

# ADVANCING AN AGENDA? A REFLECTION ON RECENT DEVELOPMENTS IN CANADIAN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

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## PART I: Reflections on the Topic

In recent years, citizens and citizen organizations have come to play an increasing role in the development and interpretation of public law both in administrative and judicial processes. A threshold question that I have been asked to address in this paper is whether it is appropriate for such groups to pursue their “agendas” through recourse to the courts and tribunals. In addressing this provocative question, I propose to focus on developments in one specific area of legal activism - public interest environmental litigation - with a view to assessing how effectively environmental organizations have advanced what might, for the present purposes, be referred to as an environmental “agenda.” But I would first like to make some preliminary observations about assumptions implicit in the topic as framed.

At the outset, it is important to be mindful of the pervasiveness of “agenda-setting” in public law. It would be a mistake to assume that only those groups that we usually associate with “public interest” or “cause” litigation are participating in the litigation process to promote an agenda. While the Women’s Legal Education and Action Fund (LEAF),<sup>1</sup> Mothers Against Drunk Driving,<sup>2</sup> the National Citizens

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<sup>1</sup> For a comprehensive summary of LEAF cases, see online: Women’s Legal Education and Action Fund <<http://www.leaf.ca/>>.

<sup>2</sup> See for example *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.) [MADD and Criminal Lawyers Association appearing as interveners].

Coalition,<sup>3</sup> civil liberties organizations,<sup>4</sup> aboriginal groups<sup>5</sup> and environmental interests<sup>6</sup> all engage in litigation to pursue their respective agendas, so too do business corporations, professional and trade associations and labour unions.<sup>7</sup>

Sometimes these groups litigate with a view to restraining government action; other times, they do so to defend the exercise of governmental power. But in all cases, I would contend that their participation in the judicial process is motivated and defined by a particular vision of social and political ordering. In other words, not only are they seeking vindication of their rights on the merits as is typical in private litigation, they are also mindful of and aspire to advance broader principles, interests and values.

Of course, not all of these litigants are pursuing a “master-plan” for changing the political and social *status quo*. On the contrary, the precision with which such groups define their agenda will clearly differ. For some groups, it will be relatively inchoate and generic. For instance, business interests are typically motivated to litigate public law issues by an aversion to government action and regulation that affects the cost of doing business.

For other groups, the agenda they are seeking to advance is much more specific and public, and indeed may be legally prescribed in their organizational objects and purposes. Such is the case with LEAF, the National Citizen’s Coalition as well as civil liberties and environmental groups. However, even these groups seek to invoke legal rights and remedies in distinct ways. LEAF, for instance, pursues a highly focused litigation strategy that relies almost exclusively on the equality provisions of the Charter. In contrast, public interest environmental litigants - due, in part, to

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<sup>3</sup> A discussion of the NCC’s continuing challenges to election spending laws is available; National Citizens’ Coalition, “NCC Battles Gag Laws,” online: National Citizens’ Coalition <[http://www.morefreedom.org/new\\_page\\_1.htm](http://www.morefreedom.org/new_page_1.htm)>.

<sup>4</sup> See for example *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 [the BCCLA, the bookstore and its two owners, appellants; the Canadian AIDS Society, the Canadian Civil Liberties Association, the Canadian Conference of the Arts, EGALE Canada Inc., Equality Now, PEN Canada, and LEAF, interveners].

<sup>5</sup> Illustrations abound: see for example *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. 378 (C.A.).

<sup>6</sup> See illustrations discussed in Part II below.

<sup>7</sup> See J. Bakan, *Just Words: Constitutional Rights and Wrongs* (Toronto: U of T Press, 1997); C. Tollefson, “Corporate Constitutional Rights and the Supreme Court of Canada” (1993) 19 *Queen’s L.J.* 309.

the absence of a specifically applicable Charter protection - tend to rely on a more diverse range of legal theories and seek recourse in a wider range of legal fora.

This leads into a final threshold issue: is it inappropriate for litigants to bring their political or social values into the courtroom? The evolution of more liberal standing and intervention rules suggests that courts and tribunals are recognizing - especially in the constitutional arena - the need to be mindful of the social and political context and implications of the decisions they are being increasingly being asked to make. Indeed, in Charter litigation, section one makes these mandatory considerations. In my view, judicial and administrative resolution of public law questions should be addressed in an analogous contextual and purposive manner. Such an approach not only advances important access to justice objectives, it also serves to bolster the protection of public rights (particularly those put at risk in the environmental context) and to offer the promise of enhancing the quality of administrative and judicial decision making.<sup>8</sup>

If we accept that public law disputes arise and are often litigated for a cluster of reasons that often involve a desire on the part of the litigants to advance an agenda, should this be a cause for concern? One way to respond to this question is to pose another question: what is the alternative? If we decided that agenda-advancing groups should be discouraged from seeking recourse to courts or tribunals, how would we translate this value judgment into practice, particularly given our presumably shared desire to ensure that courts and tribunals remain fora that are accessible and open to a diverse range of interests and perspectives? Undoubtedly there is a concern that courts and tribunals retain control of their dockets with a view to ensuring that scarce judicial and administrative resources are allocated wisely. Presumably, however, these bodies already possess means to effectively police these concerns through standing requirements and summary dismissal procedures.

