

# Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations

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*The demonstrations against uranium mining exploration by aboriginal and non-aboriginal residents of Sharbot Lake, Ontario illustrate how three areas of law—the law of injunctions, contempt of court proceedings and the law of public interest costs—can have a negative impact on access to justice for protestors seeking to promote and protect environmental and human rights. Using these protests as a case study, the author suggests how the law in these three areas can be*

*improved in order to make it more difficult for private individuals, corporations, and government to use the threat of imprisonment and crippling costs awards to dissuade aboriginal and environmental protestors from vindicating their rights. These suggestions range from strategic legal action to change legal rules on injunctions, contempt of court proceedings and costs awards, to anti-SLAPP suit legislation to facilitate access to justice for protestors.*

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*Les manifestations des résidents autochtones et non-autochtones de Sharbot Lake, en Ontario, contre l'exploitation d'uranium illustrent comment trois domaines du droit – les injonctions, les procédures d'outrage au tribunal et l'allocation des dépens en matière d'intérêt public – peuvent avoir un impact négatif sur l'accès à la justice pour les activistes qui désirent promouvoir et défendre les droits environnementaux et les droits humains. L'auteur dresse une étude de cas fondée sur ces protestations et suggère comment le droit dans ces trois domaines peut être amélioré afin d'empêcher que*

*les individus, les corporations et le gouvernement puissent utiliser la menace d'emprisonnement et d'adjudication de dépens écrasants pour dissuader les activistes autochtones et écologistes dans la revendication de leurs droits. Ces suggestions comprennent notamment les poursuites judiciaires stratégiques visant à obtenir la modification des règles de droit régissant les injonctions, les procédures d'outrage au tribunal et l'adjudication des dépens, ainsi que l'adoption de lois contre les poursuites-bâillon afin de faciliter l'accès à la justice pour les manifestants.*

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In recent years, Ontarians have become increasingly conscious of the latitude enjoyed by mining prospectors and exploration companies under the Ontario *Mining Act*.<sup>1</sup> The issue became a hot topic as prospecting spread from northern to southern parts of the province. The shift brought prospectors and mining exploration companies into conflict with private property owners, such as cottagers and year-round residents,<sup>2</sup> as well as aboriginal groups with land claims in the area. Two of the most publicized conflicts occurred at Sharbot Lake, north of Kingston, Ontario, and at Big Trout Lake, approximately 600 kilometres north of Thunder Bay, Ontario. At Sharbot Lake, a small mining exploration company, Frontenac Ventures Corporation, had been prospecting on Crown land, much of which is claimed by the Algonquin as their traditional territory. At Big Trout Lake, Kitchenuhmaykoosib Inninuwug (“KI”) First Nation opposed exploratory drilling by Platinex Inc. on 19 square kilometres of land just outside the KI reserve, but on its traditional lands. The purpose of this paper is to document how aboriginal groups and environmental protestors may be denied access to justice by the existing law of injunctions, contempt of court proceedings, and the rules relating to cost awards. Although demonstrations at both Sharbot Lake and Big Trout Lake were instrumental in bringing public attention to the threat that mining exploration poses to human rights and the environment, this article focuses primarily on the conflict at Sharbot Lake, in which I was involved as a legal consultant to the Ecojustice Environmental Law Clinic at the University of Ottawa.

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<sup>1</sup> *Mining Act*, RSO 1990, c M.14.

<sup>2</sup> Lee Greenberg, “Ontario to change laws governing prospecting on private property”, *The Ottawa Citizen* (30 April 2009).

The protests by the Ardoch and Shabot Algonquins, joined by local non-aboriginal residents of the Sharbot Lake area, arose in response to uranium exploration on Crown land. The aboriginal groups had been alerted to the prospecting by local non-aboriginal residents concerned with the environmental impact of uranium mining in the area.<sup>3</sup> Before recent amendments in 2009, the Ontario *Mining Act* did not require giving notice to or consulting with aboriginal groups prior to prospecting or developing mineral resources,<sup>4</sup> nor did it require environmental assessment of proposed mining projects or consultation with local residents who might be affected by the proposed mine.<sup>5</sup> Resistance to the freedom given to prospectors and mining companies under the *Act* naturally grew.<sup>6</sup> This article will address some of the areas of law that those organizing resistance to prospecting, exploration, and mining must be familiar with in order to ensure their voice is heard on important aboriginal and environmental issues. It will also identify some of the barriers these areas of law represent for the vindication of human (including aboriginal) and environmental rights by limiting access to justice for aboriginal groups and environmental protestors. A subsidiary goal is to indicate some of the areas of law which require reform in order to ensure that human rights can be adequately protected, the environment defended, and access to justice guaranteed. Some of these reforms might be suitable for inclusion in anti-SLAPP suit (“Strategic Lawsuit Against Public Participation”) legislation.<sup>7</sup>

The legal issues that arise out of prospecting for, and development of, mineral resources in Southern Ontario are located at the intersection of a number of bodies of law, such as:

1. Aboriginal law, including:
  - a. Claims of aboriginal rights and title;
  - b. Treaty land entitlements;<sup>8</sup>

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<sup>3</sup> See generally Frank Armstrong, “How a Fight for Rice Inspired a People; Algonquins Blocking Mine Have Learned From History”, *The Whig Standard* (15 September 2007); Frank Armstrong, “They’re Looking for Confrontation”, *The Whig Standard* (15 September 2007); Sue Yanagisawa, “Mine Site Proceeding Begins; Company Wants Protesters Removed from Sharbot Lake Site”, *The Whig Standard* (25 September 2007).

<sup>4</sup> See generally Lynda Collins & Penelope Simons, “Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective” (2010) 6:2 JSDLP 177 at 183-185 [Collins & Simons]; for the local perspective in the Sharbot Lake area, see Joan Rose, “Uranium mining is dangerous and should be banned”, Letter to the Editor, *The Whig Standard* (14 February 2008).

<sup>5</sup> Collins & Simons, *ibid.* For characteristics of the regime set up under the *Mining Act* prior to the 2009 amendments, see *infra*.

<sup>6</sup> See generally *supra* note 4.

<sup>7</sup> A SLAPP suit (“Strategic Lawsuit against Public Participation”) is a lawsuit brought against citizens who are criticizing and/or opposing the activities of private individuals, private companies and, sometimes, the government, in order to dissuade them from voicing their views in a public forum. For an introduction to the phenomenon, see George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation (“SLAPPs”): An Introduction for Bench, Bar and Bystanders” (1991-92) 12:4 U Bridgeport L Rev 937.

<sup>8</sup> Sometimes, as in the context of the Big Trout Lake case, mining exploration sites may be located on land adjacent to reserves that is earmarked for expansion of the reserve.

- c. The duty to consult and seek the consent of aboriginal groups prior to prospecting and mining on recognized or pending claims;<sup>9</sup>
  - d. The duty to consult aboriginal groups prior to changes to laws, such as the *Mining Act*, that affect them;
  - e. Use of injunctions against aboriginal groups advocating for their rights;
2. Environmental law, including requirements of environmental assessment;
  3. Human rights law, including
    - a. requirements for social impact assessment of proposed mining;
    - b. protection of civil liberties, including the freedom to protest;
  4. Conduct of public interest litigation, including:
    - a. Use of injunctions by private parties and companies against protestors;
    - b. Use of contempt of court prosecutions against protestors;
    - c. The role of the Crown when private parties and companies prosecute environmental and aboriginal protestors for contempt of court;
    - d. Advance costs awards for public interest litigants defending their rights in courts;
    - e. Avoiding adverse costs awards against public interest litigants where advance costs awards are not available.

As can be seen from this list, the vindication of aboriginal and human rights in the context of mining in Ontario can be complex, as it implicates many areas of law. This article focuses primarily on 1e.) the use of injunctions against aboriginal groups; 4b.) and c.), issues that arise when defending against contempt of court proceedings brought against aboriginal and environmental protestors; and 4d.) and e.), costs awards against public interest litigants. In addition to explaining how these specific areas of the law have an impact on human and environmental

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<sup>9</sup> Although the language in Canadian case law is “the duty to consult and accommodate,” as used, for instance, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, this article uses the words “obtain consent” to mirror the international law obligation contained in the *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 2007, 61st Sess, UN Doc A/RES/61/295 (2007). Article 19 of the *Declaration* set out that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Arguably, the standard of consultation and accommodation does not conform to the norm set out in the *Declaration*.

rights<sup>10</sup> and deny those who vindicate them access to justice, I will also propose some ways in which case law can be developed, or new laws proposed, to protect these important rights and promote public discussion of the issues arising from mineral exploration in Ontario.

## 2. BACKGROUND: THE SHARBOT LAKE PROTESTS

Before discussing the above legal issues, it is helpful for the reader to understand the context in which I address them. In 2008, the Ecojustice clinic at the University of Ottawa was involved in defending certain non-aboriginal protestors opposed to uranium mining exploration in the Sharbot Lake area, just north of Kingston. Their opposition was based both on support of the land claims of local aboriginal groups (the Ardoch and Shabot, who identify themselves as part of the Algonquin First Nation) and concern about the negative environmental impact of uranium mining generally and on their property specifically.<sup>11</sup> My comments reflect my experience with this litigation, and so it is important to explain the legal landscape in which they fit.

The Algonquin of Ontario have long been involved in tripartite negotiations with the federal and provincial governments to resolve their land claims. The claims in the Kingston area by the Shabot and Ardoch are related to those of the Algonquin in the Ottawa Valley (Golden Lake First Nation), the only group of Algonquin recognized as a First Nation by the federal government for the purpose of s. 35 of the *Charter of Rights and Freedoms*.<sup>12</sup> The basis of the Algonquin's claim is that the territory in the Ottawa and Kingston areas was improperly ceded to the Crown by the Williams treaties of 1923. These treaties had been negotiated between the Crown (provincial and federal) and the Mississauga and Chippewa First Nations despite the fact that the territory in question was not part of the latter's traditional territory.<sup>13</sup> Beyond the errors in the Williams treaties, the Algonquin also base their claims on petitions addressed to the Crown since 1772. These petitions opposed the invasion of their territory by non-aboriginal people and demanded the recognition of their rights as set out in the *Royal Proclamation of 1763*, which states:

[W]hereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been

<sup>10</sup> The expression "environmental rights" used in the article refers not only to the rights of humans to the environment, but also to the protection of the environment as a good in itself. For a discussion of the content of environmental rights, see e.g. Collins & Simons, *supra* note 4 at 185-188. For the components of environmental rights, including procedural environmental rights, substantive environmental rights such as the right to environmental quality, and the recognition of deprivations of human rights through environmental harm, see Lynda M. Collins, "An Ecologically Literate Reading of the Canadian Charter of Rights and Freedoms" (2010) 26 Windsor Rev Legal Soc Issues 7 at 10-12. There has yet been little legal articulation of the rights of non-humans.

