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# Access to Charter Justice

**Hon. Robert J. Sharpe***

The Canadian legal system faces an access to justice crisis.[1] While our system of justice delivers quality results, it often does so at a cost that shuts the courtroom door to all but the well-to-do. How does the access to justice crisis affect *Canadian Charter of Rights and Freedoms*[2] litigation? In this paper, I examine two areas of critical importance to access to Charter justice, standing and costs, where there appears to be a willingness to rethink long-established procedural rules that were primarily designed for the litigation of civil claims between private litigants in pursuit of money remedies.

## I. STANDING

Ordinarily, a litigant must have a direct legal interest to sue where a public right is at issue. The common law restricts standing to individuals who have suffered "special damage", either because they assert a private right that coincides with the public right, or because they claim some damage particular to themselves from the interference with the private

* Justice, Court of Appeal for Ontario. I wish to acknowledge the assistance of two people in the preparation of this paper. My law clerk, Matthew Parker, provided me with valuable research assistance. Professor Kent Roach kindly provided me with the galley proofs of the portion of the new edition of his text on Charter remedies dealing with the issue of costs from which I have borrowed freely and to which the reader is referred for more detailed consideration of the issues: see Kent Roach, *Constitutional Remedies in Canada*, 2d ed. (Toronto: Irwin Law, 2013) [hereinafter "Roach"].

[1] Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group", Canadian Forum on Civil Justice (May 2012), online: CFCJ-FCJC.org <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20 Access%20to%20Legal%20Services%20Working%20Group.pdf>.

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

right.[3] Traditional standing rules discourage public interest litigation. Public interest litigants are seen as "busybodies" who clutter court dockets with frivolous cases or cases that lack an adequate adversarial foundation and that unduly burden scarce judicial resources.[4]

However, since 1975, courts have recognized that the traditional restrictive standing rule must yield to the fundamental principle that a question of constitutionality cannot be immunized from judicial review because there is no one with sufficient interest to challenge an impugned law.[5] As Laskin J. put it in the seminal case: "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication".[6]

The courts have traditionally looked to three factors in determining public interest standing:

(1) whether there is a serious justiciable issue as to the law's invalidity;

(2) whether the litigant is affected by it directly or has a genuine interest as a citizen in the validity of the legislation; and, until recently,

(3) whether there is "no other reasonable and effective manner in which the issue may be brought before the Court".[7]

The third factor proved to be a significant hurdle. Standing was refused if the constitutional challenge could be brought by an individual litigant, without much regard for the practical realities. For example, in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*,[8] a public interest group was refused standing to challenge legislation governing the refugee determination process despite practical constraints that stood in the way of a direct challenge by individual refugee

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[3] *Boyce v. Paddington Borough Council* (1902) 87 L.T. 564, [1903] 1 Ch. 109, at p. 114 (Ch. Div.), revd [1903] 2 Ch. 556 (C.A.), revd [1906] A.C. 1 (H.L.).

[4] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 524, at paras. 26-28 (S.C.C.) [hereinafter "*Downtown Eastside*"].

[5] *Thorson v. Canada (Attorney General)*, [1974] S.C.J. No. 45, [1975] 1 S.C.R. 138 (S.C.C.) [hereinafter "*Thorson*"]; *Nova Scotia (Board of Censors) v. McNeil*, [1975] S.C.J. No. 77, [1976] 2 S.C.R. 265 (S.C.C.).

[6] *Thorson*, *id.*, at 145.

[7] *Canada (Minister of Justice) v. Borowski*, [1981] S.C.J. No. 103, [1981] 2 S.C.R. 575, at 598 (S.C.C.).

