June 13, 2025

Sent via e-mail

Civil Rules Review Working Group
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Re: Civil Rules Review Phase 2 Consultation Paper

We submit these comments on the Civil Rules Review Phase 2 Consultation Paper jointly on behalf of Ecojustice Canada Society and the Canadian Environmental Law Association (**CELA**).

With offices in Toronto and Ottawa, as well as Vancouver, Calgary and Halifax, Ecojustice is Canada's largest environmental law charity. In Ontario, Ecojustice employs 11 lawyers and 1 paralegal at offices in Toronto and Ottawa. Ecojustice is registered as a Civil Society Organization with the Law Society of Ontario, a designation the Law Society created to "make lawyer and paralegal services more accessible."[1] Our licensees provide free legal services in environmental public interest litigation and legal matters. Our lawyers regularly appear before the Divisional Court, the Superior Court of Justice, and the Court of Appeal on behalf of their clients, who include environmental groups, non-profits, individuals, and Indigenous nations and organizations. Our lawyers' clients often cannot afford to bear the expenses associated with litigation conducted by the private bar. Our lawyers litigate public interest environmental law test cases to establish points of law that are of broad importance in the environmental sector.

CELA is a public interest law clinic dedicated to environmental equity, justice, and health. Founded in 1970, CELA is one of the oldest environmental advocates for environmental protection in the country. With funding from Legal Aid Ontario (**LAO**), CELA provides free legal services relating to environmental justice in Ontario, including representing qualifying low-income and vulnerable or disadvantaged communities in litigation. CELA also works on environmental legal education and reform initiatives. CELA exists to ensure that low-income and disadvantaged people have access to environmental justice through the courts and tribunals. On behalf of our clients (i.e., individuals, residents' groups, environmental organizations, and Indigenous communities), CELA lawyers undertake civil actions, judicial review applications, Rule 14.05 applications, interventions, and appeals in Ontario's civil justice system (i.e., Small Claims Court, Superior Court of Justice, Divisional Court, and Ontario Court of Appeal).

We welcome the opportunity to provide these comments on the Phase 2 Consultation Paper. As organizations mandated to increase access to justice in the environmental law field, we believe

[1] Law Society of Ontario, "Civil Society Organizations," online: https://lso.ca/about-lso/initiatives/civil-society-organizations.

that our comments add an important perspective that was missing from the roster of Working Group members.

We agree wholeheartedly with the underlying premise of the Consultation Paper: there is a need for real, meaningful change to increase access to justice and eliminate the maximalist culture of litigation that plagues Ontario's civil justice system. Based on our research and collective professional experience, we offer comments on the proposed reforms to costs rules, applications, and motions practice. We also recommend that any reforms to the *Rules* be accompanied by changes to the Courts' practice directions and data collection practices.

A. The proposed costs rules reforms should be significantly modified to accomplish their goals

The Consultation Report proposes four major reforms to costs rules:

1) Codifying strong presumptions of partial or full indemnity costs to the successful party;
2) Calculating those costs based on the party's actual legal expenses;
3) Significantly expanding the types of conduct that will presumptively trigger full indemnity costs; and
4) Significantly constraining the courts' discretion to depart from those presumptions to cases that meet a new, undefined – but "substantial" – threshold of injustice.[2]

These reforms aim to address two problems: (1) the time and expense of adjudicating costs disputes and (2) the uncertainty and unpredictability generated by the current rules, which have negative impacts on behavioural deterrence and promoting settlement.[3]

We disagree that the proposed reforms will address those problems. On the contrary: they will seriously undermine access to justice while exacerbating those problems, particularly in public interest litigation and public law matters more generally. Costs already present the single most important access to justice barrier our clients face in bringing public interest litigation – a barrier that dictates not how they litigate, but whether they litigate at all. The proposed reforms will augment that barrier exponentially. Many of our clients (not to mention self-represented litigants) would be unable to bear the potential costs exposure under the proposed reforms – if they cannot afford to pay for their own lawyers, they cannot reasonably be expected to pay the other side's actual legal costs. In public interest litigation, this outcome could have devastating

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[2] Ontario Superior Court of Justice and Ministry of the Attorney General, *Civil Rules Review: Phase 2 Consultation Paper* (April 2025), online: https://www.ontariocourts.ca/scj/files/pubs/Civil-Rules-Review-2025-phase-two-EN.pdf at pp 89-91 ["*Consultation Report*"]. The Consultation Report also proposes changes to costs outlines practice (with which we agree) and to costs at Directions Conferences: pp 91-92. We recommend that the costs of attending the initial Directions Conference be borne separately by each party. Given that the proposed reforms will now require parties to attend this Conference in every summary proceeding, even where the parties could have dealt with scheduling matters directly, none of the goals served by a costs regime warrant shifting the costs of this Conference to one party: *Consultation Report* at p 89.

[3] *Consultation Report* at p 88.

effects on the rule of law, creating a justice system that effectively immunizes powerful, well-resourced actors from judicial scrutiny and legal accountability.

The proposed reforms will create unequal behavioural deterrents that incentivize maximalist litigation tactics by well-resourced litigants and chill public interest litigation by exposing litigants to an uncertain and unpredictable risk of exposure to powerful respondents' actual legal costs, including full indemnity costs in a broad range of circumstances. The Court's narrowed discretion to depart from the costs presumptions is not adequate to address these concerns.

To ensure that the costs rules reforms can achieve their goals while increasing access to justice, we recommend that the Working Group propose to amend Rule 57 to create a presumptive one-way costs regime that applies specifically to public interest litigation. Alternatively, we recommend a presumptive no-way costs regime that applies to all judicial review applications and Rule 14.05 applications based on the *Charter* or other constitutional grounds. In the further alternative, and at a minimum, the proposed reforms should codify the Court's existing discretion to depart from the costs presumptions for public interest litigation.

In our view, it is both ironic and unfortunate that while the Phase 2 Consultation Paper repeatedly expresses concern about excessive litigation costs and their consequential impacts on access to justice, the Paper's proposed cost reforms, if implemented, will do little or nothing to alleviate this concern in public interest cases. To the contrary, the above-noted cost reforms will likely entrench (if not exacerbate) the current cost-related barriers to public interest environmental litigation, as discussed below. Accordingly, the Phase 2 Consultation Paper represents a missed opportunity to craft meaningful and progressive cost reforms that have been passed or proposed in other jurisdictions to facilitate access to justice in public interest cases. We therefore trust that this serious omission will be appropriately rectified in the final recommendations of the Working Group.

Our submissions on this issue draw heavily on comments we, and the University of Victoria Environmental Law Centre, submitted to the Federal Court of Appeal and Federal Court Rules Committee in 2015. We have attached those comments for your reference.

1) <u>The proposed reforms will undermine access to justice by incentivizing delays and expense</u>

The proposed reforms must address unequal power dynamics in Ontario's costs regime and reduce the risk and burden of costs to public interest litigants. Since the 1970s, law reform commissions and task forces throughout the Commonwealth have consistently recognized that traditional costs rules pose substantial barriers to public interest litigation and test cases.[4] That

[4] *Incredible Electronics Inc v Canada (Attorney General)* (2006), 80 OR (3d) 723, 2006 CanLII 17939 at paras 60-61, 72, 82 (SCJ) ["*Incredible Electronics*"]; Ontario, Task Force on Legal Aid, *Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974), online: https://dn790007.ca.archive.org/0/items/mag_00000421/mag_00000421.pdf at p 100 ["*Osler Report*"]; Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989), online: https://dn790000.ca.archive.org/0/items/reportonlawofsta00onta/reportonlawofsta00onta.pdf as linked from https://digitalcommons.osgoode.yorku.ca/library_olrc/135/ at pp 137-149 ["*OLRC Report*"]; Australia Law Reform Commission, *Costs Shifting – Who Pays for Litigation?* (Canberra: Commonwealth of Australia, 1995), online:

recognition is consistent with our experience and that of public interest environmental litigators across Canada.[5]

This barrier risks undermining the rule of law, particularly when it deters ordinary citizens and citizen groups from bringing *Charter* challenges or judicial review applications to hold government officials to account. In recommending that the UK adopt a costs regime shielding certain applicants from adverse costs awards in judicial review proceedings, Lord Justice Jackson endorsed the following statement:

> A public law costs regime should promote access to justice. It should be workable and straightforward. It should facilitate the operation of public law scrutiny on the executive, in the public interest. This is the key point. For judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law. It is well-established that judicial review principles 'give effect to the rule of law'…. The facilitation of judicial review is a constitutional imperative.[6]

The same is true in Canada, where the Supreme Court has recognized that access to justice is "fundamental to the rule of law."[7] Because of the critical role that public interest litigation can play in upholding the rule of law, we recommend that access to justice be the primary purpose of a reformed costs regime for public interest litigation.

However, the proposed reforms inappropriately prioritize the compensatory role of costs over all other purposes and this emphasis could undermine access to justice. By codifying presumptions that are linked to a party's actual costs, the proposed reforms depart from decades of jurisprudence holding that "the overall objective in addressing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful party."[8] Under that jurisprudence,

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https://www.austlii.edu.au/cgi-bin/viewdoc/au/other/lawreform/ALRC/1995/75.html#13Heading18 at para 13.8; United Kingdom, the Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationary Office, 2010), online: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf at pp 304, 305, 310-313 ["*Jackson Report*"]; Justice Nicola Pain and Justice Rachel Pepper, "Legal Costs and Considerations in Public Interest Climate Change Litigation," (2019) 30:2 King's LJ 211, online: https://lec.nsw.gov.au/documents/speeches-and-papers/Pepper%20J%2C%20Pain%20J%20-%20Legal%20Costs%20Considerations%20in%20Public%20Interest%20Climate%20Change%20Litigation.pdf ["*Pepper & Pain*"]; Kent Roach, "Judicial Remedies for Climate Change" (2021) 17:1 *Journal of Law & Equality* 105 at para 61.

