

# ENVIRONMENTAL RIGHTS IN ALBERTA: A RIGHT TO A HEALTHY ENVIRONMENT

Module 5: Costs in Court and Regulatory Proceedings

*A publication of the Environmental Law Centre's Environmental Rights Program*



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October 2017



Environmental  
Law Centre

Library and Archives Canada Cataloguing in Publication

Iliya-Ndule, Chinomso, author

Environmental rights in Alberta. Module 5 : costs in court and regulatory proceedings : a right to a health environment / Chinomso Iliya-Ndule and Jason Unger.

"A publication of the Environmental Law Centre's Environmental Rights Program."

Includes bibliographical references.

ISBN 978-0-9953045-1-2 (PDF)

1. Costs (Law)--Alberta. 2. Human rights--Environmental aspects--Alberta. 3. Environmental law--Alberta. I. Unger, Jason, 1971-, author II. Environmental Law Centre (Alta.), issuing body III. Title.

KEA562.3.I45 2017  
KF8995 I45 2017

347.7123'077

C2017-907532-2

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OCTOBER, 2017

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## Acknowledgements

The Environmental Law Centre would like to thank the Alberta Law Foundation for its support of the ELC's *Environmental Rights* program. The ELC is publishing a series of educational modules concerning legal rights related to environmental quality. This work is in support of enacting laws that will foster environmental quality for future generations of Albertans.

PROGRAM SUPPORTER: ENVIRONMENTAL BILL OF RIGHTS IN ALBERTA

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## Executive Summary

Public participation in environmental decision making – whether challenging decisions in the courts or participating in regulatory proceedings - requires time and money. Participants in court processes need money for filings, document preparation, expert evidence and lawyers. In regulatory proceedings there may be a need to hire experts and lawyers to participate in an effective manner. Costs arise, not only from the direct costs of participation, but also from the ability of other parties to be awarded some of their costs from the “unsuccessful” party. These costs directly impact one’s right to access the justice system and effectively participate in regulatory proceedings.

Concerns around costs in environmental decision making can be distinguished between bringing a legal action or appeal to court (i.e. a judicial proceeding) and the costs associated with participating in a regulatory proceeding and/or appeal to a regulatory tribunal (i.e. a regulatory proceeding).

The general rule in Alberta’s system of awarding costs in judicial proceedings is that the successful party will have a portion of their costs covered, at the discretion of the court. In relation to public interest litigation, including environmental litigation, there has also been some recognition that issuing adverse cost awards against a public interest litigant should occur in only limited circumstances (i.e. the court should make a “no-costs order”). However, Alberta courts still issue costs against litigants in public interest cases.<sup>1</sup> Accordingly, the ELC recommends that the *Alberta Rules of Court* be amended to state a “no-cost” assumption in favour of the public interest litigant.

Like in judicial proceedings, those participating in a regulatory proceeding may have some of their costs covered at the discretion of the relevant tribunal. There is no legislative mechanism to allow awarding costs incurred prior to the initiation of a statutory appeal. Once an appeal has been filed some of the costs may be covered. Appellants are faced with significant uncertainty as to whether costs will be covered and to what degree. To counter this uncertainty, the ELC recommends passing legislation that provides a clear identification of the quantum of costs that will be granted in relation to the tribunal hearing process as early as possible in a proceeding.

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<sup>1</sup> See *Alberta Wilderness Association v Alberta* (Environmental Appeal Board), 2013 ABQB 44 (CanLII), <<http://canlii.ca/t/fvz87>> . *Vriend v Alberta*, 1996 ABCA 274 (CanLII) <http://canlii.ca/t/2dd17>, retrieved on 2017-10-10 Also see *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253 (CanLII), <http://canlii.ca/t/1hm4w>.

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## INTRODUCTION

Participation in environmental decision making costs money. Experts are often needed to review and provide evidence on technical issues, and lawyers may be hired to provide legal advice and representation. The cost of participation can be significant. When lawyers speak of “costs” in the context of environmental decision making, the term refers to the ability to recover some (or in the very rare occasion all) of the expenditures related to participation. These costs may be awarded as part of court proceedings (as a matter of course) or for costs related to administrative appeals to tribunals like the Alberta Energy Regulator or the Alberta Environmental Appeals Board.

The context of “costs” awards or coverage of costs in environmental matters can be distinguished between different types of decision making processes: taking a matter to court (i.e. court ordered costs) and participating in administrative decisions and appeals to regulatory tribunals (i.e. regulatory costs).

This report (along with the companion document, *Costs in Alberta’s Environmental Regulatory Tribunals*) is aimed at providing a general understanding about how costs are awarded to parties by courts and by regulatory tribunals. The report concludes with some general recommendations about how our laws around costs may evolve to better foster and facilitate access to justice regarding public interest environmental decisions.

### The importance of costs

Fundamentally the issue of awarding a party “costs” is about facilitating access to justice. An award of costs in the court context recognizes that a successful party should be reimbursed for the costs incurred bringing or defending a law suit. An award of costs also acts to discourage actions with little merit and to promote settlement in some situations.

Contrast that with an award of costs in the regulatory context where the purpose is to ensure a level of procedural fairness and equity among participants. The regulatory context is less concerned with “winners” and “losers” and is more concerned with allowing those impacted by specific developments and government decisions to participate effectively in the process.<sup>2</sup>

In the same instances, the risk of having costs awarded against a public interest litigant or appellant may undermine valid public interest initiatives to protect the environment. In the context of going to court to challenge an environmental decision the European Commission has noted:<sup>3</sup>

The costs of a judicial review procedure present a potential major deterrent to bringing cases before a national court. This is especially true in environmental cases, which are often initiated to protect general public interests and without any financial gain in view. Indeed, after weighing the potential benefits of litigation against the risk of incurring high litigation costs, the public concerned may refrain from seeking a judicial review even in well justified cases.

Facilitating and promoting access to justice and environmental rights can only occur where such cost awards are available, where adverse cost awards are used sparingly, where the quantum or amount of cost coverage is appropriate and where there is sufficient certainty in cost awards to allow for litigants to properly engage in the court or regulatory process.

## Differentiating costs: courts and tribunals

Cost awards in court processes are, “in the usual case...awarded to the prevailing party after judgment has been given.”<sup>4</sup> The award of costs in court proceedings is premised on the

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<sup>2</sup> *Bell Canada v Consumers' Association of Canada*, 1986 SCC 49 (CanLII) at para 30 (*Bell Canada*); and *Green, Michaels & Associates Ltd v Alberta (Public Utilities Board)*, 1979 AltaSCAD 8 (CanLII) at para 30 (*Green, Michaels & Associates Ltd*).

