

# Funding Public Interest Litigation: Should Judges be Funders?

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A fair and impartial justice system is one of the hallmarks of democracy. We know and accept that justice must not only be done, it must be *seen* to be done. Inherent in that concept is accessibility to the courts by *all* citizens, regardless of their personal or financial circumstances. A justice system available to only those who can afford it loses its claim to legitimacy.

In addition, the elaborate rules and procedures associated with our increasingly complex and costly legal system have often rendered the average layperson unable to navigate these unfamiliar waters. Public interest litigation, in particular, is virtually impossible for unrepresented plaintiffs to launch, and insufficient funding for legal counsel is one of the most formidable barriers to overcome.

The sacred promise of equal access to justice in Canada is not being fulfilled. Legal aid in particular is in a state of crisis across the country. The limited purpose of this paper is to consider practical options which could ease the financial burden placed on potential public interest litigants, with a view to revitalizing the sacred promise in this sphere of the law. We argue that judges must move to the forefront and play an active role in ensuring fair hearings. Judges are the “gatekeepers” to our justice system and as such have the authority, as well as the obligation, to ensure that the courthouse door remains open.

In order to fully appreciate what it is about public interest litigation that necessitates special consideration, one must first understand its purpose and unique characteristics. What follows is a brief analysis of the evolution of public interest litigation to its current status.

## I. PUBLIC INTEREST LITIGATION AND STANDING

Public interest litigation is a relatively new area of the law. Indeed one could say it is still in its infancy. It is only in the past two decades that it has become firmly entrenched in our common law.

Public interest litigation is unique in that it does not reflect the traditional structure of our adversarial system wherein two private parties seek a resolution to their dispute. Rather, it is an action commenced by a plaintiff, usually against the state, not for the protection of personal interests or compensation for the loss thereof, but for *public* benefit. Most often it involves challenges to the validity of either federal or provincial legislation, or government action. Frequently the relief sought is declaratory in nature, as opposed to compensatory. Its purpose is to clarify existing rights and benefits to which Canadians are entitled, or, alternatively, to provide a check on state power.

While any potential plaintiff may initially file suit, prior to the continuation of the action, standing must be granted by the court (in the absence of a direct or personal interest). Over the past 20 years the test to grant public interest standing has been refined and is now well established. Pursuant to several Supreme Court of Canada decisions,<sup>1</sup> public interest standing may be granted at the discretion of the court if the following criteria have been met:

- a. There is a serious issue as to the validity of the impugned legislation or action;
- b. The plaintiff has a genuine interest in the particular issue;

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<sup>1</sup> See *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138 [hereinafter *Thorson*], wherein the appellant taxpayer sought a declaration as to the validity of certain provisions of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31; *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 S.C.R. 265 [hereinafter *McNeil*], wherein the powers of the Nova Scotia Board of Censors were challenged after the banning of the film “Last Tango in Paris”; *Borowski v. Canada (A.G.)*, [1981] 2 S.C.R. 575 [hereinafter *Borowski*], where sections of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to abortion were challenged under the *Canadian Bill of Rights*, S.C. 1960, c. 44; and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [hereinafter *Finlay*], wherein the plaintiff welfare recipient challenged the legality of federal welfare payments to the provinces under the Canada Assistance Plan.

- c. There is no other reasonable or effective means of bringing the action before the courts.

The willingness of courts to grant public interest standing to a plaintiff has changed over the years. At times the test has been strictly applied and at times it has been given a more liberal interpretation. Prior to “the Trilogy” of *Thorson*, *McNeil* and *Borowski*, courts were reluctant to grant public interest standing for fear that “mere busybodies” would be encouraged to commence trivial proceedings and thus consume scarce judicial resources. For instance, in *Smith v. Ontario (Attorney General)*,<sup>2</sup> the Supreme Court denied the plaintiff standing on the basis that he had not in fact actually violated the provisions of *The Ontario Temperance Act* and thus subject to prosecution. As such he had not established that he was “exceptionally prejudiced”. It was suggested that only in a “situation of oppression, by reason of drastic and arbitrary legislation” would standing even be considered, let alone granted. In the Supreme Court’s opinion, to hold otherwise would open the “floodgates” to “virtually every resident in Ontario”, leading to “grave inconvenience” and public disorder.

Fortunately this narrow doctrine was firmly rejected in *Thorson* when Laskin J. specifically noted that courts are “quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs”.<sup>3</sup> In dismissing the “floodgate” argument, he considered it “alarming” if legislative power were protected from challenge by such a restrictive approach. In his view, compliance with the Constitution was more important than strict adherence to the standing test.

A further milestone in the development of public interest litigation was *Finlay*. Until this point in its history, public interest standing had been limited to situations where the constitutional validity of particular legislation was in question. *Finlay* broadened the scope of public interest standing to including issues arising in an administrative law context. In keeping with the principles enunciated in the Trilogy, it was held that “the

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<sup>2</sup> [1924] S.C.R. 331, where the plaintiff, a resident of Toronto, challenged the provisions of *The Ontario Temperance Act* 6 Geo. V, c. 50, which prohibited the importation of liquor into Ontario after he unsuccessfully attempted to order whiskey and beer from a dealer in Montreal.

<sup>3</sup> *Thorson*, *supra* note 1 at para. 12.

consideration of serious constitutional *or other public law* ... is a proper use of court resources.”<sup>4</sup>

With the decision in *Finlay*, it appeared that public interest litigation would become a burgeoning area of the common law. However, some have said that the Supreme Court reversed its earlier position and returned to a conservative approach in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*.<sup>5</sup> In a striking “change in attitude”, the spectre of the “mere busybody” was resurrected after it had been laid to rest only 10 years earlier in the Trilogy.<sup>6</sup> It was disheartening that despite the Council’s genuine interest in refugee protection, standing was denied. The Council had a history of involvement in refugee protection issues and had participated in the past in the development of refugee policy. The Council was clearly not a “mere busybody”, yet the Supreme Court noted an individual refugee claimant could have launched this challenge instead.

