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Costs and Access to Justice: Are Party and Party Costs a Barrier to the Courts?

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The Canadian legal system is sometimes said to be open to two groups – the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford them. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment. To the second group should be added people involved in serious family problems, where the welfare of children is at stake; in such cases the Supreme Court has ruled that legal aid may be a constitutional requirement.

It is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. But at the same time, they quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts. Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.

The result may be injustice. A person injured by the wrongful act of another may decide not to pursue compensation. A parent seeking custody of or access to the children of a broken relationship may decide he or she cannot afford to carry on the struggle – sometimes to the detriment not only of the parent but the children. When couples split up, assets that should go to the care of the children are used up in litigation; the family's financial resources are dissipated. Such outcomes can only with great difficulty be called "just".

Remarks of the Right Honourable Beverley McLachlin, P.C.
Presented at the Empire Club of Canada
Toronto, March 8, 2007[1]

[1] http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp

I. Introduction

The issue of "access to justice" has been a pressing concern in the legal community for quite some time. When the courts are too expensive of an endeavour for the average person, a grave disservice is being done to Canadians. How the average citizen can have meaningful access to justice is not a simple question to answer. There are multiple reasons why access to justice has been hindered in recent times, including the cost of legal counsel and the increasing complexity of the law.

Many have turned their attention to lawyers and the costs they charge their clients when considering the issue of access. Undoubtedly, this is fair comment (though one should not forget the role of the state in providing funding for critical legal services at a meaningful level either). Yet, one should be looking holistically at the issue of access to justice. The issue of access to justice includes more than lawyers, but also the courts.

The purpose of this paper is to examine the possible impact that party and party costs has on access to justice. Costs are routinely considered as an afterthought, if they are considered at all. However, the amount of costs can be significant and has only increased in Manitoba through recent rule amendments.[2] The potential then exists that with the increased quantum of costs, some people are taking the "grim" option of giving up so that their legal issues "wither on the vine."

In considering the relationship of costs to access to justice, I begin by assessing the traditional purposes given for party and party costs. In my view, the courts have fettered their discretion on costs to the point that there is only one real rule and that is "loser pays." The purposes for party and party costs then can serve to drive reasonable people from the courts because of the financial consequences of loss.

After considering the purposes behind costs, I then move on to consider one existing method of using costs to facilitate access to justice-- interim cost awards. The Supreme Court recognized in the *Okanagan Indian Band* case that in rare circumstances a litigant can, before the conclusion of the case, get costs from the opposing litigant in any event of the cause. While this case created the hope that deserving litigants could receive funding to access the courts, the case has not resulted in any meaningful increase in court access.

Next, I consider the emergence in Canada of a "half-way point" between "loser pays" and interim costs-- the "protective cost order" (PCO). The PCO has emerged in English law and has received some endorsement from our Supreme Court. PCOs allows litigants to address the issue of costs *before the conclusion of the case* and allows litigants to either cap or eliminate their costs exposure to the other side. Further, PCOs allows a litigant to get costs if they win, albeit at a more modest rate than under the usual cost rules. PCOs exist in Canadian law, but have not yet been ordered

[2] For an analysis of the new costs regime in Manitoba please see Curran P. McNicol, "An Overview of Costs Awards: A Refresher on Select Costs Issues," 2011 Mid-Winter Conference.

in anyone's favour. However, I contend that there is much to commend in PCOs because it can allow litigants who raise public interest issues the ability to raise such issues without the prospect of a crippling cost liability in the event of loss.

Finally, I argue that PCOs are not enough because it is limited to public interest cases. For litigants with run of the mill civil disputes that will not change the law (e.g. a personal injury action or a judicial review to quash a tribunal's decision for a breach of natural justice), there remains a concern about access to justice. In my view, we must see civil justice and the resolution of private disputes as a public good in itself. Drawing upon the recommendations of the Australian Law Reform Commission (ALRC) I contend that a "material effect" exception to the "loser pays" principle be introduced to the costs regime. Under such a rule, if a litigant can show that his/her ability to present his/her case or negotiate a fair settlement is adversely impacted by the prospect of cost liability then costs can be addressed like under a PCO-- namely in advance and capping or reducing cost liability altogether.

It is my conclusion that courts should stop fettering their discretion on costs with the "loser pays" rule and return to a wide reaching discretion on costs to make sure that costs do not act as a barrier to justice but rather that costs are consistent with the goals of justice.

II. Assessing the Purposes of Party and Party Costs

A) The Expectation of Costs for the Victor

In Canada (as well as other Commonwealth countries), it is taken as self-evident that a successful litigant should be entitled to costs from the losing litigant.[3] Successful litigants have a legitimate expectation that they will receive costs unless the successful litigant was guilty of some misconduct.[4] As noted by William A. Stevenson and Jean E. Côté in their text on civil procedure:

> A judgement that there are to be "no costs" is misleading, and really condemns the successful party to pay his own costs unaided, and so there should be reasons to deprive him of an award of costs. It is not enough that the trial judge just dislikes him.
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> Costs are to be denied only for good reason, and the discretion exercised judicially, and only on relevant grounds, so costs cannot be denied a successful party guilty of no misconduct.[5]

[3] See Manitoba Law Reform Commission ("MLRC"), *Costs Awards in Civil Litigation* (Report #111, September, 2005) at p. 3. Accessed on-line at http://www.gov.mb.ca/justice/mlrc/reports/111.pdf.
[4] See generally *Sooley v. Canadian Home Assurance Co.* 1994 CarswellNfld 59 at para 13.
[5] *Civil Procedure Encyclopaedia*, Vol. 4 (Edmonton: Juriliber, 2003) at p. 72-97.