[8] [1992] S.C.J. No. 5, [1992] 1 S.C.R. 236 (S.C.C.).

claimants. The tone of the judgment is revealing and reflective of traditional skepticism towards public interest litigants:

> ... It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by a [*sic*] well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.[9]

More recently, however, the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*[10] reflects a significant shift in attitude and liberalization of standing in Charter cases. Writing for the Court, Cromwell J. held that the three factors were not to be "treated as hard and fast requirements or free-standing, independently operating tests" but rather to be "assessed and weighed cumulatively" and "applied in a flexible and generous manner that best serves" the underlying purposes of limiting standing.[11] Most significantly, he reformulated the third factor by replacing the requirement that there be "no other reasonable and effective manner in which the issue may be brought before the Court" with the much more flexible test of "whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts".[12] As a result, despite the fact that individual sex trade workers could challenge the legislation when faced with prosecution and notwithstanding the ongoing litigation brought by sex trade workers in Ontario,[13] the Court permitted a public interest group whose object was to improve the lot of female sex trade workers to challenge *Criminal Code*[14] provisions dealing with different aspects of prostitution.

The tone and tenor of *Downtown Eastside* is significant. It recognizes that "in a constitutional democracy … there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts".[15] Traditional

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9 *Id.*, at 252.

10 *Downtown Eastside*, *supra*, note 4.

11 *Id.*, at para. 20.

12 *Id.*, at para. 37.

13 *Canada (Attorney General) v. Bedford*, [2012] O.J. No. 1296, 109 O.R. (3d) 1 (Ont. C.A.), leave to appeal granted [2012] S.C.C.A. No. 159 (S.C.C.).

14 R.S.C. 1985, c. C-46.

15 *Downtown Eastside*, *supra*, note 4, at para. 22.

standing rules discouraging constitutional litigation are replaced with an emphasis on a principle of legality that facilitates the litigation of arguable constitutional claims, welcomes public interest litigants and takes into account the practical realities that make suits by individual litigants problematic. While maintaining the need for a three-factor test to filter claims brought by litigants lacking a personal legal interest in the outcome, the Supreme Court appears to have significantly broadened the filter's gage and thereby increased access to Charter justice for public interest litigants by permitting claims to proceed where the proposed suit is a reasonable and effective way to bring the issue before the courts.

Implicit in the judgment is the view that Charter litigation should be encouraged and viewed in a positive light, as being in the public interest. Where necessary, traditional procedural rules designed to discourage litigation should be reassessed and, where appropriate, reformulated to ensure access to Charter justice.

## II. Costs

Like the traditional rules for standing, traditional costs rules tend to discourage rather than encourage litigation. If applied without moderation to public interest litigants, the civil justice costs regime represents a significant impediment. Public interest litigants tend to be poorly funded. They are often dependent upon the efforts of *pro bono* or poorly paid counsel and rarely have any prospect of a monetary award from which a contingency fee can be paid, even if successful. Their opponents, in contrast, are usually well-funded and determined governments. If the lack of means to start the suit is not enough, the threat of an adverse costs award if the case fails can be a powerful disincentive to launch the case in the first place.

Our traditional costs rules are designed to foster three fundamental purposes: (1) to indemnify successful litigants for the cost of litigation; (2) to encourage settlements; and (3) to discourage frivolous suits and sanction inappropriate behaviour by litigants.[16] These rules and the purposes they foster work best where the interests involved in the litigation are essentially those of private parties in pursuit of remedies that have a monetary value. The winner should receive

[16] See *Fong v. Chan*, [1999] O.J. No. 4600, 46 O.R. (3d) 330, at para. 22 (Ont. C.A.).

partial compensation for the cost of the litigation as a matter of simple justice. Settlements are considered to be desirable and are encouraged by the offer to settle regime that rewards parties who are willing to compromise their claims and punishes parties who refuse to accept reasonable offers. Finally, cost rules provide a disciplinary tool that courts can deploy to discourage frivolous suits and to sanction inappropriate behaviour by litigants.

How well do these rules and the purposes they foster fit the model of Charter litigation?[17] First, the interests involved are not usually those of private parties in pursuit of monetary remedies. Financial incentives seem to be misplaced as Charter issues and Charter remedies involve the interest of the public at large. It is not evident that the indemnification rationale holds. Moreover, there is a lack of symmetry of resources as between the public interest rights seekers and government defenders. Second, the encouragement of settlements rationale is, at best, an awkward fit as Charter claims are not ordinarily susceptible to compromise. Of the three purposes that emerge from the private litigation model, only the behaviour control rationale seems to apply.