Moreover, surely part of the *raison d'être* of courts and tribunals in a liberal democracy is to consider and resolve public law disputes in a manner consistent with the rule of law and the principles of due process. Indeed, a measure of how effectively courts and tribunals are discharging this essential function is the legitimacy and respect they are able to command within society at large. The flourishing state of public interest litigation speaks well to how effectively courts and

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<sup>8</sup> For an extended and useful discussion of the benefits of enhancing public participation in judicial and administrative processes see R. Anand and I. Scott, "Financing Public Participation in Environmental Decision Making" (1982) 60 Can. Bar Rev. 81 at 87-94.

tribunals are fulfilling this key role. Thus, I assert that the challenge of democratizing access to justice for public interest litigants and public interest issues within judicial and administrative processes is one that courts and tribunals should welcome, as daunting a task as that might at times appear.

Insofar as a goal of this paper is to reflect on the success or failure with which groups have engaged judicial and administrative processes to advance their agenda, I propose to devote Part II to an examination of legal developments in public interest environmental litigation, perhaps the fastest growing area of public interest litigation in this country. In Part III, I conclude with some observations on what lessons flow from this case-study in terms of the current state, and future prospects of public interest litigation in Canada.

## **Part II: Public Interest Environmental Litigation: The Recent Record**

There is little doubt that, during the 1990s, tribunals and especially courts, were called upon with increasing frequency to assess arguments and adjudicate claims made by environmental groups. There are many reasons for this phenomenon. In part, this trend reflected an evolution of social values. In 1987, upon publication of *Our Common Future* (a report of the World Commission on Environment and Development also known as the "Brundtland Commission Report"), "environmental protection" topped the list of Canadians concerns, a position it had not occupied since the mid 1970s, and one that it was to retain for much of the 1990s. The 1990s were also a decade that saw unprecedented growth in support for, and membership in, various environmental organizations.<sup>9</sup>

Enhanced engagement by environmental interests in administrative and judicial processes was also a product of opportunity and capacity. At the federal and provincial levels, new legislation was enacted that imposed legally binding responsibilities on private and public bodies to protect the environment. Under these new laws, and pursuant to public interest standing principles, citizens and citizen groups were effectively invited into the judicial arena. To assist them in taking up this invitation, the capacity of the public interest environmental bar expanded, most notably with the establishment of the Sierra Legal Defence Fund in 1991, Canada's first national, full-service, *pro bono* public interest environmental law firm.

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<sup>9</sup> For an overview of the rise of public interest environmental litigation in Canada, see S. Elgie, "Environmental Groups and Courts: 1970-1992" in G. Thompson, M. McConnell and L. Heustis, eds., *Environmental Law and Business in Canada* (Aurora, Ont: Canada Law Book Inc., 1993).

In this part, my goal is to provide an overview of the some of the legal landmarks and issues that emerged during the past decade. Given space limitations, I have chosen to limit this discussion to cases that have arisen in the judicial review context. In choosing this focus, it should be recognized that many important principles and cases were also argued before administrative tribunals, and that several landmark decisions during this period also emerged out of private prosecutions pursued against polluters by citizens and citizen organizations.<sup>10</sup>

This said, in what follows I discuss first the impact of public interest environmental litigants as interveners in the Supreme Court of Canada. I will then discuss the evolving caselaw with respect to three issues of particular concern to public interest environmental litigants: standing, the availability of interlocutory injunctive relief, and costs.

### *Interventions in the Supreme Court of Canada*

During the 1990s, the Supreme Court of Canada came to recognize environmental protection as a “fundamental value of Canadian society” and through its evolving jurisprudence played a leadership role in demonstrating how this value can be better realized within our federal model. Its continuing commitment to this goal has recently been affirmed in *Spraytech v. Hudson*.<sup>11</sup>

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<sup>10</sup> A noteworthy illustrations of successful public interest involvement in the tribunal context was a lengthy and complicated proceeding before the Ontario Environmental Appeal Board prompted by an application by Petrocan seeking permission to increase sulphur dioxide emissions at one of its refineries. In the result, the company and the SLDF (acting for a group of public interest litigants) agreed to a settlement under which Petrocan committed to significantly reducing its proposed emissions and contributing a quarter of a million dollars to an airshed research trust fund: see *Bart v. Ontario (Ministry of Environment)*, [1997] O.E.A.B. No. 9 File Nos. EBR00003.A1, EBR00007.A1. Public interest environmental interests have also secured a number of helpful administrative rulings in the context of freedom of information claims: see for example *Order P-1557, Institution: Ministry of the Environment*, [1998] O.I.P.C. No. 92; Appeal P-9700179 (Ontario Information and Privacy Commissioner H. Big Canoe, Inquiry Officer: April 27, 1998); *Order PO-1909, Institution: Ministry of the Environment*, [2001] O.I.P.C. No. 109 Order PO-1909 Appeal PA-000357-1 (Ontario Information and Privacy Commissioner, D. Hale, Adjudicator May 30, 2001). [NOTE: The styles of cause in these cases are routinely anonymized by the tribunal, but in both of these cases the filer -- SLDF has waived anonymity].

<sup>11</sup> *114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [hereafter *Spraytech v. Hudson*].

In all of the environmental law cases decided by the Court since the early 1990s, environmental groups were given intervener status, and while it is difficult to discern with certainty the extent to which their submissions influenced judicial decision-making, there is strong evidence that the Court found their participation helpful and their submissions persuasive.

The Court's first environmental case of the 1990s was *Friends of Oldman River v. Canada (Minister of Transport)*.<sup>12</sup> Handed down in 1992, the decision was a decisive, eight-to-one victory for the plaintiff. The case was brought by the Friends of Oldman River, a small Alberta-based environmental group that was opposed to a large dam being constructed on the Oldman River by the Alberta government. Under federal law, the Alberta government required a federal licence under the *Navigable Waters Protection Act*. Although the project had significant environmental effects, the federal Minister of Transport issued the licence without conducting an environmental assessment (EA) as required by a federal Environmental Assessment and Review Process Guidelines Order (EARP Guidelines). The Minister later rejected repeated requests that he undertake an EA on the ground that the EARP Guidelines were not mandatory and that the project was a matter of provincial concern.