The importance of the "loser pays" principle was affirmed by the Supreme Court in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38. The majority (per Bastarache and LeBel JJ) held at para 34:

> [The] idea that costs awards can be used as a powerful tool for ensuring that the justice system functions fairly and efficiently was not a novel one. Policy goals, like discouraging — and thus sanctioning — misconduct by a litigant, are often reflected in costs awards: see M. M. Orkin, The Law of Costs (2nd ed. (loose-leaf)), vol. I, at § 205.2(2). Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39. This framework has been adopted in the law of British Columbia by establishing the "costs follow the cause" rule as a default proposition, while leaving judges room to exercise their discretion by ordering otherwise: see r. 57(9) of the Supreme Court of British Columbia Rules of Court, B.C. Reg. 221/90.

As can be seen from the above, the Supreme Court was careful to note that the "loser pays" principle can co-exist with policy goals of costs.

A corollary to the reasonable expectation of costs is that costs are only assessed at the conclusion of a case.[6] It is only after the "dust has settled" and the case is in that a court can determine who has won and who has lost and issue a cost award accordingly. To do so any earlier, it is feared, would amount to the prejudgment of the case without the benefit of a full evidentiary record and to the prejudice of the losing party.

B) The Conflicting Purposes of Party and Party Costs

The fact that Canada (along with other Commonwealth countries) has adopted the "loser pays" approach to costs does not answer the question of why we have adopted this principle. In its report on costs, the MLRC noted the conflicting purpose of cost awards:

> Despite the ubiquitous nature of cost awards in Canada, however, their purpose is not always clearly articulated or understood. There are, in fact, several different rationales that are offered at different times and in different

[6] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at para 20.

> circumstances, some of which can be seen as contradictory.[7]

The purpose of party and party costs have evolved over time and have been expressed in a number of different ways. The MLRC summarized the purpose of costs as follows:

> It is probably the case that there are two basic rationales that underpin costs rules of the type that exist in Manitoba: equity and incentives. It is generally considered fair that a party that succeeds at trial should be "made whole," while a party who has either brought an unmeritorious action or defended an indefensible position should be forced to compensate the party who was thereby forced to respond. It is also generally felt that meritorious claims will be encouraged, and frivolous and vexatious litigation discouraged, by the prospect that at the end of the day the victorious party will have their legal fees borne, at least to some extent, by the loser.[8]

Hamilton J.A. offered a more expanded rationale for party and party costs in the *232 Kennedy* case:[9]

> To summarize, in no particular order of importance, the purposes served by an award of party and party costs are as follows:
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> - to indemnify the successful litigant, on a partial basis, for legal costs incurred or, in the case of a self-represented litigant, for lost opportunity;
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> - to encourage settlements by having all litigants, whether represented or not, address the issue of costs;
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> - to discourage and sanction frivolous actions or defences, unnecessary steps in litigation and inappropriate behaviour by ensuring that all litigants, whether represented or not, have recourse to, or are subject to, an award of costs; and
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> - to facilitate access to justice. In this regard, I do not view the decision in 1465778 Ontario Inc. as limiting this

[7] See Manitoba Law Reform Commission ("MLRC"), *Costs Awards in Civil Litigation* (Report #111, September, 2005) at p. 3.
[8] See Manitoba Law Reform Commission ("MLRC"), *Costs Awards in Civil Litigation* (Report #111, September, 2005) at p. 4-5.
[9] *232 Kennedy Street Ltd. v. King Insurance Brokers (2002) Ltd.*, 2009 MBCA 22 at para 35.

> purpose to circumstances involving pro bono counsel. Having said that, the circumstances of a particular case will determine whether access to justice issues arise. This is not the occasion to expand on this important issue.[10]

Due to the conflicting nature of the purpose of cost award, it is my view that some attention should be given to the purposes offered for party and party costs and then consider whether such purpose can serve or hinder access to justice.