<sup>11</sup> Sue Yanagisawa, "Lawyers Attempt to Force Hand of Justice; Want to See Protesters Brought to Trial", *The Whig Standard* (5 October 2007).

<sup>12</sup> *Canadian Charter of Rights and Freedoms*, s 35, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) 1982*, c 11.

<sup>13</sup> The Chippewa and Mississauga notified the Crown of this fact during the negotiations.

ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds ....<sup>14</sup>

The *Proclamation* clearly reserves for Canada's Aboriginal peoples vast tracts of what is now Canadian territory, including the part of southern Ontario on which the Ardoch and Shabot reside.<sup>15</sup> In addition, it acknowledges that the agreement is "essential" to the Colonies' interests, rather than an act of generosity toward aboriginal peoples, and it protects the Indians from disturbance by non-Indians unless the latter are on land purchased by the Crown.<sup>16</sup>

The Golden Lake First Nation has been negotiating with the provincial government since 1991, and with the federal government since 1992. Both levels of government requested that the negotiations be expanded so that they could address not only the traditional territory of Golden Lake, which is in the Ottawa region, but also the Sharbot Lake area. These negotiations cover a total of approximately 9 million hectares (90,000 sq. km.), including Algonquin Park and the watershed of the Ottawa and Mattawa Rivers. In 1994, the First Nations and the Crown established a framework agreement for the negotiations, which identifies the various potentially affected Algonquin nations (beyond the Golden Lake First Nation).<sup>17</sup> The negotiations, which are still ongoing, have resulted in a further framework agreement signed in August of 2009 that covers 36,000 square km in the Ottawa and Mattawa river valleys.<sup>18</sup> It is aimed at concluding a modern treaty that will address all land claims, including those of the Shabot and Ardoch, aboriginal claims to natural resources on the Algonquin's traditional territory, the management of resources, the management of the environment and prevention of environmental harm, and the management of financial income from the protection and exploitation of the aboriginal rights recognized in the treaty.<sup>19</sup>

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<sup>14</sup> *The Royal Proclamation, 1763* (UK) RSC 1985, Appendix II, No 1.

<sup>15</sup> See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 at 1103 and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 at para 200 (per LaForest J and L'Heureux-Dubé J). On the relevance of the *Royal Proclamation* for Ontario aboriginal peoples, see Michael Coyle, "Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future – Part I" (2005) 31 Queen's L J 75 at 83 [Coyle, "Part I"]. For a discussion of the basis of Ontario aboriginal peoples' claims, see *ibid* at 89-93 and Coyle, "Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future – Part II" (2006) 31 Queen's L J 796 at 807-808. On the extensive record of Ontario aboriginal groups in Ontario courts since the nineteenth century, see Sidney L. Harring, "The Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law" (1992) 56 Sask L Rev 297.

<sup>16</sup> Coyle, "Part I", *ibid* at 83.

<sup>17</sup> The Algonquins of Ontario, Her Majesty the Queen in Right of Ontario and Her Majesty the Queen in Right of Canada, *1994 Framework For Negotiations Agreement*. See generally Ontario Ministry of Aboriginal Affairs, "Claim History," online: <<http://www.aboriginalaffairs.gov.on.ca/english/negotiate/algonquin/history.asp>>.

<sup>18</sup> The groups included in the negotiations are the Algonquins of Pikwàkanagàn First Nation and nine other Algonquin communities in the Ottawa River watershed: Antoine, Bancroft, Bonnechere, Greater Golden Lake, Mattawa/North Bay, Ottawa, Shabot Obaadjiwan, Snimikobi and Whitney and Area. See Government of Ontario, Ministry of Aboriginal Affairs, News Release, "Agreements Reached to Advance Negotiation of Eastern Ontario Land Claim" (6 August 2009), online: Ontario Newsroom <<http://news.ontario.ca/maa/en/2009/08/agreements-reached-to-advance-negotiation-of-eastern-ontario-land-claim.html>>.

<sup>19</sup> *Ibid*.

The litigation at issue arose when non-aboriginal residents in the Sharbot Lake area notified the Ardoch and Shabot that a small mining exploration company, Frontenac Ventures Corporation (“Frontenac”), had begun to explore on Crown land to which they claimed aboriginal title. The purpose of the exploration was to discover uranium deposits. The local residents were concerned both by the potential negative environmental effects of a uranium mine close to their properties and by the failure of the company to advise and consult with the aboriginal groups that claimed the land as their traditional territory.

In order to make the public aware of the environmental and aboriginal rights issues that arise from prospecting and mining exploration, the local non-aboriginal residents, who call themselves “settlers” to acknowledge the colonial context in which they have come to own property on the Algonquin’s traditional territory, joined with the Shabot and Ardoch in protests at the Frontenac drilling sites. In response, the company began a lawsuit to protect its exploration activities and, arguably, to dissuade and sanction the protestors.<sup>20</sup> In this litigation against the Ardoch and Shabot, Frontenac requested \$77 million in damages. Frontenac then sought an injunction from the Superior Court at Kingston to enjoin the demonstrators from protesting at the site. Once the injunction was granted, it was enforced by the Ontario Provincial Police (“OPP”). On the basis of information obtained from the OPP, Frontenac began prosecutions against both aboriginal and non-aboriginal protestors for contempt of court for having violated the injunction. Frontenac abandoned prosecution of the non-aboriginal residents, but it successfully prosecuted several members of the aboriginal groups, some of whom were given heavy fines (\$10,000 to \$25,000) and prison sentences of six months.<sup>21</sup>

These are the events which inform my consideration of the law in this area.

### 3. LEGAL CONTEXT: THE ONTARIO MINING ACT AND THE 2009 AMENDMENTS

Prompted in part by the Frontenac Ventures Corporation’s prosecutions of Shabot and Ardoch members, by similar prosecutions in Northern Ontario as well as by increasing public dissatisfaction with an outmoded provincial mining law, the Ontario government passed certain amendments to the *Mining Act*,<sup>22</sup> which received royal assent on October 28, 2009. The *Act* was enacted in 1873. Its goal was to encourage mineral exploration in a territory which, at that time, was only sparsely populated. Until recent years, exploration and mining primarily took place in Northern Ontario. In these distant parts of the province, it was rare for mining interests to come into conflict with non-aboriginal groups. The profile of mining exploration in Ontario has changed, however, with exploration moving further south, where it has come to the attention of both aboriginal and non-aboriginal groups in Southern Ontario.

Several aspects of the old law gave rise to the conflicts described above. First, s. 27 of the *Act* permitted a prospector to obtain a permit to prospect on large portions of provincial ter-

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<sup>20</sup> This lawsuit could be interpreted as a SLAPP suit, though Frontenac Ventures Corporation likely considered it a suit intended to protect its investment and its interests in the mining exploration.

<sup>21</sup> *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 25-29, [2008] 3 CNLR 119 [*Frontenac*]. For similar sentences in a similar context, see *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation et al.*, 2008 ONCA 533, 91 OR (3d) 18.

<sup>22</sup> *An Act to amend the Mining Act (Bill 173)*, SO 2009, c 21.



ritory, including Crown land and some land presently occupied by cottagers and permanent residents. The section reads:

Except where otherwise provided, the holder of a prospector's licence may prospect for minerals and stake a mining claim on any,

- (a) Crown lands, surveyed or unsurveyed;
- (b) lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913, not at the time on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited;<sup>23</sup>

Given that approximately 89 % of the province is Crown land and that the *Act* permits prospecting on both this land and land for which mineral rights have been reserved to the Crown since 1913, the *Act* opens up a large portion of the province to prospecting and, potentially, exploration.<sup>24</sup> Moreover, the pre-2009 *Act* does not require that property owners be notified of prospecting activities or that they be consulted about this activity. As a result of the absence of a notice requirement and of the considerable tracts of land open for prospecting, one could wake up one morning to discover signs of prospecting in one's woodlot, along the shores of lake - and river - front on one's property, or on neighbouring Crown land.

The 2009 amendments to the *Act* are a significant improvement on the 1873 *Act*, although they by no means address all the difficulties that I and other authors have noted. The amendments do, however, cover the following matters (all references are to the section numbers of the *Act to amend the Mining Act*):

1. In Southern Ontario,<sup>25</sup> no prospecting, staking sale or lease of land will be allowed if there is an owner of the surface rights, although the mining rights might belong to the Crown (s. 15);

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<sup>23</sup> *Mining Act*, *supra* note 1, s 27. This section must be read in conjunction with the section which excludes exploration on the "part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are growing, or on the part of a lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locatee of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just."

<sup>24</sup> Data analyzed by the Ontario Ministry of Northern Development, Mines and Forestry permit the following conclusions, based on a combination of existing Ministry policy and an interpretation of the *Mining Act*. In general, staking can occur on Crown land that is not covered by a "surface rights only" patent. If the owner of land in Southern Ontario (defined as being south of the south shore of the French and Mattawa Rivers and Lake Nippising (*Mining Act*, s 35.1(1), *supra* note 2) has only a patent on the surface rights (with mineral rights retained by the Crown), the Ministry does not generally permit prospecting on this land. Nonetheless, approximately 1.4% of "surface rights only" patents have been staked, although all other claims on "surface rights only" patented land have been withdrawn unless the owner of the surface rights applied to the Ministry to request that the mineral rights be opened for staking. The situation in Northern Ontario is slightly different. There, the owner of a "surface rights only patent" must apply to the Ministry to have its land, the mineral rights of which belong to the Crown, withdrawn from staking.