Unlike in the Trilogy, the third step of the standing test was applied in a very narrow fashion and limited to situations in which “no directly affected individual might be expected to initiate litigation.”<sup>7</sup> The argument put forward by the Council that it was in a better position financially and otherwise to institute the proceedings, as opposed to an individual claimant facing possible deportation, was not accepted.

The following quote illustrates the resurgence of the “floodgate” fear and the narrowing of the previously liberal principles of public interest standing:

However, I would stress that recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an

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<sup>4</sup> *Finlay*, *supra* note 1 [emphasis added].

<sup>5</sup> [1992] 1 S.C.R. 236, [hereinafter *Canadian Council*], wherein the Council sought a declaration that certain provisions of the *Immigration Act*, R.S.C. 1985, c. 1-2, affecting the refugee determination process violated the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*] and the *Canadian Bill of Rights*, *supra* note 1.

<sup>6</sup> See J. Ross, “Standing in Charter Declaratory Actions” (1995) 33 *Osgoode Hall L.J.* 151-201, at para. 28-30.

<sup>7</sup> *Canadian Council*, *supra* note 5 at para. 34 [emphasis added].

issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly burdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a well-meaning organization pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.<sup>8</sup>

Just a short time later the Supreme Court reiterated these sentiments in *Hy and Zel's Inc. v. Ontario (Attorney General)*; *Paul Magder Furs Ltd. v. Ontario (Attorney General)*,<sup>9</sup> when it denied the applicants standing to challenge certain provisions of Ontario's *Retail Business Holidays Act*<sup>10</sup> which restricted holiday shopping. In the opinion of the Supreme Court, too liberal an interpretation of the standing test could lead to its abuse.<sup>11</sup>

Subsequent to *Canadian Council* and *Hy and Zel's*, commentators, in a "dismal forecast," predicted that the "golden age" of liberal public interest standing in Canada was coming to an end.<sup>12</sup> The trend which emerged from these two cases was denounced and the "floodgate" argument soundly hailed as unreasonable and unrealistic, as follows:

[w]hen the "floodgates" of litigation are opened to some new class of controversy [...] it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff [...] must feel strongly enough about the issues in question to pay the bills [...] The idle and whimsical plaintiff, a dilettante who litigates for a

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<sup>8</sup> *Ibid.*, at para. 35.

<sup>9</sup> [1993] 3 S.C.R. 675, (1994) 107 D.L.R. (4th) 634 [hereinafter *Hy and Zel's* cited to D.L.R.].

<sup>10</sup> R.S.O. 1980, c. 453.

<sup>11</sup> For a more detailed examination of this case, see P. Bowal & M. Cranwell, "Case Comment: Persona Non Grata: The Supreme Court of Canada Further Constrains Public Interest Standing" (1994) 33 *Alta. L. Rev.* 192.

<sup>12</sup> Ross, *supra* note 6 at para. 46.

lark, is a spectre which haunts the legal literature, not the courtroom.<sup>13</sup>

Fortunately the chill which immediately followed *Canadian Council* and *Hy and Zel's* did not continue. The critics' fears were assuaged. The public interest standing doctrine is now alive and flourishing in Canada, particularly in comparison to other common law jurisdictions. A wide variety of cases have reached the courts and public interest standing has been granted to individuals and organizations across Canada.<sup>14</sup> One lingering negative effect from *Council of Churches*, however, is that it did encourage defendants to resist standing, which they regularly do, making cases even more difficult and expensive to conduct.

A very recent example out of the Public Interest Law Centre in Winnipeg illustrates the inroads which have been made into previously uncharted territory. In *Harris v. Canada*,<sup>15</sup> standing was granted for the first time to a third party seeking to challenge a ruling made by Revenue Canada in favour of another taxpayer. Mr. Harris filed his suit based on the Auditor General's Report released in 1996 which questioned the appropriateness of an advance tax ruling which had the effect of allowing billions of dollars to escape Canada tax-free. Mr. Harris was afforded

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<sup>13</sup> *Ibid.*, at para. 17, quoting K.E. Scott, "Standing in the Supreme Court – A Functional Analysis" (1973) 86 *Harv. L. Rev.* 645 at 673-674.

<sup>14</sup> Recent examples include *Woodworkers for Fair Forest Policy Society v. British Columbia (Ministry of Forests)*, [2000] B.C.J. No 2180, online: QL (BCJ), where the British Columbia Supreme Court granted standing to the applicant to challenge a decision made by the British Columbia Minister of Forests and the Chief Forester to grant a tree farm licence to the respondent, Canadian Forest Products Ltd.; *Bury v. Saskatchewan Government Insurance*, (1990) 75 D.L.R. (4th) 449, where the Saskatchewan Court of Appeal affirmed the standing granted to the plaintiffs to seek a declaration that the proposed disposition by Saskatchewan General Insurance of its general insurance business was *ultra vires* its governing legislation; *Canadian AIDS Society v. Ontario*, (1995) 25 O.R. (3d) 388 (Ont. Gen. Div.), where standing was granted to the applicant to challenge reporting requirements regarding a donor's positive HIV status on the basis that it violated the *Charter*; *Cameron v. Nova Scotia (Attorney General)*, (1999) 172 N.S.R. (2d) 227 (S.C.), where standing was granted to a couple who had been denied reimbursement for the cost of *in vitro* fertilization from their Nova Scotia Health Care Plan to seek a declaration that such services were not insured services under provincial legislation; and *Prince Edward Island Nurses Union v. Prince Edward Island (Lieutenant Governor in Council)*, (1995) 126 Nfld. & P.E.I.R. 345, (P.E.I.S.C.), where standing was granted to the applicants to challenge the validity of a controversial *Public Sector Pay Reduction Act*, S.P.E.I. 1994, c. 51.