C) Assessing the Indemnity Purpose

It is fair to say that the indemnity principle is routinely treated as the prime purpose behind a cost award. As noted by the MLRC (and as cited above), a victorious litigant should be compensated from the losing litigant, at least in part, for the fact that the victorious litigant had to incur the expense of proving a legal right in the courts. A cost award then seeks to put the victorious litigant in the same place he/she would have been in had the other party "seen the light" and accepted the victorious party's legal position. On this point, Abrams and McGuinness write:

> The cost of litigation is now a substantial deterrent to the ability of a party to vindicate his or her legal rights. If cost recovery was removed, the ability to seek judicial redress of wrongs would be substantially curtailed. … [As] a general principle, it is the party who is found to be in the right (whether defender or complainant) who is most entitled to his or her day in court. Having prevailed in the proceeding, that party's entitlement should be respected by compensating him or her for the cost of bringing the matter before the court for adjudication. If anything, there would seem to be merit in increasing the extent of cost recovery, rather than reducing its availability.[11]

It is my view that the "indemnity principle" supports the contention that "to the victor goes the spoils" but also that those with meritorious claims should be encouraged to bring them by ensuring that they get their costs at the end of the day. The Australian Law Reform Commission ("ALRC") noted that cost awards can be used to allow litigants of meagre means some method of financing litigation-- namely, through cost awards against a defendant.[12]

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[10] See also *Okanagan* at para 22-27.

[11] Linda S. Abrams and Kevin P. McGuinness, *Canadian Civil Procedure Law*, 2nd ed (Markham: LexisNexis, 2010) at p. 1398.

[12] ALRC, Costs Shifting - Who Pays for Litigation (ALRC Report 75) Published on 20 October 1995. Last modified on 25 August 2010. Accessed on-line at http://www.austlii.edu.au/au/other/alrc/publications/reports/75/ALRC75.pdf.

In some instances, the use of costs to reward the victorious will be consistent with access to justice principles. As contended by Abrams and McGuinness, the litigant with a good case can rest assured that he/she will be vindicated and indemnified for at least some of the legal costs incurred. Yet, in my mind, courts and advocates of the indemnity principle have allowed the "loser pays" principle to blind them to the unique facts of each case. Some cases may well be suited for the "loser pays" principles, but others may not. In my respectful view, there are many cases where it is very difficult to conclude who is the "meritorious" litigant before a judicial decision is made. Further, some litigants may be risk adverse and look at the down side of costs as opposed to the up side of costs with the corresponding result that these people may be less likely to bring their good cases forward to adjudication or at all.

I also wish to stress that the "loser pays" principle, while treated as "holy writ," is not accepted universally in the world and not even in Manitoba. Accordingly, there is nothing inherently good about the "loser pays" principle or at least, the "loser pays" principle should not be regarded with such reverence that the other purposes behind cost awards are ignored or only mentioned in a perfunctory manner.

It is instructive that American law has rejected the "loser pays" principle, as a general concept, because of access to justice concerns. The MLRC commented as follows on the American rule on costs:

> The primary justification for the American rule flows from an inherent belief in the importance of access to the courts to enable the righting of wrongs. <u>The theory is that a person with a legitimate grievance, faced with the prospect of having to pay his opponent's legal costs in the event he does not prevail at trial (for whatever reason), may be dissuaded from pursuing or defending his rights</u>.[13]

While the MLRC notes that American law has created many exceptions to the "bear your own costs" rule, it remains the case that America has placed a higher value on access to justice than rewarding success through cost awards.

I accept that the "no costs" approach or "bear your own costs" approach seen in America is treated as alien to many Canadians.[14] However, the approach exists happily in Manitoba at present. Under *The Class Proceedings Act*, C.C.S.M. c. C130, Manitoba class action law has followed the American "no costs" approach.[15] The MLRC

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[13] See Manitoba Law Reform Commission ("MLRC"), *Costs Awards in Civil Litigation* (Report #111, September, 2005) at p. 23-4.

[14] See Manitoba Law Reform Commission ("MLRC"), *Costs Awards in Civil Litigation* (Report #111, September, 2005) at p. 30 generally.

[15] Section 37 of the Act reads:

Costs

in *Class Proceedings* (Report #100, January 1999)[16] recommended a "no-costs" approach because of access to justice concerns. The MLRC wrote at p. 75 of this report, "This [the no-costs approach] will ensure that potential plaintiffs are not deterred from launching class proceedings by their potential exposure to a large cost award in the event the proceeding is unsuccessful, and as a result will enhance access to justice for potential claimants." In addition, it is common that litigants before tribunals will bear their own costs. For example, in labour law, it is extraordinarily rare for grievance arbitration to result in a cost award against a litigant (even though both parties do bear their proportionate cost of the arbitrator).

This leads to the conclusion that courts should not be treating the "loser pays" principle as anything more than one factor amongst many to consider. In fact, one could contend that the Legislature is signalling through the *Class Proceedings Act* that access to justice is an important concern when it comes to costs. It is now that case, under existing costs doctrine, that procedure will trump substance. A litigant who can start a class proceeding will be immune from costs whereas a litigant who has suffered a wrong unique to him (and not spread amongst a class of people) will be exposed to costs. As existing costs law gives a court unfettered discretion to consider costs, it is submitted that courts should be examining other approaches to costs seen in Manitoba before simply awarding costs to the victor.

37(1) Subject to this section, no costs may be awarded against any party with respect to any stage of a class proceeding, including a motion for certification under subsection 2(2) or section 3, or any appeal arising from a class proceeding.

