in Little Sisters makes it clear that orders for advance costs will be granted sparingly. As Faisal Bhabha puts it in his article “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions,” it is now apparent that Okanagan represents “not an opening but, rather, the high watermark of public interests costs doctrine.”

3. Proposals for reform

Our survey of public interest costs jurisprudence reveals two extremes of potential costs orders, neither of which provides public interest litigants with an adequate opportunity to plan for legal expenses over the course of a trial. At one end of the spectrum are ex post facto cost orders, which leave the discretionary matter of costs to the end of the proceeding. Not only are such orders inherently unpredictable, but their uncertainty is compounded by a confusing and sometimes contradictory jurisprudence marred by unsettled legal issues. At the other end of the spectrum are advance costs awards, the only form of anticipatory costs currently available to public interest litigants. While undoubtedly a powerful tool for facilitating access to justice, courts are reluctant to grant such orders except in the most extraordinary of circumstances. In light of these problems, it is necessary to canvass an alternative measure that would be more widely available to public interest litigants yet still capable of addressing issues of uncertainty as to costs.

There is substantial room for judicial innovation between the two extremes of ex post facto costs orders and advance costs. One approach is to expand the category of anticipatory costs to include the same types of orders that are currently available in the ex post facto context. Rather than limiting applicants to the extraordinary measure of advance costs, public interest litigants could also request a one-way or no-way costs regime immunizing them from an adverse costs award. This would remove the deterrent effect of costs on public interest litigants, while avoiding the more contentious aspects of advance costs. Even if the application was denied, the applicant would come away with a better understanding of the likely costs outcome at the end of trial. The applicant could then make an informed decision whether to continue with the litigation in the face of a potential adverse costs award.

97. Ibid at para 36.
98. Ibid at para 38, quoting Okanagan, supra note 6 at para 1.
The notion of a preliminary determination of costs in public interest litigation is by no means novel. Proposals for such a regime date back several decades, well before the advent of advance costs in Okanagan. One of the first recommendations was made by Anand and Scott in their 1982 article “Financing Public Participation in Environmental Decision Making.” Concerned that traditional costs rules were a serious impediment to public interest litigants, particularly when appearing as an intervenor before tribunals overseeing environmental assessments, the authors put forward a number of reform proposals. One suggestion, based upon recommendations in the 1974 Report of the Ontario Task Force on Legal Aid calling for the availability of adverse costs immunity at the conclusion of proceedings, argued that the same protection should be available in advance of trial:

We advance for consideration an alternative fee-shifting proposal which would involve an exercise of administrative or judicial discretion to institute a one-way cost rule at an early stage in the proceedings. Some time after initiating or intervening in proceedings, the public participants would have to apply for “certification” as a cost-exempt group in much the same way as plaintiff class representatives do under Rule 23 of The American Federal Rules of Civil Procedure.

The Ontario Law Reform Commission made a similar proposal in its 1989 Report on the Law of Standing. Litigants would be protected from an adverse costs award if the court was satisfied of the following conditions:

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

100. Supra note 10.
101. Supra note 10 at 99, cited by Anand & Scott, supra note 10 at 100, n 82.
102. Anand & Scott, ibid at 114-115.
Like Anand and Scott, the Commission recommended that the order be made available at any stage in the proceeding.105

Most recently, Chris Tollefson took up Anand and Scott’s recommendations in a series of articles advocating for the determination of costs at the outset of public interest litigation.106 According to Tollefson, it could be argued that the access to justice principles set out in Okanagan impose a procedural obligation on courts to adopt such an approach.107 In his latest article, “Costs in Public Interest Litigation,” Tollefson turns his attention to England, “the jurisdiction where anticipatory costs orders in public interest cases have evolved the furthest.”108 In particular, he considers the recent development of protective costs orders as a source of guidance for Canadian courts. PCOs are a form of costs order made in advance of trial immunizing the applicant from an adverse costs award. First recognized by an English trial court in 1999,109 the availability of PCOs was affirmed by the Court of Appeal in the landmark case of R (on the application of Corner House Research) v Secretary of State for Trade and Industry.110

The English approach to public interest costs merits particular attention in light of some obiter comments made by the Supreme Court of Canada in Little Sisters. Stressing the need to consider a range of alternatives prior to granting an order for advance costs, the Court endorsed the use of an adverse costs immunity order as an intermediate measure and cited the Corner House decision with approval:

Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or “protective orders”) can be ordered in specified circumstances, the order

105. Ibid at 163, 185.
107. Tollefson, “The Public Interest Litigant,” supra note 92 at 60: “likely the most important way that Okanagan could be elaborated from an access to justice perspective is to argue that it implies a procedural obligation on courts to regularly consider making ‘alternative’ costs orders at the outset of litigation in public interest cases.”
108. Supra note 42 at 197.
may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see R. (Corner House Research) v. Secretary of State for Trade and Industry, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.\(^{111}\)

Binnie J. and Fish J., the two dissenters in the case, adopted a similar position: "[i]t is true that an order for advance costs should not be made where a lesser costs order would suffice, such as protective costs orders, which ensure that plaintiffs or applicants in public interest litigation do not have costs orders made against them at the conclusion of proceedings."\(^ {112}\) Thus, despite closing the door on advance costs as a widely available order in public interest cases, the Supreme Court of Canada in Little Sisters appears to have opened another.

The recommendation by the Supreme Court of Canada to consider PCOs has so far only been taken up by a lone Ontario trial court in the case of Farlow.\(^ {113}\) In attempting to develop a test for PCOs for the first time in Canada, the trial judge draws from a number of sources, including the decision in Corner House. Given the English experience in this area, English case law is likely to play a significant role in the future development of PCOs in Canada. It will therefore be helpful to review the emergence of PCOs overseas before examining the Farlow decision in detail.