Judicial recognition of the inherent differences between Charter litigation and the private litigation model that fostered the traditional regime of cost rules may be leading us to a different and distinctive pattern of cost rules for Charter litigation. If this distinctive pattern continues to develop and evolve, it could have a significant impact in making Charter justice more accessible. When considered together with the more liberal standing rule announced in *Downtown Eastside*, we may have the seeds of a distinctive approach to traditional procedural rules for Charter cases that encourages access to Charter justice. I examine some of these developments below.

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[17] While I am reluctant to cite myself, I do so here to demonstrate that I have already taken a position on these issues in my judicial capacity. See *Mahar v. Rogers Cablesystems Ltd.*, [1995] O.J. No. 3035, 25 O.R. (3d) 690, at 704-705 (Ont. Gen. Div.):

> ... The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interests. An unrelenting application of those rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants. Such a consequence would be undesirable with respect to proceedings such as the present one which was, in my view, brought on a bona fide basis and which raised a genuine issue of law of significance to the public at large.

### 1. Advance Costs

Advance costs orders in Charter litigation represent a significant departure from the traditional rule that cost awards are made at the end of a trial on the loser-pays principle. In the leading case, *British Columbia (Minister of Forests) v. Okanagan Indian Band*,[18] the Supreme Court recognized the need "to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole", but emphasized that an award of advance costs is discretionary.[19] The Court outlined three conditions that must be present before such costs are ordered:

(1) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial.

(2) The claim to be adjudicated is *prima facie* meritorious.

(3) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

To date, advance costs orders have been essentially limited to Aboriginal[20] and language rights claims.[21] In fact, subsequent cases suggest that advance costs orders are the exception rather than the rule. For example, in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*,[22] the Court emphasized that advance costs are a rare and exceptional remedy of last resort and insisted upon a narrow definition of public interest. The applicant must show that the claim asserted affects a significant sector of the public and that it would be virtually impossible to litigate the case without an advance costs award.

Advance costs may be rare, but these cases do establish an important point of principle. As with the standing jurisprudence, they demonstrate a judicial recognition of the need to rethink the automatic application of traditional procedural rules to public interest Charter litigation.

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18 [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371, at para. 40 (S.C.C.).

19 *Id.*, at para. 27.

20 See, *e.g.*, *id.*

21 See, *e.g.*, *R. v. Caron*, [2011] S.C.J. No. 5, [2011] S.C.R. 78 (S.C.C.).

22 [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38, at paras. 38-41 (S.C.C.).

## 2. The "Loser-Pays" Rule: Awarding Costs against an Unsuccessful Charter Applicant

Should the ordinary "loser-pays" rule apply to unsuccessful Charter applicants? Courts, including the Supreme Court, have certainly awarded costs in the government's favour against unsuccessful Charter applicants.[23]

In contrast, legal scholars,[24] law reform commission reports[25] and even some judges[26] have called for a "one-way" cost rule whereby public interest litigants may recover costs if successful but are not subject to an adverse costs award if they lose. While the jurisprudence on the point is unsettled, it seems that, as a practical matter, the "loser-pays" rule is no longer routinely applied. Successful governments often do not ask for costs in Charter litigation. This, I suspect, flows from a recognition that the public interest is served by Charter litigation, even where the claim fails. Moreover, even when sought, costs are not invariably ordered against unsuccessful Charter litigants. The indemnity rationale that underlies the traditional rule is considerably weaker where the government is the successful litigant.[27] To the extent that current practice removes or alleviates the threat of an adverse costs award, access to Charter justice is clearly enhanced.

On the other hand, an argument can certainly be made that some threat of an adverse costs order should remain to discourage frivolous claims and

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[23] See, *e.g.*, *Operation Dismantle Inc. v. Canada*, [1985] S.C.J. No. 22, [1985] 1 S.C.R. 441 (S.C.C.); *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.).