<sup>3</sup> European Commission, Communication from the Commission, *Commission Notice on Access to Justice in Environmental Matters*, Brussels, 28.4.2017 C(2017) 2616 at p. 51. Online: [http://ec.europa.eu/environment/aarhus/pdf/notice\\_accesstojustice.pdf](http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf).

<sup>4</sup> *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para 20 (*Okanagan Indian Band*).

indemnification or compensation of a successful party for expenses incurred in defending an unfounded claim or in asserting a legal right.<sup>5</sup>

On the other hand, whether costs are awarded in regulatory proceedings is not typically based on the notion of “success” but rather on the utility of participation.<sup>6</sup> In regulatory proceedings, the purpose of an award of costs is dependent on the legislation granting the tribunal the power to award costs focused on the furtherance of public interest and public participation.<sup>7</sup> These factors may include whether the party claiming costs used the process efficiently (i.e. avoided repetitious evidence and questioning), brought relevant evidence to the tribunal, and provided needed legal and technical assistance.<sup>8</sup> For instance, the award of costs in the Alberta Energy Regulator’s (AER) hearings is intended to compensate participants for costs incurred for meaningful participation in the hearing.<sup>9</sup>

## Who typically has to pay costs?

The court or tribunal determines who pays costs and in what amount.<sup>10</sup> Generally, in court proceedings the unsuccessful party pays costs to the successful party (commonly referred to as the “default cost award”).<sup>11</sup> In proceedings before tribunals, the applicant or approval holder

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<sup>5</sup> *Ibid.* at para 21.

<sup>6</sup> *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 397 (CanLII), <<http://canlii.ca/t/gfgj9>>, retrieved on 2017-10-05.

<sup>7</sup> Robert A Centa & Denise Cooney, “Trend in Costs Awards before Administrative Tribunals” (2014) 27:3 *CJALP* 259 at 261-262 (Trends in Costs Awards before Administrative Tribunals); R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at 8-1; Jerry DeMarco & Paul Muldoon, *Environmental Boards and Tribunals in Canada: A Practical Guide* (Canada: LexisNexis, 2011) at 25 – 30 & 130-131; *Kelly v Alberta (Energy Resources Conservation Board)* 2012 ABCA 19 at para 31 (*Kelly*) at para 31; *Bell Canada*, *Supra* note 1; *Green, Michaels & Associates Ltd*, *Supra* note 1; *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 (CanLII) at paras 31 & 32 (*Cabre Exploration Ltd case*).

<sup>8</sup> *Supra* note 5.

<sup>9</sup> *Kelly*, *supra* note 4.

<sup>10</sup> Court of Queen’s Bench Costs Manual: Costs between Parties: Introduction to Costs (Updated September 29, 2010) at 3/19 (ABQB Costs Manual: Introduction to Costs).

<sup>11</sup> *Alberta Rules of Court*, AR 124/2010, at rule 10.29(1).

typically pays costs, however, there are instances where the tribunal may make an order that the tribunal or government should pay a costs award.<sup>12</sup>

## A) Costs of going to Court

The Alberta Courts' authority to award costs is found in the *Rules of Court*.<sup>13</sup> However, the award of costs is ultimately based on the Court's discretion.<sup>14</sup> A court may order costs following the completion of an action or may choose to award interim or advance costs.<sup>15</sup> Also, the court may grant relief from costs or issue an order that protects a party from costs.<sup>16</sup>

Alberta courts have the power to award a variety of costs, and "about the only thing which costs awarded by a court cannot cover is the expenses of the court or tribunal (beyond fees ..., or of applications by the parties to other tribunals or regulatory agencies".<sup>17</sup> The scope of costs that are typically considered include:

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<sup>12</sup> *Alberta Energy Rules of Practice*, AR 99/2013 at Rule 65; *Environmental Appeal Board Regulation*, AR 114/1993, at ss. 19(4), 20(3) (*EAB Regulations*); *Alberta Utility Commission Rule 009: Rules on Local Intervener Costs*, s. 2.3 (*AUC Rule 009*). This should be differentiated from an award of costs against a tribunal in a court proceeding which is only made in exceptional circumstances where the tribunal has acted capriciously or abusively. *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 912 (CanLII) at para 13.

<sup>13</sup> *Alberta Rules of Court*, supra note 11, Division 2 & Schedule C.

<sup>14</sup> *Ibid* at r 10.29(1)(a) read together with r 10.31(1); *Court of Queen's Bench Act*, RSA 2000, c-31, s 21 (*Court of Queens Bench Act*); *Court of Appeal Act*, RSA 2000, c-30, s 12; *Pharand Ski Corp. v. Alberta*, 1991 CanLII 5883 (ABQB) at para 8.

<sup>15</sup> See Chris Tollefson "Costs in Public Interest Litigation Revisited" (2011) *Advocates Quarterly* 39, 197.

<sup>16</sup> *Ibid*. Tollefson notes that "protective costs orders" are very rare in Canada. An application for a protective costs order was rejected in the 2012 decision of *Lockridge v. Director, Ministry of the Environment*, 2012 ONSC 2316 (CanLII), <<http://canlii.ca/t/fz754>>, the court noting "while the issues are of public interest in broad sense, the narrow nature of the impugned decisions and the limited remedy available in a judicial review application lead to the conclusion that the application does not have sufficient public importance to justify such an exceptional costs order" at para 167". Also see *Havnert-Faga v. Faga*, 2013 ONSC 1581 (CanLII), <<http://canlii.ca/t/fwjng>> where the argument for a cost immunity order was rejected, in part, due to the fact that the case had "no element of public interest".

<sup>17</sup> WA Stevenson & JE Côté, *Alberta Civil Procedure Handbook* (Edmonton: Juriliber, 2017) rule 10.31, p 10-44 (*Alberta Civil Procedure Handbook*); *Lee v Anderson Resources Ltd.*, 2002 ABQB 190 (CanLII) at para 61 – 62 (courts lack jurisdiction to award costs for proceedings before tribunals).