<sup>15</sup> [2000] 4 F.C. 37 [hereinafter *Harris*].



public interest standing on behalf of all Canadian taxpayers (except of course of the taxpayer who reaped the benefit of the ruling).

What is particularly significant about *Harris* is that standing was granted despite valid privacy and confidentiality issues raised by the Crown on behalf of the affected taxpayer. In the normal course, information regarding the identity and financial circumstances of all taxpayers must be kept strictly confidential so as to maintain privacy. In this case, however, the identity of the taxpayer was not the issue, but rather government accountability, or in essence the lack thereof, and whether or not preferential treatment was given to this particular taxpayer.

Regardless of the outcome, *Harris* is a case of national importance in that it has established a precedent regarding accountability for decisions made by government departments which affect not only the parties involved, but all Canadians. For instance, the loss of millions of dollars in tax revenue translates into decreased funding available for social programs or health care. Further, allegations of preferential treatment in favour of certain wealthy individuals or families erodes the legitimacy of our tax system. It is crucial that the public perceive the collection of income tax to be a fair process across the board.

*Harris* is also an example of how public interest litigation can serve as an effective method of bringing to light excessive or unlawful government action. Unfortunately, despite the progress this case and others like it have made in the development of the law, there is a danger that public interest cases are beyond the reach of most potential litigants. Without adequate funding, all the steps forward will be in vain. As one commentator noted, “liberalized standing rules address only part of the problem facing potential public interest litigants. Costs, the most formidable barrier to participation, remain a powerful disincentive.”<sup>16</sup>

The expenses associated with public interest litigation include not only the actual start-up fees and those incurred during the litigation process itself, but also the very real threat of an adverse cost award at the end of the day should the plaintiff be unsuccessful. Very few plaintiffs are able to undertake such a risk personally. Unless steps are taken to rectify this dire predicament facing potential litigants, access to the justice

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<sup>16</sup> L. Friedlander, “Costs and the Public Interest Litigant”, (1995) 40 *McGill L.J.* 55 at para. 1.

system will be restricted to those with either very deep pockets or those who are able to access an alternative source of funding.

There are possible options to address deficiencies in funding and the balance of this paper explores methods available to ensure the liberal principles of public interest standing remain meaningful. Tentative steps have been taken in some areas, in particular with respect to cost awards, but the time has come for a great leap forward.

## II. FUNDRAISING

The most commonly heard response to the “problem” of funding public interest litigation is that people who care about the issue in question should simply raise the necessary funds from the public at large. Thus, fundraising has offset *some* of the litigation costs incurred in the *Harris* case. This case attracted enormous media attention and public sentiment overwhelmingly favours Mr. Harris. Contributions to what is known as “Project Loophole” have been received from both individuals and corporations across Canada.

In reality, however, these donations will cover only a fraction of the actual costs. This case wound its way through various levels of the Federal Court for four years before standing was ultimately granted to Mr. Harris to proceed, and is now only at the point of trial. Countless motions and appeals have been filed and argued by both sides, each of which requires extensive preparation. The Public Interest Law Centre has finite and modest financial resources at its disposal and as a result was required to obtain the assistance of a private bar lawyer on a *pro bono* basis for the trial. Even with the monies raised through “Project Loophole”, the parties are still on an unequal playing field in terms of funding and resources.

The imbalance becomes even greater in cases which garner little media attention or public support. The Public Interest Law Centre has represented members of the most disadvantaged and overlooked groups in our society and fundraising in these circumstances is simply not a viable option. For example, there would be few contributors to a prisoner voting rights fund, to cite one issue which the Centre has vigorously pursued for the past 15 years.<sup>17</sup>

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<sup>17</sup> *Sauve v. Canada (Chief Electoral Officer)*, [2000] 2 F.C. 117. The plaintiffs in this case include current and former federal penitentiary inmates and a group representing Aboriginal inmates. At issue is the validity of specific sections of the *Canada*

Consequently, while private funding is certainly appreciated and provides a means of participation in the litigation process by the public at large, it is not realistic to rely upon it to sustain a public interest lawsuit through to its completion.

### III. TEST CASE PROGRAMS

Non-profit organizations may provide financial relief to public interest litigants in certain circumstances. The Court Challenges Program of Canada (“Court Challenges”)<sup>18</sup> receives \$2.75 million annually from the Department of Canadian Heritage with which to fund selected test cases. Its mandate is to advance and protect equality rights under federal legislation, or language rights under either federal or provincial legislation by providing financial assistance for test cases of national significance.<sup>19</sup>

Assistance may be given to individuals who are members of a disadvantaged group or to organizations which act on their behalf. As noted above, in order to qualify the applicant must be commencing a “test case” in the sense that the matter is not already before the courts or has already been decided. Several additional factors are also considered at the time an application for funding is received, such as the impact the case may have on the individual plaintiff, how the case will advance the law in general, and the seriousness of the issue.

Should an application for funding be approved, Court Challenges provides funding to conduct initial research and, in addition, the cost of the litigation itself up to prescribed limits. This is vital to public interest cases where expert evidence, which is extremely costly, is often necessary. In 1999-2000, the acceptance rate of applications for funding was 72.3 % and the most common reasons cited in refusing an application were that the matter was not a test case or fell under provincial domain.<sup>20</sup>

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*Elections Act*, S.C. 2000, c. 9, which deny voting rights in federal elections to those inmates serving sentences of more than two years. This case is currently pending before the Supreme Court of Canada and will be heard in December, 2001.