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

[6] *Jackson Report* at pp 303 (para 2.2) and 310 (para 4.1(iv)).

[7] E.g., *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 39. See also *Driver v wpd Canada Corporation*, 2017 ONSC 5747 at para 5 (per Lederer J, in dissent) (Div Ct) ["*Driver*"]: "As a matter of social policy we want people to engage with government when they are unhappy with, or seek clarification of, decisions that have been made. We detract from that ambition if we too easily tell people they will have to pay costs if they engage but do not succeed…"

[8] *Zesta Engineering Ltd v Cloutier*, 2002 CanLII 25577 at para 4 (Ont CA); *Boucher v Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 at para 26 (Ont CA) ["*Boucher*"]; *Davies v Clarington*

the failure to consider the reasonableness of a costs award can lead to results that are "contrary to the fundamental objective of access to justice."[9] However, the proposed reforms would entrench a system that ignores reasonableness by default and constrains the Court's discretion to award costs that are "fair and reasonable" to a small subset of exceptional cases.[10]

This departure is particularly problematic in public interest litigation, where tying costs to a party's actual legal expenses creates unequal behavioural deterrents. As it is, "the threat of having costs awarded against a losing party operates unequally as a deterrent" in public interest litigation, because it "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."[11] By definition, public interest litigants lack the same personal, proprietary or financial interests that typically motivate private litigants.[12] Moreover, public interest litigation typically involves inherent power imbalances between the parties, as it pits applicants seeking to enforce or obtain clarity about public laws – typically individuals, citizen groups or charitable organizations – against powerful and well-resourced government and, in some cases, corporate actors. In many cases, public interest litigation raises novel issues, the resolution of which will have broad public value. At the same time, the novel nature of these issues makes the outcome difficult to predict for lawyers and parties.

In our experience, our clients are already motivated to proceed quickly and efficiently to the merits of the cases they bring – they do not have the time or resources to waste on unnecessary interlocutory steps. By tying costs to a party's actual legal expenses, the proposed reforms give well-resourced respondents – who typically benefit from delays in such litigation – a green light to engage in maximalist litigation tactics, including over-lawyering, duplicating arguments between multiple respondents, and bringing unnecessary or disproportionate motions, knowing that they are better positioned to absorb the potential costs consequences.

That problem will be further exacerbated if the Working Group establishes "notional" rates for salaried counsel that are lower than the rates charged by private bar lawyers.[13] Because Ecojustice is a Civil Society Organization registered with the Law Society, our lawyers cannot, and do not, charge fees for our services.[14] Our clients would need to rely on the notional rates to recover costs, meaning that respondents would face lower costs exposure than our clients.[15] This creates a windfall situation where respondents can recover significantly higher costs if they win

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(Municipality) et al, 2009 ONCA 722 at para 52 ["*Davies*"]; *Boutis v The Corporation of the County of Norfolk et al*, 2025 ONSC 1841 at para 16.

[9] *Davies* at para 52; *Boucher* at para 37.

[10] *Consultation Report* at pp 90-91: the Court will "have the discretion to depart" from the costs presumptions "and award fair and reasonable costs" based on enumerated factors but "will only be required to consider the requisite factors once a party has established that the application of the Costs Presumptions would result in an injustice…with the "injustice" threshold being a substantial threshold to overcome."

[11] *Osler Report* at p 100.

[12] E.g., *Incredible Electronics* at paras 91-100; *Pepper & Pain* at p 3.

[13] *Consultation Report* at p 89.

[14] Law Society of Ontario, *By-Law 7: Business Entities*, s 51(1).

[15] Including, in some cases, government respondents, who occasionally retain private bar counsel to supplement Ministry of Attorney General lawyers on our clients' matters.

than they have to pay if they lose, further distorting the behavioural deterrent value of costs awards in public interest litigation. It also undermines the access to justice goals of the Civil Society Organization designation.

This same concern applies in relation to CELA's clients who undertake public interest environmental litigation. CELA lawyers are prohibited by statute from charging fees for providing legal aid services.[16] While CELA clients are entitled to receive a favourable cost award if successful,[17] such costs vest in Legal Aid Ontario, not CELA or our clients.[18] If "notional rates" are set for the salaried lawyers at CELA, then respondents in litigation brought by CELA may face lower adverse cost exposure than our low-income, vulnerable or disadvantaged clients.

Expanding the availability of full indemnity costs awards, as recommended by the Working Group, will also inhibit or chill public interest litigation. As noted above, public interest litigation often involves novel issues – ranging from incremental proposed evolution of the common law to the interpretation of new statutory provisions. Because these issues are novel, respondents often seek to strike out pleadings that raise them. By tying the full indemnity costs presumption to ill-defined Representations Rules, including the representation that the claim is warranted by "a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law," we are concerned that the proposed reforms will, at a minimum, incentivize motions to strike on this basis as a litigation tactic. More fundamentally, however, we are concerned that this presumption will deter important public interest test case litigation, including *Charter* litigation, limiting the ability of the common law and the *Charter* to evolve and risking immunizing government actors from judicial scrutiny.

While we agree that clearly frivolous, vexatious, or abusive conduct should be sanctioned in all types of litigation, including public interest litigation, the proposed reforms lack sufficient clarity to achieve this goal. Given the stakes, they will doubtless generate additional litigation about the costs presumptions. To avoid this, we recommend that the proposed reforms clearly define the types of misconduct that will attract full indemnity costs. For example, the Ontario Land Tribunal's costs rules enumerate a non-exhaustive list of the types of unreasonable, frivolous, vexatious and bad faith conduct that might attract costs awards at that Tribunal.[19]

While the proposed reforms would allow the Court to keep a limited discretion to depart from the costs presumptions, they tie that discretion to the vague and undefined concept of "injustice." They further limit the Court's discretion by describing "injustice" as a "substantial threshold" that litigants must overcome. This narrow discretion will not correct the problems outlined above; indeed, given the ambiguity of the term "injustice" and the high stakes for litigants, we expect that this discretion will prompt considerable litigation to define its scope and will result in uncertainty, expense and delay as a result.

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[16] *Legal Aid Services Act, 2020*, S.O. 2020, c 11, ss 8 and 44.
[17] *Ibid*, s 12(1).
[18] *Ibid*, s 12(3).
[19] Ontario Land Tribunal, *Rules of Practice and Procedure*, r 23.

By codifying these presumptions and concurrently limiting the Court's discretion to depart from the costs presumptions, the proposed reforms create a regime that is far more party-driven than court-managed. This is an unexplained and undesirable departure from the Working Group's stated goals throughout the remainder of the Consultation Paper.[20] By tying costs to winning, they will likely incentivize a scorched earth litigation culture – respondents in public interest litigation will be encouraged to pursue every incremental benefit that could contribute to winning, no matter how disproportionate, because the deterrent value of costs will be inherently lower for respondents under this regime. These outcomes will undermine access to justice and the rule of law.

2) The Working Group should propose alternative reforms to costs rules for public interest litigation

The primary objective of costs rules reform should be increasing access to justice, particularly in public interest litigation. To accomplish that objective, we recommend establishing a presumptive one-way costs rule for public interest litigation that shields public interest litigants from adverse cost awards. Alternatively, we recommend establishing a presumptive no-way costs rule for judicial review applications and Rule 14.05 applications based on the *Charter* or the Constitution. At the very least, in the further alternative, we recommend codifying the Court's existing discretion to depart from the costs presumptions in public interest litigation.

Under a presumptive one-way costs rule, public interest litigants would be shielded from adverse costs liability, while preserving their ability to recover costs. At the same time, the Court would retain discretion to depart from the presumption in appropriate circumstances, including where respondents demonstrate that the litigation did not involve issues of public importance or that the public interest litigant conducted the litigation in a frivolous, vexatious or abusive manner.

Since the 1970s, this sort of costs reform has been consistently recognized and recommended for its access to justice and rule of law benefits by law commissions, legal experts and task forces throughout the Commonwealth. For example,

- Justice Osler recommended amending the *Legal Aid Act* to "[cast] 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";[21]
- Raj Anand and Ian G Scott recommended the adoption of a discretionary one-way cost rule for public interest environmental cases;[22]

[20] E.g., *Consultation Paper* at pp 83, 87.
[21] *Osler Report* at p 100.
[22] Raj Anand and Ian G Scott, "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can Bar Rev 81 at 114-119.

- the Ontario Law Reform Commission recommended that in public interest cases courts should not award costs against litigants who meet prescribed public interest criteria absent frivolous, vexatious or abusive conduct;[23]
- in the United Kingdom, Lord Justice Jackson's review of civil litigation costs recommended implementing a one-ways costs rule for all judicial review claims;[24] and
- in the United States, some environmental statutes create one-way cost shifting regimes that allow successful litigants seeking to enforce the law to recover costs while shielding them from costs if they do not succeed.[25]

A presumptive one-way costs rule for public interest cases would help level the playing field, providing certainty and predictability for litigants while incentivizing timely and efficient litigation strategies and increasing access to justice.

We believe that litigants who conduct themselves in a vexatious manner would be unable to demonstrate that their litigation meets the criteria for public interest litigation. The Court has more appropriate tools than costs to govern such litigants, such as vexatious litigant orders and the ability to deny public interest standing.

In the alternative, our organizations would also support a presumptive no-way costs regime for all judicial review applications and Rule 14.05 applications based on the *Charter* or the Constitution. Under such a regime, each party would presumptively bear its own costs. While such an approach does not advance access to justice to the same degree as a one-way costs regime (because, for example, it can still be prohibitively expensive for litigants to pay their own lawyers), such an approach would still lower access barriers when compared to the status quo while providing certainty about costs to parties and disincentivizing, to some degree, some unnecessary or disproportionate litigation tactics (because, for example, respondents could not use the threat of their own costs associated with such tactics to push for settlement). Such reforms would also reflect the reality that private parties are typically bystanders in such proceedings, as the substantive focus of the challenge and the response is government conduct.[26]

Ontario already has experience with such regimes, which exist at the Ontario Land Tribunal (and existed at predecessor tribunals like the Environmental Review Tribunal). In our experience, parties as a rule do not litigate in those venues in a frivolous or vexatious manner, although the Tribunal retains the ability to award costs if they do.

At the very least, the proposed reforms should explicitly codify the Court's well-established existing discretion to depart from the proposed costs presumptions for public interest litigation

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[23] *OLRC Report* at pp 156-164.
[24] *Jackson Report* at pp 310-313.
[25] E.g., Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2012), 39 Advocate Q 197 at 199-200; *OLRC Report* at 160.
[26] E.g., *Driver* at para 7 (per Lederer J, dissenting); *Lancaster v Compliance Audit Committee et al*, 2013 ONSC 7631 at paras 169-170 (SCJ) ["*Lancaster*"].

without the need to clear a substantial new "injustice" threshold.[27] They should also retain existing presumptions that parties intervening as friends of the court should not be subject to or eligible for costs awards, absent vexatious or abusive conduct. This would provide certainty and clarity to all parties (mitigating the uncertainty posed by the ill-defined concept of "injustice") while ensuring that public interest litigants are not shut out of the justice system by punitive costs rules. The failure to, at minimum, retain this discretion would bring Ontario out of step with jurisdictions across the Commonwealth, which create special costs rules for public interest claims. In the environmental law sphere, England and Wales have special rules capping costs in environmental judicial reviews,[28] while Australian courts also regularly award no or reduced costs against unsuccessful environmental public interest claims.[29] Such a failure would also send a deeply concerning message at a time when the rule of law is coming under increasing attack by politicians around the world, including here in Ontario.[30]

B. The proposed application procedure reforms should more clearly explain how they will modify rules governing judicial review applications

The proposed new Presumptive Summary Hearing process will apply to many public law matters, including judicial review applications under the *Judicial Review Procedure Act* and *Charter* or constitutional applications under Rule 14.05. However, the Consultation Paper does not clearly explain whether or how the proposed reforms will modify existing rules governing such applications. For example, it is unclear whether or how the up-front evidence model will apply to such applications.

We propose the following changes to ensure that the proposed reforms appropriately reflect the summary nature of applications and the critical role that such applications play in upholding the rule of law.

1) The Rules should seek to encourage merits hearings in judicial review applications within one year of commencement

The Consultation Paper proposes unclear timelines for matters that proceed by way of summary hearing. On one hand, the proposed goals for the *Rules* include striving for the settlement or final

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[27] E.g., *Incredible Electronics*; *Friends of Toronto Public Cemeteries Inc v Ontario (Public Guardian and Trustee)*, 2020 ONCA 509 at para 18; *Sarnia (City) v River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732 at para 19; *House v Lincoln*, 2015 ONSC 6286 at paras 8-9 (SCJ); *Lancaster* at paras 154-182; *St James' Preservation Society v Toronto (City)*, 2006 CanLII 22806 at paras 12-41 (Ont SCJ), revd on other grounds 2007 ONCA 601.
[28] E.g., UK, Ministry of Justice, Explanatory Memorandum to The Civil Procedure (Amendment) Rules 2017, SI 2017/95, online: https://www.legislation.gov.uk/uksi/2017/95/pdfs/uksiem_20170095_en_001.pdf at paras 7.4, 7.5. However, even these caps can chill public interest litigation depending on how they are applied: Environmental Law Foundation, Friends of the Earth & RSPB, *A Pillar of Justice II: The continuing impact of legislative reform on access to justice in England and Wales under the Aarhus Convention* (June 2023), online: https://elflaw.org/wp-content/uploads/2023/06/A-Pillar-of-Justice_Report.pdf.
[29] E.g., *Bob Brown Foundation v Commonwealth of Australia (No 2)* [2021] FCAFC 20 at paras 6-17.
[30] Dale Smith, "Premier Ford's judicial independence rant draws ire" (6 May 2025), CBA National, online: https://nationalmagazine.ca/en-ca/articles/law/judiciary/2025/premier-ford-s-judicial-independence-rant-draws-ire; "Public Statement by Ontario's three Chief Justices regarding Judicial Independence – April 30, 2025," online: https://www.ontariocourts.ca/scj/public-statement-by-ontarios-three-chief-justices-regarding-judicial-independence/.

resolution of all proceedings within two years of commencement.[31] On the other hand, the overview of the summary hearing process suggests that a summary hearing should occur – but not be finally resolved – within two years of commencement.[32]

In our view, two years to get to hearing is too long for matters proceeding by summary hearing – especially judicial reviews – and will increase delays compared to the status quo. In our experience under the current *Rules*, even complex judicial review applications can be heard – and decided – in 18 months or less. To ensure that the reformed *Rules* avoid unnecessary delay, we recommend that summary hearings for judicial reviews be held no later than one year after commencement.[33] Setting this expectation will also ensure that parties do not bring unnecessary interlocutory motions in summary hearing matters.

We recommend that the proposed reforms also include a default six month time limit for rendering judgment in summary hearing matters, similar to the time limit established for contentious proceedings in Quebec.[34] Codifying such a time limit would help increase access to justice and decrease delays: in public interest litigation, delays in judgment can undermine the rule of law by allowing respondents to continue infringing rights, or to avoid accountability by mooting the underlying dispute, which can reflect poorly on the administration of justice. Codifying a default time limit would increase certainty for parties and signal to the public that all participants in the justice system are doing their part to minimize delays.

Finally, government respondents in public interest litigation hold disproportionate powers to moot or otherwise neuter litigation by, for example, introducing retroactive legislative amendments.[35] The proposed costs rules reforms do not account for such situations, and the current *Rules* create a presumption that a party abandoning an application must pay costs.[36] To incentivize the orderly settlement of such proceedings, the *Rules* should be amended to create a presumption that the respondent pay costs to applicants who are forced to abandon in such circumstances or, alternatively, that the parties bear their own costs.[37]

2) <u>The current, unworkable timelines governing judicial review applications should be corrected</u>

The Consultation Paper proposes that parties attend an initial Directions Conference in all summary hearing matters to address litigation scheduling, among other issues. To simplify scheduling and minimize associated delays and costs, we recommend that the current scheduling rules for judicial review applications be amended.

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[31] *Consultation Report* at p 18.
[32] *Consultation Report* at p 11.
[33] We acknowledge that some summary hearing matters, such as Rule 14.05 Charter applications, may be significantly more complex and might appropriately remain on the two year timeline.
[34] *Code of Civil Procedure*, CQLR c C-25.01, s 324. The Court retains some discretion to depart from these timelines.
[35] E.g., *Greenpeace Canada v Minister of the Environment (Ontario)*, 2019 ONSC 5629 (Div Ct) ["*Greenpeace*"].
[36] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 38.08(3) ["*Rules*"].
[37] See also, e.g., *Jackson Report* at p 313 (paras 4.13, 5.1).

In our view, the current rules do not work well or efficiently. They do not permit the parties, particularly applicants, to know the case they must meet, which unnecessarily complicates proceedings. For example, they require a respondent to serve and file its application record after the applicant files its factum, meaning that the applicant has no opportunity to respond to any affidavit evidence contained in the responding record.[38] Similarly, the Rules require the applicant to file a list of relevant transcripts with its application record before the applicant has a chance to cross-examine responding affiants.[39] In practice, parties must negotiate agreements or seek case management to address these issues, increasing delays and costs. In our experience, parties to judicial review applications typically end up following a process similar to that set out in Part 5 of the *Federal Courts Rules*.[40] Amending the *Rules* to require such a process by default could eliminate the uncertainty, costs and delays caused by the current *Rules*.

Likewise, in cases where the respondent must deliver a record of proceedings under the *Judicial Review Procedure Act*, although there is a requirement to deliver the record "forthwith" there is neither a defined timeline that fits within the timelines for exchanging materials under the *Rules* nor any clear process for resolving disputes over the requirement for and scope of the record - which often results in delay.[41] In order to exchange other materials in an efficient and proportionate manner, parties need to know whether there will be a record and, if so, what is in it. These issues are also addressed adequately in part 5 of the *Federal Courts Rules*.[42]

To address these problems, we recommend that the Rules and the *Judicial Review Procedure Act* be amended to impose clear, workable default timelines for the exchange of materials. Those timelines could be modelled on the *Federal Courts Rules*,[43] such that the default steps could be:

Step	**Timeline**
File notice of claim	30 days after decision, unless extended by leave or another Act provides otherwise (JRPA, s 5(1))
Respondent files notice of appearance	10 days after notice of claim
Respondent serves and files record of proceedings, where applicable	20 days after notice of claim (*would require amendment to JRPA, s 10)
Applicant serves affidavits	30 days after notice of claim or record of proceedings, as the case may be

[38] *Rules*, r 68.04(4).
[39] *Rules*, r 68.04(1), (2)(d), (4), (5)(b).
[40] *Federal Courts Rules*, SOR/98-106, rr 300-319.
[41] *Judicial Review Procedure Act*, RSO 1990, c J.1, s 10, which requires the respondent to file the record of proceedings "forthwith."
[42] *Federal Courts Rules*, rr 317-318.
[43] *Federal Courts Rules*, rr 301-314.