- I. Costs for legal fees,
- II. Costs for fees charged and expenses incurred by experts and witnesses, and
- III. Costs for disbursements (out of pocket expenses) associated with an action.<sup>18</sup>

Most often, costs awards do not include expenses or fees incurred during participation in alternative dispute resolution (ADR) processes.<sup>19</sup> An award of costs may be on a party-and-party basis, solicitor-and-client basis, or solicitor and his own client basis or the court may decide that each party should cover their own costs (i.e., no-cost award).<sup>20</sup>

A party-and-party costs award is an award of costs that does not serve to totally indemnify the successful party for its costs.<sup>21</sup> It is usually calculated based on Schedule C of the *Rules of Court*.<sup>22</sup> “Solicitor and client costs” provide indemnity to the successful party for all costs that were “essential to and arising within the four corners of the litigation”.<sup>23</sup> A “solicitor and own client costs” award is aimed at completely indemnifying the successful party for costs but such costs are rarely granted.<sup>24</sup>

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<sup>18</sup> *Alberta Rules of Court*, *supra* note 11, r 10.31, Schedule B, Division 3 & 20 & Schedule C (*Alberta Rules of Court*). *Ma v Coyne*, 2016 ABCA 119 (CanLII) at para 12; *Davidson v Patten*, 2005 ABQB 521 at paras 34 – 39; and *Alberta Civil Procedure Handbook*, *supra* note 17.

<sup>19</sup> *Alberta Rules of Court*, r 10.31(2)(c); Alberta Energy Regulator Rules of Practice, AR 99/2013, r 58(1)(c) (*AER Rules of Practice*) read together with *Directive 031: REDA Energy Cost Claims* (February 24, 2016), s 6.4 (*AER Directive 031*).

<sup>20</sup> *Alberta Rules of Court*, *supra* note 11, r 10.31(1) & (3); Allan A Fradsham, *Alberta Rules of Court Annotated 2017*, (United States: Thomas Reuters, 2017 ed) Vol 1 at p 1174 – 1175 (*Alberta Rules of Court Annotated 2017*). It is important to note that the latter 2 scales of costs are awarded in rare and exceptional cases. *Evans v. Sports Corp.*, 2011 ABQB 616 at para 12.

<sup>21</sup> *Alberta Rules of Court Annotated 2017*, *Supra* note 24 at p 1173; *McCarthy v Roman Catholic Separate School District No 1 (Calgary)*, 1980 CanLII 1145 (ABQB) at para 3 (*McCarthy*).

<sup>22</sup> Fradshem A, *Alberta Rules of Court Annotated 2017*, (Toronto, Carswell 2017) at p 1175; *Sidorsky v CFCN Communications Ltd.*, 1995 CanLII 9022 (ABQB) at paras 7 – 8. *McCarthy v Calgary Roman Catholic Separate School District No. 1 (Calgary)*, 1980 CanLII 1145 (ABQB) at para 5; Fradshem A, *Alberta Rules of Court Annotated 2017*, (Toronto, Carswell 2017) at p 1173; *Alberta Treasury Branches v 1401057 Alberta Ltd.* (Katch 22), 2013 ABQB 748 (CanLII) at para 33 (*Alberta Treasury Branches*).

<sup>23</sup> *Ibid.*

<sup>24</sup> William A. Stevenson and Jean E. Côté, *Civil Procedure Encyclopedia*, (Edmonton: Juriliber, 2003), pp. 72-67 to 72-68.

The courts usually determine the scope of costs to be paid in each case; and where the court is silent on the issue, the amount of costs will be determined in accordance with *Rules of Court*.<sup>25</sup>

The long-standing rule regarding costs is that a successful litigant, absent misconduct, is entitled to a costs award against the unsuccessful party (i.e. the unsuccessful party is subjected to an adverse cost award).<sup>26</sup> This rule applies equally to interlocutory applications, i.e. those applications that may be brought prior to or peripheral to the main hearing or trial.<sup>27</sup> As mentioned earlier, the award of costs is used to indemnify a successful party on a party-and-party basis, i.e., for a portion of the costs incurred during an action.<sup>28</sup> The Supreme Court of Canada in *B. (R) v Children's Aid Society of Metropolitan Toronto*, stated the rationale for this rule as follows:<sup>29</sup>

...had the unsuccessful party initially agreed to the position of the successful one, no costs would have been incurred by the successful party. Accordingly, it is only logical that the party who has been found to be wrong must be ready to support the costs of a litigation that could have been avoided.

The award of costs is entirely a matter of judicial discretion (unless otherwise rule constrained).<sup>30</sup> Denial of costs to a successful litigant is to be limited to "exceptional circumstances".<sup>31</sup>

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<sup>25</sup> *Alberta Rules of Court*, *supra* note 11, r 10.41(1)(2), Schedule C & Schedule B, Division 3.

<sup>26</sup> *Alberta Rules of Court*, *supra* note 11, r 10.29(1), 10.31; Mark M Orkin, *The Law of Costs*, 2<sup>nd</sup> ed (Toronto: Canada Law Book, 1987) (loose-leaf updated 2010, release 29), pp 2-17 & 2-18; *Court of Queen's Bench Act*, *supra* note 37, s 21; see also ABQB Costs Manual: Introduction to Costs, *Supra* note 31 at 2/19; *Alberta Treasury Branches*, *Supra* note 27 at para 32.

<sup>27</sup> *Alberta Civil Procedure Handbook*, *supra* note 17 at 10-36 & *Enviro Trace Ltd v. Sheichuk*, 2015 ABQB 28 (CanLII) at para 1.

<sup>28</sup> *Alberta Rules of Court*, *supra* note 11, Schedule C; *Reese v Alberta (Ministry of Forestry, Lands and Wildlife)*, 1992 CanLII 2825 ABQB.

<sup>29</sup> 1995 CanLII 115 (SCC) at 405.

<sup>30</sup> *Alberta Rules of Court*, *supra* note 11, Information note at 10-19.

<sup>31</sup> *Canada Deposit Insurance Corp v Canadian Commercial Bank*, (1987), 50 Alta LR (2d) 1 at 4, 5 (QB); *Kretschmer v. Terrigno*, 2012 ABCA 345 (CanLII) at para 116; *Stewart v Stewart*, (1982), 20 Alta LR 193 at 193. For interlocutory applications see: *Votour v Tucker*, 2010 ABQB 34 (CanLII) at para 4.