<sup>18</sup> Located at 616 - 294 Portage Avenue, Winnipeg, Manitoba, R3C 0B9. Telephone: (204) 942-0022; online: Court Challenges Program of Canada <http://www.ccppja.ca>.

<sup>19</sup> Court Challenges Program of Canada, Annual Report 1999-2000 at 7.

<sup>20</sup> *Ibid.*, at 48 and 50.

In the 1999-2000 fiscal year, Court Challenges participated in a number of significant test cases and played a vital role in ensuring access to the justice system for those who might otherwise have been excluded.<sup>21</sup>

Unfortunately, however, Court Challenges is restricted in its scope, as it is limited to funding challenges only to federal legislation under section 15 of the *Charter*, or federal and provincial legislation regarding language rights. As a result, it is only a partial solution to the problem of inadequate funding.

#### IV. STATE-FUNDED COUNSEL

As our legal system becomes increasingly complicated, it is often difficult, if not impossible, for an unrepresented plaintiff to participate effectively. As such, those individuals or groups unable to afford legal counsel or to commence an action would be denied access to the courts despite a valid claim. In the event an unrepresented public interest litigant forged ahead nonetheless, the fairness of the proceedings would certainly be suspect, given the disparity between the parties in terms of available resources.

The necessity for trial fairness has long been recognized in the criminal law context due to the possibility of incarceration, the ultimate restriction on liberty by the state. It is accepted by the courts that in situations where an accused cannot afford legal representation, there exists the possibility that the trial will be rendered unfair.

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<sup>21</sup> See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, where certain provisions of the *Indian Act*, R.S.C. 1985, c. I-5, which prohibited Band members that reside off-reserve from participating in Band elections, were challenged. On May 20, 1999 the Supreme Court rendered its decision in favour of the non-resident Band members on the basis that the prohibition violated equality rights under s. 15 of the *Charter*. See also *Sauve*, *supra* note 16. In *R. v. Mills*, [1999] S.C.R. 668, the Supreme Court held upheld the provisions of Bill C-46, which set out the process to be followed by a judge regarding access by an accused to a complainant's private records in a sexual assault case. The Supreme Court held that Bill C-46 did not violate an accused's right to a fair trial under ss. 7 and 11(d) of the *Charter* and balanced those rights against complainants' rights to equality and privacy.

To ensure the trial is fair in such a scenario, a remedy has been fashioned by the courts pursuant to section 24(1) of the *Charter*.<sup>22</sup> If it can be shown by the accused that an unfair trial will result from lack of representation, the charges will be stayed unless and until defence counsel is appointed and paid for by the state. Thus, if the Crown is intent upon pursuing prosecution of the accused, it must ensure that funds are made available for this purpose.<sup>23</sup>

For an accused to benefit from this remedy, he/she must meet two requirements. Firstly, it must be shown that the accused is unable to afford counsel and has exhausted all possibilities of obtaining legal aid. Secondly, the accused must also show that the issues to be raised at trial are sufficiently complex such that lack of legal representation will result in an unfair trial.

An example of the procedure to be followed by the courts to determine whether a stay is appropriate in the circumstances can be found in the recent decision from the Manitoba Court of Appeal in *R. v. Drury*.<sup>24</sup> Both Mr. Drury and the co-accused, Mr. Hazard, had been charged with a number of serious offences and represented themselves at trial after their preliminary motion for state-funded counsel was denied. Both were convicted and each sentenced to a total of five years' imprisonment. On appeal to the Manitoba Court of Appeal, Steel J.A. commenced her analysis of the issue by reiterating the purpose of a stay under section 24(1) of the *Charter*, namely to "guarantee a fair trial in serious and complex cases where the accused is impecunious and has been refused assistance by Legal Aid."<sup>25</sup>

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<sup>22</sup> Section 24(1) of the *Charter* states: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

<sup>23</sup> These types of cases are commonly referred to as "*Rowbotham* Applications" after the leading case of *R. v. Rowbotham*, (1988) 41 C.C.C. (3d) 1 (Ont. C.A.) [hereinafter *Rowbotham* cited to C.C.C.].

<sup>24</sup> [2001] 1 W.W.R. 442 (Man. C.A.) [hereinafter *Drury* cited to W.W.R.], leave to appeal to the Supreme Court dismissed March 22, 2001.

<sup>25</sup> *Ibid.*, at para. 22.

The financial circumstances of both Messrs. Drury and Hazard were reviewed, together with details pertaining to their attempts to obtain legal counsel. In addition, evidence was presented by five senior criminal attorneys in Manitoba as to the estimated costs likely to be expended for a trial of this particular length and complexity. The Deputy Director of Legal Aid Manitoba also testified and confirmed that its current tariff was insufficient to provide adequate compensation to any defence counsel willing to step forward and represent either accused.

In this case it was ultimately determined that both accused had sufficient assets with which to retain counsel on their own. However, had that not been the case, the Court of Appeal was prepared to grant a stay.

Based on the principles gleaned from the jurisprudence in this area of the law, a valid argument can be made that a similar remedy should be made available to public interest litigants. While the threat of incarceration is not an issue in civil cases, the consequences of the state action or legislation which arise in public interest cases can be equally devastating. The impacts may reach far beyond the affected individual to the broader public interest. It is a logical step from the protection of the rights of an accused in a criminal context to the protection of the rights of all Canadians from unlawful state action.

Support for such an assertion can be found in several recent cases, two of which will be discussed in detail below.