III. The English approach: protective costs orders

R v Lord Chancellor, ex p Child Poverty Action Group (Child Poverty) was the first decision to recognize the availability of PCOs in the U.K.\(^ {114}\) Justice Dyson of the Queen's Bench heard two separate interlocutory costs applications together brought by non-profit organizations. In the first case, a prominent anti-poverty organization applied for judicial review of a decision excluding participants in social security proceedings from entitlement to legal aid. In the second case, two human rights organizations concerned with the abolition of torture sought judicial review of a decision by the Director of Public Prosecutions to not prosecute two individuals for the possession of an electric shock baton contrary to firearms legislation. All of the applicants requested immunization from a potential adverse costs award based on the public interest nature of the issues raised.

Preferring the term "pre-emptive costs orders" to "protective costs orders" proposed by the applicants, Dyson J. was quick to conclude that the

\(^{111}\) Little Sisters, supra note 14 at para 40 (emphasis added).

\(^{112}\) Ibid at para 135 (emphasis added).

\(^{113}\) Supra note 15.

\(^{114}\) Supra note 109.
decision to immunize a party in advance of a proceeding clearly fell within
the court's wide discretion on the matter of costs under the Civil Procedure
Rules. However, such an order should only be granted in exceptional
circumstances. Two reasons were provided. First, it is sometimes difficult
to gauge whether an issue will be of sufficient public importance to justify
a departure from the traditional rule that costs follow the event during an
interlocutory application. Public importance may only become clear once
all of the arguments have been heard and the case has been judged on its
merits. Second, and related to the first, it is difficult to make a sufficient
assessment of the merits of the claim at the interlocutory stage. With
these observations in mind, Dyson J. set out a test for PCOs:

[T]he necessary conditions for the making of a pre-emptive costs order
in public interest challenge cases are that the court is satisfied that the
issues raised are truly ones of general public importance, and that it has a
sufficient appreciation of the merits of the claim that it can conclude that
it is in the public interest to make the order... The court must also have
regard to the financial resources of the applicant and respondent, and
the amount of costs likely to be in issue. It will be more likely to make
an order where the respondent clearly has a superior capacity to bear
the costs of the proceedings than the applicant, and where it is satisfied
that, unless the order is made, the applicant will probably discontinue the
proceedings, and will be acting reasonably in so doing.

Applying the test to the cases before the court, both applications
were denied. Dyson J. deemed the litigation too premature to ascertain
whether the issues at stake were of sufficient public importance and the
arguments advanced of sufficient merit. Also, it was found that two of the
parties would have continued with the litigation regardless of whether they
obtained the order.

1. The Corner House decision
The English Court of Appeal decision in Corner House is the leading
authority on PCOs. Corner House, a non-profit organization involved in
advocacy work relating to corruption, brought an application for judicial
review challenging a change of procedure by the Export Credits Guarantee
Department of the Department of Trade and Industry. Corner House alleged
that the changes weakened anti-corruption protection in the awarding of
government contracts on the international market. Corner House applied
for a PCO during the proceeding and was denied at first instance. The Court of Appeal overturned the decision, but only granted the order subject to the condition that any costs recoverable would be capped at $25,000.

Undertaking a review of the jurisprudence on public interest costs and PCOs, the Court of Appeal revisited the decision in Child Poverty and its interpretation in subsequent lower court cases. In the process, the Court of Appeal touched upon the Supreme Court of Canada decision to award advance costs in Okanagan. Described as going "one step further" than PCOs, the Court of Appeal noted that advance costs orders were beyond their jurisdiction under the Supreme Court Act 1981 as interpreted by the House of Lords in Steele Ford & Newton (a firm) v CPS. Reference was also made to the 1989 report by the Ontario Law Reform Commission calling for the availability of a judicial tool similar to that of PCOs.

Agreeing with Dyson J. that PCOs should only be awarded in "the most exceptional circumstances," the Court of Appeal settled on the following guiding principles when considering an application for such an order:

(1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(i) the issues raised are of general public importance;
(ii) the public interest requires that those issues should be resolved;
(iii) the applicant has no private interest in the outcome of the case;
(iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and
(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

120. Ibid at 55.
121. (UK), c 54.
122. Ibid at 77. In Steele Ford & Newton, [1993] 2 ALL ER 769 at 780-781, [1994] 1 AC 22 at 40-41, the House of Lords ruled that the Supreme Court Act 1981, which governs the courts' discretion as to costs, does not confer the power to award costs out of central funds without express statutory authorization.
123. Corner House, supra note 110 at 42, citing Report on Standing, supra note 102.
124. Corner House, supra note 110 at 72.
125. Ibid at 74.
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The Court added that a cap on the costs recoverable by the party receiving the PCO will almost always be necessary. Such a cap should be modest, limited to "solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest."126 The only situation in which a cap will not be necessary is when *pro bono* counsel is seeking a PCO and the court institutes a no-way costs regime. On the issue of costs for the application seeking a PCO, the court stated that both parties must bear some degree of liability in order to "provide an appropriate financial disincentive for those who believe that they can apply for a PCO as a matter of course or that contesting a PCO may be a profitable exercise."127

2. *Post-Corner House jurisprudence*

In *R (Compton) v Wiltshire Primary Care Trust (Compton)*, the English Court of Appeal heard three appeals concerning the requirements of PCOs.128 The decision provided the Court with an opportunity to clarify a number of the principles established in *Corner House* and has arguably had the effect of increasing the accessibility of PCOs in the U.K.

The appeals arose out of two judicial review proceedings brought by Compton challenging the decision of Wiltshire Primary Care Trust (WPCT) to close two hospital units. PCOs were utilized in both instances. In the first judicial review proceeding, which concerned the closure of a day unit, the PCO stated that WPCT would be unable to recover costs from Compton, but costs recoverable by Compton from WPCT were capped at £25,000. In the second proceeding, which involved a minor injuries unit, the terms of the order were reversed. Compton was unable to recover costs from WPCT, but the costs recoverable by WPCT from Compton were capped at £20,000.