<sup>25</sup> For a definition, see *ibid.*

2. The *Act* requires notification of surface rights owners that a claim has been staked (s. 24);
3. The *Act* recognizes and affirms Aboriginal treaty rights, as protected under s. 35 of the *Constitution Act, 1982*, including the duty to consult (ss. 2, 46, 40, 51, 56, 57, 79);
4. The *Act* restricts the kinds of land that can be staked to exclude lots on a registered plan of subdivision, on summer resorts, residential or cottage lots smaller than one hectare, land within the property boundary of, or within 100 metres of, a residential or cottage dwelling on a lot one hectare or larger, or municipal land (including public buildings, sports fields, arenas, libraries, parks and skating rinks), among other types of land (s. 29);
5. The *Act* asserts the importance of minimizing the impact of mining activities on public health, safety and the environment (s. 2).

It is difficult to assess the robustness of the amendments with regard to the protection of human and environmental rights; the details on these protections have been relegated to the regulations, which have yet to be passed. For instance, there does not as yet appear to be any provision for environmental or social assessment of prospecting, staking, exploration, or mining. Significantly for my topic in this paper, no sections deal with legitimate public protest, for example by placing restrictions on SLAPP suits.<sup>26</sup>

#### 4. LEGAL ISSUES ARISING FROM PROTESTING MINING ACTIVITIES

As I noted in the introduction, I will address three legal issues that arise from opposition to mining activities in Southern Ontario and that have a serious impact on access to justice for aboriginal and environmental protestors:

1. Should courts issue injunctions against aboriginal and environmental groups protesting mining exploration on lands traditionally claimed by aboriginal groups?
2. Are there sufficient procedural and substantive legal protections for aboriginal and environmental protestors against the use of contempt of court proceedings by private parties and companies seeking to quell the protests?
3. Are public interest litigants sufficiently protected against costs awards so that the prospect of such awards does not prevent meritorious public interest litigation to defend human (including aboriginal) and environmental rights?

I address each of these issues in turn.

##### 4.1 Injunctions

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<sup>26</sup> For a comprehensive review of the contents of the amendments, see the other articles in this volume.

As is common in many suits that natural resource companies bring against protestors,<sup>27</sup> Frontenac Ventures Corporation sought an injunction against the protestors at its prospecting site. The injunction was in the form of a “Jane Doe and John Doe” injunction, which not only prohibited the named parties from protesting, but also applied to anyone who joined in. This section examines whether it is suitable for courts to issue injunctions to address such issues and concludes that it is generally not. Corporations have access to a number of more suitable remedies that ensure greater procedural protection for protestors.

Canadian courts have frequently questioned the wisdom of using injunctions in order to deal with public protests outside the labour context. In *R. v. Bridges*,<sup>28</sup> Justice Southin of the British Columbia Court of Appeal, writing for the majority, stated in *obiter* that she would have liked to have heard argument about the suitability of using the case law on injunctions to deal with public protests. She reasoned that this case law had developed in a time when British Columbia courts were arguably anti-union,<sup>29</sup> and this put into question whether it was suitable for the modern era of public protest. She stated:

Before I turn to the submissions of counsel, I think it important to enter this warning.

Today, the citizenry take to the streets over many social issues. Once upon a time, the citizenry rarely took to the streets save in labour disputes. The attitude of this Court, half a century ago, to such conduct as was exhibited here, when that conduct occurred in labour disputes was expressed by O’Halloran, J.A. in *Hollywood Theatres Ltd. v. Tenney* [1940] 1 W.W.R. 337 especially at 351 when, having referred to the British Columbia Trade-unions Act, R.S.B.C. 1936, c. 289 and the American Clayton Act of 1914, said:

The term “picket” is not used in either statute. By no straining of the language may such terms as “communicating,” “persuading,” “recommending,” “advising,” “warning,” and “urging” be extended to include marching backwards and forward in an organized manner in front of the employer’s premises, let alone include the organized mass demonstration of June 11. Tactics of this character have little in common with “warning,” “urging,” “persuading,” “recommending” and “advising;” instead such tactics imply an atmosphere of moral coercion, intimidation and obstruction.<sup>30</sup>

I think it is not unfair or unkind to say that by the 1950’s, the courts of British Columbia were thought by some to be anti-labour because of the number of injunctions granted in labour disputes.

Ultimately, to the relief of most, if not all, judges, the jurisdiction to deal with what is commonly called picketing was, in large measure, placed in the hands of what is now the Industrial Relations Council.

<sup>27</sup> See Julia E. Lawn, “The John Doe Injunction in Mass Protest Cases” (1998) 56 UT Fac L Rev 101 [Lawn]; Amir Attaran, “*Mandamus* in the Enforcement of the Criminal Law: Ending the Anti-Protest Injunction Habit – Issues Arising from *MacMillan Bloedel v. Simpson*” (1999-2000) 33 UBC L Rev 181 [Attaran].

<sup>28</sup> *R v Bridges*, [1990] BCJ No 2859, 78 DLR (4th) 529 (BC CA) [*Bridges*].

<sup>29</sup> On the labour context in which this case law arises, see Lawn, *supra* note 27 at 114-116.

<sup>30</sup> *Bridges*, *supra* note 28 at 541-542 (DLR).

There is today the grave question of whether public order should be maintained by the granting of an injunction, which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the Criminal Code.

I regret that no serious or sustained argument was put to us on the hearing of these appeals concerning that question which would, by its nature, have given rise to consideration of such cases as *Sorrell v. Smith* [1925] A.C. 700, *Thomson (D.C.) and Co. Ltd. v. Deakin* [1952] 2 All E.R. 361 (C.A.), *Crofter Hand Woven Harris Tweed v. Veitch* [1942] 1 All E.R. 142 (H.L.) and *Williams v. Aristocratic Restaurants* [1951] S.C.R. 762.

Southin J.A. was questioning whether the law of injunctions, developed in a different age and different social context, was adequate for dealing with a modern protest as a form of public expression. She went on to comment on the inappropriateness of the court issuing an injunction in the circumstances of the case before her:

It is obvious to me that the terms of this order were taken from precedents developed during the course of labour disputes. There is much to be said for the proposition that such precedents should be put permanently away and the court should give, in these cases where the citizens take to the streets and an injunction is sought, a fresh consideration to the extent to which the court should go. That consideration should, in every case, depend on the precise nature of the dispute, the precise conduct in issue and so on.<sup>31</sup>

In addition to the policy preoccupations expressed by Southin J.A., procedural concerns arise from using the remedy of injunction against protestors. These injunctions are not limited to specific parties. As Julia Lawn observes, a John Doe or Jane Doe will not have a lawyer present to oppose the issuing of the injunction.<sup>32</sup> Moreover, even if legal representation were possible, it would be difficult for counsel to adequately represent all the specific interests and contextual factors raised by different groups of protestors.<sup>33</sup> Finally, without specifics about the parties to whom the injunction is to apply, it is difficult for law enforcement officials to notify those whose freedom of speech, liberty, and, potentially, security of the person, are limited by the injunction. Lawn points out that “[t]he obligations and practices of giving notice and bringing details to the court’s attention, while imperfect safeguards, at least represent an attempt to ensure that an *ex parte* order will reflect both sides.”<sup>34</sup>

In addition to these procedural concerns, the origin of the law of injunctions also puts into question the suitability of the remedy where a legitimate protest defends environmental and aboriginal rights. An injunction is an equitable remedy and, as the Supreme Court of Canada (“SCC”) has affirmed on a number of occasions, equity is intended to take into account the “social fabric” in order to produce just results. For example, in *Pro Swing Inc. v. Elta Golf Inc.*,<sup>35</sup>

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<sup>31</sup> *Bridges*, *supra* note 28 at 542 (DLR).

<sup>32</sup> Lawn, *supra* note 27 at 124-125.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 125.

<sup>35</sup> *Pro Swing Inc. v. Elta Golf Inc.* 2006 SCC 52 at p 6, [2006] 2 SCR 612.

Justice Deschamps, writing for the majority, discussed the equitable jurisdiction of the court and the importance of considering social realities when applying equitable remedies:

At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge's discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as "Equity follows the law", "Delay defeats equities", "Where the equities are equal the law prevails", "He who comes to equity must come with clean hands" and "Equity acts in personam" (Hanbury & Martin *Modern Equity* (17th ed. 2005), at paras. 1-024 to 1-036, and I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the social fabric. As Spry puts it:

. . . the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.

Neither Justice Thomson nor Justice Cunningham, the Associate Chief Justice of the Superior Court of Ontario, seems to have taken into account the "social fabric"<sup>36</sup> when deciding to issue the two injunctions and the orders enforcing them against the protestors at Sharbot Lake.<sup>37</sup> In other words, they ignored the fact that an injunction is an equitable remedy and disregarded SCC jurisprudence in overlooking the social context in which the remedy was requested. In particular, they did not take into account the protestors' legitimate concerns about the environment or the rights of First Nations peoples. In my view, the expression of these concerns ought not to be stifled through the use of the principles of equity.

Indeed, as it turns out, the Ontario Court of Appeal condemned the issuing of an injunction against the Ardoch and Shabot First Nations and non-aboriginal protestors of Sharbot Lake. In fact, they went so far as to reprimand the Superior Court in *obiter* despite the fact that the parties did not challenge the injunction. Addressing the aboriginal rights of the Algonquin First Nations, Frontenac's private interest in pursuing its exploration plan in accordance with valid mining claims and agreements, and the issue of respect for the Crown property rights of Ontario, the Court said:

And how are these interests to be effectively balanced? The answer has been clear for almost 20 years in the jurisprudence of the Supreme Court of Canada – consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights

<sup>36</sup> In the criminal law, the context of the offence and the systemic barriers faced by aboriginal people are relevant to sentencing an aboriginal offender by virtue of s 718.2(e) of the *Criminal Code*, RSC 1985, c C-64. See *R v Gladue*, [1999] 1 SCR 688 at para 81, 171 DLR (4th) 385.