In making an award of costs, the court may order a party to pay: a) full indemnity to the other party for all its reasonable and proper legal expenses and disbursements; b) a portion of the other party's litigation expenses, which could be in accordance with Schedule C or multiples of the fees fixed in schedule C of the Rules or a lump sum; or c) no cost at all.<sup>32</sup>

In determining the amount of a costs award, the court may consider the following factors:<sup>33</sup>

- a) the result of the action and the degree of success of each party;
- b) the amount claimed and the amount recovered;
- c) the importance of the issues;
- d) the complexity of the action;
- e) the apportionment of liability;
- f) the conduct of a party that tended to shorten the action; and
- g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

In deciding whether to impose, deny or vary the amount of a costs award, the Court may also consider matters relating to the conduct of the parties, including unnecessary steps that delayed or lengthened the action, non-compliance with the *Alberta Rules of Court (Rules of Court)*<sup>34</sup> or a Court order, or misconduct.<sup>35</sup> Usually, the court calculates costs in accordance with Schedule C of the *Rules of Court* (Schedule C) plus reasonable and proper disbursements.<sup>36</sup> Where the factors set out above dictate, or the conduct of a party is found to be inappropriate, the Court may make a costs award that is a multiple of the fees fixed by Schedule C.<sup>37</sup>

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<sup>32</sup> See *Alberta Rules of Court*, *supra* note 11, r 10.31(1) & (3), 10.32, 4.29; ABQB Costs Manual: Introduction to Costs, *supra* note 31 at 11/19 – 13/19.

<sup>33</sup> *Alberta Rules of Court*, *supra* note 11, r 10.33(1).

<sup>34</sup> *Supra* note 11.

<sup>35</sup> *Ibid* at r 10.33(2) & information note at p 10-19.

<sup>36</sup> *Reese*, *supra* note 28; *Alberta Rules of Court*, *Supra* note 11, schedule c contains a grid that sets out the fees that a successful party is entitled to recover for each significant step taken in an action.

<sup>37</sup> *Reese*, *supra* note 28.

## Public interest litigation and costs: the environmental context

Public interest litigation is that which raises issues of broader “public interest” and importance which are not readily represented or brought by private parties.<sup>38</sup> However, discerning whether an action is public interest litigation can pose a challenge.

The difficulty here is that in a constitutional democracy such as ours, there is no monolithic, universally recognized public interest. Indeed, if there was, there would be little or no need for public interest litigation since the democratic process would presumably elect governments prepared to act in accordance with the accepted public interest. But that is not the case in modern day Canada. Consequently, as Sharpe J. put it in *Mahar v. Rogers Cable Systems*, *supra*, at 703, “There will always be a debate about what is the public interest.”<sup>39</sup>

Justice Nixon of the Alberta Court of Queen’s Bench has noted “public interest litigation involves proceedings which raise a novel issue of public importance commenced by a party who has no personal, economic or proprietary interest in the outcome”.<sup>40</sup>

It is recognized that an award of costs in court processes can hinder valid public interest litigation from taking place. The costs of litigation have continued to rise such that the impact of a cost award, it has been noted, may exceed the value at stake in a dispute.<sup>41</sup>

Environmental litigants typically do not have the advantage of significant financial resources unlike their “opponents” (the government and private interest litigants), nor are they typically seeking a financial (or compensatory) result.<sup>42</sup> Thus, adverse costs awards may cause

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<sup>38</sup> See *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2011 BCCA 515 (CanLII), <<http://canlii.ca/t/fpbqgs>>, retrieved on 2017-10-06.

<sup>39</sup> *St. James' Preservation Society v. Toronto (City)*, 2006 CanLII 22806 (ON SC), <<http://canlii.ca/t/1nw8f>>, At para 24.

<sup>40</sup> *Gendre v Fort Macleod (Town)*, 2016 ABQB 111 (CanLII), <<http://canlii.ca/t/gnh13>>.

<sup>41</sup> Martin Twigg, “Costs Immunity: Banishing the “Bane” of Costs From Public Interest Litigation” (2013) 36:1 Dalhousie L J (2013) 193 at 195 (Costs Immunity).

<sup>42</sup> *Ibid.* at 196. In this paper, an environmental rights litigant may either be a) a litigant with no direct, pecuniary or material interest in the proceeding or b) a litigant with a modest interest in comparison to the costs of pursuing the action. *Odhavji Estate v Woodhouse*, 2003 SCC 69 (CanLII) at 76.

environmental rights litigants to abandon their claim due to the legitimate fear of the inability to pay the costs of their litigation and adverse costs.<sup>43</sup>

An effective public interest costs framework values public interest engagement in the judicial sphere as a matter of upholding the rule of law. A costs award should “allow litigants with limited resources but strong claims to avail themselves of an often prohibitively expensive system” with the possibility of recouping at least some of the legal costs incurred.<sup>44</sup>

Further, the fear of losing and becoming subject to a costs award should not deter potential litigants with limited resources from pursuing their claim.<sup>45</sup> Chris Tollefson has observed, that for public interest environmental litigators in Canada, the prospect of an award of adverse costs was the most challenging barrier to access to justice confronting public interest litigants.<sup>46</sup> This was regarded as being a function of, amongst others, 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.<sup>47</sup>

Numerous courts and academics cite the Ontario Law Reform Commission’s 1989 *Report on the Law of Standing* which reviewed access to justice issues with respect to public interest litigation and recommended that a public interest cost exemption be recognised, due to the

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<sup>43</sup> *Ibid.* at 195.

<sup>44</sup> Federal Court of Appeal and Federal Court Rules Committee “Review of the Rules on Costs Discussion Paper, October 5, 2015. Online: <[http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Costs\\_discussion\\_paper\\_\(ENG\)\\_revised\\_oct\\_5-2015.pdf](http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Costs_discussion_paper_(ENG)_revised_oct_5-2015.pdf)> at p.3.

<sup>45</sup> *Ibid* and Canadian Environmental Law Association, Ecojustice Canada, Environmental Law Centre University of Victoria, “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 at page 3, online: Canada Environmental Law Association <http://www.cela.ca/sites/cela.ca/files/Costs-Access-to-Justice-Public-Interest-Envl-Litigation.pdf> (ENGO submission).

<sup>46</sup> Chris Tollefson, “Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond” (2006) 19:1 Can J Admin L & Prac 39 at 49 (Costs and Public Interest Litigant); ENGO submission *ibid.* at 3 & 6.

<sup>47</sup> *Ibid.*

fact that adverse cost awards could be a significant deterrent to a public interest litigant.<sup>48</sup> The commission went further to recommend factors that should be considered before a public interest costs exemption is made.<sup>49</sup> The commission summarized the factors thusly:<sup>50</sup>

...No costs should be awarded against a person who commences a proceeding where

- 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 such 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; and
- d) the defendant has a clearly superior capacity to bear the costs of the proceeding,

unless the person engaged in vexatious, frivolous or an abusive conduct.