Considerations re costs

37(2) The Court of Queen's Bench or The Court of Appeal may only award costs to a party in respect of a motion for certification or in respect of all or any part of a class proceeding or an appeal arising from a class proceeding if

(a) the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party;

(b) the court considers that an improper or unnecessary motion or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose; or

(c) the court considers that there are exceptional circumstances that make it unjust to deprive another party of costs.

Assessment of costs

37(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.

Class members not liable for costs

37(4) Class members, other than a person appointed as a representative plaintiff, are not liable for costs except with respect to the determination of their own individual claims.

[16] See on line at http://www.gov.mb.ca/justice/mlrc/reports/100.pdf

D) Assessing the Disincentive for Frivolous or Vexatious Litigation

It is commonly said that costs are good because it can be used to sanction or discourage frivolous or vexatious litigation. It is hard to argue that people who abuse the rules of civil procedure should be punished. However, should this be done by party and party costs or through solicitor and client costs? Let me put the matter this way: do party and party costs *really* draw a line between the vexatious litigant and the reasonable litigant who simply lost?

In my view, the answer to the question is no. A person with an arguable case (but who loses) is *treated exactly the same* as the vexatious litigant who loses. Both are routinely subject to the "loser pays" principle. In fact, it would be rare for the vexatious litigant to pay increased costs or solicitor and client costs; thus the exposure of the vexatious litigant and the reasonable litigant who lost would be the same. However, the exposure of the reasonable litigant could actually be more than the exposure of the vexatious litigant. The vexatious litigant may actually see his/her claim struck or summarily dismissed before he/she can get to trial while the reasonable litigant will go to trial and lose; thus face more in a cost award.

The ALRC has contended that the costs regime is not a good mechanism by which to address frivolous or vexatious claims. They write

> 4.12 It is not possible to measure accurately the extent to which the costs indemnity rule deters claims and defences that may be frivolous, vexatious or without merit. Although it seems that the rule deters a proportion of these claims and defences, it also appears that people who wish to pursue these claims or defences will often not be deterred by the risk of an adverse costs order.
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> 4.13 The risk of an adverse costs order seems to the Commission to be an inefficient mechanism for filtering frivolous, vexatious or unmeritorious claims and defences. Deterring unmeritorious claims and defences is more appropriately addressed by case management and other procedural controls designed to identify and deal with such claims and defences at an early stage of proceedings.[17]

The point of the ALRC can be made another way. For those people inclined to bring frivolous and vexatious claims (many of whom are likely self-represented), the prospect of an adverse cost award does little to temper their behaviour. Such litigants may not be thinking of things rationally or simply may have made the cold and rational decision that they are judgment proof thus a cost award means little to them. In contrast, the reasonable person with a legal grievance looks rationally at a cost award and, if they

[17] ALRC, Costs Shifting - Who Pays for Litigation (ALRC Report 75) Published on 20 October 1995.

are at all risk adverse or even cost sensitive, decide not to pursue their case. One can fairly imagine that such a person may have had a winner or a case worthy of determination, but such cases go nowhere. These reasonable litigants are the ones being deterred from the courts and are not being heard by anyone. In my view, the civil justice system fails these litigants in (an arguably) hopeless effort to deter the vexatious litigant.

Consistent with the purpose of deterring frivolous and vexatious claims, is the fear that a "no costs" approach will encourage not a flood of litigation, but a flood of *dubious* litigation. Many pejoratively fear an "Americanization" of our civil justice system. Any argument based on the fear of "Americanization" should be flatly rejected. The ALRC had this to say about the fear of an "Americanization" of Australian law:

> Concerns have been expressed that without the costs indemnity rule there would be an epidemic of unreasonable litigation. The high level of litigation said to exist in the United States is often given as an example of what could happen in Australia. However, the high level of litigation in the United States is the product of a number of factors, many of which do not exist in Australia. For example
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> -- in the United States many people rely heavily on obtaining compensation in the courts as there is no comprehensive medical insurance scheme and only a limited welfare system
> -- the amount of damages awarded in United States courts tends to be more generous than in Australian courts, possibly because damages are assessed by a jury rather than a judge
> -- lawyers in the United States are able to enter contingency fee agreements based on a percentage of the damages award these types of agreements are not proposed in Australia (except in Queensland).
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> There may also be doubts about the extent to which the level of litigation in the United States is due to individual litigants. Various studies have indicated that
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> -- tort cases make up a very small proportion of all cases
> -- most new cases filed in the federal courts are criminal
> -- most civil proceedings are commenced by the United States government and business.

> The high level of litigation in the United States is the product of many factors. It is not possible to attribute the level to any single factor such as the costs allocation rule.[18]

In my view, we are best to eliminate the purpose of deterring frivolous or vexatious claims from the law of party and party costs. Party and party costs are not used to punish the morally blameworthy because courts draw no real distinction between "bad litigants" and "reasonable litigants"-- both are punished for the mere fact of losing. Instead, one should turn to the law on solicitor and client costs as the means by which to punish procedural wrongdoing. In addition, procedural rules on striking claims or summary judgment are the best way to protect people from dubious claims, not the party and party costs regime. This purpose behind costs is, in my view, assisting in driving the reasonable litigant to stay at home and doing nothing to prevent dubious litigation.

E) Conclusion

I freely admit that altering the cost regime into a "no costs" system will not lead to a golden age for access to justice. In some instances, the "loser pays" principle is appropriate, but not invariably so. My concern is that courts are ignoring the fact that the Legislature has conferred upon them a wide discretion on costs and instead created a hardened rule of "loser pays" without allowing for any meaningful analysis of the merits of each case. Undoubtedly, certainty is a goal, but if certainty is indeed desired, one would have expected the Legislature to say so clearly. By the fact that the Legislature has not done so, it has intended that each case be considered on its unique facts by the courts. In my view, we would do well in heeding the following words of the House of Lords:

> As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule.[19]

In sum, it is high time that we return the law of costs to its discretionary roots and reject hard and fast rules which may serve to create access to justice issues.

III. Interim Cost Awards and the Illusion of Access to Justice

One large problem with cost awards when it comes to access to justice is that a litigant will not know if it is exposed to costs or the amount of its exposure until the case is concluded. The uncertainty of such liability may make litigants reluctant to start litigation that may be meritorious (albeit not necessarily successful). While there are

[18] ALRC, Costs Shifting - Who Pays for Litigation (ALRC Report 75) Published on 20 October 1995. See Appendix C.

[19] *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176 as cited in *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 4 All ER 1 (C.A.) at para 27.

cases that do depart from the loser pays principle,[20] it takes a "risk giddy" litigant to wait until they have lost to address the issue of costs and even then the prospect of success is small that they will be able to overcome the "loser pays" principle.

In order to take access to justice seriously, costs should be considered as early as possible in appropriate cases. In Canada, one established means by which costs can be considered early in the process and before final determination is through "interim costs." Interim cost awards allow one litigant to get a cost award at some early point in a proceeding from the opposing litigant. In essence, the litigant's legal counsel is funded by the opposing litigant. Before a dispute is resolved (and the result known), money is changing hands.

The Supreme Court of Canada recognized and affirmed the availability of interim costs and the court's inherent jurisdiction to make such cost awards in the case of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371. The case created some level of hope that litigants who would not otherwise be able to afford legal counsel could obtain funds (from the opposite party) to pay for legal counsel; thus reducing the potential that economics would drive people away from the courts.

In the case of *Farlow*,[21] Herman J. summarized the law on interim costs as follows at para 91-2:

> 91 The criteria that the Supreme Court established for granting advance or interim costs may be of some assistance. In Okanagan, the Court set out the following conditions (at para. 40):
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> (i) 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;
> (ii) the claim is prima facie meritorious; it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means; and
> (iii) the issues are of public importance and have not been resolved in previous cases.
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> 92 These criteria were further refined in Little Sisters at paras. 39 to 44 as follows:
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> (i) The injustice that would arise if the application is not granted must relate to both the individual applicant and to

[20] See Chris Tollefson, "Costs in Public Interest Litigation: Recent Developments and Future Directions" (2009), 35 Adv. Q. 181 at p 189-197.
[21] *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847 (S.C.J.)

> the public. This does not mean, however, that every case of interest to the public will satisfy the test.
> (ii) An advance costs award must be an exceptional measure. The applicant must be able to demonstrate attempts to obtain private funding and, if not impecunious, must commit to making a contribution. The court should also consider different kinds of cost mechanisms.
> (iii) There would be no injustice if the issue could be settled or the public interest satisfied without an advance costs award.
> (iv) If an advance costs order is made, the litigant must relinquish some control over how the litigation proceeds.

As can be seen, the test for interim costs is quite high and is essentially limited to public interest cases and not generally available to all cases.

Since *Okanagan* and *Little Sisters*, interim cost awards have been very, very rare. Chris Tollefson has noted that there have been only two successful interim cost award cases since *Little Sisters*-- one is an Aboriginal rights case and another deals with the assertion of a right to bilingual court proceedings.[22] Interestingly, the second case (the bilingual case known as *R. v. Caron*) was heard by the Supreme Court recently on the issue of the right to interim costs. The decision has yet to be rendered. Whether interim costs are expanded or retracted by the Supreme Court remains to be seen.

Though interim costs did present some reason for optimism that costs could be used to address access to justice issues, the reality is that the concept of interim costs has had little practical effect. And perhaps this is fair. It is undoubtedly extraordinary for one litigant to pay for an opposing litigant's legal fees before the fight is done. The problem with interim costs is that it asks too much when less is required to ensure access to justice in many cases. What that "lesser" cost order should be leads us to English law and "protective cost orders."

IV. "Protective Cost Orders" and Access to Justice in Public Interest Cases

A) PCOs in English Law

In England, courts have been using their inherent jurisdiction to address costs before the conclusion of a case by eliminating or capping cost liability, but not providing "interim costs" as seen in *Okanagan*.

A PCO is an order that determines the costs consequences of a case *before the case is determined on its merits*. But there is more. Consistent with the wide

[22] See Chris Tollefson, "Costs in Public Interest Litigation: Recent Developments and Future Directions" (2009), 35 Adv. Q. 181 at p. 200.

discretion that courts possess on costs, a PCO can see (1) an order that each party bear their own costs (2) the applicant litigant will get costs at the end of the case in any event of the cause (3) if the applicant litigant is not successful his/her cost liability is capped to a stipulated dollar amount or eliminated all together. Of course, the court retains the discretion to use costs to punish litigants for frivolous or vexatious steps taken despite the PCO. However, the advantage of the PCO is that a litigant of meagre means can determine in advance whether the cost consequences are low enough for that person's case to proceed.

One of the leading cases on PCOs is *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 4 All ER 1 (C.A.)[23]-- a decision of Lord Phillips MR. The Court of Appeal held at p. 5, "The general purpose of a PCO is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs being made against him, a fear which would disinhibit him from continuing with the case at all." In the case, a non-governmental organization wished to judicially review a decision of a governmental department. This department was involved in assisting British companies investing in foreign countries. The NGO (Corner House) was concerned about the prospect of private British companies (receiving financial backing from the government department at issue) using taxpayer's funds to bribe foreign officials to obtain lucrative contracts. The department issued a policy on bribery and corruption, but after consulting with industry and not the NGO it significantly watered down its policy. The NGO sought to judicially review the decision to change the policy for a failure to consult. However, the NGO was concerned about its cost liability (which in England is akin to solicitor and client costs in Manitoba).

The Master of the Rolls held that courts had an inherent jurisdiction to award PCOs. Drawing upon costs jurisprudence in the Commonwealth (including the *Okanagan* case and recommendations of the Ontario Law Reform Commission on costs), the Court of Appeal held that the test for a PCO was as follows (at p. 23):

> We would therefore restate the governing principles in these terms:
>
> 1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that 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;

[23] See also http://www.bailii.org/ew/cases/EWCA/Civ/2005/192.html

> v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
> 2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.
> 3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

The Master of the Rolls was careful to stress that PCOs were to be for "rare cases:" p. 23. He added some additional guidance on the terms of a PCO at p 23-4:

> We would rephrase that guidance in these terms in the present context:
>
> i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability;
>
> ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.
>
> iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly.

In the result, the PCO was granted to Corner House. Its cost liability to the defendant was eliminated but its cost entitlement would be capped to an amount to be determined.

B) PCOs in Canadian Law

PCOs would be a mere legal curiosity for Canadian lawyers if it were not for the majority decision in *Little Sisters*. Bastarache and LeBel JJ held, during the course of commenting on the rarity of interim costs awards, at para 40:

> Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see R. (Corner House Research) v. Secretary of State for Trade and Industry, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

This reference to *Corner House* seemingly dropped out of the sky from nowhere. I am not aware of the concept being considered in Canadian law before *Little Sisters*.

Tollefson has expressed some level of surprise that public interest litigants have not taken up *Little Sisters* and its apparent adoption of PCOs in any meaningful manner.[24] Since Tollefson's article, I have found one case that has considered PCOs in Canadian law-- *Farlow v. Hospital for Sick Children*, [2009] O.J. No. 4847 (S.C.J.).

Farlow is a tragic medical malpractice case. The plaintiffs were parents of a child who died due to a congenital genetic disorder (Trisomy 13) only 2.5 months after the child was born. The parents, unrepresented by counsel, issued a medical malpractice claim in Small Claims court against the hospital and two doctors.[25] In

[24] See Chris Tollefson, "Costs in Public Interest Litigation: Recent Developments and Future Directions" (2009), 35 Adv. Q. 181 at p. 200.

[25] To give you a tenor of their allegations, the court described the plaintiff's claim as follows, with reference to their statement of claim:

"11. The Farlows claim that the Hospital and the physicians were negligent and in breach of their professional obligations in that they:

(a) failed and/or refused to provide appropriate testing and diagnostic information about Annie which would have permitted them to give informed consent to treatment decisions;
(b) failed and/or refused to offer necessary palliation during Annie's gradual asphyxiation;

addition to seeking monetary compensation (of $10,000 plus interest), the parents sought various orders (such as mandatory training for doctors on the law of consent and transparent policies on the allocation of treatment for children) none of which were in their pleadings.

Much of *Farlow* is about why the case should be transferred to Superior Court and out of Small Claims. However, the Farlows took the position that if the claim was transferred to Superior Court then they should receive costs immunity (akin to a PCO).

Herman J. reviewed the English law on PCOs as well as the Canadian law on interim costs. In addition, the court noted that Nova Scotia and Newfoundland had statutory provisions akin to PCOs. The court concluded that it had inherent jurisdiction to award costs immunity in exceptional circumstances.[26] In my view, this decision would be equally applicable to Manitoba law.

Herman J. then considered what the appropriate test for "costs immunity" (or a PCO) should be in Ontario law. The court began at para 90:

> There is limited guidance as to what an appropriate case might be. In referring to different kinds of costs mechanisms, like adverse costs immunity, Bastarache and LeBel JJ. in Little Sisters, noted that a "creative costs award" is an exceptional one, to be granted in special circumstances (at para. 40).