In the view of Waller L.J., the primary issue on appeal engaged the first two requirements of the *Corner House* test: 1) whether the applications for judicial review raise serious issues of general public importance; and 2) whether the public interest requires the issues to be resolved.129 WPCT argued that the requirement of "general public importance" cannot be met where an issue is of a purely local nature, such as the closure of a hospital. Moreover, the exceptionality of PCOs as originally stated in *Child Poverty

126. *Ibid* at 76.

127. If an application is denied based on written submissions alone, proportionate costs should not exceed £1,000. If renewed and contested at an oral hearing, proportionate costs should not exceed £2,500. If there are more than one defendants or one or more interested parties contesting the application, one additional set of costs may be awarded. *Ibid* at 78-81.


should be incorporated into the *Corner House* test as a stand-alone requirement.\(^{130}\)

A majority of the Court (Waller L.J. and Smith L.J. with Buxton L.J. dissenting) upheld the decisions to award PCOs to Compton. In the leading opinion, Waller L.J. made clear that the factors laid out in *Corner House* are not to be read in an overly restrictive way or as statutory provisions.\(^{131}\) Accordingly, the requirement that an issue be of general public importance does not mean that it must be of interest to the public on a national scale. Matters that are local in nature, including the closure of a hospital, may still meet the standard.\(^{132}\)

Moreover, the exceptional nature of protective costs orders as originally stated in *Child Poverty* was not intended in *Corner House* to constitute an additional requirement of "exceptionality." According to Smith L.J., "the only function of the *Corner House* endorsement of Dyson J.'s statement was to serve as a reminder that PCOs are not to be routinely made and that it will be a rare case which meets all the requirements."\(^{133}\)

Finally, courts should avoid an all or nothing approach to protective costs orders. The judiciary should use their discretion to award a range of orders of varying strength based upon the degree to which the applicant has satisfied the *Corner House* test. In the words of Smith L.J.:

> It seems to me as a matter of common sense, justice and proportionality, that when exercising his discretion as to whether to make an order and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five *Corner House* requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for the judge to make the strongest of orders, if the financial circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances.\(^{134}\)

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133. *Ibid* at para 83.
Commentators have suggested that the refinements in *Compton* have made PCOs more accessible to public interest litigants.\(^\text{135}\) Indeed, Buxton L.J. writing in dissent took issue with the expansive interpretation of the majority:

> The effect of the decision in this case is very greatly to extend the types of cases in which, if other requirements are fulfilled, a PCO can be made. And although judges retain a discretion to refuse nonetheless to make PCOs, it is difficult to see how a judge could use that discretion to refuse a PCO in the type of case in which the making of a PCO has been upheld by this court and there were no policy factors (for instance, collusion or the creation of an artificial case) that militated against it.\(^\text{136}\)

Despite Buxton L.J.’s reservations, the approach of the majority in *Compton* was affirmed by a unanimous Court of Appeal in a subsequent case dealing with protective costs, *Re (Buglife—The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation*.\(^\text{137}\)

In *Buglife*, an environmental organization dedicated to the protection of invertebrates brought an application for judicial review challenging the decision of a local planning authority. Although the application was dismissed, Buglife obtained a PCO limiting the costs recoverable by both parties in the proceeding to £10,000. Buglife subsequently appealed the judicial review decision and requested an additional PCO to cover the appeal proceedings. After reviewing the relevant principles for PCOs, the Court of Appeal stated that “the correct approach is for us to follow *Corner House* as explained by Waller L.J. and Smith L.J.,”\(^\text{138}\) confirming the majority’s reasons in *Compton*. The Court then awarded a further PCO for the appeal proceedings, again limiting the costs recoverable by both parties to £10,000, ruling that the *Corner House* principles should apply on appeal just as they do at first instance.\(^\text{139}\)

Another requirement of PCOs that has been relaxed since *Corner House* is the stipulation that “[t]he applicant has no private interest in the outcome of the case.”\(^\text{140}\) Initially, the no private interest requirement was interpreted quite strictly by the judiciary, including the Court of Appeal

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135. Andrew Lidbetter, Anna Condliffe & Nusrat Zar, “Protective Costs Orders in Judicial Review Proceedings” (28 October 2008), online: International Law Office <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=a6cb88ba-733d-4eaa-a3f1-67dd12babebe2>: “[arguably, the interpretation of the *Corner House* principles by the majority of the Court of Appeal in *Compton* has increased the likelihood of these orders being granted in future cases.]”


140. *Corner House*, supra note 110 at para 74.
in *Goodson v HM Coroner for Bedfordshire and Luton*. Following the death of Goodson’s father during a medical procedure, Goodson applied to the coroner requesting a full inquiry and the appointment of an independent medical expert. The coroner rejected the application, prompting Goodson to seek judicial review in conjunction with an order for protective costs. The Court of Appeal denied the PCO partly on the basis of Goodson’s personal, yet non-pecuniary, interest in the outcome of the case. However, this approach was criticized heavily by courts and commentators in the years following *Goodson*, prompting the Court of Appeal to reevaluate its position in *Morgan v Hinton Organics (Wessex) Ltd & CAJE (Hinton Organics).*

*Hinton Organics* concerned an action for private nuisance brought by two residents against a nearby composting company. The issue of protective costs was raised for the first time by the residents on appeal following an award of costs from an interim application. The Court declined to provide the order given that costs had already been incurred, calling the issue “redundant,” but nonetheless felt obliged to address the role of private interests in PCOs due to past controversy. After reviewing a trend in the case law diluting the private interest requirement, the Court of Appeal noted the incongruity of its position in *Goodson* with the later “flexible” approach to the *Corner House* test advocated in *Compton*. In the end, the Court concluded that “the ‘flexible’ basis proposed by Waller L.J., and approved in *Buglife* should be applied to all aspects of the *Corner House* guidelines,” including the private interest requirement.