Respondent serves affidavits	30 days after applicant's affidavits
Cross-examinations, if any	20 days after respondent's affidavits
Applicant serves and files application record, factum, and certificate of perfection	30 days after cross-examinations
Respondent serves and files application record and factum	30 days applicant's application record

While this timetable could be modified at the Directions Conference, establishing workable default rules would simplify the Directions Conference and provide a baseline that encourages the complete exchange of materials within six months, leaving ample time to schedule a hearing within the proposed one year time limit and appropriately reflecting the intended summary nature of such proceedings. It would also ensure that all parties know the case they must meet at an early stage of the proceedings, consistent with the Working Group's proposal for an up-front evidence model in civil actions.[44]

3) If the proposed PLP requirement expands to applications for judicial review, the limitation period for bringing such applications should be extended

While the Consultation Paper does not propose to immediately require parties to follow Pre-Litigation Protocols (**PLPs**) in applications for judicial review, parties must do so in the UK.[45] Given the constitutionally guaranteed nature of judicial review, we urge the Working Group to exercise caution before considering introducing PLPs in judicial reviews in Ontario. In our view, any introduction of PLPs in judicial reviews should be accompanied by a corresponding extension of the default limitation period under the *Judicial Review Procedure Act*.[46]

C. The proposed motions practice reforms should also eliminate duplication between interlocutory motions and arguments revived at the merits determination stage

We agree with the Consultation Paper's observations about the need to curb current motions practice.[47] The expenses and delays associated with maximalist motions practice can be particularly harmful in public interest litigation, where litigants seeking to hold respondents accountable to the law already face power and resource imbalances. In this context, justice delayed can also often be justice denied, as delays create opportunities for respondents, including the government, to render moot underlying disputes and limit judicial scrutiny of their actions.

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[44] We also encourage the Working Group to consider whether it would be appropriate to require respondents to set out the basis for their opposition to the claim in a more substantive notice of appearance.
[45] UK Ministry of Justice, "Pre-Action Protocol for Judicial Review," online: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv.
[46] *Judicial Review Procedure Act*, RSO 1990, c J.1, s 5(1). The Working Group proposed extending limitation periods for actions it currently proposes to subject to PLPs: *Consultation Report* at p 22.
[47] *Consultation Report* at pp 53-54.

For example, in a recent constitutional challenge brought by litigants who were granted public interest standing, upon service of the Notice of Application, the Crown agreed to refrain from implementing the impugned legislative provision until a particular date. Upon attending Civil Practice Court, the earliest available hearing date was five weeks beyond that date. Despite the judge's urging, the Crown refused to extend its undertaking, necessitating an urgent injunction motion. While the Crown was successful in resisting the injunction for the period until the hearing date and without prejudice to the applicants making a request for further injunctive relief to the application judge, it took no steps to implement the provision during that period of time.[48]

On the return of the application, the judge invited further submissions on the question of injunctive relief and granted the applicants' injunction until the release of his decision. The Crown has since (i) brought a motion for leave to appeal the injunction order; (ii) sought a stay of the injunction order; and (iii) passed legislative amendments to the impugned legislative provision.

In short, the Crown forced public interest litigants to bring an unnecessary injunction motion, and, when it did not prevail, has brought two further motions in respect of it. This is an example of the kind of conduct the *Rules* ought to deter, given the burdens it creates for litigants and for the judicial system.

Our above recommendations about summary hearing timelines will, if implemented, significantly curtail unnecessary interlocutory motions in summary hearings by limiting the time available to bring and determine such motions. In addition, we recommend further changes to minimize the delays caused by certain interlocutory motions in public interest litigation proceeding by summary hearing.

In our experience, public interest litigants often face motions to strike their proceedings as moot or as disclosing no reasonable cause of action. While in some cases, such motions may appropriately increase access to justice by weeding out unmeritorious claims or streamlining evidence, in our experience respondents often use such motions to get "two kicks at the can," as they repackage the same arguments at the merits hearing, which causes delay.[49] Currently, respondents in public interest litigation have little incentive not to bring such motions, even where they are unlikely to meet the high standard for striking a proceeding, as they are typically better resourced than applicants and stand to benefit from delay.

The Working Group recognized a similar problem with respect to failed summary judgment motions, which can cause significant delay and expense without resolving an issue.[50] To address that problem, the Working Group proposes to eliminate failed summary judgment motions by

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[48] *Cycle Toronto et al v Attorney General of Ontario et al*, 2025 ONSC 2424 at paras 36-37.
[49] See, e.g., *Greenpeace* at paras 22-27 (per Corbett J, dissenting but not on this point; see also para 104 per Myers J), referencing *2471256 Canada Inc (cob Greenpeace Canada) v Ontario (Minister of the Environment)*, 2019 ONSC 670 (Div Ct).
[50] *Consultation Report* at pp 51-52.

enabling judges to render final decisions at summary hearings. The Working Group has also proposed streamlining the rules governing pleadings motions.[51]

A slightly different solution is needed to curb motions practice in public interest litigation, which typically already proceeds by way of summary hearing. In our view, the Working Group should recommend the following changes for public interest litigation:

- As a default, require that pleadings issues be dealt with at the merits hearing except in the clearest cases, consistent with the practice of the Federal Courts;[52]
- In those exceptional clearest cases, require respondents to raise any motion to strike pleadings, including by filing the necessary Notice of Relief and Directions Conference Submission, at the initial Directions Conference, so that the schedule for the matter can accommodate the motion within the time limit for getting to the merits hearing;[53]
- Eliminate the moving party's right of appeal from the resulting Motions Order should its motion fail, while preserving an appeal for the applicant should the motion succeed, recognizing that many arguments raised at the preliminary stage are duplicated at the merits hearing in any event; and
- If the Working Group retains the proposed costs presumptions, deny unsuccessful moving parties the ability to recover costs for any step of the proceeding, absent vexatious or abusive conduct by another party, to encourage parties to bring preliminary motions only in the clearest of cases and to minimize the value of preliminary motions as a litigation tactic to drain the resources of public interest litigants.

D. The proposed reforms should be accompanied by changes to the Courts' practice

If implemented, the proposed reforms will require the Courts to update existing practice directions. Those practice directions are unnecessarily complex, in many cases requiring litigants to review multiple documents to determine how to proceed. This can pose a barrier to access to justice. We encourage the Working Group to recommend that the Court review all of its practice directions with a view to streamlining and simplifying them. While we appreciate that there are regional differences within the Ontario courts, we note that the Federal Courts – which sit across all regions of the country – operate under streamlined, consolidated practice directions. We see no reason the Ontario courts cannot do the same.

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[51] *Consultation Report* at pp 61-64.
[52] E.g., *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 at paras 47-48; *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13.
[53] This would be consistent with the summary nature of applications and would ensure that respondents do not "frustrate the Court's obligation to resolve applications expeditiously, summarily, and "without delay"": e.g., *Tait v Canada (Royal Canadian Mounted Police)*, 2024 FC 217 at para 28. While *Tait* is a Federal Court decision, those principles also find support in the *Rules* (e.g., r 1.04(1)) and the Working Group's mandate.

Finally, we note that The Advocates' Society has published a report about the need for better court data.[54] We encourage the Working Group to recommend that the Court and the government begin collecting this data, which will be invaluable in evaluating the impact of the changes that result from the Civil Rules Review.

We trust that our analysis and recommendations will be duly considered by the Working Group, and please contact the undersigned if you have any questions or require further information about this joint submission.

Sincerely,

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[54] The Advocates' Society. *Key Metrics: Unlocking the Power of Court Data to Transform the Justice System* (2025), online: https://advocates.ca/Common/Uploaded%20files/advocacy/courtdata/TAS_Key_Metrics_Unlocking_the_Power_of_Court_Data_Mar_2025.pdf.

COSTS AND ACCESS TO JUSTICE IN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

SUBMISSIONS TO THE
FEDERAL COURT OF APPEAL AND FEDERAL COURT
RULES COMMITTEE

NOVEMBER 23, 2015

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

ecojustice

Environmental Law Centre
UNIVERSITY OF VICTORIA

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COSTS AND ACCESS TO JUSTICE IN PUBLIC INTEREST ENVIRONMENTAL LITIGATION

PART I. INTRODUCTION

A. Who We Are

We are public interest organizations that provide *pro bono* legal services to citizens and citizen groups in public interest environmental law proceedings.