<sup>37</sup> Thomson J had issued an injunction to refrain the Ardoch and Shabot from interfering with their mining exploration on 27 August 2007, while Cunningham ACJSC had issued an interlocutory injunction enjoining the Ardoch, Shabot and any associated persons with interfering with the exploration on 27 September 2007.

and other important, but at times, conflicting interests: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; and *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2005] 3 S.C.R. 388. The honour of the Crown requires that it act as a committed participant in the undoubtedly complex process of consultation and reconciliation: *Haida Nation, Taku River and Mikisew Cree*.

Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.

I am quick to point out that in this case, the AAFN did not appeal either the interim or the interlocutory injunctions granted by Thomson J. and Cunningham A.S.C.J.C. It is thus not for this court to address the merits of either order. However, I think it is important to give judicial guidance on the role to be played by the nuanced rule of law described in *Henco* when courts are asked to grant injunctions, the violation of which will result in aboriginal protestors facing civil or criminal contempt proceedings.

Where a requested injunction is intended to create “a protest-free zone” for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, “The John Doe Injunction in Mass Protest Cases” (1998) 56 U.T. Fac. L. Rev. 101. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process: *Haida Nation*, p. 532.<sup>38</sup>

The Court of Appeal noted that it was improper for Justice Cunningham to issue an order enforcing the injunction, given that the Ardoch First Nation had refused to make submissions on the injunction out of a desire to continue consultation with the Crown, and given that the Judge had not properly considered aboriginal law relating to the issue.<sup>39</sup> Indeed, the Court of Appeal explicitly made reference to a statement by Algonquin Elder William Commanda expressing the aboriginal legal position that no further exploration should occur on land claimed by the Algonquin. One of those convicted of contempt of court, Robert Lovelace, reported the following statement by Elder Commanda:

The authority for this particular moratorium lies both with the AAFN Algonquin First Nation – Mr. Perry was our representative Elder who after hearing consensus within the community and at the Family Heads Council – and it also comes from the authority of William Commanda who is the principal Elder of all of the Algonquin people, and after he considered it, after he talked with the people that are important

<sup>38</sup> *Frontenac*, *supra* note 21 at paras 45-48.

<sup>39</sup> The Ardoch had refused to make submissions to the judge on either injunction because they were of the view that the issue was best settled through negotiation with the province (*ibid* at paras 17, 21).

to him and the Algonquins that he feels are – are representative of the Algonquin voice, then he also gave his hand to signing that moratorium.

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With the voice of William Commanda, all Algonquins have the opportunity to heed that law. All Algonquins can turn to William Commanda and say, I respect this Elder, I respect his teachings, I respect his learned opinion, and they can either subscribe to that or not.<sup>40</sup>

Clearly, the Court is indicating the importance of aboriginal law as an independent source of law relevant to the reconciliation of aboriginal peoples with the Crown. The decision of the Superior Court to issue the injunctions without consideration of relevant aboriginal law was improper: it did not appreciate all the relevant legal sources, nor did it take into account the social context relevant to granting an injunction.

While the Superior Court had justified issuing the orders enforcing the injunction on the basis that a failure to abide by a court order violated the rule of law, the Court of Appeal reaffirmed the view it had expressed in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*<sup>41</sup> to the effect that invocations of the rule of law alone cannot justify issuing and enforcing injunctions against aboriginal and environmental protestors in the situation the latter faced at Sharbot Lake. As Laskin J.A. states, the rule of law involves consideration of the importance of respecting the rights of minorities and of reconciling aboriginal and non-aboriginal interests through negotiation. Consequently, injunctive relief is not suitable. He makes his case as follows:

... [N]o one can deny the importance of the rule of law in Canada. The preamble to our Constitution states that Canada is founded on principles that recognize the rule of law. The Supreme Court of Canada has said that it is one of our underlying constitutional values. See *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; and *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

But the rule of law has many dimensions, or in the words of the Supreme Court of Canada is “highly textured.” See *Reference re Resolution to Amend the Constitution*, supra, at 805. One dimension is certainly that focused on by the motions judge: the court’s exercise of its contempt power to vindicate the court’s authority and ultimately to uphold the rule of law. The rule of law requires a justice system that can ensure orders of the court are enforced and the process of the court is respected.

Other dimensions of the rule of law, however, have a significant role in this dispute. These other dimensions include respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights.<sup>42</sup>

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<sup>40</sup> *Ibid* at para 27.

<sup>41</sup> *Henco Industries Ltd. v Haudenosaunee Six Nations Confederacy Council*, (2006) 82 OR (3d) 721, 277 DLR (4th) 274 (Ont CA).

<sup>42</sup> *Ibid* at paras 140-142.

Courts are increasingly acknowledging that equitable remedies such as injunctions are not suitable where citizens, both aboriginal and non-aboriginal, seek to stimulate public debate about environmental and human rights issues through peaceful protest. The use of such remedies essentially converts a conflict between private parties (the protestors and the mining company) into a conflict between the courts and the protestors. As Amir Attaran observes, this is a “step that risks, in the long run, bringing the administration of justice into disrepute.”<sup>43</sup>

Before issuing an injunction or an enforcement order, courts must establish whether the government is consulting in good faith with aboriginal groups. In my view, the role of courts is to ensure the government is acting honourably, and they can best fulfill it by strictly reviewing whether the government is abiding by its duty to consult, accommodate, and implement the outcome of consultations. If conflicts between aboriginal peoples and the Crown are to be resolved through consultation, then there must be strict and effective enforcement of the Crown’s obligations.<sup>44</sup> Dwight Newman has discussed the standard of review used by courts in reviewing Crown action in this regard: it is reasonableness.<sup>45</sup> While I do not challenge this standard, it has arguably been applied somewhat deferentially. Indeed, Newman states that “courts show a meaningful degree of deference to the development of reasonable processes and do not seek to intervene in every instance, but they do stand ready to intervene in an instance where the Crown party has fundamentally failed the duty to consult.”<sup>46</sup> Perhaps courts ought to expand the scope of their review to include the pace at which the process is unfolding, the Crown’s negotiation tactics (confrontational vs. conciliatory), and the nature of the proposed accommodation. Courts have begun to supervise these aspects of the implementation of the duty to consult. For instance, in *Hupacasath First Nation v. British Columbia (Minister of Forests)*,<sup>47</sup> the British Columbia Superior Court issued an order appointing a mediator in the consultations between the First Nation and the government. Some of the factors the Court considered in making this appointment were: the government had not given priority to the consultation and accommodation process despite an earlier decision by the Court explaining the Crown’s duty to consult;<sup>48</sup> the length of the preliminary consultation phase, which had lasted two years, as well as other delays;<sup>49</sup> the government’s failure to involve all the relevant ministries;<sup>50</sup> and the Crown’s failure to take sufficient account of the concerns of the First Nation in regard to possible future exercise of aboriginal rights over some of the land in question.<sup>51</sup> The Court concluded that it had the jurisdiction to review the Crown’s efforts to consult and accommodate the First Nation on a standard of reasonableness,<sup>52</sup> and after reviewing the actions of the government on this standard, the Court concluded that the “position taken by

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<sup>43</sup> Attaran, *supra* note 27 at 188.

<sup>44</sup> On the duty to consult, see Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009) at 41-44 [Newman].

<sup>45</sup> *Ibid* at 41.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Hupacasath First Nation v British Columbia (Minister of Forests)*, [2009] 1 CNLR 30.

<sup>48</sup> *Ibid* at para 91.

<sup>49</sup> *Ibid* at paras 100, 143-144.

<sup>50</sup> *Ibid* at paras 146-147.

<sup>51</sup> *Ibid* at paras 156-157.

<sup>52</sup> *Ibid* at para 187.



the Crown is inconsistent with a balancing process aimed at eventual reconciliation, and is inconsistent with the context of this dispute (in particular, with conclusions reached in the 2005 decision [which set out in detail the nature of the Crown's duty to consult in this case])."<sup>53</sup> Mr. Justice Smith concluded that "the Crown did not correctly understand what was required, and misapprehended its duty to consult and accommodate in the circumstances."<sup>54</sup> Courts should continue to supervise consultation between First Nations and the Crown as occurred in *Hupacasath First Nation* and expand and develop the criteria for an effective consultation and accommodation process that aims at reconciliation between aboriginal groups and the Crown. Moreover, to ensure effective and good faith negotiation, perhaps courts should provide better remedies for aboriginal peoples to provide incentives to the Crown to resolve the issue through consultation. Newman notes that punitive awards will only be made "against a government if its conduct has been particularly blameworthy."<sup>55</sup> If damage awards were more available, this would create incentives for good faith consultation and accommodation. Finally, even if nothing else were to change with the current regime, courts should consider whether the government ought to be made a party to a proceeding if the court is considering issuing an injunction against an aboriginal group or individual and the Crown is engaged in consultations and negotiations with the group. In this way, it would be more open to the court, in resolving a dispute, to require the Crown to consult, negotiate, and accommodate in good faith.

Other remedies are also available as alternatives to injunctions. Attaran has suggested that resource companies should be able to apply to a court for an order of *mandamus*. This order would allow the Court, in appropriate circumstances, to order the police to carry out their public duty of law enforcement and maintenance of the public order as set out in the *Criminal Code*.<sup>56</sup> While I cannot comment extensively on this option, it has the benefit of ensuring that proceedings arising from police enforcement will be conducted by the Crown with all the procedural protections that such prosecutions afford a defendant,<sup>57</sup> including *Charter* remedies.<sup>58</sup>

#### 4.2 Contempt of Court and Procedural Protections for Protestors

Many problems arise when the power of contempt of court is used to prosecute protestors. First, since they are often not parties to the litigation giving rise to the injunction, protestors do not have the pleadings, and so cannot know how to interpret the injunction. In addition, there is no clear direction as to when private parties may bring contempt proceedings against

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<sup>53</sup> *Ibid* at para 239.

<sup>54</sup> *Ibid* at para 240.

<sup>55</sup> *Ibid* at 43.

