

March 7, 2016

## The Public Interest Exception to the Normal Costs Rule in Litigation

By: Shaun Fluker

Case Commented On: *Gendre v Fort Macleod*, [2016 ABQB 111](#)

This judgment by Madam Justice K.D. Nixon touches on the public interest exception to the normal rule in Canadian law that the unsuccessful party in litigation is liable to the successful party for either a portion of or all the successful party's legal costs (commonly known as 'costs follow the event'). The substantive matter in this case involved an application by the Mayor of Fort Macleod seeking to have the Court set aside bylaws and resolutions passed by the Council of the Town of Fort Macleod which removed the Mayor's powers. The Mayor argued the passage of such bylaws and resolutions amounted to an abuse of process by the Council. Justice Nixon dismissed this judicial review application in *Gendre v Fort Macleod*, [2015 ABQB 623](#), and the [media](#) reported that the Council sought approximately \$100,000 in legal costs against the Mayor. One of the arguments put forward by the Mayor in an attempt to shield himself from costs was that his action constituted public interest litigation.

Over the duration of a career, every professor eventually accumulates many books. Over time, some books begin to stand apart from the others on the shelf as a dependable and trusted starting point for countless research projects. One of these stalwarts on my bookshelf is the Ontario Law Reform Commission's 1989 *Report on the Law of Standing*. This Report investigated access to justice issues with respect to public interest litigation, noting at the outset that the traditional view of the elected government as the sole guardian of the public interest had given way to an acknowledgment that sometimes government is the wrongdoer and the role of guardian must be taken up by someone else (at pages 1-6). The Report made several recommendations for law reform to enhance access to the legal system for public interest litigation including recommendations on costs, noting that the prospect of an adverse cost award is a significant deterrent for someone contemplating a public interest action (at pages 146-149).

The Report gave the following recommendation for a public interest exception to the normal costs rule in Canada that costs follow the event (at pages 152-156, 179):

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

- The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
- 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;
- The issues have not been previously determined by a court in a proceeding against the same defendant;
- The defendant has a clearly superior capacity to bear the costs of the proceeding; and
- The proceeding is not vexatious, frivolous or an abuse of process.

Professor [Chris Tollefson](#) at the University of Victoria has written extensively on public interest costs since the mid-1990s, and he more recently explored the status of the law on public interest costs in his 2011 article entitled “[Costs in Public Interest Litigation Revisited](#)”, (2011) 39 Adv Q 171. Professor Tollefson’s analysis demonstrates a growing appetite for a public interest costs exception in Canadian law, including the provision for an advance or interim costs award in exceptional circumstances. My colleague Professor Jennifer Kosha also explored this a few years back on ABlawg, see [Interim Costs and Access to Justice at the Supreme Court of Canada](#).

We can distill the following points from their doctrinal work: (1) Canadian courts have endorsed a public interest costs exception and have applied the test recommended by the 1989 Ontario Law Reform Commission report – in Alberta this test was cited with approval by the Court of Appeal in *Pauli v ACE INA Insurance Co*, [2004 ABCA 253](#) at para 24; (2) a party seeking to shield itself from costs using this exception must satisfy each of the factors in the test; (3) obtaining an advance or interim costs award in public interest litigation (in contrast to the usual scenario where costs are determined *ex post*) is far more exceptional and reserved for the rarest of circumstances; and (4) the law on public interest costs, while developing, remains somewhat unpredictable and is no substitute for an access to justice program – such as the once-disbanded but [likely to be reinstated Court Challenges program](#) – that allocates public funds to support the cost of public interest litigation. This last point highlights the important point that it is one thing to shield the unsuccessful public interest litigant from liability for an adverse cost award, but this protection does nothing to actually facilitate public interest proceedings in the first place. This is one reason why law schools are increasingly operating clinical programs that offer pro bono legal services in public interest law, such as the new [Public Interest Law Clinic](#) operating here in Calgary.

The allocation of costs is ultimately a matter of judicial discretion. In Alberta, this discretion is to be exercised in accordance with sections 10.28 to 10.34 of the *Alberta Rules of Court*, [Alta Reg 124/2010](#). It seems unfortunate that the public interest exception was not codified when the new Rules were enacted back in 2010. In any event, the prospect of an adverse cost award is a necessary conversation between a public interest litigant and their counsel at the early stages of a public interest case, and I can tell you from my years in the trenches of public interest environmental law that the prospect of adverse costs remains a deterrent to public interest litigation in Canada. Some will no doubt say this is a good thing! Moreover, the public interest litigant cannot assume the court hearing their case will be familiar with the law governing a public interest costs exception and therefore the public interest litigant must be prepared to argue for immunity from adverse costs.

All of which brings us back to the municipal dispute in Fort Macleod. Mayor Rene Gendre argued that his application for judicial review fell within the realm of public interest litigation as an action that engaged the principles of democracy and that he should accordingly be shielded from the significant adverse costs sought by the Council. Justice Nixon applied the test for a public interest costs exception and concluded the Mayor’s action did not qualify as public interest litigation because (1) this was not a test case that transcended the interests of the parties; (2) the Mayor had a significant personal interest in the outcome, albeit not an economic one; and (3) the case did not invoke truly novel points of law (at para 18). Justice Nixon went on to exercise her discretion on costs applying some of the factors set out in the *Rules of Court*, concluding that the appropriate amount of costs payable by the Mayor is \$9750 plus disbursements (at paras 21-23).

I'll end this comment with the following thought. While the test for a public interest costs exception has been developed in order to determine whether someone is entitled to costs immunity, the test seems to be more about determining when a person may be characterized as a public interest litigant. And so one reason why this area of law remains unpredictable is because this determination can be a very difficult exercise. As an example of the possible difficulties, consider how to determine when someone's requisite genuine interest in a public matter is too personal or proprietary to qualify as a public interest concern. On the one hand someone with a significant stake in the matter is perhaps most likely to raise the public interest issue and best qualified to argue it before the Court – and yet the more personal or direct their interest the less likely the litigation will be seen as an adjudication on a public matter of concern. Perhaps some assistance could be garnered here by revisiting the public interest costs exception in light of how the Supreme Court of Canada restated the test for public interest standing in *Canada (Attorney General) v Downtown Eastside Sex Workers Against Violence Society*, [2012 SCC 45](#) (for some commentary on this decision from ABlawg see Christina Lam and Theresa Yurkewich, [Some Much Needed R&R: Revisiting and Relaxing the Test for Public Interest Standing in Canada](#)).

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