1) Environmental Law Centre

The Environmental Law Centre ("ELC") is a non-profit society that operates the ELC Clinic at the University of Victoria, Faculty of Law. The ELC Clinic is Canada's first, and largest, curricular public interest environmental law clinic. Committed to scientific integrity in environmental decision-making, the ELC works with First Nations, environmental non-profits and community groups to protect the environment through legal education and outreach, law reform, and advocacy before various tribunals and courts. For over twenty years, the ELC has provided free legal services to its clients, enabling them to access the justice system in ways that would not otherwise be possible. The ELC has a longstanding interest in costs law reform and access to justice that it has advanced through law reform efforts, scholarship, and legal advocacy including appearing in its own name as an intervenor in the Supreme Court of Canada to make submissions on costs and public interest litigation.[1]

2) Ecojustice Canada

Ecojustice Canada ("Ecojustice") is a national non-profit charity making the case for a better Earth. For the last twenty five years, we have provided legal services to community and environmental groups and individuals through funding legal, scientific, and support services. Our practice is focused on litigation of public interest environmental law test cases to establish points of law that are of broad importance in the environmental sector. These cases are also public interest cases in that we do not usually represent parties who have a substantial private interest in the issue. We also have an access to justice mandate wherein if clients have the means to secure private bar counsel we sometimes do not represent them. Our model is to bring a small number of impactful cases. Legal services are provided on a *pro bono* basis, but clients of our lawyers are billed at-cost for disbursements. Adverse costs awards are sought to compensate Ecojustice for funding legal services and for reimbursing client disbursements. No-costs agreements are frequently negotiated with government respondents. However, due to the test-case nature of our practice, adverse costs awards play a relatively minor role in funding our legal services. The bulk of our funding comes not from such awards, but from charitable donors. Likewise, our clients rely primarily on donors to fund their disbursement costs.

[1] In 2007, the ELC intervened before the Supreme Court of Canada (with Sierra Legal Defence Fund, now Ecojustice) to make submissions on costs in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.

3) Canadian Environmental Law Association

The Canadian Environmental Law Association ("CELA") is a public interest law group founded in 1970 for the purposes of using and improving laws to protect the environment and human health, particularly in relation to vulnerable or low-income communities. CELA is funded by Legal Aid Ontario as a specialty clinic, and CELA lawyers represent individuals, citizens' groups, and First Nations in courts and before tribunals on various environmental matters. CELA clients are responsible for paying disbursements incurred by CELA on their behalf, and for paying adverse cost awards, if ordered. CELA's legal services are provided to clients without charge, but CELA lawyers may seek costs on behalf of clients, and such costs, if awarded, vest in Legal Aid Ontario. CELA has been involved in environmental proceedings in the Federal Court and Federal Court of Appeal, both as counsel of record and as a litigant in its own name.

B. Purpose of these Submissions

The purpose of these submissions is to provide the Federal Court of Appeal and Federal Court Rules Committee ("Rules Committee") with our responses and comments to the *Review of the Rules on Costs Discussion Paper* dated October 5, 2015 ("Discussion Paper").

We will focus our submissions on portions of the Discussion Paper that are relevant to public interest environmental litigation based on our research and collective professional experience. Where we speak to "public interest litigation" in these submissions, we do so from our points of view as public interest environmental lawyers.

Our submissions will be divided into the following parts. In Part II, we will discuss why access to justice should be the overarching purpose served by costs awards in public interest litigation. These submissions address questions 1 to 3 in the Discussion Paper. In Part III, we will discuss various reform proposals that address approaches to costs in the Federal Court of Appeal and Federal Court ("Federal Courts"). These submissions generally address questions 5 to 9 in the Discussion Paper. In Part IV, we summarize our key recommendations to the Rules Committee.

PART II. ACCESS TO JUSTICE IN PUBLIC INTEREST LITIGATION

The Rules Committee in the Discussion Paper asks the following questions:

1. *In your view, what are the purposes served by costs awards?*
2. *Do you agree that indemnification, discouraging disproportionate or otherwise abusive litigation behaviour, encouraging settlement and ensuring access to justice are proper purposes?*
3. *Should any of those purposes be prioritized?*

We agree with the Rules Committee that, generally speaking, the four purposes served by costs awards are indemnification, encouraging settlement, discouraging frivolous suits and abusive litigation conduct, and access to justice. We submit, however, that in the context of public interest environmental litigation, access to justice should be the overarching purpose served by

costs awards. This conclusion flows from a consideration of the unique characteristics of public interest litigation, and the importance of ensuring that costs rules are alive to the distinctions between public interest litigation and private litigation.

Bearing in the mind the differences between these two types of litigation is important for developing an approach to costs that is appropriate in the context of public interest environmental litigation. Many of the principles and values that inform costs law reflect the imperatives and dynamics of private litigation. It should not be assumed that these same principles and values apply equally (or at all) in public interest litigation.

A. Discouraging Frivolous Suits

Of the four listed purposes served by costs awards, discouraging frivolous suits and abusive litigation conduct is the least compelling. There is little or no evidence to suggest that this is a real problem for the judicial system.[2] As Justice Cromwell has recently observed, in a leading Supreme Court of Canada standing case, concerns about preventing a flood of lawsuits brought by "busybodies" can sometimes be overstated:

> Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 Harv. L. Rev. 645, at p. 674.[3]

In fact, as we will address below, a far more compelling concern is that application of the common law preference that costs should follow the event will deter the bringing of meritorious cases that would advance the public interest.

B. Encouraging Settlement

Although the prospect of adverse costs presents an initial barrier to launching a public interest environmental case, it is not an important factor in encouraging settlement of public interest cases. This is particularly so in the context of judicial review applications, which is the primary form of legal proceeding commenced by our respective clients before the Federal Courts. The weakness of costs as an incentive to settle in public interest cases is a function of the difference between private and public interest litigation.

In private civil litigation, litigants seek to vindicate or defend against a private right that is often amenable to monetization (*e.g.* a property or contractual right, or a right to damages due to a tort or nuisance) or pertains to a private good (*e.g.* real property, chattel, or intangible property such as a patent or a licence). Private interest litigants tend to have a real, often economic, stake in

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[2] See Raj Anand and Ian G. Scott, QC, "Financing Public Participation in Environmental Decision-Making" (1982) 60 Can. Bar Rev. 81 at 86-87.

[3] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 at para. 28.

proceeding with—and defending against—these types of civil litigation. In these circumstances, parties across the *lis* can come to a mutually satisfactory and beneficial position by agreeing on some monetary amount for settlement.

In contrast, public interest litigants typically seek to assert the vindication of a public right or the enforcement of a Crown obligation that is often resistant to monetization (*e.g.* a *Charter* right for the former, or a duty to protect a listed species under the *Species at Risk Act* for the latter) or that targets a subject which is a common or public good (*e.g.* clean air or water). While litigants who bring public interest lawsuits may not always be devoid of private interest motives, private motives rarely justify bringing the claim in an economic sense. Furthermore, public interest litigants are driven by broader issues of public importance that transcend the immediate interests of the parties to the *lis*. In these circumstances, in our experience, settlement is rarely a realistic outcome.

Moreover, in public interest cases, opportunities for settlement are not common as settlement would often would require government actors to change administrative practices or admit to unlawful practices. In most cases (except those where the litigants lacked a procedural opportunity to do so), public interest litigation is preceded with a written request or warning that, if acted upon by the respondents, would avoid the need for litigation *ab initio*, or would result in settlement discussions at an early stage of the litigation. Even though public interest environmental organizations lack deep pockets and are greatly concerned about the potential for adverse costs, opportunities to resolve such issues without a hearing are truly very rare. In the environmental context, the respondents in judicial review applications are typically government or industry parties with deep pockets who are unmotivated to settle by the prospect of a potential adverse cost award. We would note anecdotally that settlement of both public and private interest environmental cases is in fact far more common in the United States where there are no costs, and more frequent successful litigation of these issues. This demonstrates that, where public interest litigants have settlement options available to them, they do take advantage of those opportunities, even without the threat of adverse costs. However, it makes little sense to penalize litigants through adverse costs where settlement is not a realistic option.

Lastly, it is important for the Federal Courts costs regime to recognize that environmental organizations (as well as other public interest organizations) advocate to persuade elected politicians in the legislature to enact laws that protect the public good. The proper interpretation and application or implementation of the requirements of these laws is therefore of utmost importance to public interest litigants. In our experience, the vast majority of individuals and organizations who bring environmental cases on such issues as clean air or water or endangered species are genuinely motivated by the broader legal, governance, environmental, and interpretive principles at issue and not only the narrow *lis* between the parties. Crucially, we note that, as a result of their experience in advocacy on issues related to the *lis*, the vast majority of such litigants are granted public interest standing.

C. Indemnification

The main rationale supporting indemnification as a purpose served by costs awards is compensation.[4] This is a "fault-based" rationale that aims to compensate the successful party for its costs because it has been wronged at the hands of the unsuccessful party. Alternatively, indemnification is justified as "spoils" to compensate the victor for the legal expenses that it incurred to vindicate or defend its legal rights in the courts. There are two main reasons why this rationale does not apply in public interest litigation, particularly where the public interest litigant is unsuccessful. Firstly, unlike in private civil litigation, unsuccessful public interest litigants are usually not at "fault". They seek to vindicate a public right to hold government to account in accordance with the rule of law. That they were unsuccessful in their claim does not mean that they did something wrong that should be punished by a costs award. Secondly, an unsuccessful public interest litigant should not be required to compensate the successful government party because such litigation accrues public benefit (*e.g.* clarifying the interpretation or application of an environmental statute), regardless of the outcome of the proceeding. Therefore, in our view, the government party should generally bear its own costs, and its expenses ought to be paid for by the public purse.

Intriguingly, it should be noted that government respondents are becoming more amenable to offering public interest litigants no-way or one-way costs settlement agreements, perhaps in response to developments in the public interest costs jurisprudence. However, this occurs inconsistently and cannot be relied on as an access to justice mechanism. The fact that some government respondents, who would themselves be entitled to costs, have recognized these alternatives to be appropriate arrangements more rapidly than the courts speaks to the strong need for reform in the rules surrounding costs awards.

Indemnification is also a weak rationale for awarding costs against public interest litigants in favour of private respondents in judicial review applications. Such costs awards undermine, if not obviate, the access to justice benefits of a costs regime in public interest litigation. Private respondents are often characterized in costs decisions as innocent bystanders, who have been forced into the litigation as the result of actions taken by public interest litigants. In our experience, this characterization is often misleading and inaccurate.[5] There is no doubt that the civil rules require such respondents to be named where they are "directly affected". But this does not mean they should be therefore endowed with an automatic right to be indemnified should they choose to defend, in concert with the government party, litigation brought by public interest litigants that is ultimately unsuccessful.

Indeed, the involvement of private respondents in litigation of this kind is not always constructive or helpful. Private respondents often participate in the litigation to "bootstrap" the reasons provided by the public authority in its alleged legal error. Moreover, such respondents can impede settlement both by resisting changes to administrative decision-making and by

[4] Chris Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 UBC L. Rev. 303 at 309-312.

[5] See, generally, the discussion of this issue by Perell J. in *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723, 2006 CanLII 17939 at paras. 106-110 (Ont. Sup. Ct. J.) [*Incredible Electronics*].

demanding large adverse costs or damages. For example, private respondents have been known to threaten the governmental authority (against whom a public interest suit has been brought), with litigation or political consequences if the authority relents and change the practices at issue in the suit.

In short, it is far from self evident that a private respondent that chooses to align itself with and lend support to a governmental decision being challenged by a public interest litigant should be entitled to rely on the indemnification rationale for costs at the conclusion of the litigation. In these circumstances, courts should look critically at private costs claims advanced on an indemnity footing. First, as a general rule, we would argue that courts should scrutinize carefully the appropriate ambit of involvement of a private respondent in a judicial review when that party subsequently seeks its costs against an unsuccessful public interest litigant. In most cases, this involvement should be limited to providing context or at most a materially different legal argument that is needed to protect its own interests in the litigation. Where the private respondent has "taken on" the arguments of the public authority, and incurs large costs in so doing, as opposed to playing a more minimal role in addressing issues specific to its own interest, this should be a factor weighing heavily against indemnification. Second, courts should be concerned to protect public interest litigants against the "piling-on" effect where the "right" the private litigant is seeking to defend takes the form of a grant of entitlement to use a public resource.[6] Thus, where a private respondent has elected to participate in the litigation, it should generally bear its own costs as the direct consequence of its self-imposed decision to participate.

D. Access to Justice

The final purpose served by costs awards is access to justice—a principle and purpose that has gained much attention and importance in legal discourse. As stated by McLachlin C.J., writing for the majority of the Supreme Court of Canada, "access to justice is fundamental to the rule of law".[7] The Supreme Court of Canada has also held that access to justice is an important consideration to the application of costs rules, particularly in the context of public interest litigation.[8]

Notably, a survey of public interest environmental litigators in Canada concluded that the spectre of an adverse costs award was the most formidable access to justice barrier confronting their litigation clients.[9] This was broadly regarded as being a function of a variety of factors, including the potential that their prospective clients could be liable for multiple sets of costs for various arms of government as well as private project proponents.

Other jurisdictions have recognized the problem that traditional party-and-party costs rules pose to access to justice. The Ontario Law Reform Commission in its 1989 *Report on the Law of*

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[6] *Ibid*.
[7] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 39.
[8] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at paras. 27-30.
[9] Chris Tollefson, "Costs and the Public Interest Litigant: *Okanagan Indian Band* and Beyond" (2006) 19 Can. J. Admin. L. & Prac. 39 at 49. This finding is consistent with our own experiences and observations as public interest environmental law practitioners.

Standing stated that the prevailing costs rules in Ontario superior courts posed a "formidable deterrent" to litigation that seek to enforce public rights.[10] Similarly, the Australian Law Reform Commission in its 1995 report stated that the "costs indemnity rule" had a deterrent effect on public interest litigation and test cases.[11] Similar findings are contained in Lord Justice Jackson's landmark 2010 report on civil litigation costs and access to justice in the United Kingdom.[12]

A key reason why economic barriers to justice for public interest litigation should be a concern is that such cases can often confer important social benefits as well as benefitting the operation of our justice system.[13] Particularly in the context of judicial review, the ability for ordinary citizens and citizen groups to bring judicial review applications in order to hold government officials to account is an invaluable tool for ensuring that the rule of law is upheld. As Jackson L.J. quoted in his report:

> A public law costs regime should promote access to justice. It should be workable and straightforward. It should facilitate the operation of public law scrutiny on the executive, in the public interest. This is the key point. For judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law. It is well-established that judicial review principles 'give effect to the rule of law'…. The facilitation of judicial review is a constitutional imperative.[14]

Due to the societal benefits that public interest litigation can bring and the important role that such litigation can play in upholding the rule of law, we recommend that access to justice should be the overriding purpose when considering approaches to costs awards at the Federal Courts.

PART III. ALTERNATIVE COSTS REFORM PROPOSALS

The Rules Committee in the Discussion Paper asks the following questions:

5. *What areas of law should be treated differently (examples might include: labour law, human rights law or prisoners' rights)?*
6. *Should actions and applications for judicial review be treated differently?*
7. *What are the advantages and disadvantages of one-way fee-shifting? In what classes of cases would it be appropriate or not?*
8. *What are the advantages and disadvantages of a "no costs" approach?*
9. *In what classes of cases would it be appropriate or not?*

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[10] Ontario, Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989) at 137ff [OLRC Report].

[11] Australia, Australia Law Reform Commission, *Costs Shifting – Who Pays for Litigation?* (Canberra: Commonwealth of Australia, 1995) at para. 13.8 [ALRC Report].

[12] United Kingdom, the Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (London: The Stationary Office, 2010) at 304 [Lord Jackson Report].

[13] See Anand & Scott (1982), *supra* note 2; Tollefson (1995), *supra* note 4 at 312-314; ALRC Report (1995), *supra* note 12 at para. 13.6; Martin Twigg, "Costs Immunity: Banishing the 'Bane' of Costs from Public Interest Litigation" (2013) 36 Dalhousie L.J. 193 at 196.

[14] Lord Jackson Report (2010), *supra* note 12 at 303.

As a preliminary observation, we note that question 5 does not make reference to environmental law as one of the examples of areas of law that may be treated differently by costs rules, even though the *Federal Courts Act* confers upon the Federal Courts exclusive supervisory jurisdiction over bodies and persons exercising powers under federal environmental statutes such as the *Canadian Environmental Assessment Act, 2012*, the *Species at Risk Act*, the *National Energy Board Act*, the *Canadian Environmental Protection Act*, and others.[15]

Not only is environmental law a distinct practice area subject to Federal Court oversight, we would argue that it is a practice area with distinct dynamics and features. Based on our experience as practitioners in this field, the overarching concern that costs rules reform must address is the negative impact on access to justice posed by the spectre of adverse costs awards.

With this objective at the forefront, the submissions that follow address three ways that, in our view, the harmful effects that this spectre presents can be removed or alleviated. These potential avenues for reform are: 1) clarifying costs rules in the Federal Court of Appeal and Federal Court for public interest cases; 2) enhancing the availability of protective costs orders for public interest litigants, and 3) establishing a presumptive default one-way or no-way costs rule for judicial review applications.

A. Clarifying Costs Rules

Prior to the coming into force of the current *Federal Courts Rules* in 1998, former Rule 1618 expressly provided that all parties would bear their own costs in all judicial review applications unless the Court otherwise orders.[16] The current *Federal Courts Rules* now provide the Federal Courts with full discretionary power over costs.[17] With the new *Rules*, there are no longer legislated presumptions as to costs rules except in class actions[18] and proceedings under the *Citizenship, Immigration and Refugee Protection Rules*,[19] where the presumption is a no-cost regime. Surprisingly, the Discussion Paper states that "the practice of the Federal Court and Federal Court of Appeal is to the effect that two-way fee shifting with partial indemnity is the default rule in all cases".[20] We are unaware of any current enactment or practice directions that would justify this presumption of two-way costs shifting at the Federal Courts.

The discrepancy between the *Federal Courts Rules* and the Discussion Paper with regards to the existence of a default costs rule illustrates the uncertainty that currently exists regarding the potential for adverse costs awards at the Federal Courts. This uncertainty is compounded by inconsistency and unpredictability in the Federal Courts' jurisprudence dealing with the adverse costs liability of public interest environmental litigants. In a small handful of cases, the Federal Court has, we would acknowledge, offered transparent and instructive accounts of the applicable

[15] *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18, 18.1 & 28.
[16] Tollefson (1995), *supra* note 4 at 313; Chris Tollefson, Darlene Gilliland & Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 Can. Bar Rev. 473 at 489.
[17] *Federal Courts Rules*, SOR/98-106, R. 400.
[18] *Ibid.*, R. 334.39.
[19] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, R. 22.
[20] Discussion Paper at 5.

principles. Notable in this regard are *Harris v Canada*[21], and *McEwing v Canada*[22], discussed below. Frequently, however, costs decisions in public interest cases are made without the benefit of counsel submissions on the applicable law. Moreover, where reasons are offered, these tend to be sparse.

In *Harris v. Canada*, the Federal Court confirmed that Rule 400(3)(h) provided that the court may consider the public interest in having the proceeding litigated when determining costs. That case involved tax litigation by Mr. Harris, a taxpayer who alleged that the Minister of Natural Revenue had acted illegally by bestowing a special benefit upon certain taxpayers.[23] The action was dismissed. In considering a claim for costs by the unsuccessful Mr. Harris, the court held that Rule 400(3)(h) was the most significant factor and adopted the criteria from the Ontario Law Reform Commission for applying an amended costs regime in public interest litigation:

(a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
(b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
(c) The issues have not been previously determined by a court in a proceeding against the same defendant.
(d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
(e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.[24]

Since *Harris*, the caselaw on costs in public interest cases, particularly dealing with the adverse costs liability of public interest litigants has evolved significantly. The development of this caselaw is reprised in *McEwing v. Canada (Attorney General)*. [25] In *McEwing*, the court was called upon to grapple with the appropriate costs award against a set of unsuccessful public interest applicants who had challenged election results that they believed were tainted by fraud. In his reasons, Mosley J. characterized the issue as "a matter of high public interest and analogous to *Charter* litigation".[26] After recounting the positions of the parties, Mosley J. canvassed the recommendations of the Ontario Law Reform Commission's 1989 *Report on the Law of Standing* and leading authorities on costs awards in public interest cases, including *Incredible Electronics Inc. v. Canada (Attorney General)*, [2006] 80 OR (3d) 723; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71; *Victoria (City) v. Adams*, 2009 BCCA 563; and *Harris v. Canada*, [2002] 2 FCR 484.

Justice Mosley concluded that the case fell squarely within the criteria endorsed by the Federal Court in *Harris*.[27] He also agreed with the applicants that "to impose any significant measure of costs against them would have a chilling effect" on similar types of public interest litigation in

[21] *Harris v. Canada* (2001), [2002] 2 FCR 484, 2001 FCT 1408 (CanLII) [*Harris*].
[22] *McEwing v. Canada (Attorney General)*, 2013 FC 953 [*McEwing*].
[23] *Harris*, *supra* note 21 at paras 213-226.
[24] *Ibid.* at paras. 222-223.
[25] *McEwing*, *supra* note 22.
[26] *Ibid.* at para. 4.
[27] *Ibid*. at para. 18.

the future.[28] As a result, Mosley J. awarded only a modest amount of $7,000 plus disbursements of $6,206 against the unsuccessful applicants (compared to the approximately $120,000 originally sought by the successful respondents).[29]

McEwing is an encouraging and important case. Not only does it articulate the basis for its decision on costs in a transparent and thorough way that builds on *Harris* and other relevant authorities, it does so in a manner that is mindful of broader contextual factors that are relevant when making decisions of this kind including the evolving jurisprudential landscape on costs awards and access to justice.

Despite *Harris* and *McEwing*, practice in the Federal Courts in relation to costs in public interest cases has not been particularly predictable or consistent. Among other things, this has meant that the significance and weight to be given to Rule 400(3)(h) remains unclear, particularly where a party has already met the test for public interest standing.

We now offer some observations that more specifically address the Federal Courts' jurisprudence dealing with potential adverse costs liability in environmental cases. For this purpose, we consider a representative sampling of recent cases that fall into this description. This sampling underscores the unpredictable, inconsistent, and often opaque nature of the relevant caselaw.

On the one hand, there have been a significant number of cases in recent years in which the Federal Courts have declined to award adverse costs against unsuccessful environmental or Aboriginal litigants. These cases include: *Prophet River First Nation v. Canada (Attorney General)*, 2015 FC 1030; *Peace Valley Landowner Association v. Canada (Attorney General)*, 2015 FC 1027; *Nunatsiavut v. Canada (Department of Fisheries and Oceans)*, 2015 FC 492; *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189; and *Grand Riverkeeper Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520. In most of these cases, it is not clear whether counsel made submissions as to costs. Moreover, the reasons for decision rendered in these cases tend to be very sparse, generally turning on the conclusion that the litigation had been brought in, or in some way dealt with, the public interest.

On the other hand, however, there have also been numerous cases in which the Federal Courts have awarded adverse costs against unsuccessful public interest or First Nations litigants. These include: *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981; *Ontario Power Generation Inc. v. Greenpeace Canada*, 2015 FCA 186; *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FC 1118; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31; and *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2002 FCA 515. With one exception, none of these decisions offers reasons as to why the unsuccessful litigant should be liable for adverse costs. The one exception is *Bow Valley*, where the Federal Court of Appeal held that the public interest aspect of the case was not enough to override the fact that the

[28] *Ibid.* at para. 22.
[29] *Ibid.* at para. 24.

appellants' case "was largely based on arguments with no factual foundation" and that this factor "weigh[ed] against granting the appellants relief from costs"[30]

Having regard to the above cases, we can identify the following trends. The Federal Courts often do not refer to either Rule 400(3)(h) or the test in *Harris* in awarding costs even where the parties have raised this test and relied on public interest factors (including standing) in their cost submissions. The public interest factor in Rule 400 is generally not addressed, and frequently no reasons are given as to why it is or is not accorded weight. This provides public interest litigants with little insight or guidance into how the costs decisions of the Federal Courts are made in their cases. In some cases, public interest litigants are protected from costs on the basis that they raised "legitimate" concerns. In others, the order as to costs is entirely silent on this and other criteria in the *Harris* test. In particular, these decisions routinely fail to address why a party would be granted public interest standing, and yet the public interest factor is not significant enough to immunize the unsuccessful public interest litigant.

In summary, the broad discretion accorded to the Federal Courts by Rule 400 of the *Federal Courts Rules* coupled with the unpredictability in the jurisprudence canvassed above have resulted in uncertainty for prospective public interest litigants that, in turn has had very real and negative impacts on access to justice. We will make further recommendations below on possible avenues for reducing this uncertainty. As a threshold matter, however, we would urge the Rules Committee to clarify whether there exists a "default" costs rule. As indicated above, the Rules Committee offers the view that a two-way costs rule is the "default rule" at the Federal Courts despite the absence of such a default position being articulated in the *Federal Courts Rules*. At minimum, therefore, we propose that the Rules Committee recommend that the Federal Courts issue a "Practice Direction" and a "Notice to Parties and the Legal Profession" that either a) affirms the absence of a default rule in accordance with Rule 400; or b) gives notice of the presence of a default rule and the circumstances in which such a default rule will be triggered. Such a Practice Direction and Notice would provide much needed clarity and certainty to prospective public interest litigants as to their potential liability for adverse costs awards.

B. Protective Costs Orders

In this section we discuss the role that the potential availability of protective costs orders ("PCOs") play in promoting access to justice. The availability of PCOs has been advanced as one solution to assist public interest litigants to access the courts. The basic structure of such an order is that the public interest litigant must bring a motion and seek an order protecting them from adverse costs in any event of the cause. In such a motion (as is the case with cost submissions after the event), the public interest litigant has the onus of demonstrating why they should be "exempt" from paying costs. If granted, such orders exempt the litigant from adverse costs liability on terms prescribed by the court. These terms could range from a complete exemption, to a cap on adverse costs liability, to a conditional exemption from adverse costs that is subject to the litigation being conducted in a responsible manner. The theory of such orders is that they facilitate access to justice for public interest litigants in cases where the issues of broad public importance might not otherwise be adjudicated.

[30] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 2002 FCA 515 at para. 79.

In our experience, to date PCOs have failed to enhance access to justice for our clients. The reasons are as follows:

1. Securing a PCO requires significant additional resources that are typically unavailable, particularly at the outset of litigation. Such motions, where they have been sought, have been highly resource intensive and time consuming to bring.

2. The timing of the motion is disadvantageous as the merits of the case have not been argued, and the litigant may not yet have been granted public interest standing. Such a motion must ordinarily be brought at an early juncture, at a point in the process when counsel are focussed on other competing demands and priorities.

3. Bringing a PCO motion adds risk to the litigation. This is because the outcome of the protective costs motion is highly discretionary and fraught with additional uncertainty. Such a motion itself bears the potential of resulting in an adverse cost award. A client sensitive to adverse costs is unlikely to be willing to take a step that could actually increase their costs liability if unsuccessful and that is certain to increase disbursement costs.

4. At the outset, this onus puts the public interest litigant at a presumptive disadvantage. The dominance of the "loser-pays" approach to costs in the cause tends to hold sway unless the criteria in the test for a PCO are met. Multiple respondents may oppose the motion, (as is the case with cost submissions after the event) asserting that the "loser-pays rule" ought to apply and challenging the litigant on each of the discretionary criteria.

5. PCOs in Canada[31] and elsewhere[32] are considered to be "exceptional" and the test for meeting the threshold for a PCO is often extremely discretionary and sets a high bar. It is difficult to advise a public interest client whether or not they could be eligible for a PCO.

Ecojustice lawyers have brought two such motions, one in the Federal Court of Appeal and one in Ontario Divisional Court. Neither were granted. One was in the case of *MiningWatch*.[33] In that case, the public interest litigant MiningWatch was successful below. On appeal by the government respondent and the mining company, MiningWatch brought a protective costs motion seeking an order that, in the event the appeals were successful, the public interest litigant should not have to pay costs. The motion relied in part on the Supreme Court of Canada's decision in *Okanagan* setting out principles for interim costs.[34] This motion was denied at the

[31] See *Farlow v. Hospital for Sick Children* (2009), 100 OR (3d) 213, 2009 CanLII 63602 at para. 89 (Ont Sup. Ct. J.) [*Farlow*].
[32] See *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] EWCA Civ 192 at para 72 (Eng CA).
[33] *MiningWatch Canada v. Canada (Fisheries and Oceans*) (20 February 2008), A-478-07 (FCA) per Sharlow J.A [*MiningWatch*].
[34] *British Columbia (Minister of Forests)* v. *Okanagan Indian Band*, 2003 SCC 71 at para. 35 (see also paras. 19-21 and 31-37).

Federal Court of Appeal without reasons except for the statement that "even if this Court has the discretion to make the order sought, this is not an appropriate case in which to exercise that discretion."[35] Costs of the PCO motion were granted in the cause. The Supreme Court of Canada ultimately granted costs throughout to the successful public interest litigant.[36]

The bottom line from an access to justice perspective is that the theoretical availability of a PCO does little to facilitate access to justice at the outset of a potential piece of litigation. Faced with the spectre of a substantial adverse costs award, many prospective public interest litigants may rationally decide to abandon potentially meritorious litigation. This is not merely a speculative concern. In our respective practices over the years, we have had numerous clients who decide not to pursue potentially meritorious legal proceedings due to well-founded apprehensions about the potentially crippling effect of an adverse costs award either personally or organizationally. In short, if the litigant cannot bear the risk and cost of the litigation, there is no reason to think they can bear the risk and cost of an uncertain PCO motion.

The experience with PCOs both in Canada and elsewhere is that they are rarely granted.[37] Similarly, the test for interim costs set out in *Okanagan* and the test for special costs set out more recently by the Supreme Court of Canada in *Carter v. Canada (Attorney General)*[38] are so high a bar as to be virtually impossible to meet. In *Carter*, public interest applicants seeking special costs must demonstrate not only that they have raised an issue of public importance, but they must also show that the issues raised "have a significant and widespread societal impact".[39] Likewise, to obtain a PCO, the caselaw suggests that public interest litigant must prove counter-intuitive negative factors, such as demonstrating that the litigation cannot proceed without the PCO.[40] The tests are also stacked against institutional environmental non-profits and charities that may have substantial budgets (often earmarked for other purposes), but limited access to unrestricted donations.

In short, the PCO caselaw to date and associated impracticalities have effectively nullified the potential for PCOs to play a meaningful role in promoting access to justice. In our view, there is no demonstrable need to force public interest litigants to meet a high threshold test merely to obtain protection from adverse costs awards. Courts already have a variety of means (including standing rules and summary dismissal procedures) that are fully capable of ensuring that cases brought forward for adjudication are justiciable and deserve to be heard.

C. Presumptive One-way or No-way Rule

Based on the foregoing, we propose that the Rules Committee recommend that: (1) a presumptive one-way costs regime apply to public interest litigants that bring judicial review

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[35] *MiningWatch*, *supra* note 33.
[36] *MiningWatch Canada v. Canada (Fisheries and Oceans*), 2010 SCC 2.
[37] See *e.g.*, The Honourable Mr. Justice Sullivan, *Ensuring Access to Justice in England and Wales: Report of the Working Group of Access to Environmental Justice* (May 2008), online: World Wildlife Fund UK <http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf>.
[38] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 138-140.
[39] *Ibid.* at para. 140.
[40] *Farlow*, *supra* note 31 at para. 95.

applications in the Federal Courts; or (2) a presumptive no-way costs regime apply to all judicial review applications brought in the Federal Courts. Moving towards a model that presumptively shields public interest litigants (and potentially other litigant categories) from adverse costs liability would yield significant dividends in terms of access to justice. Yet, at the same time, because the presumption would be rebuttable in appropriate cases, the Federal Courts would retain a residual discretion over the disposition of costs until the conclusion of the proceedings.

Recognition of the need to revisit whether the traditional two-way cost rule should be applied in public interest litigation is not new. Mr. Justice Osler in his 1974 *Report of the Task Force on Legal Aid* stated:

> [W]e 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 but 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.[41]

Anand and Scott also called for a departure from the two-way rule for public interest environmental cases.[42] As between no-way and one-way costs rule, Anand and Scott found that "significant barriers to participation [in American environmental tribunals] exist in spite of the prevalent no-way costs rule" that was in existence in American environmental tribunals at the time.[43] In the end, they concluded that the "sole effect [of the no-way rule] is to reduce the total potential cost liability while fixing the certain cost liability at a high and often unaffordable level".[44] Therefore, the authors preferred a one-way costs rule that placed the onus on a successful opponent to show that the case involved no public issue of importance or that the claim was brought in a frivolous or vexatious manner.[45]

The Ontario Law Reform Commission recommended implementing a qualified one-way rule for public interest cases, whereby courts should not award costs against a litigant who meets certain public interest criteria unless that litigant has engaged in vexatious, frivolous, or abusive conduct.[46] As for the no-way rule, the Commission found that such a rule offers only the "appearance of equality" for public interest plaintiffs who have no personal, pecuniary, or

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[41] Ontario, Task Force on Legal Aid, *Report of the Task Force on Legal Aid* (Toronto: Ministry of the Attorney General, 1974) at 99.
[42] Anand & Scott (1982), *supra* note 2 at 114.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] OLRC Report (1989), *supra* note 10 at 160.

proprietary claims in the proceeding because the plaintiff and defendant would be "unequally affected by whatever economic incentives are in effect".[47]

Similar proposals have been advanced in other common law jurisdictions. In the U.K., in his high profile 2010 report on costs and access to justice, Jackson L.J. recommended the implementation of a one-way costs rule for all judicial review claims.[48] In the U.S.A., where the default position for all civil litigation is a no-way rule, Congress has enacted one-way costs models to incentivize private citizens to bring public interest lawsuits in a variety of practice areas, including the enforcement of key federal environmental laws.[49]

While our organizations would prefer that a presumptive one-way rule be applicable in all public interest cases, in the alternative we would also favour adopting a model in which a no-way costs regime presumptively applied in all judicial review proceedings brought before the Federal Courts.

The key benefit of adopting either of these two proposed presumptive rules is the certainty as to potential adverse costs liability that the presumption would provide to public interest litigants. As described above, in our view, the most critical law reform priority should be to create enhanced certainty surrounding the spectre of adverse costs liability for our public interest clients. Combatting the chilling effect of this uncertainty should be an overarching priority of any effort to clarify or amend the applicable rules or judicial practice surrounding costs. In this regard, both a presumptive one-way model for public interest cases and a more generally applicable presumptive no-way model for all judicial review applications represent a significant advance from the *status quo*. Subject to it being shown that a suit was frivolous or vexatious, or for some other reason was exceptional in a way that justified an adverse costs award against them, public interest litigants would have the benefit of costs immunity. Moreover, public interest litigants would no longer need to argue for protection from adverse costs in advance (in the form of a PCO), because costs immunity would be assured from the outset as long as the litigation was conducted in a professional and responsible manner.

If the Rules Committee were inclined to recommend an across-the-board presumptive no-way rule, such a regime could be designed to allow for successful parties to be rewarded with a costs order in designated "special circumstances", should the party seeking costs demonstrate to the Court's satisfaction that the presumption is rebutted. These special circumstances could be defined over time through an iterative process involving consultation with affected interests and practitioners in the various practice areas under Federal Courts' jurisdiction.

As to whether a presumptive one-way rule for public interest cases or a presumptive no-way rule ought to be introduced for judicial review proceedings, each approach has its own set of advantages and disadvantages. A key difference between these two models is that the one-way model has the potential to reward and thus incentivize citizens and citizen organizations that

[47] *Ibid.* at 159-160.
[48] Lord Jackson Report (2010), *supra* note 12 at 313.
[49] Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2012) 39 Advocate Q. 197 at 199-200; OLRC Report (1989), *supra* note 10 at 160.

bring successful public interest cases. We believe, overall, that this incentive has potential value. However, whether such a measure would enhance the supply of public interest practitioners willing to take on public interest environmental cases is an open question, given the high fixed costs and risks of mounting what are typically quite complex judicial reviews.

Another difference between these two models is ease of implementation. A generally applicable no-way costs presumption for all federal judicial reviews would likely be simpler to implement. This said, as discussed above, it would be important to achieve clarity around what "special circumstances" would justify a departure from this rule. In contrast, a prerequisite to implementing a one-way costs presumption in favour of public interest litigants would be to define in advance what cases, by virtue of their "public interest" attributes, would be governed by this new presumption. In order to ensure that any new regime does not get mired in legal manoeuvring, clarity and transparency as to the scope and nature of its application would be critical. It would likewise be important to ensure clarity as to the circumstances in which the presumption could be deemed rebutted. We are confident that these definitional and operational questions, while complex, can be resolved. However, precisely what form that resolution should take would likely require further consultation and reflection beyond that which is possible in this present consultation process.

In summary, adoption of either a presumptive one-way rule for public interest litigants or the presumptive no-way rule would represent a significant advance in terms of access to justice for public interest litigants at the Federal Courts. While each alternative has its own set of advantages, disadvantages and challenges, both will reduce the uncertainty and chilling effect posed by the spectre of adverse costs awards, the predominant barrier to justice in public interest environmental litigation.

PART IV. RECOMMENDATIONS

We recommend to the Rules Committee the following:

1) Access to justice should be recognized as an overarching purpose when adjudicating costs in public interest cases brought before the Federal Courts.

2) The Federal Courts should apply a presumptive one-way rule in favour of public interest litigants or, alternatively, a presumptive no-way costs rule in all judicial reviews. The Courts would retain discretion to award costs against an unsuccessful public interest litigant in a judicial review application if a prevailing party can demonstrate to the Courts' satisfaction that the application involved no issue of public importance or that the application was brought in a frivolous or vexatious manner.