<sup>56</sup> *Ibid*. On the suitability of the *Criminal Code*, *supra* note 37, for dealing with mass protest cases, see Lawn, *supra* note 27 at 128-129 and Bridges, *supra* note 28 at 285.

<sup>57</sup> Newman, *supra* note 44 at 43, para 2.

<sup>58</sup> Lawn, *supra* note 27 at 130.

protestors, or when the Crown may do so.<sup>59</sup> The Sharbot Lake case brings into sharp relief the conflicts that arise when private parties enforce court orders through contempt proceedings. The injunction issued by Thomson J. in the case of the Sharbot Lake protests was issued not only against the Ardoch and the Shabot, who were parties to the suit brought by Frontenac against them for obstructing their mining exploration efforts, but also against particular protestors who were not parties to this litigation. In addition to the named parties, the injunction targeted “Jane Doe” and “John Doe,” capturing all potential protestors within its scope. Despite attempts by counsel for protestors charged with contempt of court, the pleadings in the main action out of which the injunction arose were never made available to them, although they were necessary for understanding the terms of the injunction. Also, although the Crown became a party to the litigation, it did not take over the enforcement of the injunction or the prosecution of those charged with violating it. Instead, the private mining exploration company, Frontenac, was left to seek an order for enforcement of the injunction and to prosecute those caught violating it.

In this section, I address two main issues. The first is the outmoded nature of the law of contempt in Canada, which is unsuitable for dealing with the nuances of modern public protest. The second is the lack of procedural protections for protestors under the current law of contempt. My comments on both of these issues arise from my experience in defending environmental protestors from the Sharbot Lake area. In these cases, Frontenac, the mining exploration company, charged non-aboriginal environmental protestors with contempt of court for breaching an injunction when the latter were found in violation of the order by OPP. When the defendants sought disclosure of the facts on the basis of which the prosecutions were to proceed, the private prosecutors (Frontenac) refused to abide by disclosure requirements for either civil or criminal litigation despite the severe repercussions a conviction could have for the defendants. Moreover, although the Crown intervened in the hearings regarding the issuing of the injunctions against the Shabot, Ardoch and their associates, the Crown did not take over the prosecution of the contempt proceedings. As a result, the defendants were unable to obtain full disclosure of the evidence on which Frontenac was relying for the prosecution—a problem that was arguably motivated by the financial and corporate interests of Frontenac, and which led Frontenac to refuse to acknowledge that the disclosure obligations in *R. v. Stinchcombe*<sup>60</sup>

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<sup>59</sup> I am not suggesting that the Crown should take over all civil contempt proceedings. However, I am of the view that in the context of the resolution of aboriginal issues and legitimate public protest, the public interest militates in favour of Crown prosecution. There are two reasons for this. First, it is easier to hold the Crown to providing procedural protections for defendants, given its role in protecting and promoting the public interest. Second, the Crown will not be subject to the financial and commercial interests that motivate private parties. As a result, Crown prosecution and discretion to abandon such prosecutions may lessen the likelihood that private prosecutions for contempt of court can be used as SLAPP suits. The government is aware of the danger of private prosecutions in the criminal context. For instance, s 507.1(4) allows the Attorney General to review a privately laid information. This relatively new section is presumably based on the legitimate concerns of the Crown that the criminal law should not be used as a tool of harassment by private parties. Similar considerations ought to apply to contempt proceedings.

<sup>60</sup> *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1.

applied to it.<sup>61</sup> This problem of procedural fairness could have been avoided if the Crown had prosecuted, as it would have been clearer that it had strict disclosure obligations. Moreover, when the Crown is the prosecutor, it is easier to raise *Charter* arguments about the conduct of both the police enforcing the Court order and the prosecution's conduct of the case.

To understand the unfairness inherent in private prosecutions of civil or criminal contempt in cases of legitimate public protest or cases involving aboriginal peoples, one must understand the nature of contempt proceedings.<sup>62</sup> Contempt of court, whether prosecuted civilly or criminally, may result in imprisonment of those found in violation of a court order. Thus, both types of contempt potentially infringe the rights to liberty and security of the person protected in s. 7 of the *Charter*. In common law as in civil law jurisdictions, the quasi-criminal nature of contempt of court has long been recognized. In *Comet Products U.K. Ltd. v. Hawkex Plastics Ltd. et al.*, Lord Denning, M.R., makes this point:

Although this is a civil contempt, it partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding.<sup>63</sup>

The views of Lord Denning in *Comet* have been adopted by Canadian courts both explicitly, as in *MacNeil v. MacNeil*,<sup>64</sup> and implicitly, as in *Canadian Broadcasting Corporation et al. v. Quebec Police Commission*.<sup>65</sup> Ontario courts have also affirmed the quasi-criminal nature of civil contempt in Ontario law.<sup>66</sup> For instance, in *Huntsville (Town) v. Hutley Ltd.*, Justice Eberhard of the Ontario Superior Court of Justice affirmed that civil contempt of court is a quasi-criminal offence to which there are corresponding heightened obligations to ensure a fair trial. He stated that:

. . . a civil contempt motion carries with it protections unlike other civil motions and is akin to a criminal proceeding in aspects including presumption of innocence,

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<sup>61</sup> Under the Supreme Court of Canada's decision in *R v Stinchcombe*, the Crown is obliged to disclose all relevant material, both inculpatory and exculpatory, that is in its possession. In the words of Justice Sopinka, *ibid* at 343 (SCR):

With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.

<sup>62</sup> On the various types of contempt proceedings, see Jack Watson, "Badmouthing the Bench: Is There a Clear and Present Danger? To What?" (1992) 56 Sask L Rev 113.

<sup>63</sup> *Comet Products U.K. Ltd. v. Hawkex Plastics Ltd. et al.*, [1971] QB 67 at 73 (CA).

<sup>64</sup> *MacNeil v MacNeil* (1975), 67 DLR (3d) 114, at 122 (NSCA).

<sup>65</sup> *Canadian Broadcasting Corporation et al. v. Quebec Police Commission*, [1979] 2 SCR 618, 28 NR 541.

<sup>66</sup> *Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al.* (No. 2), (1975) 4 OR (2d) 585 at 64, 19 CCC (2d) 218 (Ont HC); *Re Regina and Monette*, (1975) 64 DLR (3d) 470, (1976) 28 CCC (2d) 409 (Ont HC) at 765.

onus of proof, applicability of the *Canadian Charter of Rights and Freedoms* and a heightened attention to procedural fairness.<sup>67</sup>

The quasi-criminal nature of contempt of court is further underlined by the fact that it is the sole common law offence preserved in Canadian criminal law by virtue of s. 9 of the *Criminal Code*.<sup>68</sup>

Civil contempt proceedings are brought even closer to criminal contempt proceedings when it is recognized that the presiding judge can convert the former into the latter once the nature and quality of the contemptuous conduct is determined. This was pointed out by McEachern C.J.B.C. in *R. v. Bridges (Nos. 1 and 2)*, in which he states:

. . . [t]he determination of whether an alleged contempt which arose in civil proceedings, such as by disobedience of an order of the Court, is criminal or civil is made by the Court in the course of the proceedings. As Wood, J. said, the form of the proceedings by which the alleged contemner was brought before the Court is irrelevant.<sup>69</sup>

As a result of the ability of a court to convert civil contempt into criminal contempt, charges of civil contempt ought to be subject to the full procedural protections guaranteed to all accused charged with a criminal offence under the *Criminal Code*. This principle was recognized by the Supreme Court of Canada in *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, where Gonthier J., speaking of civil contempt of court under the *Civil Code of Procedure (CCP)* of the Province of Quebec, stated that the offence of contempt of court involves an element of public law, “because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue.”<sup>70</sup> Gonthier J. went on to affirm that under the *CCP* imprisonment is available as a sentence for contempt of court.<sup>71</sup> As a result of the availability of imprisonment as a punishment, the offence is “*strictissimi juris* and quasi-penal in nature.”<sup>72</sup> The nature of the offence of contempt of court as *strictissimi juris*, meaning “of the strictest right or law,” imposes on the courts “the most scrupulous attention . . . to ensure adherence to all necessary safeguards.”<sup>73</sup>

The classification of a civil contempt motion as a motion akin to a criminal proceeding requiring heightened attention to procedural fairness favours the strict application of the pro-

<sup>67</sup> *Huntsville (Town) v. Hutley Ltd.*, [2000] OJ No. 4528, at para 6. See also *McClure v. Backstein*, [1987] OJ No 498, 17 CPC (2d) 242; *Beattie v. Ladouceur*, [2001] OJ No 4852 at para 13, 23 RFL (5th) 33 (Ont SC); *Stratford Professional Firefighters Association, Local 543, I.A.F.F. v. Stratford (City)*, (1981) 23 CPC 250 at para 3, [1980] OJ No 1600 (Ont HC); *Melville v. Beauregard*, [1996] OJ No 1085 (Ont CJ) at para 13.

<sup>68</sup> *Criminal Code*, *supra* note 36, s 9.

<sup>69</sup> *Bridges*, *supra* note 28 at 532 (DLR); see also *Everywoman's Health Centre Society (1988) Victoria Drive Medical Clinic Ltd. v. Bridges*, [1989] BCJ No 453, 54 BCLR (2d) 273; *Poje v. A.-G. B.C.*, [1953] 1 SCR 516, [1953] 2 DLR 785,

<sup>70</sup> *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 SCR 1065 at p 1075, 96 DLR (4th) 376.

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

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

<sup>73</sup> *Black's Law Dictionary*, 6th ed (St. Paul: West Publishing, 1990), sv “*strictissimi juris*”; see also *Toronto Transit Commission v. Ryan*, (1998) 37 OR (3d) 266 at 270, 41 CLRBR (2) 21 (Gen Div).

cedural protections provided to defendants in the *Criminal Code* and affirmed in *Charter* jurisprudence. One of the most important of these protections is the requirement that the prosecutor disclose the evidence on which he intends to rely during the prosecution. The requirements for this disclosure are set out in *R. v. Stinchcombe*.<sup>74</sup> Despite the obvious nature of this claim that the prosecutor must disclose these facts, Frontenac refused to provide the defendants with the relevant documents. For instance, it would not provide protestors charged with contempt a summary of the evidence of the OPP officers, nor would it provide transcripts, affidavits, the officers' notes or other documents that the Crown normally hands over to a defendant in a criminal prosecution. Moreover, the only remedies available to the defendant upon such a refusal are motions for dismissal of the contempt proceedings on the basis of abuse of process or motions for third party disclosure of documents. This situation raises obvious concerns regarding the capacity of civil society to organize effectively against environmentally hazardous conduct and violations of human rights (including aboriginal rights), and it is clearly incongruous with the Ontario Court of Appeal's recent affirmation of reconciliation as an overarching theme in Canada-First Nations relations.

A number of solutions exist to this problem, including:

1. Courts could impose the *Stinchcombe* disclosure requirements on private parties for civil contempt of court proceedings;
2. The Crown could take over the prosecution of contempt of court proceedings involving public interest protestors—this may be especially important where protestors are aboriginal peoples that engage the honour of the Crown and its fiduciary obligations to aboriginal peoples;
3. Legislatures could create provisions in anti-SLAPP suit legislation to ensure proper procedural protections for protestors in cases of environmental and human rights protests.

I will discuss each of these briefly.

If case law were to establish that the disclosure requirements set out in *R. v. Stinchcombe* applied to private parties prosecuting civil and criminal contempt, then some of the injustice inherent in private prosecutions would be attenuated. This is not an outlandish suggestion, given that in *Stinchcombe*, Sopinka J. stated that the disclosure obligations of the Crown in criminal cases were derived from what he called the much higher standards of disclosure historically observed by parties in civil litigation. He writes:

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. *Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice.* This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated

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<sup>74</sup> *R v Stinchcombe*, *supra* note 60 at sub-title “2. Crown’s Obligation To Disclose.”

from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.<sup>75</sup> [Emphasis added]

As yet, there are few precedents that support this kind of disclosure outside Quebec,<sup>76</sup> although the first Ontario case, *Vale v. USWA Local 6500*, appeared in 2010.<sup>77</sup>

In my view, the *Vale* case is not directly applicable to disclosure in cases involving aboriginal and environmental protestors, as it arises in the context of a labour dispute between Vale Inco and its union. As such, it does not take into account the relevant contextual factors that are present in a public protest as occurred at Sharbot Lake. This is evident in the review of the factors enumerated by Justice Robbie D. Gordon that should be taken into account when a court makes a disclosure order. The factors are:

1. The relief being sought by the party bringing the motion for contempt. If the motion is brought essentially for the purpose of ending the unlawful conduct that is one thing; if the motion is brought with a request for significant penal sanction, that is another thing entirely;
2. Whether the alleged contempt is ongoing, resulting in an urgent need to preserve order and protect the authority of the court;
3. If the alleged contempt is not ongoing, whether the relationship between the parties is such that the impugned conduct might reasonably be expected to resume without timely intervention by the court;
4. The nature of the conduct alleged; and
5. The nature and extent of the materials of which disclosure is sought and the time expected to produce it.<sup>78</sup>

These factors are not immediately applicable to environmental and aboriginal protestors because it is unclear how a court is to balance the need for urgent action against the importance of vindicating constitutionally protected aboriginal rights or of shielding those seeking to protect important public resources such as the environment and environmental human rights against potentially harmful exploitation by a private corporation. Justice Gordon's proposed framework is rendered more precarious by his affirmation that, while it is important to "ensure that the alleged contemnor has a fair trial in accordance with the principles of fundamental justice,"<sup>79</sup> the Court may be justified in derogating from the requirements of a fair trial if this

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<sup>75</sup> *Ibid* at 332.

<sup>76</sup> See *Microcell Solutions Inc. v Telus Communications Inc., Société Télé-Mobile and D-2 Technologie Inc.*, [2004] QJ 9388, court file no 500-17-017783-039 at para 27, in which the Quebec Superior Court affirmed that *Stinchcombe* applies in civil contempt proceedings. In that case, Justice Clément Gascon stated at para 26:

... in at least four decisions, the Superior Court [of Quebec] has recognized that the duty of full and complete disclosure of evidence does apply in the context of civil contempt of Court proceedings.

<sup>77</sup> *Vale v USWA Local 6500 et al*, 2010 ONSC 3039 [*Vale*].

<sup>78</sup> *Ibid* at para 7.

<sup>79</sup> *Ibid* at para 8.

derogation is in accordance with the factors considered in an analysis under s. 1 of the *Charter*. In other words, Justice Gordon seems to be saying that a breach of trial fairness can be justified by the government in certain cases on the basis of expediency. This is problematic when one recalls that, in the *Motor Vehicle Reference*, Justice Lamer clearly stated that a breach of s. 7 is not generally justifiable under s. 1, given the fundamental interests at stake.<sup>80</sup> In that case, he reminds us that although “[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7,” this will only be in “exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.”<sup>81</sup> For this reason, I believe Justice Gordon is wrong to think that considerations relevant to a s. 1 analysis are pertinent to ordering disclosure in a contempt of court case in which the liberty of the alleged contemnor is always in potential jeopardy. Finally, *Vale* fails to deal with third party disclosure, which is relevant in the Sharbot Lake protests, as the notes of officers that were necessary for effective cross-examination were, according to Frontenac Ventures Corporation, in the hands of the OPP, not the mining exploration company. For these reasons, *Vale* is not directly applicable to environmental and aboriginal protestors.

I have already discussed the benefits of the Crown taking over contempt proceedings from private parties in cases of legitimate public protest and aboriginal rights. In both of these situations, there is a public interest in promoting free speech and in encouraging peaceful resolution of conflict; the interests of a private individual or corporation, which do not incorporate the same fiduciary duties and duties of honour should thus have no place in resolving such a dispute. Of course, if the Crown were to take over prosecutions, the judge may consider the interests of the private party, who should perhaps be allowed to intervene. Beyond that, however, the severity of the penalties for both civil and criminal contempt requires strict observance of procedural fairness. Moreover, it is not unusual for the Crown to take over private prosecutions. When an information is laid against a person by a private party under the *Criminal Code*, the policy of the Attorney General of Ontario is to either take over prosecution or seek a stay of proceedings.<sup>82</sup> This policy followed from the recommendations of the Martin Commission.

Finally, effective anti-SLAPP suit legislation could include provisions on the use of contempt proceedings. In my view, this legislation should forbid such proceedings and create a more effective and less confrontational method for resolving disputes. In the absence of such a dispute resolution method, however, anti-SLAPP suit legislation could, at a minimum, ensure that incarceration is not an available penalty, that the rules of procedural fairness should be

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<sup>80</sup> *Reference Re: Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486 at para 83, 24 DLR (4th) 536.

<sup>81</sup> *Ibid.*

<sup>82</sup> Under s 579 of the *Criminal Code*, *supra* note 36. For an example of the application of this policy, see the recent decision of the Attorney General to intervene in a *Criminal Code* charge laid by a private party against OPP Police Chief Julian Fantino. The private party, a political organizer in Caledonia, wished to charge Fantino with unduly influencing Caledonia municipal officials so that the latter would not participate in demonstrations in support of the organizer’s opposition to the government handling of aboriginal issues arising from land claims in the Caldeonia area. See “Summons issued for OPP head over Caledonia dispute”, *CBC News* (8 January 2010), online: CBC <<http://www.cbc.ca/canada/toronto/story/2010/01/08/ont-fantino-caledonia-mchale-allegations.html>> and Christie Blatchford, “OPP Commissioner charged in Caledonia dispute”, *The Globe and Mail* (8 January 2010), online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/opp-commissioner-charged-in-caledonia-dispute/article1425039/>>.

strictly observed, that the judge should take into account the public interest in arriving at a resolution of the dispute, and that the Crown should take over any prosecutions for contempt that might arise. The recent modifications to the *Civil Code of Quebec* in 2009 with regard to SLAPP suits provide the judge better control over the initiation and conduct of proceedings if he or she feels they are abusive, including sanctions against parties who bring abusive, unmeritorious suits. However, the amendments do not address the procedural protections discussed above, nor do they place any limits on the use of contempt proceedings where the litigation involves aboriginal rights or the public interest.

#### 4.3 Costs for Public Interest Litigants

The cost of engaging in public interest litigation has always been a major deterrent for those interested in holding both government and private companies accountable for harm to the environment and for human rights violations.<sup>83</sup> For the purposes of the following discussion, “public interest litigation” refers to litigation that develops the meaning and defines the scope of legal rights, responsibilities, and obligations, thereby empowering individuals to participate in Canadian society in a manner that is meaningful to them and not harmful to the equally important rights of others. The current regime of costs awards is not properly calibrated for separating vexatious and unmeritorious public interest litigation from litigation that is truly in the public interest. Moreover, it does not offer the right incentives for public interest litigants to have access to justice, nor does it dissuade corporations, individuals or government from initiating SLAPP suits. For instance, in the case of the Sharbot Lake protests, both aboriginal and non-aboriginal protestors could have incurred serious cost awards if they were unsuccessful in their defence against the contempt of court prosecutions. In my view, those defending themselves against contempt of court proceedings should be insulated from adverse costs awards as is the case in criminal law prosecutions. In criminal cases, as a general rule, the defendant who is convicted of an offence is not required to pay the costs the Crown incurred in the prosecution—to do so would dissuade potentially innocent people from defending themselves vigorously and would also be unfair given the socio-economic status of most defendants. Without insulating defendants from costs awards, we cannot be sure that the criminal justice system is imprisoning only those guilty of an offence rather than those too poor to put up a fight. In the civil context, however, protestors can face consequences as severe as in the criminal justice system, such as incarceration, and they can be further punished by an award of prosecutor’s costs. This was the case in the Sharbot Lake protests. When counsel went in search of case law to support its claims that public interest litigants should be insulated from adverse costs awards, it found that little existed. This must change if financially powerful parties are to be deterred from bringing SLAPP suits against environmental and human rights protestors who are potentially serving the public by highlighting violations of these rights.