Firstly, in *R. v. Dedam*,<sup>26</sup> a stay was granted pursuant to section 24(1) of the *Charter* even though the accused did not face incarceration upon conviction. Mr. Dedam, a resident of Burnt Church, New Brunswick, was charged with obstructing a fishery officer, an offence under the federal *Fisheries Act*.<sup>27</sup> It was his intention to raise a defence at his trial that he was entitled to fish on the basis of his aboriginal and treaty rights.

McCarroll J. undertook a typical “*Rowbotham* Application” approach and heard evidence from Mr. Dedam that he did not have the financial resources with which to retain counsel. Just as in the *Drury* case noted above, experienced lawyers testified as to the estimated costs associated with the complex defence Mr. Dedam intended to raise. As

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<sup>26</sup> [2001] N.B.J. No. 186 (Prov. Ct.), online: QL (NB) [hereinafter *Dedam*].

<sup>27</sup> R.S.C. 1985, c. F-14.

well, the Director of Legal Aid New Brunswick confirmed that due to the fact Mr. Dedam did not face a prison sentence, he did not meet its eligibility requirements.

What is significant about this case is that the threat of incarceration was not the determinative factor. Rather, the focus was directed toward the complexity of the proposed defence and its possible implications, not only upon Mr. Dedam, but on others in his situation. In ultimately concluding that a stay was the appropriate remedy, McCarroll J. stated:

I am satisfied on the balance of probabilities that this case involves extremely complex legal issues... [T]he possibility of a potential jail sentence is not the only indicator of seriousness... [T]he issue the charge deals with is of extreme importance, and I would go on to say it's of national importance... Simply looking at the penalty attached to this charge does not do justice, in my opinion, to the reality of this whole situation... [T]he outcome in this case could well affect hundreds of native fishers who strongly and fervently believe in their right to fish lobster. The determination of this issue, in my opinion, is indeed serious, not just to the person charged, but to the governments of both the province and the country as well... [T]he evidence to be presented by the defence is of such a complex and time-consuming nature requiring months of preparation and organization that it would be unfair to allow this trial to proceed without the appointment of state-funded counsel...

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Secondly, in *New Brunswick (Minister of Health and Community Services) v. G.(J.) [J.G.]*,<sup>29</sup> the Supreme Court extended this concept into the civil law sphere when it ruled that indigent parents have a constitutional right to state-funded counsel when facing the loss of custody of their children to the state. Their rationale for such a finding was that “[w]hen government action triggers a hearing in which interests protected by section 7 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair.”<sup>30</sup> Relevant factors which were taken into

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<sup>28</sup> *Dedam*, *supra* note 26 at para. 27.

<sup>29</sup> [1999] 3 S.C.R. 46 [hereinafter *G.(J.)*].

<sup>30</sup> *Ibid.*, at para. 2.

consideration included the interests at stake, the complexity of the proceedings and the capacities of the parents to participate meaningfully in the process.

Of paramount importance in *G.(J.)* is the affirmation by the Supreme Court that “security of the person”, as guaranteed by section 7 of the *Charter*, spans beyond physical restraint on liberty and encompasses “psychological integrity” as well. A caution was made, however, that such psychological integrity must be greater than the ordinary stresses and anxieties arising out of everyday life, but certainly does not require the individual to “rise to the level of nervous shock or psychiatric illness”.<sup>31</sup>

There is no doubt that apprehension of a child by a government agency is a “gross intrusion into a private and intimate sphere” by the state. It was also recognized by the Supreme Court that an “individual’s status as a parent is often fundamental to personal identity” and acknowledged that the loss of custody of a child has a devastating impact on the parent.<sup>32</sup> As a result of the consequences to both the parent and the child, it was considered crucial that a fair hearing be conducted in order to determine the best interests of that child. To that end, meaningful participation by the parent was held to be an essential factor.

The Supreme Court made it clear, however, that legal representation of the parent may not be a prerequisite for a fair hearing in all situations, but may be appropriate in circumstances where the proceedings are complex or the parent is unable to effectively participate. It was specifically mentioned that meaningful participation on the part of the parent “goes beyond mere ability to understand the case and communicate.”<sup>33</sup>

In her judgment, L’Heureux-Dubé J. stated that section 7 cases should be interpreted “through the lens of ss. 15 and 28,”<sup>34</sup> particularly with respect to child protection proceedings which frequently affect parents who are members of disadvantaged groups, particularly visible minorities, Aboriginal people and the disabled.

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<sup>31</sup> *Ibid.*, at para. 58-60.

<sup>32</sup> *Ibid.*, at para. 61.

<sup>33</sup> *Ibid.*, at para. 83.

<sup>34</sup> *Ibid.*, at para. 114-115.



The remedy ultimately awarded in favour of the parent in *G.(J.)* was different from that of a stay granted under section 24(1), as that was obviously not an option in those particular circumstances. Instead, the Province of New Brunswick was ordered to provide state-funded counsel in accordance with either the tariff of Legal Aid New Brunswick or the tariff applicable to non-governmental lawyers hired by the Province in similar proceedings.

It is interesting to note that a variation of this remedy has been awarded by the courts in situations where the Legal Aid tariff would be insufficient to adequately compensate counsel.<sup>35</sup> For instance, in *R. v. Chan*,<sup>36</sup> the Alberta Court of Queen's Bench ordered state-funded counsel at rates in excess of the Legal Aid tariff due to the nature of the prosecution. This was an extreme complex case wherein 35 individuals charged with offences relating to participation in a criminal organization were to be tried together. The commitment required on the part of defence counsel was enormous and as such the court recognized that an increased hourly rate than that afforded by Legal Aid was warranted.<sup>37</sup>

From the above, it is clear that funding for public interest litigation would be a natural extension of the reasoning applied in these cases.

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<sup>35</sup> Such situations are commonly referred to as "Fisher Applications", after the case of *R. v. Fisher*, [1997] S.J. No 530, online: QL (SJ), wherein the Saskatchewan Court of Queen's Bench granted Mr. Fisher's request to have Brian Beresh appointed to represent him. Due to the unique circumstances of this case, the Court appointed Mr. Beresh to represent Mr. Fisher despite the fact that he was not resident in Saskatchewan. Further, the Court ordered an hourly rate to Mr. Beresh of \$150.00, well above the Legal Aid tariff. See also *R. v. L.C.W.*, (2000) 191 Sask. R. 69, wherein the Saskatchewan Court of Queen's Bench appointed two lawyers to act on the accused's behalf regarding an application to declare him a dangerous offender. In that case, the court ordered that counsel refer their accounts to the Registrar for taxation at the conclusion of the trial. See also *R. v. Fok*, (2000) 275 A.R. 381 where the Alberta Court of Queen's Bench granted the accused's request to have two counsel appointed to represent him on his "Fisher Application." The Court also ordered "reasonable" fees and disbursements to be paid by the State to the accused's counsel. In addition, the Court suggested that an agreement be reached between the Crown and defence counsel as to a reasonable hourly rate, failing which the Court would hear further argument and decide.

<sup>36</sup> (2000) 40 C.R. (5th) 281 (Alta. Q.B.) [hereinafter *Chan*].

<sup>37</sup> *Ibid.*, at para. 65 where the Alberta Court of Queen's Bench awarded an hourly rate in accordance with the Test Case Funding Contribution Agreement and ordered state-funded counsel at the rates of \$150.00 per hour for each senior lawyer, \$100.00 per hour for each junior lawyer, and \$50.00 per hour for each articling student.

Issues of national or public importance are raised and the effects of the legislation or government action often violate the psychological integrity of the affected individual and others in the same situation. It would therefore be appropriate for courts to order state-funded counsel for the same reasons they have done so in other realms of the law. As will be noted below, Legal Aid plans in Canada are unable to assist public interest litigants in any significant way, given the crisis in maintaining minimal legal representation for ordinary domestic and criminal law matters.

A recent example of the new approach we advocate is *Spracklin v. Kichton*,<sup>38</sup> wherein the plaintiff commenced an action to challenge the definition of “spouse” in Alberta’s *Matrimonial Property Act*.<sup>39</sup> In a progressive decision, Watson J. ordered the Attorney General of Alberta to provide state-funded counsel in relation to the plaintiff’s constitutional challenge. At paragraph 81, Watson J. set out the reasons for his ruling, as follows:

- a. Ms. Spracklin is an individual person, not a corporation, association, representative or class action plaintiff;
- b. She is not financially able to finance the *Charter* challenge;
- c. She is not legally trained and as such not capable of advancing her challenge without legal representation;
- d. Her *Charter* challenge is not frivolous nor “an experiment”;
- e. The issue raises matters of importance to Canadians and to human dignity;
- f. Her claim “is not an effort to run a lottery against state resources”;
- g. The issue may not get adjudicated in light of the fact that others in Ms. Spracklin’s situation are likely in a similar financial position;
- h. There is no court challenges program available in Alberta;

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<sup>38</sup> [2001] A.J. No 990 (Q.B.), online: QL (AJ) [hereinafter *Spracklin*] Judgment delivered July 23, 2001.

<sup>39</sup> R.S.A. 2000, c. M-9.

- i. Her challenge could proceed even if she were unrepresented, however the “negative consequences of that are plain”;
- j. Ms. Spracklin would be afforded reasonable representation by competent counsel, not a “Cadillac” representation.<sup>40</sup>

The Court also put forward a suggested approach to be taken by the parties in order to agree on a reasonable amount of compensation for legal counsel.

As will be explored in greater detail below in the section of this paper regarding cost awards, it is important to bear in mind that the discretionary remedies noted in the above cases were established by the courts in response to the obvious and inherent power imbalance between the state and the individual. The courts often remarked on their duty and obligation to ensure the unrepresented party receives a fair trial.<sup>41</sup>

## V. THE STATUS OF LEGAL AID IN CANADA

Legal Aid is “synonymous with access to justice” and an integral part of our justice system.<sup>42</sup> However, its current status across Canada is precarious. What is needed is a fresh approach on the part of both levels of government and a shift “away from an emphasis on dollars toward a focus on a governmental responsibility for public legal services.”<sup>43</sup> Legal Aid is one the most effective means of ensuring fairness in the system, however “fairness in battle cannot be achieved if only one party is armed.”<sup>44</sup>

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<sup>40</sup> For a further discussion of this decision, see the August 31, 2001 issue of “Lawyers Weekly”, vol. 21, No 16 at 2.

<sup>41</sup> For example, in *Rowbotham*, *supra* note 23, the Ontario Court of Appeal, at p. 46, held that “the basic premise must be that the trial judge himself will do everything to make sure an unrepresented litigant receives a fair trial.” In *R. v. Lewis*, [1995] Y.J. No. 116 (Terr. Ct.), online: QL (YJ), the court noted that every court has the power to control its own process and that the principles of natural justice require a judge to ensure the accused receives a fair trial. In *Dedam*, *supra* note 26, the court noted at para. 27 that “[a] trial judge’s paramount obligation is to ensure that an accused receives a fair trial ... Justice must not only be done, but must be seen to be done.”

<sup>42</sup> M. Buckley, “The Legal Aid Crisis: Time for Action”, a background paper prepared for the Canadian Bar Association in June, 2000, at 6.

<sup>43</sup> *Ibid.*, at 5.

<sup>44</sup> *Ibid.*, at 7.

A graphic example of the perilous situation facing Legal Aid occurred in Manitoba in a situation strikingly similar to that of the *Chan* case. In a test case of the federal government's "anti-gang" legislation, 30 alleged members of the Manitoba Warriors were to be tried together in what would have been one of the most complicated and lengthy trials in Canadian history. Most of the accused were indigent and clearly met the eligibility guidelines to obtain Legal Aid counsel due to the serious nature of the allegations. However, providing Legal Aid counsel to all eligible accused individuals in this prosecution would have bankrupted the entire program.

As a result, negotiations were undertaken between the provincial government and Legal Aid Manitoba and an agreement was ultimately reached whereby additional funds would be set aside by the government in excess of Legal Aid's annual budget. It was also agreed that the hourly rate to be paid to legal counsel for their services would be in excess of the Legal Aid tariff to ensure they were adequately compensated.

Even in the absence of situations such as the Manitoba Warriors case, funding for Legal Aid programs across Canada is insufficient to meet the needs of those requiring legal representation. The Canadian Bar Association has been actively lobbying the federal government for a significant increase in funding to address this dire predicament. In response, the federal government has allocated an additional \$20 million in "bridge financing" for criminal and immigration/refugee matters.<sup>45</sup>

Unfortunately the federal government has not responded in kind regarding civil matters, including public interest litigation. Federal Justice Minister Anne McLellan recently indicated no additional funding will be provided for civil legal aid until a two-year study has been completed.<sup>46</sup> As a result, no relief is in sight to increasing access to the justice system for public interest litigants through Legal Aid.

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<sup>45</sup> See the August 24, 2001 issue of "Lawyers Weekly", vol. 12, No 15, at 23.

<sup>46</sup> *Ibid.*

## VI. THE COURT'S DISCRETIONARY AUTHORITY TO AWARD COSTS

A promising means of funding public interest litigation can be seen on the horizon. Two cases from the past several months have opened the door to the justice system for potential public interest litigants on the basis of their valuable contribution to the public benefit, one being the *Spracklin* case noted above and the other to be discussed in greater detail below. Unfortunately these are only glimpses of what has yet to become an accepted legal principle and this is an issue still being considered in a somewhat piecemeal fashion. What is required is a concerted effort on the part of lawyers and judges alike to ensure that favourable cost awards in public interest cases, regardless of the outcome, become a reality.

Traditionally costs are awarded to the successful party in order to encourage settlement without hindering access to the courts.<sup>47</sup> In the usual course, “party and party” costs are awarded to the successful party based on a tariff which is calculated according to each particular step undertaken in the litigation process. On rare occasions, “solicitor and client” costs may be awarded which are on a higher scale and reflect the actual costs incurred. This type of cost award is punitive in nature and for the most part occurs in situations where there has been misconduct on the part of one of the parties or the lawyers.

The historical rationale for awarding costs to compensate the successful party does not, and should not, apply to public interest litigants. Financial compensation is not the plaintiff's goal in these cases, but rather protection against unlawful government action. Therefore, judges must turn their minds away from conventional principles and towards recognition of the unique characteristics of public interest litigation. To do so would ensure that public interest litigants are afforded access to the justice system and rewarded for their efforts, even if they are unsuccessful at the end of the day.

One of the reasons why the law of costs has stalled in this context is because courts rarely give reasons when awarding costs and this issue is often overlooked on appeal. Hence, it is an area ripe for growth and development and judges have a vital role to play in that regard. What is also clearly needed is clarification and guidance from the courts as to

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<sup>47</sup> Friedlander, *supra* note 15 at para. 2.

when and how a public interest exception to the customary rule of costs should be implemented.

Several commentators have suggested possible options to consider, however to date there is no general consensus on what form this exception should take. In its “Report on Standing,” the Ontario Law Reform Commission (“OLRC”) proposed that the traditional “costs follow the event” rule should be deviated from in certain situations. More particularly, it recommended the following criteria be adopted when determining if a certain case should fall within a “public interest” exception:

- a. The litigation must raise issues of importance beyond the immediate interests of the parties;
- b. The plaintiff must have no personal, proprietary or pecuniary interest in the outcome, or if such an interest does exist, it clearly does not justify the litigation economically;
- c. The litigation does not present issues which have previously been judicially determined against the same defendant;
- d. The defendant must have a clearly superior capacity to bear the costs of the proceeding.<sup>48</sup>

Should a particular case satisfy the requirements of this four-fold test, the OLRC and other supporters recommend that a “one-way” costs regime be implemented such that costs would be awarded in favour of successful public interest litigants, but not against them if they lose.<sup>49</sup> An alternative approach to the “one-way” rule has also been suggested and

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<sup>48</sup> C. Tollefson, “When the ‘Public Interest’ Loses: The Liability of Public Interest Litigants for Adverse Costs Awards”, (1995) 29 *U.B.C. L. Rev.* 303-339 at para. 95.

<sup>49</sup> See also C. McCool, “Costs in Public Interest Litigation: A Comment on Professor Tollefson’s Article, (When the ‘Public Interest’ Loses: The Liability of Public Interest Litigants for Adverse Cost Awards)” (1996) 30 *U.B.C. L. Rev.* 309; C. Tollefson, *supra* note 48; and the Australian Law Reform Commission recommendation in *Costs Shifting—Who Pays for Litigation?* (Canberra: Commonwealth of Australia, 1995), all advocating the “one-way” rule. For cases where losing public interest party relieved of costs, see *Valhalla Wilderness Society v. British Columbia*, (1997) 25 C.E.L.R. (N.S.) 197 (B.C.S.C.); *Friends of the Island v. Canada (Minister of Public Works)*, (1995) 16 C.E.L.R. 146 (F.C.).

entails the adoption of the American “no-way” cost rule wherein each party bears its own costs.<sup>50</sup>

The difficulty with both of these propositions is that while they protect a public interest litigant from an adverse cost award, they do not solve the problem of the prohibitive costs of the litigation itself should the plaintiff be unsuccessful. A more appropriate solution would be to create a public interest exception whereby a modified “one-way” rule would be adopted such that the plaintiff would be awarded costs regardless of the outcome on the basis of the importance of the issues raised.<sup>51</sup>

This solution is available and at the discretion of the courts. The importance of public interest litigation is in fact already recognized and codified in federal and provincial court rules.<sup>52</sup> Just as with the remedy created by the courts in granting a stay pursuant to section 24(1) of the *Charter*, judges should also recognize the necessity for trial fairness and the disparity in available resources in public interest cases.

The following case is illustrative of the court’s inherent discretion to deviate from the traditional rules of costs in an appropriate case in order to ensure issues of national importance are heard.

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<sup>50</sup> See Friedlander, *supra* note 16.

<sup>51</sup> See *Finlay*, *supra* note 1 (decision on the merits, [1993] 1 S.C.R. 1080 at 1132-1133, awarding party and party costs to Mr. Finlay throughout, despite the Crown’s success on appeal; *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 726, awarding solicitor and client costs where the plaintiff succeeded on his *Charter* claim but lost on remedy, the only issue appealed by the Crown; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at 460-461, awarding costs to the unsuccessful appellant against the government under s. 53(2) of the *Access to Information Act*, R.S.C. 1985, c. A-1, which expressly authorized costs in favour of the losing applicant where an important new principle is raised under the litigation; public interest tribunal practice of awarding one-way costs was approved in *Bell Canada v. Consumers Association of Canada*, [1986] 1 S.C.R. 190.

<sup>52</sup> Rule 400(3)(c) of the *Federal Court Rules* states that a court may consider “the importance and complexity of the issues” when exercising its discretion in awarding costs. This is also reflected in Manitoba’s *Court of Queen’s Bench Rule 57.01(1)* where it also states that the complexity of the proceedings and the importance of the issues are relevant factors in awarding costs.

In *Rogers v. Ontario (Works, Administrator for the City of Greater Sudbury)*,<sup>53</sup> the applicant sought interim relief pending the determination of her constitutional challenge of the Regulations pursuant to which her social assistance benefits had been suspended. She was seeking costs “payable forthwith” as opposed to the usual course of awarding costs payable at the conclusion of the litigation.

Ms. Rogers had received social assistance benefits until they were terminated after she was convicted of welfare fraud. At that time Ms. Rogers was 39 years old, living alone and 22 weeks pregnant. She was under long-term treatment for various disorders and as a result of the termination of her benefits, was rendered destitute and forced to rely on food banks and charities to survive.

In finding in favour of Ms. Rogers, Epstein J. acknowledged the traditional principles regarding costs, however she also considered other cases which have recognized the importance of *Charter* litigation.<sup>54</sup> The following quote provides the basis for her decision to award costs “payable forthwith” and also succinctly summarizes the rationale judges in future cases should follow:

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

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<sup>53</sup> [2001] O.J. No. 3346 (Ont. Sup. Ct.), online: QL (OJ) [hereinafter *Rogers*], judgment delivered August 21, 2001. For a further discussion of this case, see the September 7, 2001 issue of “Lawyers Weekly”, vol. 21, No 17 at 3.

<sup>54</sup> See *Canadian Newspapers v. Attorney General (Canada)*, (1986) 32 D.L.R. (4th) 292 (Ont. H.C.J.), where it was held “... it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden”; *Re Lavigne and Ontario Public Service Employees Union (No. 2)*, (1987) 41 D.L.R. (4th) 86 (Ont. H.C.J.), where White J. stated “it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means.”



by the “other side” at the conclusion of the litigation. It may take years before those who accept *pro bono* retainers are reimbursed for their expenses and compensated for the time spent on the file. Accordingly, larger firms who can more easily “carry the file” accept more *pro bono* retainers. By limiting the type and number of firms who are able to assume this type of financial obligation, the public’s access to counsel who will act for them in *Charter* challenges is similarly limited.<sup>55</sup>

There is a disturbing footnote to this case in that subsequent to this decision, Kimberly Rogers was discovered dead in her sweltering apartment. In her earlier decision regarding the merits of the case, Epstein J. specifically noted in what was to be an eerie forewarning:

In the unique circumstances of this case, if the applicant is exposed to the full three-month suspension of her benefits, a member of our community carrying an unborn child may well be homeless and deprived of basic sustenance. Such a situation would jeopardize the health of Ms. Rogers and the fetus thereby adversely affecting not only the mother and child but also the public—its dignity, its human rights commitments and its health care resources. For many reasons, there is overwhelming public interest in protecting a pregnant woman in our community from being destitute.<sup>56</sup>

It is simply essential that justice be accessible for people like Kimberly Rogers. No judge should countenance a hearing in his or her court which is markedly unfair, especially when matters of broad public interest are at stake. The time has arrived for public interest litigation to be properly funded. Judges can be part of the solution. Judges should be funders.

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<sup>55</sup> *Rogers, supra* note 53 at para. 20.

<sup>56</sup> *Rogers v. Ontario (Works, Administrator for the City of Greater Sudbury)*, [2001] O.J. No 2167 at para. 19 (Ont. Sup. Ct.), online: QL (OJ), judgment delivered May 31, 2001.