[24] See, *e.g.*, Raj Anand & Ian G. Scott, "Financing Public Participation in Environmental Decision Making" (1982) 60 Can. Bar Rev. 81, at 114-15; Lara Friedlander, "Costs and the Public Interest Litigant" (1995) 40 McGill L.J. 55, at 74-77, 97-100; Chris Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 U.B.C. L. Rev. 303, at 309-14; Chris Tollefson, Darlene Gilliland & Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 Can. Bar Rev. 473, at 484-87; and Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011) 39 Adv. Q. 197.

[25] Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989).

[26] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76, at para. 69 (S.C.C.), McLachlin C.J.C. departed from normal court rules, finding that the Foundation "brought an important issue of constitutional and criminal law that was not otherwise capable of coming before the Court. This justifies deviating from the normal costs rule and supports an order that both parties bear their own costs throughout." In *Incredible Electronics Inc. v. Canada (Attorney General)*, [2006] O.J. No. 2155, 80 O.R. (3d) 723 (Ont. S.C.J.), after an extensive review of the case law and literature, Perell J. concluded that genuine public interest litigants should not be subject to the usual loser-pays rule.

[27] See *St. James' Preservation Society v. Toronto (City)*, [2006] O.J. No. 2726, 272 D.L.R. (4th) 149 (Ont. S.C.J.).

to sanction inappropriate behaviour by Charter litigants. Both in the Charter context and elsewhere, making *pro bono* parties subject to the ordinary cost consequences in litigation ensures that parties do not abuse the system and also promotes access to justice by enabling and encouraging more lawyers to volunteer to work *pro bono* in deserving cases.[28]

One solution might be to consider the English remedy of a "protective costs order" in favour of public interest litigants.[29] These orders parallel, but are more modest than advance costs orders. The purpose of a protective costs order is to allow claimants of limited means access to the court in order to advance their case without the fear of an order for substantial costs being made against them, a fear which would inhibit them from continuing with the case at all.[30]

## 3. Costs for an Unsuccessful Charter Applicant

While the cases are rare, the Supreme Court has recognized that even an unsuccessful Charter applicant may be entitled to costs. For example, in *Schachter v. Canada*,[31] the Court awarded costs to a plaintiff who won at trial on an innovative section 15 issue but ultimately lost on appeal on a remedial issue after the Crown conceded the section 15 violation. Similarly, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[32] the Court upheld an order requiring the government-funded defendant to pay the costs of unsuccessful Charter litigants who challenged a compulsory blood transfusion for their child on grounds of religion. The order was said to be "highly unusual" and something to be permitted "only in very rare

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[28] In *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, [2006] O.J. No. 4248, 82 O.R. (3d) 757 (Ont. C.A.), a non-Charter case, Feldman J.A. held that *pro bono* counsel could recover costs when successful but that *pro bono* litigants could also have costs awarded against them.

[29] See *R. (on the application of Corner House Research) v. Secretary of State for Trade & Industry*, [2005] EWCA Civ. 192, [2005] 4 All E.R. 1 (C.A.).

[30] *Id.*, at para. 74. Such an order may be made where the court is satisfied that:

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

[31] [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

[32] [1994] S.C.J. No. 4, [1995] 1 S.C.R. 315 (S.C.C.).

cases”,[33] but again, it rests on the recognition that Charter challenges, even those that are unsuccessful, often provide clarification on issues that affect a broad spectrum of the public and are therefore not to be discouraged.

### 4. Enhanced Costs for a Successful Charter Applicant

Successful Charter litigants, like all other successful litigants, generally receive their costs on a partial indemnity basis. Nevertheless, full indemnity costs have been awarded where there has been misconduct by the government defendant.[34] In *Victoria (City) v. Adams*,[35] the British Columbia Court of Appeal drew on the Supreme Court’s advance cost jurisprudence to award costs on an enhanced scale, identifying four factors to consider when determining whether special costs should be awarded to a successful public interest litigant:

(a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;

(b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;

(c) As between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and

(d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.[36]

### 5. Costs as a Section 24(1) Remedy in Criminal Cases

Costs generally do not follow the event in criminal cases. The award of costs on indictable offences is specifically prohibited, but costs may be allowed on summary conviction appeals.[37] The Supreme Court has

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[33] *Id.*, at 390.