Of course, civil litigation involving private parties raises issues that do not arise in criminal proceedings. When one of the parties is the government and the other is seeking to vindicate important environmental and human rights, the public interest character of the litigation is more apparent. However, when the government is not a party, or if one of the parties is a

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<sup>83</sup> On cost awards as a barrier to access to justice, see Chris Tollefson, “Costs in Public Interest Litigation: Recent Developments and Future Directions” (2009) 35 *Advocates Quarterly* 181 at 181-182 [Tollefson].



private individual or corporation, it is more difficult to separate public interest litigants from merely self-interested ones with an animus against that individual or corporation. In addition, the presumption in Canadian law is that the prevailing party should be entitled to costs regardless of whether the litigation was in the public interest.<sup>84</sup> In the Sharbot Lake protest cases, not all the protestors became involved out of complete selflessness; some were landowners in the area whose use and enjoyment of their land would be harmed by uranium mining or even prospecting for uranium, and whose land would diminish in value as a result of Frontenac's explorations. While existing case law on public interest costs is beginning to develop techniques for separating out public interest litigants from those who are purely self-interested, and for determining the relevance of self-interest in the characterization of litigation as being in the public interest, more work needs to be done in this regard. I provide some suggestions about how I think the law should develop in this area.

There is some limited jurisprudence which confirms that courts recognize their duty to prevent SLAPP suits by awarding costs to victorious public interest litigants. For instance, in *Grys v. Sewell and Jaffary*, Galligan J. justified an award of costs on the following basis:

As the hearing progressed I gained the initial impression that the action instituted by the plaintiff was an abuse of the process of this Court in that I formed a tentative opinion that the sole purpose of the litigation was to stifle public debate upon the plaintiff's performance of his duties as a member of City Council. It appeared to me then that the legal foundation of the action was tenuous at best and that the conduct of the proceedings indicated a desire on the part of the plaintiff not to have the issue of his conduct aired in a public trial but, quite the contrary, to stifle discussion about it.<sup>85</sup>

Galligan J. then went on to state that where the courts are used to stifle public debate, this constitutes an abuse of process that justifies the court penalizing the party who is abusing the court's process on its own motion:

A democracy is founded upon freedom of speech and upon the right of persons to publicly and forcefully debate matters which affect the public. The Courts exist for the purpose of assisting the course of democratic life not for the purpose of destroying it. In my view, a deliberate attempt to use the Court's process to stifle public discussion of a matter of public interest and importance is a gross abuse of the process of the Court and one that entitles the Court on its own motion to penalize someone who has used the process of the Court for such a base purpose.<sup>86</sup>

Less obvious is that courts should ensure that public interest litigants are protected against adverse costs awards in the event that they lose litigation that raises meritorious public interest issues. There are three methods for protecting public interest litigants in this case: advance costs awards; a principled refusal to issue costs against a public interest litigant; and costs awards in favour of public interest litigants who lose on the merits. For the purpose of the following discussion, "public interest litigation" means litigation that develops the meaning and defines the scope of legal rights, responsibilities and obligations in a way that empowers individuals

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<sup>84</sup> *Ibid* at 193; see also *Sierra Club of Western Canada v British Columbia (Chief Forester)*, (1994) 94 BCLR (2d) 331, [1994] BCJ No 1713 (SC).

<sup>85</sup> *Grys v Sewell and Jaffary*, [1972] 1 OR 864 (HC) at 865-866.

<sup>86</sup> *Ibid* at 866.

to participate in Canadian society in a way that is meaningful to them and does not derogate from the equally important rights of others.

One of the most effective ways of dissuading SLAPP suits is by ensuring that costs awards offer the right incentives for defendants to defend themselves against private and corporate prosecutions and provide disincentives for the latter to initiate abusive prosecutions in the first place. The key is to use the criteria for awarding costs so as to encourage litigation that is truly in the public interest and discourage frivolous or vexatious litigation animated solely by self-interest. Advance costs awards—costs awards to public interest litigants made by courts in advance of the proceedings—are a good example of how costs can be used as an incentive to promote legal resolution of public issues in a democracy that values public discussion.<sup>87</sup> A number of Supreme Court of Canada cases, some older and others recent, address the issue of advance costs awards. I will not review all of the law in this area—I will only provide an overview to demonstrate how these awards can be a powerful tool in righting power imbalances in cases of legitimate protest in the public interest.

The seminal case is *B.C. v. Okanagan Indian Band*,<sup>88</sup> in which the SCC set out a framework for dealing with advance costs. However, many details of the limits of such costs awards, including issues about the kinds of litigation in which they are appropriate and the criteria for identifying public interest litigants, have yet to be fleshed out. *Okanagan* arose out of an aboriginal title claim on the part of the *Okanagan Indian Band*. The Band had filed a constitutional question challenging provisions of the *Forest Practices Code of British Columbia Act*,<sup>89</sup> which they claimed infringed their aboriginal rights. The province moved to have the case put down for trial rather than allowing it to be dealt with through a summary procedure. The Band objected on the basis that they lacked the financial resources to fund a full trial. They asked that the Court exercise its discretion under the *Rules of Court* of the Supreme Court of British Columbia to issue an order granting them their costs in any event of the cause. The SCC affirmed that superior courts have the discretion to make such awards. They based this view on the evolution of the policy reasons for granting costs awards and on the importance of access to justice for citizens wishing to use the courts to resolve issues of importance to “the community as a whole.”<sup>90</sup> The court explained the shift in the policy underlying costs awards as follows:

As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia Rules of Court, Rule 37(23) to 37(26); Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba Queen’s Bench Rules, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

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<sup>87</sup> On the useful role that advance costs awards can play in the promotion of access to justice, see Tollefson, *supra* note 83 at 185.

<sup>88</sup> *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.

<sup>89</sup> *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159.

<sup>90</sup> *Ibid* at para 27.

Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.<sup>91</sup>

The Court has clearly affirmed that indemnification of the successful party is not the only policy goal underlying costs awards—costs awards can be used to ensure the efficient and fair functioning of the justice system and to discourage vexatious or abusive conduct of litigation. The expansion of the principles justifying costs awards emboldened the court to consider other policy objectives that can be pursued through costs awards. One of these policies was the promotion of access to justice. In this regard, the Court stated that, “in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party.”<sup>92</sup> As well, the Court acknowledged that costs awards can be used to level the playing field when parties to a dispute have unequal power due to different levels of financial resources.<sup>93</sup>

In setting out the legal principles that apply in awarding advance costs, the Supreme Court stated that superior courts have the inherent jurisdiction to grant such costs awards by virtue of their jurisdiction to give equitable remedies.<sup>94</sup> The Court developed the following framework to guide a judge considering whether to exercise her discretion to make an advance costs award:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial—in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
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>95</sup>

The principles of genuine impecuniousness, lack of viable alternatives to the litigation in question, a *prima facie* meritorious claim, and a legal issue the resolution of which will benefit

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<sup>91</sup> *Ibid* at paras 25-26.

<sup>92</sup> *Ibid* at para 30.

<sup>93</sup> *Ibid* at para 31.

<sup>94</sup> *Ibid* at paras 35, 37.

<sup>95</sup> *Ibid* at para 40.

the community as a whole, have been affirmed as guiding principles in making advance costs awards. In *Little Sisters II*, the Court also added the gloss that such awards will be only be made in exceptional cases.<sup>96</sup>

While *Okanagan* addressed advance costs awards in civil matters, it is still unclear if and how these awards will be available in criminal cases or in quasi-criminal cases such as contempt of court proceedings. In Ontario, the question about criminal cases has been resolved by *R. v. Fournier*.<sup>97</sup> In that case, the Court of Appeal held that advance costs awards cannot be made for defendants charged with a *Criminal Code* offence unless the defendant has applied to Legal Aid Ontario for funding or has demonstrated that such an application would be futile.<sup>98</sup> In arriving at this conclusion, it affirmed the Court's ruling in *R. v. Rowbotham*,<sup>99</sup> which stated that

... where the trial judge finds that representation of an accused by counsel is essential to a fair trial, the accused, as previously indicated, has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ one. Where the trial judge is satisfied that an accused lacks the means to employ counsel, and that counsel is necessary to ensure a fair trial for the accused, a stay of the proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the Charter where the prosecution insists on proceeding with the trial in breach of the accused's Charter right to a fair trial.

The Court has the discretion to make an advance costs award to a person facing a criminal charge if he or she has been refused Legal Aid and the Court has made an independent assessment that the accused's funds are insufficient to mount a defence.<sup>100</sup>

The Supreme Court of Canada recently applied the principles in *Okanagan* to those defending themselves against quasi-criminal charges. In *R. v. Caron*,<sup>101</sup> the appellant had been granted an interim costs award for a case involving a challenge to s. 34(2) of the Alberta *Use of Highway and Rules of the Road Regulation*.<sup>102</sup> Caron had been issued a ticket for a traffic infraction, but it was not available in French. He challenged the regulation on the basis that it violated his rights as a Francophone Canadian. The Alberta Court of Appeal framed the issue as whether the SCC case of *Okanagan* applied to the appellant.<sup>103</sup> The Court affirmed that the same principles that apply to criminal cases apply to quasi-criminal cases if the charge is "serious and complicated," as is the case with an "environmental disaster as a result of a chemical spill."<sup>104</sup> The Court noted that the defence against a charge for a traffic offence is not a serious and complicated one, but that the complication arose from the constitutional issues raised by the appellant. Given the

<sup>96</sup> *Little Sisters Book and Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 37, [2007] 1 SCR 38.

<sup>97</sup> *R v Fournier*, [2006] OJ No 2434 (Ont CA), 209 CCC (3d) 58.

<sup>98</sup> *Ibid* at para 9.

<sup>99</sup> *R v Rowbotham*, (1988) 41 CCC (3d) 1 at p 70, 63 CR (3d) 113 (Ont CA).

<sup>100</sup> *R v Peterman*, [2004] OJ 1758 at para 22, 70 O.R. (3d) 481 (Ont CA).

<sup>101</sup> *R v Caron*, 2011 SCC 5 [*Caron SCC*]; For the Court of Appeal case, see 2009 ABQB 745, (2009) 241 CCC (3d) 296 (Alta CA) [*Caron ABCA*].