The courts have recognized the threat that adverse costs awards have on access to justice for public interest litigants; and adopted different cost rules for public interest litigants.<sup>51-52</sup> The courts have generally agreed that public interest proceedings may be disposed of without an

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<sup>48</sup> Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: OLRC, 1989) (Ontario Law Reform Commission) at 147. *Harris v. Canada*, *Supra* note 68 at para. 222, cited in *Elders Council of Mitchikanibikok Inik v. Canada (Indian Affairs and Northern Development)*, 2010 FC 910 (CanLII) at para. 6; See also *Shepherd v. Canada (Solicitor General)* (1990) F.C.J. No. 803, where the Federal Court awarded costs to the applicant who was largely unsuccessful on the basis that his application led to changes in policy and practice of the National Parole Board and Correctional Services of Canada.

<sup>49</sup> *Ibid* at 152 – 156.

<sup>50</sup> *Ibid* at 179. See also Shaun Fluker, "Public interest Exception to the Normal Costs Rule in Litigation" (2016), online: ABlawg.ca [http://ablawg.ca/wp-content/uploads/2016/03/Blog\\_SF\\_Gendre\\_March2016.pdf](http://ablawg.ca/wp-content/uploads/2016/03/Blog_SF_Gendre_March2016.pdf) (Shaun Fluker).

<sup>51</sup> *Pauli* case, *supra* note 58; *Harris v Canada*, 2001 FCT 1408 (*Harris v Canada*); *Public School Board's Association of Alberta v Alberta (AG)*, 1998 ABCA 238 (CanLII); *Dickason v University of Alberta*, 1992 CanLII 30 (SCC), this case involved a private-interest test case.

<sup>52</sup> *Costs Immunity*, *supra* note 41 at 196. See also *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253 (CanLII), <<http://canlii.ca/t/1hm4w>>.

award of costs.<sup>53</sup> Public interest cases are not automatically exempted from costs awards, but, the court retains its discretion to consider the public interest factor along with other relevant factors when deciding whether to make an award of costs or not.<sup>54</sup>

In *Friends of Oldman River Society v. Minister of Environmental Protection*,<sup>55</sup> the Court of Appeal held that only in the most exceptional cases will the court interfere with the general rule of costs; and a case which raised a novel point, is in the public interest and in which the applicant stands to receive no financial gain, does not automatically deserve a departure from the general rule.

Case law reveals that consistency in the area of public interest costs is lacking when it comes to the award of cost in public interest cases.<sup>56</sup> Despite the “public interest cost exemption”, there are also a number of cases where the Court has awarded costs against unsuccessful public interest litigants.<sup>57</sup> It has been noted that when private third parties, as against the government or public bodies, successfully defend an environmental test case the “public interest cost exemption” often does not apply.<sup>58</sup>

As pointed out by Shaun Fluker, applying the public interest cost exemption test is a difficult and unpredictable exercise; and although it shields public interest litigants from liability for adverse costs awards, it does little to facilitate public interest litigation.<sup>59</sup> Because the award of costs is discretionary, and the public interest costs exemption is entirely a common law principle, it is almost impossible for an environmental rights litigant to predict with certainty

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<sup>53</sup> *Pauli v. ACE INA Insurance Co.*, 2004 ABCA 253 (CanLII), <http://canlii.ca/t/1hm4w> citing *Vriend v Alberta*, 1996 ABCA 274 (CanLII); *Boissoin v Lund*, 2010 ABQB 123 (CanLII) where each party bore their own costs; *Friends of Calgary General Hospital v Calgary (City of)*, 2001 ABCA 162 (CanLII) where each party bore their own costs, reversing the cost award of the chambers judge.

<sup>54</sup> 2005 ABQB 530 (CanLII) at para 5.

<sup>55</sup> 1996 ABCA 136 (CanLII).

<sup>56</sup> *Costs Immunity*, *supra* note 41 at 207.

<sup>57</sup> *Vriend case*, *supra* note 1; *Reese*, *supra* note 28; *Alberta Wilderness Association v Alberta (Environmental Appeal Board)*, 2013 ABQB 44 (CanLII).

<sup>58</sup> *Costs Immunity*, *supra* note 41 at 212; *Costs and Public Interest Litigant*, *supra* note 46 at 53.

<sup>59</sup> Shaun Fluker, *supra* note 50.

whether or not his/her case will be deemed to be one of public interest and thus be entitled to a costs exemption or at very least to a reduced costs award.<sup>60</sup>

## Environmental public interest litigation path forward

The Canadian Environmental Law Association, Ecojustice and the University of Victoria Environmental Law Centre have advocated (in relation to changes to the Federal Rules of Court) that “in the context of public interest environmental litigation, access to justice should be the overarching purpose served by costs awards”.<sup>61</sup> The groups’ report further outlines how the four main purposes for costs can be differentiated in the public interest litigation context.<sup>62</sup>

- i. The use of adverse costs awards serves to deter litigants with limited resources from bringing meritorious environmental claims that could advance public interest.<sup>63</sup>
- ii. The use of costs awards as a tool to discourage frivolous suits seems to be irrelevant considering that the test for public interest standing.<sup>64</sup> The test for public interest standing acts to curtail frivolous public interest cases.

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<sup>60</sup> *Gendre v Fort Macleod (Town)*, 2016 ABQB 111 (CanLII).

<sup>61</sup> *Supra* note 45 at page 3.

See also, Chris Tollefson, “Costs in Public Interest Litigation Revisited” (2011) 39:2 *Advocates Quarterly* 197 at 204; Costs and Access to Justice in Public Interest Environmental Litigation, *Supra* note 10; *Okanagan Indian Band*, *Supra* note 2 at paras. 27 – 30.

<sup>62</sup> *Ibid.* at 3- 5. Federal Court of Appeal and Federal Rules Committee, “Review of the Rules on Costs Discussion Paper” (October 5, 2015) at 2 - 3, online: [http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Costs\\_discussion\\_paper\\_\(ENG\)\\_revised\\_oct\\_5-2015.pdf](http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Costs_discussion_paper_(ENG)_revised_oct_5-2015.pdf) (Discussion Paper); Mark M Orkin, *The Law of Costs*, 2<sup>nd</sup> ed (Toronto: Canada Law Book, 1987) (loose-leaf updated 2010, release 29), at 204 (*The Law of Costs*); Linda Abrams & Kevin McGuinness, *Canadian Civil Procedure Law*, 2<sup>nd</sup> ed (Markham, Ontario: LexisNexis Canada, 2010) at 993; Thomas Rowe Jr, “The Legal Theory of Attorney Fee Shifting: A Critical Overview” (1982) 1982:4 *Duke LJ* 651 at 653.

<sup>63</sup> Raj Anand & Ian G Scott, “Financing Public Participation in Environmental Decision-Making” (1982) 60:1 *Can Bar Rev* 81 at 86 – 87; Costs and Access to Justice in Public Interest Environmental Litigation, *supra* note 45 at 3.

<sup>64</sup> Environmental Law Centre, “Standing in Environmental Matters”, December 2014 at 13. Generally, in granting standing, the Courts consider: whether the case raises a serious justiciable issue; whether the party bringing the case has a real stake or real interest in the proceedings; and whether the proposed suit is a reasonable and effective means to bring the issue to court. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII).

- iii. On the issue of encouraging settlement: environmental rights litigants' are typically driven by issues that often transcend private interest motives, such as compensation for a specific harm, being more concerned with procedural rights and legislative interpretation and administration.<sup>65</sup> Further, resolution of environmental issues often require government actors to change administrative practices or admit to unlawful practices, which also limits the option of settlement.<sup>66</sup> Although public interest environmental litigants may be motivated to settle, the respondents are usually the government or industry parties who are unmotivated by the prospect of adverse cost awards to settle.<sup>67</sup>
- iv. Indemnification is also a weak rationale for awarding costs against public interest litigants because unlike private litigation, unsuccessful environmental rights litigants are usually not at fault. Also, an unsuccessful environmental rights litigant should not be required to compensate the successful government party because such litigation accrues public benefit, regardless of the outcome of the proceeding.<sup>68</sup>

The groups advocated for the adoption of a “presumptive one-way rule in favour of public interest litigants or, alternatively, a presumptive no-way cost rule in all judicial reviews”.<sup>69</sup>

### Advance and Interim Costs

In a bid to address the concerns about access to justice and to mitigate the severe inequality between litigants, Alberta courts have recognized the discretionary power to order one party to pay the other's interim costs in deserving public interest cases.<sup>70</sup> The power to order interim costs has been held to be inherent in the discretionary power of the Courts to determine when

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<sup>65</sup> Costs and Access to Justice in Public Interest Environmental Litigation, *supra* note 45 at 4.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Discussion Paper, *supra* note 44 at 5.

<sup>69</sup> *Ibid* at 16. This would still be subject to assessing whether a given litigation was public interest in nature and whether it was frivolous or vexatious in nature.

<sup>70</sup> See *R v. Caron*, 2011 SCC 5 adopting the decisions in *Okanagan Indian Band*, *Supra* note 2 (*Caron*); *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 (CanLII). The court has also awarded advancing funding in cases where without the award the applicant will be unable to proceed with the action. *Thomlinson v Alberta*, 2003 ABQB 308 (CanLII) at para 131; *McCormack v Martin*, 2004 ABQB 947 (CanLII).

and by whom costs are to be paid.<sup>71</sup> However, the Courts have held that advance or interim costs will only be granted in exceptional and rare cases, where absence of advance funding will work a serious injustice to the public interest.<sup>72</sup> For an application for advance funding to succeed, the case must establish such special circumstances to fall within the restricted group of cases where the court will exercise its discretion to make an advance funding award.<sup>73</sup>

In practice, the award of advance funding is rarely available so “most public interest litigants must take their chances with the usual costs determination at the end of trial.”<sup>74</sup>

### Security for Costs Requirements

In Alberta, the primary provision dealing with orders for security for costs in environmental public interest litigation is Rule 4.22 of the *Alberta Rules of Court*<sup>75</sup> which provides:<sup>76</sup>

The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:

- a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
- b) the ability of the respondent to the application to pay the costs award;
- c) the merits of the action in which the application is filed;

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Okanagan Indian Band*, *Supra* note 2; *Little Sisters Book and Art Emporium*, *Supra* note 77; *R v Caron*, *Supra* note 77; *Joseph v Canada*, 2008 FC 574 (CanLII) at para 28. *Okanagan Indian Band* laid down three criteria that must be met before an advance or interim costs award may be made in public interest cases, they are: 1) the party seeking an interim costs order genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would not proceed if the order were not made; 2) the claim to be adjudicated is prima facie meritorious; and 3) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

<sup>74</sup> *Costs Immunity*, *supra* note 41 at 197; *Costs and the Public Interest Litigant*, *supra* note 19 at 43.

<sup>75</sup> RSA 2000 c B-9. There is a specific provision with related jurisprudence in relation to corporations under the *Business Corporations Act*. Section 254 of the *Business Corporation Act*, provides “in any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.”

<sup>76</sup> *Alberta Rules of Court*, *supra* note 11, r 4.22.

- d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
- e) any other matter the Court considers appropriate.

When a security for costs order is made, the party to whom the order is directed must provide the security within two months or any other time specified by the court.<sup>77</sup> If the security is not provided the action could be dismissed or struck out.<sup>78</sup> For a security for costs award to be made, the applicant must convince the judge that it is unlikely that the plaintiff can pay costs, and that it is just and reasonable for the order to be made.<sup>79</sup>

There is no express exemption for a public interest litigant from the need to provide security for costs. Nevertheless, the public interest nature of a litigation may be relevant in the eyes of a court as noted by Justice Glube of the Nova Scotia Supreme Court:<sup>80</sup>

To order security for costs where a public interest action arises would, as was argued on behalf of the Coalition, have "serious and chilling results." It would affectively end any such actions. It would be anomalous to grant standing and then effectively bar the action by ordering security for costs at this time.

A BC court, in contrast, found that a claim of "public interest" litigation was more of a local and private interest, in deciding to order that security be paid.<sup>81</sup> Broadly using security for costs orders for environmental litigants, who may have limited financial resources, may significantly hinder their access to justice. As such, in relation to environmental rights related cases, a limit to security for costs may be justified. For example, under the Quebec Environmental Quality

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<sup>77</sup> *Ibid*, r 4.23(1)(b).

<sup>78</sup> *Ibid*, r 4.23(1)(d).

<sup>79</sup> *Xpress Lube & Car Wash Ltd v Gill*, 2011 ABOB 457; *Provalcid Inc v Graff*, 2014 ABQB 453 (CanLII).

<sup>80</sup> *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority*, 1993 CanLII 4582 (NS SC), <http://canlii.ca/t/1qlbq>, retrieved on 2017-06-13.

<sup>81</sup> See *Residents and Ratepayers of Central Saanich Society v. Saanich (District)*, 2011 BCCA 340 (CanLII), <<http://canlii.ca/t/fmlgc>>, retrieved on 2017-06-13.

Act security for costs of seeking an injunction in support of environmental rights is capped at \$500.<sup>82</sup>

## B) Costs of participating in regulatory decisions and appeals

There are a variety of rights for Albertans to participate in the environmental decision making process. Typically this has two distinct stages:

- first, one can comment on or object to a given application that is before a government officer or agency, such as an application for a water approval before the Director of Alberta Environment and Parks (i.e. participating in the “government decision”); and
- second, before a tribunal that is engaged to review the original government decision.

Alberta law does not enable the coverage of costs related to participating in the government decision-making process. Once that decision is appealed to a tribunal there may be some recoverable costs.

A tribunal’s power to award costs is conferred and limited by statute.<sup>83</sup> The details on the awarding of costs are outlined in the tribunal’s regulations or directives.<sup>84</sup> Most environmental and natural resource tribunals in Alberta have the express authority to award costs, including the Alberta Environmental Appeals Board (EAB), the Alberta Energy Regulator, the Alberta Utilities Commission, the Natural Resources Conservation Board, and the Public Lands Appeal Board. An examination of the various cost provisions for several environmental tribunals are outlined in the companion document (*Participation and Cost and Alberta Tribunals*).

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<sup>82</sup> See s. 19.4 of the *Environment Quality Act*, CQLR c Q-2.

<sup>83</sup> *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, 1983 CanLII 2929 (FCA). See also *Edmonton (City) v Alberta (Public Utilities Board)*, 1985 ABCA 6 (CanLII) at paras 20, 23, 27.

<sup>84</sup> Examples of costs provisions contained in secondary legislation include: *AER Rules of Practice*, *supra* note 12, r 58 - 67; *AER Directive 031*, *supra* note 12; *AUC Rule 009*, *supra* note 12.

While this report does not set out in detail the relevant regulations and rules regarding recovery of costs for tribunal proceedings, there are some key aspects of costs that should be discussed, including:

- i) the extent of coverage of costs,
- ii) the timing of cost awards, and
- iii) the issuance of cost awards against appellants.

#### **i) Extent of coverage of costs**

The costs which are typically covered in tribunal process are linked to the preparation and presentation of evidence and argument at a hearing. Tribunal processes typically include a front end - voluntary mediation or alternative dispute resolution process - that are not typically covered by tribunal cost awards. These mediation processes are meant to be a less formal and more efficient way of dealing with affected party's concerns as compared to a hearing.

Only when a tribunal engages a more formal adjudicative function are cost provisions likely to be engaged. This means that, while it may be important to engage legal counsel or other experts at early stages and during mediation, there is not an opportunity to have those costs covered except through direct negotiation with proponents. It should be noted that there is some provision for costs where there is binding dispute resolution by the Alberta Energy Regulator but that this does not extend to most mediation efforts.<sup>85</sup>

#### **ii) Timing of cost awards**

The technical or scientific complexity of environmental matters create additional challenges where costs are awarded at the conclusion of the hearing. Engagement of experts at the front end of the processes, ideally even prior to filing a notice of appeal, means that parties who may be directly affected or those pursuing public interest outcomes may be out of pocket, with

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<sup>85</sup> *AER Rules of Practice*, *supra* note 12 at s.58(1)(c).

little certainty about if and, perhaps more importantly, how much the cost award will cover. This uncertainty of cost coverage has recently been illustrated by a review of cost awards of the Alberta Energy Regulator conducted by Shaun Fluker and Eric Dalke, illustrating that depending on the nature of the cost incurred the AER's awards will vary considerably.<sup>86</sup>

Alberta tribunals may provide cost awards at various points in the process. In this way access to justice may be facilitated for those who may not be able to afford up-front costs of engaging lawyers and experts. These awards typically take the form of "advanced" (prior to the costs being incurred) or "interim" (prior to the conclusion of the proceeding) cost awards. To be successful in attaining advanced or interim costs there are typically criteria that have to be met which establish need, that a party has sought to be efficient and acting in good faith, and the relevance of the evidence sought to be brought forward.

### iii) Issuance of cost awards against appellants

Issuing an award of costs against appellants (i.e. adverse cost awards) does not typically occur in the environmental regulatory realm. The role of the adjudication is fundamentally different from the "winner takes all" approach that guides our courts. Public participation in these processes is premised on providing a better grounding for decision making and minimizing risks to individuals who may be impacted by decisions. Therefore, if tribunals were to issue adverse cost awards against appellants, the legislative intent of public participation would be directly undermined.

As noted by the EAB in its cost decision re: Pembina Corporation:<sup>87</sup>

where an appeal validly raising broad "public interest" concerns is nevertheless filed unsuccessfully by private citizens (by themselves or by a non-profit organization on their behalf), the Board will generally not require the citizen-

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<sup>86</sup> "An Analysis of Costs Awarded by the Alberta Energy Regulator" (2017) *Alberta Law Review* (Forthcoming) 55:3.

<sup>87</sup> Costs Decision Re Pembina Corporation, Appeal No. 98-005-C at para 16. <http://www.eab.gov.ab.ca/dec/98-005-C.pdf>.

appellants to pay for the costs incurred by the approval holder or by the Director who ultimately prevail in the appeal.

The EAB has also noted that the costs incurred by a proponent will not be generally recoverable against an appellant as “the appeal process is a potential cost of doing business when applying for an approval” (citing the statutory right of the public to participate in the processes).<sup>88</sup> Adverse cost awards are nevertheless available to tribunals and may be warranted where vexatious or bad faith challenges are brought forward before tribunals.

The ELC, as part of an earlier review of the EAB approach to costs, had sought clarity and the power to order “relief from costs” at earlier stages of a proceeding so that the public interest participation may be facilitated.<sup>89</sup>

## Federal approaches to costs

Federal regulatory agencies that award costs are primarily limited to areas where environmental assessments are required and where hearings are held. This includes projects that undergo review by the Canadian Environmental Assessment Agency (the Agency), review panels or joint review panels under the *Canadian Environmental Assessment Act (CEAA)*, and reviews conducted by the National Energy Board (NEB) or the Canadian Nuclear Safety

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<sup>88</sup> See *Costs Decision: Walsh and Walker v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Town of Turner Valley* (13 May 2016), Appeal Nos. 13-022-025, 14-011 and 14-018-CD (A.E.A.B.) (2016 AEAB 11) Also see *Cost Decision: Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development, re: Eastern Irrigation District* (19 July 2013), Appeal No. 10-043-CD (A.E.A.B.).

<sup>89</sup> See Environmental Law Centre, *Public Access to Environmental Appeals, A Review and Assessment of Alberta's Environmental Appeals Board* (Edmonton: Environmental Law Centre 2006, <http://elc.ab.ca/pub-archives/public-access-to-environmental-appeals-a-review-and-assessment-of-albertas-environmental-appeals-board/>). *Costs Decision: Walsh and Walker v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Town of Turner Valley* (13 May 2016), Appeal Nos. 13-022-025, 14-011 and 14-018-CD (AEAB) at paras 18 & 19 (*Walsh and Walker case*); *Cabre Exploration case*, *Supra* note 3.

Commission (CNSC).<sup>90</sup> In order to facilitate public participation in environmental assessments, a Participant Funding Program (PFP) was established under *CEAA*.<sup>91</sup>

The PFP provides limited funding to individuals, incorporated non-for-profit organizations and aboriginal groups.<sup>92</sup> Funding provided by the PFP covers:<sup>93</sup>

- a) the review and provision of written comments on environmental impact statements, and draft environmental assessment reports prepared by the Agency; and
- b) in the case of EAs by a review/joint review panel, preparing and participating in hearings.

To be eligible for funding, the funding application must demonstrate that the party is directly impacted and/or that the party will add value to the EA process, including:<sup>94</sup>

- having a direct, local interest in the project, such as living in or owning property in the project area;
- having community knowledge or Aboriginal traditional knowledge relevant to the EA;
- providing expert information relevant to the anticipated environmental effects of the project; and/or
- having an interest in the potential impacts of the project on treaty lands, settlement lands or traditional territories, and/or related claims and rights.

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<sup>90</sup> *Canadian Environmental Assessment Act*, 2012 SC 2012, c 19, ss, 57, 58 (*CEAA*). Participant Funding Program: National Program Guidelines at 1, 2, online: Canadian Environmental Assessment Agency <[http://www.ceaa-acee.gc.ca/Content/9/7/7/9772442E-9A6B-4302-968E-3946E19700Do/National\\_Program\\_Guidelines.pdf](http://www.ceaa-acee.gc.ca/Content/9/7/7/9772442E-9A6B-4302-968E-3946E19700Do/National_Program_Guidelines.pdf)>.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid* at 1. This paper is restricted to individuals and NFP organizations. The PFP, regular funding provides a maximum of \$10, 500 for EAs by the Agency and \$20,000 for EAs by a review/joint review panel to eligible individuals and NFP organizations. *Ibid* at 3.

<sup>93</sup> *Ibid* at 3. Detailed guidelines of expenses covered by the PFP are provided in Appendix B – Content and Expense Category Description of the PFP Application Form.

<sup>94</sup> *Ibid* at 4.

The PFP system uses a Funding Committee to assess funding applications to determine the need and suitability of expenses that are proposed to be incurred.<sup>95</sup> Funding Committee recommendations are then confirmed or amended by the relevant agency's designated executive, who determines the final amount of funding.<sup>96</sup> Contribution Agreements are then signed which outline funding conditions and obligations of the signatories.<sup>97</sup> The approved funds may be made to the applicant in the interim after some expenses have been incurred or as a final payment at the conclusion of participation in the EA process.<sup>98</sup>

The National Energy Board (NEB), in addition to the PFP system, has jurisdiction to award reasonably incurred costs to persons who are directly affected by a project application or the Board's decision, and who have made representations at a public hearing.<sup>99</sup> The project proponent is liable to pay any costs awarded.<sup>100</sup>

## Conclusions on the Federal PFP Approach

The PFP programs provide a level of clarity and assurance around costs which are atypical in most provincial processes. As with Alberta's tribunals, the PFP system does not fully cover costs of participation; however, it provides awareness of the quantum of costs covered. This

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<sup>95</sup> *Ibid* at 6.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid* at 7 and *National Energy Board Act*, RSC 1985, c N-7, ss 39, 55.2 (*NEB Act*); NEB, "Hearing Process Handbook: A Guide to NEB Hearings" (September 2016) at 9 (NEB Hearing Process Handbook) at 13.

<sup>98</sup> *Ibid* at 8.

<sup>99</sup> *Ibid*. at 9 (NEB Hearing Process Handbook). See also *NEB Act*, s 34(3)(4). Funding under the NEB-PFP is not intended to completely indemnify an eligible applicant for all costs of participation, but is limited to a maximum of \$12,000 for eligible individuals and \$80,000 for eligible groups. However, the amount of funding an intervenor will receive is dependent on the following: the PFP application, the amount attributed to a project to be divided amongst the eligible applicants, maximum funding limit per person/group, and the PFP's annual budget. Not all costs of participation and proposed projects are eligible. Eligible costs are reimbursed from the date a project application is filed with the NEB.

<sup>100</sup> *Ibid*, s. 39. An applicant for costs must first prepare and forward a statement of incurred costs to the Board and the project proponent. The project proponent is required to pay the costs within 60 days; otherwise, the applicant or the project proponent may apply to the NEB to make a cost award. The NEB will make a costs award if the parties are unable to reach an agreement. Costs must be reasonable and receipts of costs incurred are required. The receipts must show to whom the costs are owed and reasons for the costs.

heightened certainty of cost coverage is likely to facilitate greater participation and access to justice.

## Cost recommendations

### i) Court costs

Valid public interest litigation for the protection of the environment should be fostered to ensure that our governments are administering our environmental and natural resource laws in accordance with the law. The ELC recommends codifying a general public interest cost exemption or default “no-cost” rule for bona fide public interest hearings. Qualifying actions for the “no-cost” rule should occur as early as practicable.

### ii) Regulatory costs

The coverage of costs in the regulatory context is often uncertain and untimely. The ELC recommends pursuing a system of cost allocation early in regulatory processes that allows for heightened awareness of availability and extent of cost coverage.

In addition, while adverse cost awards against appellants are rare, tribunals should be directed to decide whether relief from costs is warranted early in the process where it is apparent that the proceeding is focused on public interest decision making.

## CONCLUSION

A review of Alberta courts’ costs provision depicts a regime that doesn’t facilitate access to justice for public interest environmental litigants. The existence of public interest exemptions in common law, though commendable, do little to facilitate access to justice due to the lack of consistency in the Courts’ application of the exemption. Further, the ELC recommends

including express rules governing the award of costs in public interest litigation as a way to address the issue of inconsistency in the current practice.<sup>101</sup>

Similarly, environmental tribunals in Alberta provide a limited opportunity to cover some costs related to formal hearing processes, albeit for public interest litigants this often of little comfort where narrow standing limits these opportunities. A widening of the participation eligibility criteria and the establishment of a program similar to the Federal PFP program will further promote access to justice for public interest litigants before tribunals.