While it is now clear that the private interest requirement cannot be interpreted restrictively, there are still limits to the flexible approach in *Compton*. In *Eweida v British Airways PLC*, an employee brought an employment discrimination claim against British Airways that was dismissed at the tribunal level. After receiving leave to appeal, the

141. [2005] EWCA 1172, [2005] All ER 122 [*Goodson*].
142. Ibid at paras 26, 28. Goodson argued that a strict application of the no personal interest requirement would make it “all but impossible” to obtain a PCO in judicial review proceedings where an element of personal interest is nearly always present. Despite ruling in favour of a strict application of the test, the Court appeared to agree, noting that the lack of private interest required for a PCO would effectively disenitle Goodson to standing. “It is her relationship to her father that gives her both the interest in seeking relief by way of judicial review and sufficient standing in law to pursue her claim. As [Goodson] was constrained to accept, it is unlikely that she would have been entitled to take similar action to challenge the verdict resulting from an inquest on a stranger whose death occurred at the same hospital.”
143. [2009] EWCA Civ 107 [*Hinton Organics*].
144. Ibid at paras 35-56.
145. Ibid at para 40.
employee unsuccessfully applied for a PCO in the appeal proceedings. The decision relating to the PCO was also challenged at the Court of Appeal. In disposing of the issue, the Court acknowledged the recent emphasis on flexibility following Compton, but drew a line between public law and private law disputes: “[i]t was not public law litigation, but a private claim by a single employee against her employer. A [PCO] could not be made in private litigation.” Moreover, even if the private law aspect was not determinative, the Court stressed that the result would be the same:

    Even if the private interest condition can be applied with some flexibility, the appellant’s private interest is too significant to make it appropriate to treat the case as within the Corner House principles.

Accordingly, the PCO was denied on appeal.

The English Supreme Court has heard a number of appeals involving protective costs. However, the core principles animating PCOs outlined in Corner House have never been in issue, nor has the general structure of the test been questioned. In R (on the application of Edwards and another) v Environment Agency and others, a case involving a relatively complex procedural history, the Supreme Court faced an appeal from a decision by two Supreme Court cost officers interpreting the Corner House test in light of international obligations and EU law. While the decision may have significant consequences in U.K. courts, increasing access to PCOs for applicants engaged in public interest litigation involving certain environmental issues, its relevance in the Canadian context is likely minimal as Canada is not a signatory to the international agreement at issue in the case.

147. Ibid at para 38.
148. Ibid at para 39.
149. [2010] UKSC 57, [2011] 1 All ER 785; an appeal was originally made to the House of Lords. After a decision had been laid down, but before the issue of costs had been determined, The Constitutional Reform Act 2005 transferred jurisdiction from the House of Lords to the Supreme Court. Two costs officers were then appointed to settle the matter of costs. The decision of the costs officers was subsequently appealed to the Supreme Court.
150. The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention), of which the UK is a signatory, imposes on member states the obligation to ensure public participation in environmental decision-making. Article 9 provides that members of the public with a sufficient interest must have access to review procedures to challenge the legality of environmental decisions, and that the review procedures must be “fair, equitable, timely and not prohibitively expensive.” The Aarhus Convention is incorporated into EU law through art 10a of the EU Council Directive 85/337/EEC and art 15a of EU Council Directive (EC) 96/61. One of the issues before the Supreme Court concerned the correct application of the EU Directives to procedures in environmental proceedings, including the Corner House test for protective costs orders.
3. *A model for Canada?*

The test for PCOs outlined in *Corner House* bears a number of similarities to the test for advance costs in *Okanagan*. Perhaps this is not surprising given the attention devoted to Canadian public interest costs jurisprudence by the English Court of Appeal in *Corner House*. Most notably, applicants in both instances must demonstrate an issue of public importance requiring resolution. The requested costs order must also be necessary, meaning that the applicant would be unable to reasonably continue the litigation without it. *Corner House* even makes reference to the “exceptional” nature of PCOs, echoing the language of the Supreme Court of Canada in *Okanagan* and *Little Sisters.*

The primary difference between the two approaches lies not in their analytical structure but in the nature of the potential orders granted. Advance costs are a comparatively extreme measure appropriate only in the rarest of circumstances. The select few cases in which courts have granted such orders attest to that fact. Although PCOs are also intended to be exceptional, they can at least be tailored to fit a variety of situations. Taking into consideration the nature of the dispute and the financial circumstances of the parties involved, courts can order one-way costs with a cap or dispense with costs altogether and implement a no-way costs regime. PCOs therefore offer a more flexible and realistically attainable solution to public interest litigants seeking to avoid the uncertainty of a potential adverse costs award.

In light of the utility of PCOs and their endorsement by the Supreme Court of Canada in *Little Sisters*, the time now seems ripe to call for their adoption in Canada. However, Chris Tollefson warns that “[w]hile opportunity awaits, Canadian public interest litigators should be somewhat wary to unconditionally advocate for the English *Corner House* approach.” In support of a cautionary approach, Tollefson cites a number of concerns identified by a UK working group chaired by Lord Justice Maurice Kay examining the role of PCOs in public interest litigation.

First, significant criticism has been directed at the no private interest requirement, an issue that has proved equally contentious in Canadian

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151. *Okanagan* arguably adopts a higher standard requiring the applicant to show “no other realistic option,” (at para 40) while *Corner House* proposes a less stringent threshold of “will probably discontinue” (at para 74).

152. Advance costs are clearly more “exceptional” than PCOs, however, given the English Court of Appeal’s remarks that advance costs are beyond their jurisdiction.


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academic and judicial circles. Tollefson notes that “on its face, this would exclude a party pursuing a human rights complaint from obtaining a PCO.” However, the debate surrounding the no private interest requirement has not gone unnoticed by English courts. Critical opposition to the rule prompted the Court of Appeal to re-examine the issue in Hinton Organics and confirm the need for a flexible approach in applying all of the Corner House criteria.

Moreover, English case law suggesting that PCOs should be available only in public law litigation is less persuasive when viewed in the Canadian context. In Eweida, the Court based its decision to deny a litigant public interest status on the private nature of anti-discrimination claims. In Canada, however, human rights statutes are treated as “quasi-constitutional” and perform a decidedly public function, namely to “protect against discrimination and to guarantee rights and freedoms.”

Second, concerns have been raised regarding the English Court of Appeal’s insistence in Corner House that nearly all PCOs implementing a one-way costs regime should limit the fees recoverable to a modest amount. If the cap is set too low, such as a fee chargeable by junior counsel, a party of modest means might be unable to receive competent legal representation. While a strict application of the rule will likely lead to unfairness in some instances, it could be argued that costs capping provides a reasonable counterbalance to a measure currently viewed by English courts as extraordinary. If courts are uncomfortable with providing one party with complete immunity from costs while leaving the opposing party exposed to an indeterminate amount, placing a limit on fees recoverable could simply be viewed as a quid pro quo. It should also be noted that the issue of cost capping does not apply where no-way costs are ordered.

Regardless of which position proves correct, the English debate over cost capping in PCOs may have less relevance in the Canadian context. Unlike in the U.K. where cost capping is employed as a stand-alone measure for case management purposes, Canada has little experience

155. Ibid at paras 77-85.
156. Tollefson, “Public Interest Litigation,” supra note 42 at 200.
157. Hinton Organics, supra note 143 at paras 35-56.
160. Civil Liberties Trust, Public Interest, supra note 154 at para 93.
161. Ibid at para 95.
162. See Various Ledward Claimants v Kent and Medway Health Authority and Another, [2003] EWHC 2551, [2003] All ER 12 (QB) at para 11: Hallett J ordered a cap on costs to address “a real risk that costs have been and will be incurred unnecessarily and unreasonably.”
with such orders. In *Corner House*, the need for cost capping in PCOs was largely taken for granted and may reflect aspects of the English costs system that have no parallel in Canada. For instance, the Court of Appeal cited a case supporting the use of cost capping orders where a plaintiff is pursuing a claim without the benefit of "after-the-event" insurance, noting that the underlying principles "will always be applicable" when considering a PCO. However, legal insurance has yet to take hold in Canada in provinces other than Quebec and does not figure prominently in judicial reasoning on matters of costs. While Canadian courts may find it necessary to attach conditions to a PCO for the purposes of case management—a recommendation made by the Supreme Court of Canada in regards to advance costs orders—it is not readily apparent why the English predilection for cost capping should be taken up in Canada. If courts are concerned that public interest litigants will prolong litigation unnecessarily, then such behaviour can be factored into a costs award at the end of trial in the event that they are successful. A cap on costs only runs the risk of undervaluing the actual extent of legal expenses incurred during the course of litigation.

Third, it has been argued that the preference accorded to PCO applicants whose counsel is acting *pro bono* could limit the number of lawyers willing to take on important public interest cases. This could certainly be problematic, especially for firms that rely on legal aid work and would not be able to afford to take on cases *pro bono*. However, the danger is somewhat overstated. Many of the cases that are of sufficient public importance to justify a PCO will tend to attract competent counsel for reasons other than remuneration, such as professional development or a personal commitment to the cause.

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163. "After-the-event" insurance is a form of legal insurance covering the policyholder against expenses incurred during litigation. Unlike "before-the-event" insurance, which is taken out to cover potential future litigation, "after-the-event" insurance is taken out after an event giving rise to a legal dispute and is sometimes demanded by lawyers acting under a contingency fee agreement.


165. See *Little Sisters*, supra note 14 at paras 42-43: courts making an order for advance costs may require the applicant to "relinquish some manner of control over how the litigation proceeds" by, for example, setting limits on the chargeable rates and hours of legal work.

166. *Civil Liberties Trust*, "Public Interest," supra note 154 at para 96.


168. *Ibid* at para 95, noting that cases involving PCOs "will almost inevitably be ones that lawyers are keen to take on for reasons of professional development."
Although these issues may not be as significant as critics make them out to be, Tollefson is correct to advise against the wholesale adoption of the English approach in Canada. Given the availability of advance costs to Canadian litigants—a form of costs order not recognized in the U.K.—PCOs would represent an intermediate measure between the two extremes of *ex post facto* orders and advance costs. The test for PCOs as set out in *Corner House* may therefore need to be relaxed in Canada in order to avoid significant overlap with the *Okanagan* criteria. With this in mind, perhaps the most important lesson to be taken from the English context is the need for flexibility. The requirements for PCOs are not to be strictly construed and courts should be prepared to tailor the order in a manner most appropriate for each case. This would ensure that a wide range of litigants raising issues of public importance would be provided with at least some degree of costs protection in cases where they are unable to qualify for the more extraordinary order of advance costs.

IV. Costs immunity in Canada

1. Farlow v Hospital for Sick Children

In 2009, an Ontario trial court heard an argument for protective costs in the case of *Farlow v Hospital for Sick Children.* The plaintiffs, parents of a child who died of a congenital genetic disorder, brought an action for medical negligence in Small Claims Court against the hospital and two doctors involved in the child's care. The defendants filed a motion to transfer the proceedings to Superior Court and exempt the action from simplified procedure. The plaintiffs were willing to agree to the transfer under the condition that the court immunize them from a future costs award. The decision provides the most comprehensive overview of protective costs jurisprudence to date by a Canadian court, as well as the first articulation of a legal test for costs immunity (the Canadian equivalent to PCOs) in Canada.

After briefly surveying the law of costs relating to public interest litigants, Herman J. noted that she "was not...referred to any Ontario cases in which a party has been immunized from a costs award prior to trial." However, three Canadian cases were identified as relevant to the issue, as


170. Shortly after commencing their civil claim, the Farlows filed a complaint with the Ontario Human Rights Commission alleging discrimination in the provision of medical services on the grounds of family status and disability. The human rights complaint was dismissed as statute barred due to the ongoing civil litigation. See *Farlow v Hospital for Sick Children*, 2009 HRTO 739, [2009] OHRTD No 728.

171. *Farlow, supra* note 15 at para 81.
well as the civil procedure rules in two Canadian jurisdictions. The first case mentioned, *Little Sisters*, contains the brief endorsement of protective costs by the Supreme Court of Canada.

The second case, *1465778 Ontario Inc v 1122077 Ontario Ltd*, addresses the issue of whether costs can be awarded to a public interest litigant in cases where the opposing party is a private litigant. In disposing of the issue, the Ontario Court of Appeal made remarks about public interest costs in *obiter* that Herman J. interpreted as a reference to the availability of PCOs:

> Where a case is brought to assert a Charter claim or other matter of general public importance, different considerations may apply when deciding whether to award costs in favour of the *pro bono* party. In those cases, for example, it may be appropriate for the court to consider potentially *insulating the pro bono party from exposure to costs, or limiting the party's exposure*, in order to facilitate the resolution of an important public issue by the court. The principles that will be applied in this type of litigation will also develop as the cases arise.  

Herman J.'s interpretation of the above passage is arguable, as the statements were made during a traditional costs proceeding at the end of trial. However, the use of the words "in order to facilitate the resolution of an important public issue" could be a reference to concerns over adverse costs awards that act as a deterrent to initiating public interest litigation.

The third case, *WA v St. Andrew's College*, concerns a motion to substitute an individual as a representative plaintiff in a class action lawsuit prior to certification, but only on the condition that the new representative plaintiff be granted costs immunity. The court denied the motion, finding that costs immunity was contrary to the intention of the legislature in class proceedings as indicated by the *Class Proceedings Act*. The Act does not contemplate the possibility of immunizing litigants from future liability and financial arrangements designed to assist class litigants are already available through the *Class Proceedings Fund*. Moreover, such a result would fetter the discretion of the trial judge in a subsequent certification proceeding, which the Court noted is often the most costly stage of class action litigation. Despite the ruling against costs immunity, however, the consequences of the decision are likely limited due to the unique cost rules in class action proceedings.

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172. [2006] OJ No 4248 at para 47, 82 OR (3d) 757 (CA), as quoted in *Farlow, supra* note 15 at para 82 (emphasis added).
Herman J. also took into consideration the civil procedure rules in Nova Scotia and Newfoundland and Labrador. Both jurisdictions allow an impecunious litigant to apply for relief from costs in advance of trial. According to Rule 77.04 of the Nova Scotia Civil Procedure Rules:

77.04 (1) A party who cannot afford to pay costs and for whom the risk of an award of costs is a serious impediment to making, defending, or contesting a claim may make a motion for an order that the party is to pay no costs in the proceeding in which the claim is made.

There are no reported cases of an applicant successfully invoking the rule. However, most requests for immunity denied under 77.04 were raised at the end of trial during a traditional costs proceeding, with only one reported case involving a request on a preliminary motion. Moreover, courts have granted relief from costs due to poverty under the old Civil Procedure Rule 5.17.

In Mills v Halifax County Municipality et al, a group of nursing home residents claiming discrimination by a number of municipalities and the provincial government in the payment of varying amounts of “comfort allowance” brought an application under Rule 5.17. Justice Davison ruled that the matter should be addressed before him in chambers and not be put over to trial, as the outcome would impact the decision of the applicants to continue with or abandon the litigation. Moreover, the chambers judge disagreed with the notion that a party exempted under the Rule should not be able to receive costs, holding that the intent of the Rule was to provide relief only to the impecunious party.

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176. See Mader v Hatfield, 2011 NSSC 121, [2011] NSJ No 183, a request for a costs exemption following the resolution of an adverse possession claim was denied based on insufficient evidence of poverty; Farrell v Casavant, 2010 NSSC 46, [2010] NSJ No 43, dealing with the issue of costs in an unsuccessful personal injury claim arising out of an automobile accident, the court stressed that the financial circumstances of the losing party are rarely considered when determining costs outside of a family law context. While a few exceptions were noted, no evidence of financial circumstances aside from annual income, such as assets and liabilities, was submitted to the court; Peraud v Peraud, 2011 NSSC 80, [2011] NSJ No 120, the court had access to detailed financial records while addressing the issue of costs in a divorce proceeding and was not convinced by the professed poverty of the party invoking the rule.

177. See MacBurnie v Halterm Container Terminal Ltd Partnership, 2011 NSSC 322, 306 NSR (2d) 197, stressing that the criteria for the rule should be stringently applied, the court found that the applicant had failed to adduce sufficient evidence of financial hardship. Moreover, the applicant was unable to show that a costs immunity order was necessary to continue with the litigation because he had entered into a contingency fee agreement with his lawyer.

178. See McGean v McGean, [1992] NSJ No 455 (SC); Mills v Halifax County Municipality et al (unreported Chambers decision) 15 September 1992 in Rollie Thompson, Civil Procedure, Case Book (Faculty of Law, Dalhousie University, 2012) at 18-28 [Mills].

179. Mills, supra note 178.
Not all courts have demonstrated such a sophisticated understanding of the impecuniosity Rule. Justice Gruchy in *Rafuse v Zink's Bus Co* denied a costs exemption to a bus driver in a wrongful dismissal claim despite finding that the plaintiff met the requirements under the Rule.\(^{180}\) Nonetheless, Gruchy J. expressed concern that a litigant granted immunity from costs "would be able to pursue the defendant to the point of causing financial harm to the defendant."\(^{181}\) Gruchy J. made no attempt to substantiate the danger, however, suggesting that the outcome of the case was actually attributable to a fundamental disagreement with the nature of the Rule itself.

The old Nova Scotia Rule 5.17 is nearly identical to Rule 7.19 under the Newfoundland and Labrador Rules of the Supreme Court, which states:

7.19 (1) Any person who lacks the financial means to commence or defend a proceeding may apply to the Court to be exempt from the payment of all or any of the costs and fees which may be payable by that person as a party in the proceeding.

(2) When an applicant under rule 7.19 (1) has satisfied the Court that

(a) the applicant has complied with the legal aid regulations of the provincial plan providing legal aid or similar services, with respect to commencing or defending a proceeding thereunder; or

(b) the applicant is entitled to the exemption applied for even though the applicant has not complied with the legal aid regulations; and

(c) the applicant files with the Court a legal opinion that sets out the material facts in issue in the proceeding and establishes that the applicant has reasonable grounds for commencing or defending the proceeding;

the Court may

(d) exempt the applicant from the payment of all or any of the costs and fees in the proceeding;

(e) assign a solicitor or counsel, or both, to assist the applicant; or

(f) grant such other order as is just.

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There are only two reported cases dealing with rule 7.19, both of which denied requests for adverse costs immunity. After completing a review of the jurisprudence, Herman J. turned to the task of outlining a test for costs immunity at common law. Recognizing that Canadian courts have broad discretion to structure costs orders appropriate in the circumstances, Herman J. set out a list of guiding factors adapted from three sources: the criteria for advance costs in Okanagan; the criteria for PCOs in the U.K.; and the Nova Scotia and Newfoundland civil procedure rules.

First, a court must start from the proposition that “the granting of a costs immunity award is exceptional.” Other factors may then be taken into account, including: “whether the applicant’s financial circumstances are such that the applicant would probably not proceed absent such an order; the extent to which the public has an interest in the issues being litigated; and the potential impact of such an award on the other parties.” The language employed by Herman J. seems to indicate that none of the three factors are determinative and the list is non-exhaustive. Finally, courts should be attentive to “the risk that the party that has been immunized from a costs order may fail to be accountable for the time and money expended on the case.” For this reason, Herman J. suggests that parties subject to the order may be required to cede some control of the proceedings to the court, as recommended by the Supreme Court of Canada in Little Sisters.

Applying the above factors to the case at hand, Herman J. rejected the claim, finding that the applicant failed to meet all three criteria of the test. First, the applicants did not provide adequate financial information to allow the court to determine if a potential adverse costs award would constitute a significant deterrent. Second, there was insufficient evidence concerning the costs of litigation to properly judge the impact of a costs

182. See Thompson v Seabright, 2008 NLTD 82 at paras 10-18, [2008] NJ No 135, a self-represented litigant brought an ex-parte application invoking Rule 7.19 in advance of trial, but failed to satisfy the court of several requirements. Insufficient evidence was provided showing financial need as required under either subsection (2)(a) or (b) and, most importantly, no legal opinion was submitted showing reasonable grounds for commencing the proceeding as required under subsection (2)(c). Moreover, even if such an opinion was included, the court found that the action was barred under the Statute of Limitations. See also, Williams v Williams, [1999] NJ No 254, 179 Nfld & PEIR 283 (CA), Rule 7.19 was invoked by a husband during a child support proceeding. Denied at trial, the application of the Rule was again rejected on appeal. Not only did the husband fail to submit evidence in support of each of the three requirements under subsection (2) of the Rule, but the last minute nature of the request also justified the trial judge’s exercise of discretion in denying the application.

183. Farlow, supra note 15 at para 93.

184. Ibid at para 94.

185. Ibid at para 95.

186. Ibid at para 96.

187. Ibid at paras 98-100.
immunity award on the defendants. Herman J. also noted that the two doctors being sued were private litigants, suggesting that the outcome may have differed if the government was a party to the litigation. Finally, the claim lacked a sufficient public interest element. Despite acknowledging that the issue before the court “may well be of interest to the public,” Herman J. concluded that a failure to hear the case would not amount to “an injustice to the public.” The plaintiffs were only seeking monetary damages, not a change in law, policy or practice that would address systemic problems in society.

2. Reflecting on Farlow
As the first case to consider the criteria for costs immunity in Canada, Farlow offers a tentative first step towards establishing a more comprehensive and effective public interest costs jurisprudence. No longer will litigants be caught between a rock and a hard place, forced to overreach by requesting the extraordinary measure of advance costs—formerly the only costs order available to public interest litigants at the outset of a proceeding—or leave the issue until the end of trial and accept the uncertainty inherent in an *ex post facto* order. Litigants may now cite precedent recognizing a “third way,” a new form of anticipatory costs order offering a potential antidote to the deterrent effect of costs liability in public interest cases. Despite such promise, however, the decision is not without its problems.

One of the primary concerns relates to the sparse analytical framework set out by Herman J. Although she is able to marshal significant support in favour of recognizing a new form of anticipatory costs order, the section of the decision devoted to costs is relatively brief and only three short paragraphs deal with the actual criteria for granting costs immunity. The end result is a test that seems far from authoritative and provides minimal guidance to future litigants attempting to craft an argument for such an order.

The brevity of the decision raises another problem. Herman J. leaves many of the contentious legal issues that have long complicated the case law on public interest costs unresolved. At what point does a dispute qualify as public interest litigation? How does the presence of a private litigant affect the analysis? Are parties eligible for costs immunity if they have a personal or pecuniary interest in the outcome of the case? While Herman J. provides some implicit hints to these questions in her analysis, no attempt is made to confront such issues directly.

188. *Ibid* at para 100.
Costs Immunity: Banishing the “Bane” of Costs from Public Interest Litigation

The exceptionality factor included in the criteria for costs immunity is also problematic. First, the requirement is arguably unnecessary. Even with the recognition of access to justice as an important costs principle in Okanagan, the Supreme Court of Canada made clear in Little Sisters that “the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced.” Since courts should not depart from this rule “except for very good reasons,” any situation justifying a public interest costs order will necessarily be special.

Second, stressing the exceptional nature of costs immunity only serves to conflate the order with advance costs. This raises additional problems. Are advance costs orders more exceptional than costs immunity orders? If so, how much more exceptional? Moreover, the primary utility of allowing costs immunity orders in Canada lies in their being realistically attainable by public interest litigants, providing a reasonable middle ground between advance costs and ex post facto orders. Although PCOs are sometimes referred to as exceptional by English courts, no equivalent to advance costs exists in English jurisprudence. Any attempt to delineate the availability of costs immunity orders in Canada should be mindful of the full spectrum of costs orders presently available in the Canadian context.

In fairness, these analytical failings cannot necessarily be attributed entirely to the court. It is possible that Farlow was simply not the ideal case to break new legal ground on public interest costs. The Farlows were self-represented and their arguments presumably suffered as a result. Any litigant seeking special costs treatment due to impecuniosity should reasonably expect the court to require the disclosure of proper financial information, yet the Farlows offered minimal evidence on this front. Poor advocacy was further compounded by weak facts, which pushed the case to the fringes of acceptability for public interest litigation. As Herman J. took care to highlight, the government was not a party to the dispute and two of the defendants were private litigants. The Farlows were also seeking a substantial monetary award, not a change in law or policy that would more clearly be of interest to the public at large.

As discussed earlier in this paper, commentators have argued that the presence of a private party defendant or a plaintiff with a pecuniary interest in the outcome of the case should not always act as a bar to special

189. Little Sisters, supra note 14 at para 34.
191. Notably, many of the cases denying relief from costs under the Nova Scotia and Newfoundland and Labrador civil procedure rules also involved self-represented litigants who failed to present a proper picture of their financial situation to the court. See supra notes 175, 176, 180 and accompanying text.
costs treatment where matters of public interest are at stake. However, the Farlows were likely ill-equipped to make such arguments to the court. On such a novel issue of law, one which is beset by a complicated and sometimes conflicting jurisprudence regarding public interest status, Herman J.'s analysis would almost certainly have benefited from the submissions of well-prepared counsel for the plaintiff. In this regard, *Farlow* can be viewed as a missed opportunity.

Nonetheless, *Farlow* still has value to public interest advocates. Although a number of key legal questions remain unresolved, at least they can now be addressed at the outset rather than the end of costly litigation. Moreover, the test for costs immunity laid down by Herman J., while admittedly short on detail, offers considerably more flexibility than the comparatively strict test for advance costs. The factors for consideration are non-exhaustive and none are wholly determinative. Most importantly though, by grounding the decision in three clear sources of authority—the Supreme Court of Canada's approach to public interest costs in *Okanagan* and *Little Sisters*, the English case law dealing with PCOs and the civil procedures rules in Nova Scotia and Newfoundland and Labrador—Herman J. has laid the foundation for the development of costs immunity orders in Canada. It will now be the task of future courts and litigants to build upon that foundation by engaging substantively with the issue on a deeper level.

**Conclusion**

Canadian public interest costs jurisprudence has in the past employed an "all or nothing" approach. In the rarest of circumstances, public interest litigants might benefit from the tremendously powerful order for advance costs, forcing the opposing party to fund the costs of litigation. Most likely, however, the issue of costs would be left to the end of trial, exposing public interest litigants to the uncertainty inherent in the traditional *ex post facto* order. For many litigants with limited means, the spectre of an adverse costs award may prove too great of a deterrent, forcing them to abandon litigation which would be in the public interest to proceed. However, the *Farlow* decision has opened the door to a "third way," allowing litigants to seek immunization from costs at the outset of a proceeding.

In future, advocates of costs immunity should position the measure as a reasonable middle ground between the two extremes of advance costs orders and *ex post facto* orders. Special care should be taken to ensure that the criteria for costs immunity are sufficiently distinct from the criteria for advance costs. As the Supreme Court of Canada stated in *Little Sisters*, costs immunity merits consideration *before* an award of advance costs.
Immunization from costs, although a departure from traditional costs rules, is a comparatively conservative measure and the requirements needed to obtain such an order should be less onerous as a result. Stressing the “exceptional” nature of costs immunity is not helpful in this regard.

One way to distinguish the criteria for costs immunity from advance costs would be to lessen the impecuniosity requirement. In many cases, organizations devoted to public interest litigation will have money set aside for a particular legal dispute or test case and the threat of an adverse costs award will not prevent the matter from proceeding to trial. However, most public interest organizations must balance a variety of functions within a limited budget and the threat of an additional costs burden may deter an organization from pursuing other activities, including other avenues of public interest litigation. In Okanagan, the substantial cost of litigation was problematic not simply because the bands were unable to afford legal representation, but also because they would have been unable to address other needs essential to their communities.192 Rather than requiring an applicant to show that they would not proceed to trial absent an order for costs immunity in all cases, courts should allow evidence in the alternative that an adverse costs award would limit the ability of the applicant to pursue other activities—litigation in particular—which is also in the public interest.

Ideally, public interest costs jurisprudence would be broadly available and highly adaptive, capable of producing a range of preliminary orders suited to a variety of circumstances. If an issue is of the highest public importance and an impecunious litigant, having exhausted all other funding options, would be unable to proceed to trial without financial assistance from the opposing party, then an order for advance costs may be justified. If a party is engaged in public interest litigation with a government or other public authority and the threat of an adverse costs award would operate as a significant deterrent to pursue the claim, then a costs immunity order implementing a one-way costs regime may be appropriate. If the party opposing the public interest litigant is instead a private party, then a no-way costs regime may be preferable. In essence, the preliminary determination of costs in public interest litigation should be a contextual exercise. Courts should take into account all of the factors found to be relevant—the nature of the dispute, the financial status of the

192. Supra note 6 at paras 4-5: the Bands claimed that they had no way to raise the more than $800,000 required for trial, but that “even if they did, there are many more pressing needs which would have to take priority over funding litigation.” The chiefs testified that their communities were facing “grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education.”
parties, whether the opposing party is a public or private entity, etc.—and then tailor a costs award appropriately. Such an approach would best achieve the goal of facilitating access to justice for public interest litigants in a manner that is fair to all parties involved.