[34] See *Winters v. British Columbia (Legal Services Society)*, [1999] S.C.J. No. 49, [1999] 3 S.C.R. 16 (S.C.C.); *Mackin v. New Brunswick (Minister of Finance)*, [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405 (S.C.C.).

[35] [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29 (B.C.C.A.) [hereinafter “*Victoria (City)*”]. Compare *Quebec (Education, Recreation and Sports) v. Nguyen*, [2009] S.C.J. No. 47, [2009] 3 S.C.R. 208 (S.C.C.).

[36] *Victoria (City)*, *id.*, at para. 188.

[37] *Criminal Code*, ss. 683(3), 826.

awarded costs as a section 24(1) Charter remedy in criminal and quasi-criminal cases. For example, in *R. v. 974649 Ontario Inc.*,[38] the Court upheld a costs order in a case where the Crown had failed to make adequate disclosure. Chief Justice McLachlin stated that such an award, "while not without a compensatory element", was "intended as a means of disciplining and discouraging flagrant and unjustified incidents of non-disclosure"[39] and explained that costs awards are restricted "at a minimum, to circumstances of a marked and unacceptable departure from the reasonable standards expected of the prosecution".[40] Clearly, the emphasis on state misconduct restricts the availability of such an award.[41]

Professor Roach argues that there is much to be said for a more flexible standard for awarding costs that is not limited to flagrant violations.[42] When an individual's Charter rights are infringed, it is important he or she have a forum for vindicating those rights, even if the infringement was unintentional. By depriving a party of his or her costs because there was no state misconduct or because the Charter breach is not rare or unique, a person may be left with no avenue for vindicating his or her rights. Roach suggests that the test governing Charter damages enunciated in *Vancouver (City) v. Ward*,[43] could be used to justify a section 24(1) award of damages to reflect the costs of litigation.[44]

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[38] [2001] S.C.J. No. 79, [2001] 3 S.C.R. 575 (S.C.C.).

[39] *Id.*, at para. 81.

[40] *Id.*, at para. 87.

[41] In *R. v. Tiffin*, [2008] O.J. No. 1525, 90 O.R. (3d) 575, at para. 98 (Ont. C.A.) (citations omitted), LaForme J.A. summarized the law as follows:

> Costs, however, will not be routinely ordered in favour of accused persons whose *Charter* rights have been violated. In my view, the jurisdiction to award costs against the Crown as a s. 24(1) remedy for a *Charter* breach in cases not involving Crown misconduct requires something that is "rare" or "unique" that "must at least result in something akin to an extreme hardship on the defendant." As a general rule, costs claimed by an accused, absent Crown misconduct, will not be an "appropriate and just" *Charter* remedy[.]

[42] Roach, *supra*, note * [p. 3], at para. 11.840.

[43] [2010] S.C.J. No. 27, [2010] 2 S.C.R. 28 (S.C.C.) [hereinafter "*Ward*"].

[44] Roach, *supra*, note * [p. 3], at para. 11.1310. The Court in *Ward*, *id.*, at para. 4 set out four requirements:

1. First, the claimant must establish that a Charter right has been breached.
2. Second, the claimant shows why damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right and/or deterrence of future breaches.
3. Third, the burden shifts to the state to show that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust.

## III. CONCLUSION

The jurisprudence on costs in Charter cases appears to be in a state of flux. While the courts have certainly recognized in principle that it may be necessary to modify traditional costs rules to meet the needs of Charter litigation, the break with traditional rules to award advance costs, enhanced costs, costs in favour of unsuccessful Charter litigants, and costs as a section 24(1) remedy in criminal cases, has been described as exceptional and rare. On the other hand, the loser-pays rule appears not to be applied with any degree of rigour and we may well be evolving into a "one-way" costs regime under which public interest litigants are not required to pay costs if they lose but can recover partial indemnity costs if they win.

It remains to be seen whether the same spirit that motivated the Supreme Court in *Downtown Eastside* to reformulate the rules relating to public interest standing will lead the courts to make what has been described as exceptional in the realm of costs more routine.

4. Fourth, if the state fails to negate that the award is appropriate and just, the quantum of damages is determined by ensuring that the award of damages represents a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages.