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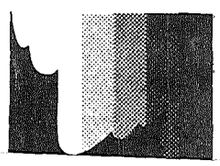
COSTS, UNDERTAKINGS AND PUBLIC INTEREST CASES

Brief to the

Civil Procedure Revision Committee



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The basic task of the Civil Procedure Revision Committee is to completely revise the Ontario Rules of Practice. However, the mandate is wider than this. The Committee has been asked to recommend amendments to the Judicature Act and to any other legislation related to civil procedure. One of the most difficult, but at the same time possibly the most important of the issues the Committee must deal with, is the high cost to the public of obtaining legal services and access to courts and tribunals. The high cost of enforcing rights and participating in the governmental process is often prohibitive to the ordinary person.

As stated in the Report of the Task Force on Legal Aid (the Osler Report, p. 19), in recent years economic changes have occurred on an almost unprecedented scale, and these have been reflected in the law. Much legislation has been enacted by all levels of government dealing with consumer rights, landlord and tenant relations, social benefits, economic and other compensation, and a great variety of activities and occupations dealt with by a diverse group of tribunals, boards and commissions. As the Report states at p. 17, equality before the law is a meaningless phrase if access to the machinery of the law is denied to a substantial proportion of the population by reason of their inability to pay for it.

The Report quotes Lord Gardiner, former Lord Chancellor of England:

> [It] is absolutely useless to go on and on passing Acts of Parliament giving poor people legal rights if they cannot afford to enforce or defend their rights; because if they cannot afford to enforce or defend them they may just as well throw their legal rights into the waste paper basket.

Much of the legislation referred to above was passed to redress the imbalance in power between the advantaged and disadvantaged segments of society. However, the problem of the high cost of legal services is not limited to the poor. The "working" class and "middle" class - those of modest means or moderate income - are also cut off from access to legal representation. In fact, in some ways they may be in a worse position than the poor. They may have less access to the Ontario Legal Aid Plan and to community clinics, which generally focus their activities on "poverty law" problems. Moreover, they are not "judgement-proof" as are the very poor, and must worry about the danger of costs being awarded against them if they are unsuccessful when considering whether to enforce their rights. These people are intimidated by the high cost of justice and afraid to assert their rights.

For example, there are now approximately 40 to 50 Federal and Ontario statutes dealing with one form or another of environmental protection, many of them passed within the last 5 years. At present, they are frequently beyond use not only by the poor, but also by individuals and groups of modest means. Many of these statutes provide for representation before boards and tribunals in sometimes lengthy public

hearings incorporating considerable expert testimony, for which no financial assistance is available under the Ontario Legal Aid Plan. Before these statutes were passed, the main line of defence against environmental degradation was the common law. For a variety of reasons, including the fact that these statutes rarely provide for injunctive relief at the suit of individuals or for compensation of individuals for losses due to environmental or health damage, the civil courts are still very important in protecting environmental rights. Again, the cost of enforcing common law rights in the courts is frequently prohibitive to the ordinary person.

This question of the high cost of obtaining justice has three aspects: fees paid to lawyers, disbursements, and costs awarded by the courts. This brief will deal primarily with the question of costs awarded against the unsuccessful party in court actions because this is one area in which reform can be accomplished with no direct additional cost to the public purse, and because the threat of costs frequently intimidates the potential plaintiff who is otherwise prepared to pay his own legal fees and disbursements.

The thrust of our submissions will be that the rules that costs are routinely awarded against the unsuccessful party and that a party seeking a temporary injunction must enter into an undertaking must be changed if the judicial system is not to be distorted by bringing "ability to pay" into Court as a requirement for justice. The basis of our recommendations is not to compel the Court to award costs to the successful public interest applicant (or deny costs to the respondent of an unsuccessful public interest applicant), but that the court should have a discretion to be exercised judiciously on the basis of guidelines designed to protect the public interest plaintiff.

We recognize that the problems addressed in this brief will not be completely resolved by the implementation of the kinds of recommendations we are making. The problem of access to the decision-making process is a much wider one which can only be addressed by considering the extent to which the Government should fund interventions before the courts, boards, tribunals and administrative agencies on public interest questions. We hope that the Committee will receive other submissions about other aspects of this problem, and give them full consideration.

The Question of Costs and the Public Interest Case

In litigation, the question of the public good to be achieved by a court's decision and the private benefit to the litigant are frequently inextricably intertwined. It is impossible to say of most cases that the result would benefit no one but the litigant, or, on the other hand, that the litigant will receive no benefit beyond that received by the general public. However, it is possible to characterize many cases as being primarily of a private nature or primarily in the public interest.

For the purposes of this brief, we will define the public interest case as a case where the plaintiff has no financial or property interests to protect, or where the potential financial gain to the plaintiff if he wins is less than the potential financial loss if he loses. A private interest case, on the other hand, would be a case where the potential financial gain to the plaintiff exceeds the potential financial loss.

The Osler Task Force pointed out that although the question of costs was beyond their mandate, there was an urgent need to review the whole question of costs. The text of the Task Force's comments in this regard are reproduced below, directly from the report itself. The Canadian Environmental Law Research Foundation supports the sentiments expressed therein.

> 4. We have elsewhere dealt with the question of costs in Legal Aid matters generally. We observe here however that The Judicature Act states that the courts' discretion as to costs may be exercised "subject to the express provision of any statute." The question of legal costs generally, and the extent to which they should be awarded by courts or tribunals, cannot really be said to be included in our mandate. However, we are emboldened to suggest at this point that it is no longer self evident that costs should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against a losing party operates unequally as a deterrent. The threat of costs undoubtedly works heavily against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore propose an amendment to The Legal Aid Act casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious.
>
> We respectfully suggest that the time is ripe for a review of the whole question of costs by the Ontario Law Reform Commission or some other appropriate body. Meanwhile, we have no doubt that the spirit underlying the principle of Legal Aid and today's legislative recognition that public participation is desirable when serious public issues are at stake, justify a departure from the rule. To grant group certificates in proper cases is not enough. The deterrent threat of being mulcted in costs is often more than enough to inhibit a group of genuinely concerned citizens from proceeding against a public authority or a large corporation though vital public issues may be at stake.
>
> We have no doubts about the equity of the principles we have proposed which tend to ensure that groups demonstrating a *bona fide* concern for matters affecting the public interest will not be penalized in costs if their efforts are unsuccessful. But to give such protection only to legally aided groups would give them an unwarranted advantage over others. Each such group might well be serving the public interest by testing public rights but the price of failure could be ruinous for even a wealthy group in the absence of such a rule as we propose.
>
> We have more than once expressed the view that to grant nominal rights is worse than useless unless the means of enforcing them are also provided. Reasonable immunity from the penalty of costs should properly follow the assertion of such rights by a legally aided group; in equity this same immunity should be extended to non-legally aided groups on the same conditions. We therefore respectfully recommend that the necessary amendments be made not just to The Legal Aid Act but to The Judicature Act and other relevant statutes conferring on courts and tribunals the power to award costs. 1

In environmental cases where a plaintiff seeks to uphold a right or vindicate an interest which is primarily a personal financial or property one, litigation is frequently beyond the means of a person of modest means. This often rules out the issuance of a Legal Aid certificate, as legal aid may only be granted in cases where a person of modest means would choose to litigate the case. A common feature of environmental

law cases is that they are expensive, frequently requiring numerous expert witnesses, and therefore beyond the means not only of individuals but of groups.

Another feature of these cases is that they frequently involve situations where the only adequate remedy would be in the nature of injunctive relief. As a result, if the plaintiff succeeds in obtaining an injunction, but no damages, any difference between the party-and-party costs awarded to him and the costs payable as between a solicitor and his client must be borne by the plaintiff personally. Furthermore, the rights to be protected in the majority of cases (those which receive little public attention) are of a relatively small monetary value. The interests that people seek to protect are frequently intangibles, such as aesthetic and psychic considerations. The value of a noise-, dust-, or odour-free environment in monetary terms may be perceived by the courts as relatively low when considering quantum of damages, if damages are the remedy sought. Moreover, the plaintiff seeking both an injunction and damages, is likely to be awarded damages only. The general principle that an injunction should not issue if damages are an adequate remedy in practice precludes the possibility of obtaining an injunction in the vast majority of cases. Under these circumstances, the costs of litigating in such cases are likely to be disproportionately high compared to the damages likely to be covered and compared to the costs which might be awarded against the unsuccessful plaintiff.

A further restriction on the possibilities of utilizing the rights available at common law is the undertaking for damages. In a civil action, as a pre-condition of granting a temporary injunction, the court may require the plaintiff to give an undertaking to be responsible to the defendant for any financial losses sustained as a result of stopping the work alleged to be harmful in the period prior to trial. Although the Court has a discretion not to require such an undertaking, it is our understanding that such an undertaking would be required in almost every case where a temporary injunction might interfere with business activities. If the plaintiff wins at trial, the application for a permanent injunction would be granted. However, if the plaintiff loses and the injunction is dissolved, he or she would be required to pay the losses incurred by the defendant in stopping his activities. Where the defendant is a business which must cease production, distribution or sales, no person or group of modest means could give such an undertaking or carry it out. Again, no assistance from the Ontario Legal Aid Plan would be available to support such an undertaking.

It is true that the court of first instance will sometimes relax the costs rule in a case clearly raising a public interest issue. However, public interest cases raising important matters of public policy must often be decided by the higher courts for their value to be of use to the community. In CELRF's experience, even when the lower court gives the unsuccessful public interest plaintiff relief from the burden of

costs, the appellate courts appear to have an unwritten rule that a public interest plaintiff who has the audacity to appeal the case which he has lost at first instance will not be spared the brunt of costs a second time if he loses, regardless of the novelty or importance of the issues he raises.

In situations where the right which one seeks to enforce has a low monetary value, there are sometimes alternatives to a civil action in County Court or Supreme Court, such as a private prosecution under provincial environmental legislation, or a Small Claims Court action. However, these forums usually provide less satisfactory relief than civil actions in the higher courts, because of the unavailability of injunctions or damages in the criminal courts and the limited damages and unavailability of injunctions in the Small Claims Court. The only advantage of these forums is the reduction in potential liability for costs to the defendant. The plaintiff's fees and disbursements payable to his or her own lawyer may not be any lower. Again, although the problem of costs awards is minimal or non-existent in these courts, the cost of litigating is still frequently disproportionately high compared to the dollar value of the results obtained, because of the complexity of environmental cases and the need for expert witnesses. It should be noted that under the present Ontario Legal Aid Plan, financial assistance is unlikely to be granted for a private prosecution or a Small Claims Court action.

Because of the inordinate difficulties in enforcing environmental rights, the Canadian Environmental Law Association, which is associated with CELRF, provides free legal advice and assistance to members of the public with environmental problems. In cases where some issue of importance to the general public is involved, or where a deserving member of the public would clearly be deprived of his or her rights if required to pay legal fees, CELA will provide lawyers pro bono to take cases before courts and tribunals. It has been our experience that even where legal services are offered free of charge, the fear of an award of costs against them is sufficient to discourage potential plaintiffs from litigating, even where they have a strong case.

The Canadian Environmental Law Research Foundation respectfully submits that the ability of the plaintiff to enter into such an undertaking should be a factor to be given serious weight and consideration on any application for a temporary injunction. Where the plaintiff otherwise establishes a case for a temporary injunction, the amount of any undertaking should be limited to an amount within the financial capability of the plaintiff.

The Canadian Environmental Law Research Foundation further respectfully submits that the plaintiff should not be ordered to give security to cover costs and damages that may be incurred by the defendant as the result of a temporary injunction unless the defendant offers clear and convincing evidence that the temporary injunction will result in irreparable damage to him. Even in such a case, the extent of the irreparable damage to the defendant should be weighed against the extent of the harm imposed upon the plaintiff by requiring him to provide such an undertaking or

security. Such undertakings or security should not be required, if , in the judgment of the Court, imposition would unreasonably hinder the plaintiff and maintenance of the suit, would tend unreasonably to prevent the full and fair hearing on the action or activity complained of, or would otherwise not be in the public interest.

Cases Where the Public Interest is Paramount

Another change in the values, attitudes, and actions of society which has taken place in recent years is the increased awareness of civil rights, "human rights", environmental rights, and other intangible rights of broader interest than those rights traditionally enforced in the courts, which are narrowly based on property or financial interests. This awareness has been reflected by the formation of public interest groups to protect and expand those rights, and by the use of the courts to enforce such rights. This kind of altruism and broader view is a necessary and worthwhile development which should not be discouraged. The protection of such rights has been made necessary by the advanced state of deterioration of the environment, and by the proliferation of government powers and personnel. The courts must be available to keep government administrators from abusing the wide powers given them by the creation in recent years of numerous boards, agencies, tribunals, and other government bureaucracies which make countless decisions affecting the daily lives of the general public.

It has been argued that it is wrong in principle and dangerous in practice to permit a plaintiff whose motives do not include any hope of personal gain to use the courts. Accordingly, the doctrine of locus standi has been used as an effective barrier against such public interest litigation. It is beyond the scope of this brief to argue the merits of the locus standi doctrine, or public litigation, in detail. However, it should be noted that the public interest litigant may be here to stay, and that the locus standi doctrine, which has been described in recent years by commentators and the judiciary as "archaic", "perverse", and "anachronistic", is being restricted in application and is likely to be further restricted permitting more public interest suits. In the event that such public interest suits do reach court, it is submitted that the Civil Procedure Revision Committee should give special consideration to the fairness of the current costs system in such cases.

In the view of the Canadian Environmental Law Research Foundation, it is patently unfair and irrational that a plaintiff who has absolutely nothing to gain financially by using the courts to vindicate important public rights should risk incurring crippling financial liabilities if he loses his case because of the current costs system.

The recognition of the value to the public of private litigation is not without precedent. Under both the federal Fisheries Act and the federal Migratory Birds Convention Act, the value of environmental protection

through the courts by private complainants has been recognized by provisions stating that the Crown will divide any fine imposed upon conviction for a water pollution offence with the complainant. In the United States, where the courts normally do not award costs, and each party is expected to pay his own legal expenses regardless of whether he wins or loses, an exception to the rule has been made in recognition of the importance to the public of the enforcement of certain statutes by private individuals or groups. The Michigan Environmental Protection Act, for example, provides that "costs may be apportioned to the parties if the interests of justice require". For some time, the American courts on their own initiative have recognized the value of test cases and other public interest litigation by awarding costs to public interest groups and individuals on the basis that they were acting as "private attorneys-general". However, in May of 1975, the United States Supreme Court held that the courts were not to create such an exception to the general rule in the absence of statutory authorization.[2] This was not a rejection of the principle that public plaintiffs are an exception to the ordinary costs rule; it was a determination that the proper forum to fashion such an exception was Congress, rather than the courts, and that Congress must determine by specific provision which statutes contain sufficiently important public policies that costs awards should be provided to public interest plaintiffs to give citizens an incentive to enforce them. Prior to this decision, in one case the court had even awarded costs to a citizens' group which lost its case.[3] In effect, the costs rule created by these statutes and by the courts prior to the Supreme Court decision was that costs could be awarded in favour of public interest litigants but not against them.

It is submitted that the Civil Procedure Revision Committee should encourage the development of a flexible "one-way" costs rule in public interest cases in Canada. At present, the Courts, and those boards and tribunals that have the power to award costs, can recognize the public interest in this manner, and sometimes do. However, they have no guidelines to follow in so doing, and no statutory encouragement or recognition of the need for this in the Rules of the Supreme Court or in the rules of procedure governing other courts, boards and tribunals. Tradition does not encourage this practice, and therefore, some formal recognition of these changing public needs is necessary.

There are precedents for the recognition of the need to balance unequal interests by considering individuals and groups as "private attorneys-general" and protecting them financially. For example, the Ontario Municipal Board's usual practice is to award no costs, leaving each party to pay his own legal expenses. The Board has in the past evolved an unwritten rule, however, that it will not award costs against citizen objectors to development, unless they abuse its process, and, in a very few cases, the Board has awarded costs in favour of such citizens against developers. This "one-way" costs rule has been used infrequently.

The Ontario Energy Board in 1977 awarded costs to intervenors in a hearing in which the Minister of Energy had asked the Board to review and report on principles of power costing and ratemaking appropriate for use by Ontario Hydro.[4] In awarding costs the Board stated:

> In the opinion of the Board, views of Ontario Hydro's customers and the public in general must be considered. To this end it is important to encourage active, informed and useful participation so that a wide range of views can be examined in detail. Without such interventions the burden upon the Board in a hearing could be overwhelming.
>
> The Board considers that intervenor participation in phase one of this hearing has been helpful, and it will therefore award costs to those intervenors who have actively participated and have put forward intelligent, well-informed and effective interventions.

The Canadian Courts have implicitly recognized such consideration by withholding costs from the successful party in some public interest situations, but have not articulated the policy reasons for doing so by creating a "private attorneys-general" category as have the American courts. In the Elora Gorge case,[5] for example, the High Court protected losing public interest plaintiffs against costs. In that case, two members of a Conservation Authority alleged that the authority exceeded its jurisdiction by giving up lands over a scenic gorge to the local road authority for the purposes of building a bridge across the Gorge to obviate a local traffic problem.

In the High Court, Mr. Justice Weatherston stated: "I think that the Plaintiffs have done a public service here in bringing this application." His Lordship made no order as to costs against the Plaintiffs, even though they lost their case. However, when the Plaintiffs, appealed and lost the Court of Appeal awarded costs against them, if demanded. In fact, substantial costs were demanded.

In another recent case,[6] a County Court Judge recognized the relative poverty of a losing plaintiff in a landlord and tenant application. His Honour Judge Cornish limited costs of the tenant applicant payable to her landlord to $ 200, in proceedings which consumed eight court days and would normally have amounted to probably over $ 1,000.

In public interest cases, even without the threat of costs, the cost of paying his own lawyer's fees and disbursements is generally sufficient to deter the plaintiff from legal action. Thus, the United States courts have recognized that it is necessary to go further than protecting public interest plaintiffs against awards of costs. They also award costs to them to encourage them to advance the public interest and they have articulated principles to guide this practice. Where a person obtained an injunction under the Civil Rights Act for practices which involved racial, discrimination, he was awarded costs.[7] The U.S. Court stated:

> If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest in invoking the injunctive powers of the federal courts.

Similarly, in an action against the Environmental Protection Agency, applicants were awarded costs:

> When private litigation vindicates a significant public policy, and at the same time, creates a widespread benefit, policy today favours awarding attorney's fees to a party who exists to serve or represent the interests of all those benefited.[8]

As one California court noted, "Exhorting citizens to participate has a hollow sound against the background of the economic realities of litigation."

It should be noted that the contingency fee, which has sometimes been suggested as a partial solution to lack of access to the courts, would be of little or no assistance in the public interest case. Lawyers would not be likely to act on the contingency basis, in which they take most of the risks of financial loss, where there is no likelihood of a large monetary award in which to share.

In the environmental context, the Canadian rule that costs generally follow the event has often been the most serious obstacle to the vindication of environmental rights before the courts. For example, in the Sandbanks case, an innovative case in which the plaintiff unsuccessfully attempted to establish, on the basis of wording in the Provincial Parks Act, that Ontario's provincial parks are held in public trust for the benefit of all the people in Ontario, the claim was dismissed as frivolous and vexatious.[9] Substantial costs were awarded against the plaintiff, a researcher for Pollution Probe who worked on a very small salary. A Defence Fund was raised by environmentalists to pay his costs. In the Elora Gorge case referred to above, costs of the Court of Appeal hearing and of an application for leave to appeal to the Supreme Court of Canada were taxed as approximately $ 14,000. In this case, a lengthy fundraising campaign was undertaken throughout Canada to raise the costs incurred by the plaintiffs.

Although a "defence fund" was raised in each of the above cases, raising of such a fund is difficult, and is the exception rather than the rule. The business community, charitable foundations, the government are unprepared to fund litigation, although they will fund other law reform activities and activities of a charitable nature and of benefit to the general community. Generally, no money is available to indemnify the public interest plaintiff against costs that may be awarded against him.

The virtue of awarding costs to the winner of a court case against the loser is said to be its discouragement of frivolous and vexatious claims. The Canadian Environmental Law Research Foundation recognizes that a defendant could be drained financially fighting a law suit with little merit, and have no means of recovering his costs from a harrassing plaintiff. It is recognized that whatever costs system is used, it must protect the defendant from being put to unnecessary trouble and expense by such a plaintiff. However, there are many ways of discouraging frivolous and vexatious claims. Ontario has a Supreme Court Rule to facilitate early dismissal of such claims as well as a statute, the Vexatious Proceedings Act, to prevent repetition of such actions. Moreover, even if costs were not necessarily to follow the event, judges would still have discretion to award them in such cases.

The current costs rule indiscriminately discourages meritorious as well as frivolous litigation, and it is respectively submitted that the discouragement of meritorious litigation is not a proper policy objective of any rule dealing with costs. Moreover, the present costs system fails to recognize the difference between actions taken to protect purely private interests and actions taken in the public interest. It is unfair to the public interest plaintiff. If it does discourage frivolous and vexatious claims, it does so unevenly. Costs will deter an individual of modest means from litigating a frivolous or vexatious case. They are unlikely to discourage a corporate plaintiff, who by a simple cost-benefit analysis, determines that the cost of launching a frivolous action or an action with little chance of success will be less than the profits reaped from his business activities carried on while the case drags on before the courts.

The Canadian Environmental Law Research Foundation recommends that in cases where the plaintiff has no personal or financial property interest to protect or where the potential financial loss that may be incurred by litigating is greater than the potential financial gain, or where the plaintiff in a private litigation seeks to vindicate a significant public policy and to create a widespread benefit, the court should award costs in favour of such a plaintiff regardless of whether he wins or loses his case, but not against him.

It is respectfully submitted that in cases where intervention or participation has been helpful to a Board or court and has served the public interest, the Board or court should have the power to award costs.

NOTES

1. Report of the Task Force on Legal Aid, Part I, November 1974, Ontario Ministry of the Attorney-General, pp. 99-100.

2. Alyeska Pipeline Service Co. v. Wilderness Society, No. 73-1977 (U.S. May 12, 1977) 5 ELR 20286.

3. Sierra Club v. Lynn, 3 ELR 20664 (W.D. Tex. 1973).

4. Reference re Principles of Power Costing and Rate Making for Use by Ontario Hydro, (1977) 6 CELN 171.

5. Rosenberg et. al. v. Grand River Conservation Authority et. al., (1976) 9 OR (2d) 771 at 780.

6. Re Pajelle Investments Ltd. and Booth (No. 2), (1975) 7 OR (2d) 229 at 239-241.

7. Newman v. Piggie Park Enterprises et. al. (1967) 390 U.S. 400 at 402.

8. Natural Resources Defense Council v. EPA, (1973) 484 f. 2d 1331, headnote.

9. Green v. The Queen in Right of Ontario et. al. [1973] 2 OR 396.