The court continued

> 93 A consideration of these criteria, adapted to the situation of costs immunity, as well as the criteria in the U.K., Nova Scotia and Newfoundland and Labrador suggest the following.

(c) placed a Do Not Resuscitate (DNR) order on Annie without consent which hastened her death;
(d) provided medications to Annie which hastened her death;
(e) disregarded the Farlows' right to decide to pursue medical treatment for Annie;
(f) denied the Farlows the appropriate opportunity to consider an autopsy and learn what caused Annie's death;
(g) practised a policy of non-treatment for infants with serious genetic disorders; and
(h) were negligent in creating and maintaining medical records including those for drug administration.

12 The Farlows claim that as a result of the defendants' negligence and professional malpractice, they watched their daughter die and suffer needlessly.

13 They seek general damages for emotional distress in the amount of $10,000 plus pre- and post-judgment interest and costs."

[26] *Farlow* at para 89.

> 94 The first proposition is that the granting of a costs immunity award is exceptional. The fact that I was not referred to any Ontario case in which it has been awarded, is testament to this proposition.
>
> 95 Other factors that may be taken into account include: whether the applicant's financial circumstances are such that the applicant would probably not proceed absent such an order; the extent to which the public has an interest in the issues being litigated; and the potential impact of such an award on the other parties.
>
> 96 A costs immunity order raises the risk that the party that has been immunized from a costs order may fail to be accountable for the time and money expended on the case. However, this risk could be addressed by requiring that the litigant relinquish some control over the litigation process, as was proposed in the Little Sisters case.

In the result, the court declined to order a PCO. First, the plaintiffs did not adduce evidence on their impecunocity thus the court could not conclude that the risk of an adverse costs award would be a "significant impediment" to advancing the claim. Second, the court was concerned about the impact of the PCO on the defendants. The court noted at para 99, "The defendants are not the government, as is the case in Charter litigation. I do not know what impact such an order would have on the Hospital, a public sector institution, and the two physicians, who are private litigants." Third, the court was not satisfied that the case was in the public interest. The court held at para 100, "accept that any case involving the treatment of a child at the Hospital for Children may well be of interest to the public. However, that is not the same as concluding that there would be an injustice to the public if it did not proceed."

C) Comments on PCOs for Manitoba

PCOs offer some reason for optimism when it comes to access to justice. To the extent that adverse cost awards discourage the average litigant, PCOs allow cost liability to be addressed in advance in many different ways. It is likely more attractive than interim cost awards simply because the danger of creating judicially sanctioned legal aid funded by wealthy litigants disappears. Further, PCOs are not a radical attack on the "loser pays" principle because the concept of rewarding victory can be retained in a PCO though the quantum is capped.

One can imagine the benefit of PCOs when it comes to Charter litigation or Aboriginal litigation. Further, judicial reviews of governmental decision making can see PCOs in appropriate circumstances. The prime target of such PCOs would likely be government. In light of *Farlow*, it would be unlikely that PCOs would be available

against private litigants. As such, a person with a damages suit against an insurer or a doctor would likely not benefit.

The question then becomes this: are PCOs enough? Should the cost regime be further adapted to allow for more run of the mill civil cases? After all, for every Charter challenge there are 100 civil cases that do not change the law or raise issues of social import, but are of fundamental importance to the litigants. For some guidance on this issue, we must turn to the recommendations of the ALRC.

V. The "Material Effect" Exception and Access to Justice

A) The Australian "Rules"

The ALRC did a comprehensive review of the costs regime in Australia. The Australian law on costs is akin to Manitoba law except for the fact that the costs available in Australia are much higher (approaching actual legal costs as in England, but not reaching that level). The ALRC recommended that the "loser pays" principle be retained, but suggested a more nuanced approach. The ALRC recommended a cost regime as follows for civil cases:

> In civil proceedings — costs follow the event
>
> I pay my costs and your reasonable costs if I lose.
>
> You pay your costs and my reasonable costs if I win.
>
> However, if
> — the litigation is a public interest case
> — one of us is unable to present his or her case properly or to negotiate a fair settlement because of the risk of an adverse costs order
>
> then some other order may be made as to the shifting of costs or to the amount of costs that may be recovered.
>
> Notwithstanding any other orders as to costs
>
> — I pay any costs incurred by another party as a result of my unmeritorious claims or defences or of any abuse by me of the court or tribunal process.
>
> — I can recover any costs I incur as a result of another party's unmeritorious claims or defences or abuse of the court or tribunal process.

> — Our ability to recover costs from each other (if any) may be limited by the imposition of costs caps and settlement rules.

In my view, the approach advocated by the ALRC is akin to the Manitoba approach but with the crucial addition of the "material effect" exception.

The "material effect" exception advocated by the ALRC relates to their proposed rule that a different cost approach would be adopted if "one of us is unable to present his or her case properly or to negotiate a fair settlement because of the risk of an adverse costs order." The ALRC wrote"

> 12.1 In this chapter the Commission recommends that the rule that costs follow the event should not apply to people *whose ability to present their case properly or to negotiate a fair settlement is materially and adversely affected by the risk of having to pay the other party's costs*. In these cases the court should be able to make another costs order such as capping the liability for costs or requiring each party to bear his or her own costs. The chapter examines the need for the exception and its likely operation in light of the responses to DRP 1.
>
> ***The need for this exception***
>
> 12.2 AJAC was concerned that the costs indemnity rule may deter people from pursuing meritorious claims or defences because of the risk of having to pay a portion of the other party's costs in addition to their own costs if unsuccessful.[1] This concern was confirmed by many of the responses to IP 13. It was widely recognised that the costs indemnity rule can deter, or help to deter, some litigants from pursuing genuine claims or defences.[2] The people most likely to be adversely affected in this way are those who may lose their home, car or livelihood or suffer some other substantial hardship if required to pay the other party's costs.[3]

The ALRC made two recommendations on what would satisfy the "material effect" exception:

> ***Recommendation 41 - presumption that a party's ability will be materially affected***
>
> The court shall presume, unless satisfied otherwise, that a party's ability to present his or her case properly or to negotiate a fair settlement will be materially and adversely

> affected if the court is satisfied that the party would suffer substantial hardship if required to pay the other party's costs.
>
> ***Recommendation 42 - substantial hardship***
> When determining whether a party would suffer substantial hardship the court shall have regard to whether the party will
> • lose or be forced to vacate his or her home
> • lose a motor vehicle or the use of a motor vehicle reasonably necessary for domestic, employment or business purposes
> • lose his or her employment or livelihood
> • be made bankrupt
> as a result, in part or whole, of being required to pay the other party's costs.

In "material effect" cases, the court could make orders akin to PCOs; namely that each party bear their own cost, that costs only go "one way;" or that the cost exposure of the relevant party be capped at some amount. Though the ALRC made these recommendations on costs, I am not aware of such recommendations being adopted.

B) The Utility of Material Effect in Canada

I admit that the "material effect" exception would be new to Canadian law and much less established as PCOs (such as they are in Canadian law). However, since costs are discretionary, there is nothing preventing consideration of the material effect approach in Canadian law if the purpose behind such an approach is reasonable.

In my view, the main reason the "material effect" exception should be adopted into Manitoba law is because it would make courts accessible to the average person and, at the same time, reaffirm the importance of the civil courts. While not every civil case will lead to changes in the law, we should not be insisting on legal change but in valuing judicial decisions in itself.

At the 2010 Pitblado Lectures, Dame Hazel Genn delivered a paper predicated upon the value of civil law. She wrote at p. 80:

> The civil justice system is about something more that private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community's defence against arbitrary government action; they promote social order; and they

> facilitate the peaceful resolution of disputes. Most importantly, the civil courts support economic activity.[27]

She continues at p. 80:

> The public courts and judiciary may not be a *public service* like health or transport systems, but the judicial system *serves the public* and the rule of law in a way that transcends private interests.

In my view, run of the mill cases (such as a negligence case against a professional or a judicial review against a tribunal or a contract dispute with an insurer) are valuable in themselves. When a person is prevented from presenting such average claims, these people can feel powerless. Their sense that "we live in an orderly society where there are rights and protections, and that these rights and protections can be made good" is effectively taken from them because they are of meagre means.

The "material effect" exception when added to PCOs allows litigants the ability to present their case where they otherwise would not be able to. Consistent with the judicial reluctance to alter the "loser pays" principle, this exception would only apply where the cost award would create a substantial hardship. The emphasis on financial hardship harkens back to the comments of the Chief Justice noted above that the average person "quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts."

Not every litigant will be devastated by an adverse cost award. The danger that PCO/material effect exception cases will deprive "the other side" of their costs should not be overemphasised. In my view, there may be reason to consider the relaxing of the strictures of the ALRC approach on material effect to consider cases where the adverse cost award would have a negative impact short of bankruptcy etc. Yet, that is for another day. The point is that PCOs and the material effect exception should be used beyond public interest case and employed in a way that underscores the value of our civil justice system by facilitating access to the courts.

VI. Conclusion

> "There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must

[27] Professor Dame Hazel Genn, "Civil Justice Reform and Alternative Dispute Resolution," 2010 Isaac Pitblado Lectures "Remedies: From Dollars to Sense?" November 26 & 27, 2010.

> inhibit the taking of case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation."
>
> ***Remarks of Toohey J. (High Court of Australia) at the International Conference on Environmental Law (1989)***[28]

Costs for the victorious is a long standing principle of our law. In many instances, such an approach is consistent with access to justice principles. However, I simply wish to stress that rewarding victory should not be at the expense of justice. Our civil justice system should not be beyond the reach of litigants-- be they those who bring a Charter challenge or simply have a dispute with their insurer or a personal injury they seek compensation for. If costs are serving or could serve as a disincentive to litigation then we need a better way. England and Australia have shown us "better ways" that are consistent with the tenor of Canadian law. It can only be hoped that we do not let the "loser pays" principle blind us from alternatives that can promote justice.

[28] Cited to ALRC, Costs Shifting - Who Pays for Litigation (ALRC Report 75) Published on 20 October 1995 at para 13.9.