In the Supreme Court of Canada the key issues were whether the EARP Guidelines were mandatory and, if so, whether they were constitutional. On the constitutionality issue, six provinces and a territory intervened to support Alberta's position that the Guidelines violated the division of powers. In its first visit to the SCC, the Sierra Legal Defence Fund was granted intervener status, and made submissions in support of the mandatory and constitutional nature of the Guidelines.

"The protection of the environment has become one of the major challenges of our time": with these now-famous words La Forest J. began his reasons for the Court.<sup>13</sup> In short order he dispatched the argument that the Guidelines were not legally binding and moved on to the broader division of powers question. In framing this question, he articulated a compelling theoretical and practical justification for dual federal-provincial jurisdiction over the "environment" as a constitutional subject matter. Drawing on his own earlier observation (then in dissent in *R. v.*

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<sup>12</sup> [1992] 1 S.C.R. 3.

<sup>13</sup> *Ibid.* at 16.

*Crown Zellerbach*<sup>14</sup>) that the environment is a “diffuse” subject, abstruse and difficult to reconcile within the existing division of powers, he held that the federal and provincial jurisdiction over environmental assessment should be seen as necessary adjuncts to their respective heads of legislative power. Seen in this light, he held the Guidelines were *intra vires*, in the result awarding solicitor and client costs to the Friends throughout.

Two years later, public interest environmental interveners again appeared in the Supreme Court in a case concerning federal licencing requirements relating to Hydro Quebec’s proposed Great Whale hydroelectric project. A key issue in the case was whether the National Energy Board could require Hydro Quebec to comply with ongoing environmental assessment conditions as a condition of being granted an electrical power export licence. The NEB was of the view that it could, but the Quebec Court of Appeal disagreed. Relying heavily on the constitutional analysis set out by the Court in the *Oldman River* case, Iacobucci J. for the S.C.C. held the Court of Appeal had adopted an “unduly narrow interpretation” of the Board’s jurisdiction and restored by NEB’s original order.<sup>15</sup>

Likely the most sweeping victory for environmental protection during the last decade occurred in 1997.<sup>16</sup> This case again involved Hydro Quebec, this time as a defendant in a prosecution for dumping PCBs into a river contrary to the *Canadian Environmental Protection Act*. Hydro Quebec, supported by the A.G. Quebec, claimed that the federal order which rendered this dumping illegal violated the division of powers. Given the far-reaching implications of the case for federal regulation of toxic substances, the Court allowed the Sierra Legal Defence Fund and the Canadian Environmental Law Association to intervene on behalf of a variety of public interest environmental groups.

Carefully scrutinizing the complex legislative regime and the voluminous scientific evidence tendered, La Forest J. rendered a decision that unequivocally affirmed federal jurisdiction to use the criminal law power for the purpose not only of protecting human health but also a “clean environment.” In his words, the latter was “a wholly legitimate public objective in the exercise of the criminal law power. Humanity’s interest in the environment surely extends beyond its own life and

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<sup>14</sup> [1988] 1 S.C.R. 401.

<sup>15</sup> See *Quebec (A.G.) v. Canada (Nat. Energy Board)*, [1994] 1 S.C.R. 159 at 191.

<sup>16</sup> *R. v. Hydro Quebec*, [1997] 3 S.C.R. 213.

health.”<sup>17</sup> In reaching this landmark conclusion, he relied heavily on arguments made by interveners with respect to the imperative that governments be empowered to fulfill its international obligations in respect of the environment.

That the Supreme Court remains committed to the path it blazed in the 1990s is clear from its most recent decision in the area of environmental law rendered in June of 2001. In this case, two Quebec-based landscaping companies challenged a bylaw enacted by the Town of Hudson that prohibited the use of pesticides for non-essential (i.e. aesthetic) purposes.<sup>18</sup> The petitioners contended that the bylaw was inoperative in that it conflicted with the provincial pesticides legislation. Sierra Legal Defence Fund was granted leave to intervene on behalf of the Federation of Canadian Municipalities and two environmental groups, while the Canadian Environmental Law Association intervened for close to a dozen environmental and health organizations.

In upholding the bylaw, writing for the Court, L’Heureux-Dubé J. stated that the “context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment.”<sup>19</sup> Two elements of L’Heureux-Dubé J.’s analysis are particularly noteworthy in terms of breaking new ground in the judicial consideration of environmental protection. The first was her explicit approval of the principle of “subsidiarity”: the notion that “law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the needs of the citizens affected, and thus most responsive to their needs, to local distinctiveness, and to population diversity.”<sup>20</sup> In support of this principle, which has become a key credo of environmentalists worldwide, she cited La Forest J. in *Hydro Quebec* and the *Brundtland Commission Report*.

The other pioneering aspect of the Court’s decision, that drew heavily on the submissions made by the environmental and health group interveners, was L’Heureux-Dubé J.’s invocation of international law as a contextual consideration militating in favour of upholding the bylaw. In this regard, she emphasized the relevance of the precautionary principle, the notion that “where there are threats of

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<sup>17</sup> *Ibid.* at 300.

<sup>18</sup> *Spraytech v. Hudson*, *supra* note 11.

<sup>19</sup> *Ibid.* at para. 1.

<sup>20</sup> *Ibid.* at para. 3.



serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."<sup>21</sup> In her view, it was noteworthy that Canada had advocated the precautionary principle in international fora, and that various commentators and courts in other jurisdictions have concluded that the principle has become a norm of customary international law.

### *Public Interest Standing*

The 1990s were also a period during which environmental and other public interest groups were able to take advantage of broadened standing principles governing challenges to administrative action. The door was opened to challenges of this type by the Supreme Court's 1986 decision in *Finlay v. Canada (Minister of Finance)*.<sup>22</sup> Prior to this decision public interest standing was restricted to cases challenging the validity of legislation (see the S.C.C. trilogy of *Thorson, McNeil and Borowski*<sup>23</sup>). In *Finlay*, the post-Charter decision of the Court on public interest standing, Le Dain J., speaking for the Court expanded public interest standing to embrace the proceedings commenced to review the validity of administrative action. Under the test expounded in *Finlay*, public interest standing in such proceedings can be granted if the applicant establishes that: (1) the litigation raises a serious or justiciable issue; (2) they have a genuine interest in the outcome of subject-matter of the litigation; and (3) there were no other persons more directly affected who might reasonably be expected to litigate the issues being advanced.

Following the *Finlay* decision, lower courts began to grant standing much more readily to public interest litigants, particularly where such groups were able to demonstrate a longstanding involvement in issues relating to the subject matter of the proposed litigation. In 1992, however, the Supreme Court revisited *Finlay* and sounded a cautionary note. In *Canadian Council of Churches*,<sup>24</sup> the Court emphasized that *Finlay* was not a "blanket approval to grant standing to all who wish to litigate an issue" underscoring the need to "preserve judicial resources" put at risk by the "unnecessary proliferation of marginal or redundant suits."

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<sup>21</sup> *Ibid.* at para. 31.

<sup>22</sup> [1986] 2 S.C.R. 607.

<sup>23</sup> *Thorson v. A.G. Canada (No. 2)*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575.

<sup>24</sup> *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 238.

In the wake of this admonition, a few courts have interpreted the “genuine interest” arm of the *Finlay* test to import a requirement that the applicant demonstrate “a direct and personal interest” in the litigation which they have construed to exclude environmental groups and concerned citizens whose interest in the subject-matter of the suit is civic as opposed to proprietary.<sup>25</sup> For the most part however, courts – while mindful of concerns about judicial economy – have continued to regard a “history of responsible involvement” around the issue at stake in the litigation to satisfy the “genuine interest” requirement.<sup>26</sup>

Two relatively recent public interest cases deserve particular mention. One of the most important cases in this area in the federal courts was rendered in the context of a challenge by the Sierra Club of Canada to a federal refusal to undertake an environmental assessment with respect to the sale of two CANDU nuclear reactors to China. The intervener, Atomic Energy of Canada, challenged the petitioner’s standing.<sup>27</sup> It argued that s. 18.1(1) of the *Federal Court Act* which permits “anyone directly affected by the matter in respect of which relief is sought” excludes, by inference, the potential for a litigant who is not “directly affected” to rely on common law public interest standing under the *Finlay* test. Evans J. rejected this argument on several grounds. He noted, first of all, previous Federal Court cases in which groups were granted public interest standing under the same provision of the *Federal Court Act* without demonstrating they were “directly affected.” Moreover, it was undesirable, in his view, for Federal courts to be governed by public interest standing rules different from those that apply in other Canadian courts. In his view, the *Finlay* test should therefore be applied where public interest litigants seek standing in proceedings governed by the Act.

An area of lingering uncertainty with respect to public interest standing concerns its applicability to challenges arising out of administrative inaction as opposed to action. Relying on *Finlay*, public interest litigants sought standing to commence *mandamus* proceedings to compel the Provincial Crown to require a local government to obtain environmental approvals in connection with the damming of a local river for water supply purposes. The B.C. Supreme Court considered this to

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<sup>25</sup> See *Shiell v. Atomic Energy Control Board* (1995), 33 Admin. L.R. (2d) 122 (F.C.T.D.).

<sup>26</sup> See *Algonquin Wildlands v. Ontario (Minister of Natural Resources)* (1996), 21 C.E.L.R. (N.S.) 102 (Ont.Crt.Gen.Div.).

<sup>27</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2. F.C. 211.

be an unjustifiable extension of the *Finlay* principle.<sup>28</sup> Relying on the House of Lords' decision in *Gouriet v. Union of Postal Workers*,<sup>29</sup> McCauley J. held that standing under *Finlay* was not available "where the public authority responsible for the enforcement of the statute decides in good faith not to place the issue before the court."<sup>30</sup>

### *Injunctive Relief*

A common stumbling block faced by environmental and other organizations that have sought recourse to the courts to protect natural areas from development has been their inability to obtain interlocutory injunctive relief. Even where courts have acknowledged that their legal claims have significant merit, judicial application of the prevailing test with respect to the availability of injunctions under *RJR-MacDonald Inc. v. Canada (Attorney General)*<sup>31</sup> has frequently led to a denial of interim relief sought. *RJR-MacDonald* established a threefold test: (1) is there a serious issue to be tried?; (2) would the applicants suffer irreparable harm if the injunction were refused? and (3) does the balance of convenience between the parties to the application justify the relief sought? In addition, courts have traditionally deemed it necessary for the applicant to undertake to indemnify the respondent for damages in the event that the claim is ultimately dismissed.

The two primary difficulties environmental groups have encountered in securing interlocutory relief have related to this undertaking requirement, and judicial interpretation of the "irreparable harm" arm of the test under *RJR-MacDonald*.<sup>32</sup> Many if not most such groups lack the financial resources to make an undertaking as to damages. As such, it seems appropriate that courts employ the undertaking requirement flexibly to ensure that the right to a remedy is not dictated solely by economic considerations. This is especially so insofar as one of the traditional reasons for imposing the undertaking requirement is to ensure that an applicant who

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<sup>28</sup> See *Society for the Preservation of the Englishman River Estuary v. Nanaimo (Regional District)*, [1999] B.C.J. No. 370.

<sup>29</sup> [1977] 3 All E.R. 70 (H.L.).

<sup>30</sup> *Supra* note 28 at para. 32.

<sup>31</sup> [1994] 1 S.C.R. 311 at 348-49.

<sup>32</sup> See further discussion in S. Elgie, "Injunctions, Ancient Forests and Irreparable Harm: A Comment on *Western Canada Wilderness Committee v. A.G.B.C.*" (1991), 25 U.B.C.L. Rev. 387; D.R. Boyd, "Seeing the Forest Through the Trees: *Algonquin Wildlands League v. Northern Bruce Peninsula and Related Cases*" (2000) 38 C.E.L.R. (N.S.) 61.

secures interim relief is not unjustly enriched at the expense of the party against whom the relief has been granted, a rationale that seemingly has little application in the context of public interest litigation.

American courts have been alive to this concern and have been generally unwilling “to close the courthouse door in public interest litigation by imposing burdensome security requirement(s).”<sup>33</sup> As such the usual practice in the United States has been to require public interest litigants seeking injunctive relief to post a nominal bond.

Recent Canadian authority suggests that our courts are beginning to re-evaluate the appropriateness of invariably imposing an undertaking requirement on public interest litigants. For example in *Friends of Stanley Park et al. v. Vancouver Parks and Recreation Board*, Davies J. observed that

If an applicant who applies for injunctive relief in a matter concerning serious public interests is able to establish a serious question to be tried, and that the balance of convenience, including the public interest, favours the granting of injunctive relief, such relief should not generally, at the interlocutory stage, be rendered ineffectual by reason of the fact that the applicant may not have the financial wherewithal to provide a viable undertaking as to damages.<sup>34</sup>

Davies J. went to state that had the applicant succeeded in meeting the test to obtain an interim injunction, he would have issued the injunction without an undertaking as to damages. The decision in this case appears to accord with emerging authority.<sup>35</sup>

The other barrier faced by public interest environmental litigants in securing interim injunctive relief has been the judicial treatment of the second arm of the *RJR-MacDonald* test: the requirement that the applicant demonstrate that they will suffer irreparable harm if relief is not granted. In private litigation, this inquiry has traditionally focused on the risk to the applicant of physical injury or economic loss. Where the applicant has been granted standing as a public interest litigant this risk

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<sup>33</sup> *Wilderness Society v. Tyrell*, 710 F. Supp. 1473 at 1492 (U.S. Dist. Ct. E.D. Cal., 1988).

<sup>34</sup> (2000), 10 M.P.L.R. (3d) 25 at para. 45.

<sup>35</sup> See also *Algonquin Wildlands League v. Northern Bruce Peninsula* (2000), 38 C.E.L.R. (N.S.) 10 (Ont S.C.J.).

is, by definition, absent; instead, in such cases, it has been argued that the relevant "irreparable harm" is harm to the environment.

The meaning of "irreparable harm" has been considered in a variety of cases that have sought to challenge the legality of proposed logging on public lands, often in old growth areas. In several cases, despite evidence that it can take hundreds of years for trees to reach mature (old growth) status, courts have concluded that the logging of old growth does not constitute irreparable harm.<sup>36</sup> In *Wilderness Society v. Banff*, the court concluded that "irreparable harm" would not result from clear-cut logging of three hundred year old trees in Banff National Park, despite expert evidence that logging would have precisely this effect.

Recent cases have been more responsive to the argument that natural resource extraction, in particular clear-cut logging, can constitute 'irreparable harm.' Indeed, the Supreme Court's decision in *RJR MacDonald*, rendered in 1994, tends to support this view. There the Court relied on a case where logging was enjoined on an island claimed by First Nations to illustrate the meaning of irreparable harm. In its words, "'irreparable' refers to the nature of the harm, not its magnitude: examples include where a permanent loss of natural resources will be the result when a challenged activity is not enjoined."<sup>37</sup>

Over time, American courts have come to conclude that harm to the environment will almost always be "irreparable." In the words of the U.S. Supreme Court: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e. irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favour the issuance of an injunction to protect the environment."<sup>38</sup>

Three recent decisions involving interim applications to enjoin logging activities in or near parklands suggest that Canadian courts may be coming to a similar realization. In 1998, Monnin J.A. (in chambers) upheld an interim injunction prohibiting construction of a road through a provincial park noting that "damages

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<sup>36</sup> See *Western Canada Wilderness Committee v. A.G.(B.C.)* (1991), 4 B.C.A.C. 296; *Canadian Parks and Wilderness Society v. Superintendent of Banff National Park et. al.* (1993), 23 Admin. L.R. (2d) 6 (Fed. T.D.).

<sup>37</sup> *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577, 61 B.C.L.R. 145(C.A.); see *RJR MacDonald*, *supra* note 31.

<sup>38</sup> *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396 at 1404 (1987).

will not compensate for a destroyed forest,” and observing that failure to grant the relief sought would “trigger a non-reversible process.”<sup>39</sup> In a similar vein, Lamek J. concluded that “absent an injunction, the clearing of the road will proceed and the trees will be gone, if not forever, at least for decades.”<sup>40</sup> Most recently, the Federal Court Trial Division held that because the proposed logging would result in the loss of trees that “could not be replaced in a person’s lifetime” this meant that nature of the harm “could not be quantified in monetary terms.”<sup>41</sup>

### Costs

Like the law governing interlocutory injunctive relief, the law governing the awarding of costs is one that has evolved over time primarily in response to cases that have arisen in the context of private litigation. Since different considerations and values come into play where the claim is brought under the auspices of public interest standing, it has been argued that in the area of costs, as in the realm of injunctive relief, courts must turn their minds to how, and to what extent, traditional principles and assumptions need to be revisited.

In most Canadian provinces and territories, the law of costs is primarily governed by the common law under which the ordinary rule is that costs will ordinarily “follow the event,” and be awarded at the conclusion of the proceeding. One of the most interesting current issues in public interest litigation, and in litigation in which the public interest is implicated, is the extent to which this presumption is being questioned.

Increasingly, in such proceedings, courts are being called upon to award costs to public interest litigants even where they do not prevail on the merits. A recent illustration is a decision of McKeown J. in an unsuccessful constitutional challenge brought during the course of the APEC Inquiry. On dismissing the claim, he held that the public interest plaintiffs should nonetheless be entitled to their costs in recognition that “the testing of the constitutional principles involved in this matter is clearly in the public interest, since they are at the heart of our constitutional

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<sup>39</sup> *Caddy Lake Cottagers Assn. v. Florence-Nora Access Road Inc.* (1998), 26 C.E.L.R. (N.S.) 322 at 324 (Man.C.A.).

<sup>40</sup> *Algonquin Wildlands League v. Northern Bruce Peninsula*, *supra* note 35.

<sup>41</sup> *Friends of Point Pleasant Park v. Canada* (2000), 38 C.E.L.R. (N.S.) 45 at 59.

democracy."<sup>42</sup> The approach adopted by McKeown J. has also found favour in the Ontario Court of Appeal<sup>43</sup> and in the Supreme Court of Canada.<sup>44</sup>

There is also emerging caselaw recognizing the right of public interest litigants, and litigants in cases presenting important issues of public policy, to be granted an interim award of costs to enable them to retain counsel in complex litigation that pits them against government. A litigant in Alberta has recently received such an award to support her challenge to a new definition of "spouse" under provincial legislation as being contrary to the Charter's equality provisions.<sup>45</sup> In making this interim award, Watson J. noted, *inter alia* that her claim was not frivolous, that she was not legally trained and could not afford counsel, and that such an award would help ensure that the matter was properly litigated. Courts in B.C. are also increasingly being asked to recognize the need for, and public benefit of, making interim costs awards in cases involving impecunious parties and important legal issues.<sup>46</sup>

In the realm of public interest environmental law, however, the most commonly litigated costs issue has been whether unsuccessful public interest litigants should be exposed to adverse costs liability. There appears to be a growing judicial recognition that the traditional rationales underpinning the usual rule that costs follow the event apply with less force, if they apply at all, to public interest litigation. Three rationales are said to justify to the usual rule: that costs should be levied against the party which the court has found to be "at fault" in the litigation; that costs should be imposed as a form of punishment for inappropriate litigation tactics or to

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<sup>42</sup> *Singh v. Canada (A.G.)*, [1999] 4 F.C. 583 at para 87.

<sup>43</sup> *B.(R.) v. Children's Aid Society of Metropolitan Toronto* (1992), 10 O.R. (3d) 321 per Tamopolsky J.A.; *Horsefield v. Ontario (Registrar of Motor Vehicles)*, *supra* note 2, per Finlayson J.A.

<sup>44</sup> *Schacter v. Canada*, [1992] 2 S.C.R. 679 per Lamer C.J.C.; *Blencoe v. B.C. (Human Rights Commission)*, [2000] 2 S.C.R. 307; and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120.

<sup>45</sup> See *Spracklin v. Kichton*, [2001] A.J. No. 990 (Q.B.).

<sup>46</sup> See *Minister of Forests (B.C.) v. Okanagan Band*, [2001] B.C.J. No. 2279 (C.A.). In this case, the Crown commenced legal action against the Band to enjoin it from harvesting timber on Crown lands. The Band defended the action by claiming it had an aboriginal right to the timber in question. When the Crown succeeded in having the matter converted to a trial, the Band applied to have its trial costs borne by the Crown. In a recent ruling the Court of Appeal has ordered the Crown to pay the Band its taxable costs in advance in recognition, *inter alia*, of the "public interest" at stake in the case: In a subsequent case, Vickers J. has ordered the federal and provincial Crowns to pay a Band its legal fees and disbursements in advance of the trial of its aboriginal title claim: see *Nemaiah Valley Indian Band v. Riverside Forest Products*, [2001] B.C.J. No. 2484 (S.C.).

deter others from similar conduct; and that costs should be awarded as the spoils of victory to compensate the victor for the expenses it has incurred as a result of the actions of the unsuccessful litigant.<sup>47</sup>

The first two rationales of these are rarely applicable to public interest litigation. Generally, therefore, when awarding costs against unsuccessful public interest litigants, courts have relied on the last of these three rationales, what I have termed the “spoils-based compensation” rationale.

Public interest litigants point out, however, that there are a variety of reasons why courts should refrain from making adverse costs awards against public interest litigants. The first is an “access to justice” rationale. As I have noted elsewhere in relation to public interest environmental litigation:

Adverse costs awards are one of the most significant barriers to realizing the promise of access to justice held out by liberalized rules of standing. Financing complex and protracted public interest litigation against government or private interests, of the type that is particularly prevalent in the environmental context, is an enormous challenge for any public interest litigant. When the prospect of being liable for the defendant’s legal costs is factored into the equation, all but the best-financed (or, possibly, judgment-proof) litigants will be deterred from proceeding except in those rare instances where a successful outcome is a virtual certainty.<sup>48</sup>

Another compelling rationale for courts to be reluctant to award costs against public interest litigants is the public benefits often associated with such litigation regardless of the outcome. The “public benefit” rationale recognizes the social utility of resolving important and often novel legal questions, holding government to account under the rule of law and encouraging disputes to be resolved within the law. On this last point, the words of Curtis J. of the B.C Supreme Court are apt:

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

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<sup>47</sup> For further discussion of the rationales governing the allocation of costs and their applicability to public interest litigation, see C. Tollefson, “When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards” (1995), 29 U.B.C.L. Rev. 303.

<sup>48</sup> *Ibid.* at 318-319.



resolve the issues according to the law, through awarding costs against them.<sup>49</sup>

This passage was recently cited with approval by Kirby J. of the High Court of Australia in a decision that upheld a trial court ruling not to award costs against a public interest environmental litigant.<sup>50</sup>

As the law of costs in Canada is primarily non-statutory (with the notable exception of federally, where it is dealt with in some detail in the *Federal Court Rules* as I will discuss), public interest litigants have pressed for judicial recognition of a common law "public interest costs exception." This proposed exception would insulate a public interest litigant from adverse costs awards where a court is satisfied that the litigation concerns an issue of public importance, that resolution of the issue will yield a public benefit, and that the litigant has acted in a responsible manner sensitive to concerns about judicial economy.

To date, courts have been reluctant to establish a stand-alone public interest costs exception. They have, however, frequently exercised their discretion to excuse unsuccessful public interest litigants from costs liability. In so doing, they have typically invoked the access to justice and public benefit rationales.<sup>51</sup>

A particularly good illustration of the application of these dual rationales in the context of public interest environmental litigation is a decision of Paris J. where he declined to award costs against an unsuccessful public interest litigant on the grounds that its suit "raised serious legal issues . . . of unquestionable public interest," that financial consequences of such an award would be "significant," and that it had "at all times acted responsibly and within the law, in particular by attempting to vindicate its position through the courts."<sup>52</sup>

For a similar analysis arising in the context of a constitutional challenge, see *Hogan v. Newfoundland*, where the court noted that the appellants were "not

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<sup>49</sup> See *Sierra Club of Western Canada v. B.C. (A.G.)* (1991), 83 D.L.R. (4<sup>th</sup>) 708 at 716.

<sup>50</sup> See *Oshlack v. Richmond River Council*, [1998] H.C.A. 11 at para. 139.

<sup>51</sup> See *Sierra Club of Western Canada v. B.C. (A.G.) supra.* note 49; *Friends of Oak Hammock Marsh Inc. v. Ducks Unlimited (Canada)* (1991), 84 D.L.R. (4<sup>th</sup>) 371 at 381 (Man. Q.B.) ["the applicants' perception of potential danger to the public interest was sufficiently well-founded that I order no costs payable to or by any of the parties"]; *Reese v. Alberta*, [1993] 1.W.W.R. 450 at 456 (Q.B.) [a "close case" in which the applicants "performed a public service"].

<sup>52</sup> *Valhalla Wilderness Society v. B.C. (Ministry of Forests)*, [1997] B.C.J. No. 2331 at paras. 8, 11.

motivated by personal gain” and that this was a case which justified “citizens taking legal action which is of vital interest to a large segment of the population.”<sup>53</sup>

As noted earlier, the rules governing costs in Federal Court proceedings differ from those prevailing in most other Canadian jurisdictions due to the fact that in the late 1990s the *Federal Court Rules* were amended to codify judicial discretion with respect to the costs determination and allocation.<sup>54</sup> In determining and allocating costs, the Rules now provide that courts shall consider a variety of factors including: the result of the proceeding, the importance and complexity of the issues, whether the public interest in having the proceeding litigated justifies a particular award of costs, and any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding.

Rule 400 departs from its predecessor - Rule 1408 - that provided that there should be no award as to costs unless there were “special reasons” to do so. Under the former Rule, public interest environmental litigants had enjoyed mixed success in arguing that they should be exempted from adverse costs awards, where such awards were sought by private sector developers. In one case, where such an award was made, the trial judge emphasized that the developer “was not a public agency with a general responsibility to participate in judicial review for the clarification of the laws. Instead it was obliged to participate to protect its very financial interests.”<sup>55</sup> On similar facts, developers have also been denied their costs.<sup>56</sup> In this case, Cullen J. observed that while “environmental advocacy” groups were not “entitled to special treatment,” neither the petitioner’s vigorous pursuit of its cause, nor the fact that the developer may have incurred “real financial hardship” justified an award of costs in the event.

To date, the jurisprudence under Rule 400 is relatively limited. In one of the few reported cases, the Federal Court of Appeal recently imposed costs against an unsuccessful public interest environmental litigant where it concluded that the appellant had failed to proceed in an expeditious manner and that it had not raised

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<sup>53</sup> (2000), 189 Nfld. & P.E.I.R. 183 at para. 180.

<sup>54</sup> *Federal Court Rules*, r. 400.

<sup>55</sup> *Canadian Parks and Wilderness Society v. Superintendent of Banff National Park* (1993), 69 F.T.R. 241 (F.C.T.D.) at 248-49.

<sup>56</sup> See for example *Friends of the Island v. Canada (Minister of Public Works)* (1995), 16 C.E.L.R. (N.S.) 146 (F.C.T.D.).

any “truly novel arguments.”<sup>57</sup> The Court also observed that although it did not doubt the genuineness of the appellant’s belief that it was acting in the “public interest,” it was “pertinent to note that all of the governments of the municipalities surrounding [the proposed development] supported the findings of the environmental assessment upon which the Minister based her decision.”<sup>58</sup>

### **PART III: Concluding Observations**

The success or failure of public interest environmental litigation, like public interest litigation generally, cannot be fully or adequately assessed on the basis of win/loss score-sheet. This is because such litigation is not just about prevailing in court but also involves other goals. These goals may include drawing judicial, legislative and public attention to pressing social or environmental problems, playing a watchdog role with respect to governmental action or inaction, and promoting access to justice by providing legal representation to clients in need.

To this extent, it is clear that public interest litigation necessarily entails seeking to advance an agenda. As I have argued earlier, however, “agenda advancement” is by no means unique to public interest litigants but rather is one that pervades litigation involving public law issues.

In this concluding Part, I will try to provide an assessment that takes account of the broader impact of what environmental groups have achieved, and failed to achieve, through litigation since over the last decade or so.

In terms of enhancing access to justice and providing legal services to needy clients, I argue that great strides have been made. This is due, in large measure, to an increasing willingness on the part of courts and tribunals to recognize the value of hearing from new interests where those interests are prepared and able to play a constructive and responsible role in the litigation process. Moreover, the capacity of the legal profession to provide able representation to ensure that these interests can, in fact, play this role has been greatly enhanced by the continuing efforts of well established public interest environmental law firms such as West Coast

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<sup>57</sup> *Inverhuron & District Ratepayers v. Canada*, [2001] F.C.J. No. 1008 at paras. 66-69 (C.A.).

<sup>58</sup> *Ibid.* The decision of the Court to award costs against the ratepayers’ group may have been influenced by a perception that although the group genuinely perceived that it was acting in the public interest, it was not a “true” public interest litigant to the extent that it had a pecuniary interest in the outcome of the litigation.

Environmental Law,<sup>59</sup> CELA and the Canadian Environmental Defence Fund and by the expanding role played by the Sierra Legal Defence Fund.

By enhancing the ability of citizens to ensure governments follow through on legal commitments they have made to protect the environment, I also argue that these public interest environmental law firms have played an increasingly effective role throughout the 1990s. That such groups were willing and able to play such a role is particularly fortuitous due to the fact that throughout this decade governments everywhere were cutting back on environmental protection and enforcement budgets. Thus not only did public interest litigation help to draw attention to practices and proposals that put the environment at risk, it also had the effect of drawing attention to the environmental costs associated with government austerity measures.

But it is with respect to informing judicial and legislative attitudes on questions of environmental protection and sustainable resource management that public interest environmental litigation has had its most empirically measurable effect. Legal historians will, I believe, regard the last decade or so as a watershed period in Supreme Court of Canada jurisprudence on environmental issues. During this period, the Court sought with vigour and creativity to develop legal principles that would optimize protection of the environment while recognizing the need to achieve balance and autonomy within our federal structure and to ensure that federal, provincial and local governments are given room and incentives to tackle this task. In developing this jurisprudence, it broke new ground by recognizing the global context within which the challenge of environmental protection must be approached, and the utility of emerging principles of international environmental law and policy. In more concrete terms, the Supreme Court's decision in *Oldman River* clearly influenced the subsequent decision of the federal government to enact Canada's first federal environmental assessment law and similar laws that have since been enacted in various provinces. In a similar way, it can be speculated with some degree of confidence that recent amendments aimed at strengthening the *Canadian Environmental Protection Act* would not have been pursued but for the decision of the Court in *R. v. Hydro Quebec*.

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<sup>59</sup> For most of the 1990s, the West Coast Environmental Law Association has administered an innovative program that allows needy litigants to secure funding for counsel in relation to public interest cases, the bulk of which are heard by the B.C. Environmental Appeal Board. This program, known as the Environmental Dispute Resolution Fund (EDRF) is fully funded by the Law Foundation of British Columbia.

Whether these developments would have occurred but for the involvement of public interest environmental interveners is impossible to say. What is clear, however, is that their presence made these outcomes more likely.

Turning to developments in trial courts across the country, we have seen a significant change in the judicial attitude towards the participation of public interest environmental groups in the litigation process. While in large measure this is attributable to the expansion of public interest standing brought about by the Supreme Court in *Finlay*, it is also, I submit, a testament to the careful and responsible way environmental groups have undertaken litigation in the post-*Finlay* era. As a result, the concerns about the prospect of well meaning groups with unmeritorious cases flooding court dockets, expressed in *Canadian Council of Churches* and elsewhere, has simply not materialized.

I also argue that important progress has been made towards recognizing the complex interplay between citizen participation and rules governing the availability of interlocutory relief and the allocation of costs. On the basis of recent caselaw, there is reason to be optimistic that courts will exercise their discretion in these areas in ways that seek to promote rather than to discourage participation in judicial processes by responsible public interest advocates.

There can be little doubt that the enhanced role that citizens and citizens groups are playing in judicial and administrative settings challenges us to reflect not only on the implications of this phenomenon in terms of the rules and procedures that have traditionally governed these fora, but also on broader questions of democratic governance. The citizen participation phenomenon is not one that courts and tribunals should resist, nor have they done so. On the contrary, they have, I submit, made significant strides towards accommodating public interest advocates in processes and under rules that were developed for different purposes in different times. The progress courts and tribunals have made on this front suggests that they are keenly aware of the multitude of public benefits that flow from citizen engagement in judicial and administrative processes. Their continuing commitment to democratizing access to justice is, and will remain, a key measure and determinant of the health of our democracy.