<sup>102</sup> *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002.

<sup>103</sup> *Caron ABCA*, *supra* note 101 at para 10.

<sup>104</sup> *Ibid* at para 15.

importance of resolving constitutional questions and the fact that many of these questions arise in the context of quasi-criminal charges, the Court concluded that “an *Okanagan* order may be available with respect to quasi-criminal proceedings when the real issue is not the guilt or innocence of the accused, but rather a constitutional question of public importance.”<sup>105</sup>

The SCC largely agreed with the Alberta Court of Appeal, although it highlighted the differences between the advance costs award in *Okanagan* and the interim cost award affirmed in *Caron*. In *Okanagan*, the First Nation had sought an award of costs in advance of a civil trial from the court before which the trial was to occur, while in *Caron*, the costs order was sought in order to continue ongoing quasi-criminal litigation, and the order was sought from a superior court for a proceeding to take place in provincial court.<sup>106</sup> As well, the advance cost award in *Okanagan* engaged the jurisdiction of a court to exercise a statutory costs authority for equitable purposes, while the order in *Caron* dealt with the inherent jurisdiction of the Superior Court to “uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.”<sup>107</sup> Nevertheless, the SCC applied the *Okanagan* factors<sup>108</sup> to find that the Alberta Queen’s Bench was right to make an interim costs award to fund the continuation of *Caron*’s case in provincial court.<sup>109</sup>

In *Caron*, the SCC was careful to limit the application of *Okanagan* to quasi-criminal charges to what is viewed not as a run-of-the-mill quasi-criminal case, but as a significant constitutional case.<sup>110</sup> I suggest that the principles enunciated in *Caron* should be extended to other types of quasi-criminal charges, such as contempt of court proceedings or opposing motions for injunctions. When a party seeks an injunction that can be enforced through contempt of court proceedings, the party against whom the injunction is sought could face prison or a serious fine. If a party can demonstrate to the court that it is engaged in a protest that seeks to resolve matters of public interest such as the use of communal natural resources or a dispute between the Crown and aboriginal peoples, given the public importance of these issues and the real threat to an important *Charter*-protected value—liberty—*Okanagan* awards should be available to individuals seeking to challenge an injunction, challenge an order for the enforcement of an injunction, or to defend themselves against contempt of court proceedings arising from the enforcement of the injunction. In my view, the development of case law to this effect would ensure that private and corporate parties think twice about using injunctions and contempt proceedings as SLAPP suits to stifle public debate of issues of public importance. In the case of the Sharbot Lake protests, the possibility of an advance costs award for the aboriginal and non-aboriginal protestors could have acted as a deterrent to the mining exploration company for seeking an injunction which, as the Ontario Court of Appeal noted, was contrary to reconciliation of aboriginal peoples and had been obtained by the Crown *ex parte* without submissions by the First Nations. It might also have deterred Frontenac from bringing

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<sup>105</sup> *Ibid* at paras 24, 47.

<sup>106</sup> *Caron SCC, supra* note 101 at para 36.

<sup>107</sup> *Ibid* at para 26, quoting Issac H Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr Legal Probs* 23 at 48.

<sup>108</sup> *Ibid* at para 39.

<sup>109</sup> *Ibid* at paras 48-49

<sup>110</sup> *Ibid* at paras 46, 49.

contempt of court charges against the local residents and environmental protestors—charges Frontenac agreed to dismiss once it encountered some resistance.

In regard to insulating public interest litigants against adverse costs awards, a number of issues arise in the case law. Although there are some good precedents available on this point in Ontario such as *Incredible Electronics*<sup>111</sup> and *St. James*,<sup>112</sup> further clarification and interpretation of the principles relating to costs awards involving public interest litigants is needed to ensure that public interest litigants will not be dissuaded from meritorious litigation by potential adverse costs awards. The issues that arise about this case law include:

- a. The need to reconcile the different frameworks for determining costs in public interest cases set out in *Incredible Electronics v. Canada (Attorney General)* and *St. James' Preservation Society*;
- b. Encouraging courts to recognize that public interest litigation need not involve the government as a party—litigation against another private party can be in the public interest;
- c. The need to interpret the criteria set out in *Incredible Electronics* and *St. James* for awarding costs in a case involving a public interest litigant;
- d. Given the case law that affirms that costs can be awarded against a losing public interest litigant, case law should be developed that recognizes the principle that public interest litigants should not have costs awarded against them when they

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<sup>111</sup> *Incredible Electronics v Canada (Attorney General)* (2006), 80 OR (3d) 723, 147 CRR (2d) 79 (Ont SC) [*Incredible Electronics*]. The case involved a *Charter* challenge to s. 9(1) of the *Radiocommunication Act*. In *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, the Supreme Court of Canada had interpreted the Act so as to make the activities of certain telecommunications companies and individuals in Canada illegal. The companies and individuals had been capturing satellite signals from U.S. direct-to-home broadcasters in order to obtain satellite television services, to the detriment of businesses such as Bell ExpressVu, which sold equipment to subscribers through its satellite broadcast system. Subsequent to the SCC case, some of these individuals and companies launched a *Charter* challenge, claiming that s. 9(1)(c) of the Act violated the Constitution. Bell ExpressVu made a motion to intervene in the proceedings, and Perell J had to decide if it should be awarded its costs on the motion, which Incredible Electronics and others had opposed. Despite having a new, powerful “foe”, the *Charter* challenge continued, but, overwhelmed by the complexity of the case (Bell ExpressVu alone filed 27 affidavits), some of the litigants, many of whom were unrepresented, sought to abandon their application, while Bell ExpressVu and the Attorney General sought an order dismissing the application with costs. Perell J was required to decide whether costs awards were warranted and if so, in what amount. In order to settle this question, he had to consider whether any of the litigants were “public interest” litigants who should not be required to pay costs to Bell ExpressVu.

<sup>112</sup> *St. James' Preservation Society v Toronto (City)*, [2006] OJ No 2726, 286 DLR (4th) 149 (Ont SC). This costs award arose out of a case in which the St. James' Preservation Society sued the City of Toronto and the Rector and Churchwardens of St. James' Cathedral. The land occupied by St. James' Cathedral was granted to the Preservation Society in trust for use as a church yard and burying ground. The Rector and Churchwardens of the Cathedral entered into an agreement with the City of Toronto and a developer to transfer zoning density from church lands to the developer's nearby property in return for refurbishment of the Church property, a heritage site. The three members of the Society challenged the agreement with the developer and the re-zoning by-laws required to give it effect. The Society lost on most of the issues, and Mr. Justice Ducharme of the Ontario Superior Court was faced with determining how costs should be awarded.

are *bona fide* public interest litigants involved in meritorious litigation and the criteria in *Incredible Electronics* and *St. James* for identifying a public interest litigant are met.

My starting point in this section is the excellent article by Chris Tollefson, who recognizes the uncertainties in the law to which I will point. Tollefson has stated that, despite the pronouncements of the Supreme Court of Canada to the effect that special rules ought to be created in order to ensure that public interest litigants have access to justice, to date, lower courts have not analyzed the issues about public interest costs in a systematic way.<sup>113</sup> Tollefson's assessment is reinforced by the opinion of Perell J. in *Incredible Electronics*, who referred to this uncertainty in the case law when he stated that the case law has yielded "erratic and unpredictable results."<sup>114</sup>

The theory underlying the awarding of costs to public interest litigants and insulating them against adverse costs awards if they lose is articulated by Perell J. in *Incredible Electronics*: when a private party benefits from being awarded a public good or a right in a public good, the litigation can be public interest litigation notwithstanding the fact that one of the parties is not the government.<sup>115</sup> In supporting this point in *Incredible Electronics*, Perell J. relied on Prof. Tollefson's article, in which the latter stated that where a private party has a stake in a public resource such as clean air, Crown timber or a waterway for the purpose of profit, the litigation can be characterized as public interest litigation. As Prof. Tollefson argues, "[t]here is a strong public interest in ensuring that [the way government has allocated rights in public resources to private interests for the purposes of profit] are subjected to regular and careful public supervision, including judicial scrutiny."<sup>116</sup>

The general framework for deciding how to award costs in public interest litigation is set out by Perell J. in *Incredible Electronics*. However, the decision of Ducharme J. in *St. James* uses a slightly different analysis. It is my view that the two approaches can be combined to provide courts an improved and more comprehensive guide when awarding costs in cases involving public interest litigants. As I mentioned, Prof. Tollefson observed that the decision of Perell J. in *Incredible Electronics* does not set out as fully the criteria to be taken into account in identifying public interest litigation as does the opinion of Justice Ducharme's decision in *St. James*.<sup>117</sup> Also, Ducharme J. focuses more directly on the implications of costs awards for denying public interest litigants access to justice.<sup>118</sup> However, *St. James* does not directly incorporate issues specific to disadvantaged and marginalized groups, nor does it take into account two important characteristics of the public interest litigant that distinguish him from the busybody—dedication to a worthy cause and evidence of courageous conduct (for instance, in taking on a large, private corporation or the government to vindicate important human or environmental rights). Perell J. points out the importance of these criteria when stating that altruism on the

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<sup>113</sup> Tollefson, *supra* note 83 at 182, 187.

<sup>114</sup> *Incredible Electronics*, *supra* note 111 at para 74.

<sup>115</sup> *Ibid* at para 108.

<sup>116</sup> Chris Tollefson, "When the 'Public Interest' Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995) 29 UBC L Rev 303 at 316.

<sup>117</sup> Tollefson, *supra* note 83 at 196.

<sup>118</sup> *Ibid* at 197.

part of the litigant is not the only indicator of a public interest litigant involved in public interest litigation. While altruism is one indicium, other virtues such as “courage, loyalty, patriotism, dedication to a worthy cause, and the pursuit of justice may qualify the litigant as a public interest litigant.”<sup>119</sup> Acknowledging the role of courage and an interest in justice in criteria for the identification of public interest litigants is useful for two reasons. First, it reflects how these litigants view themselves—they are dedicated to a pursuit of justice that they think will benefit others. Second, it provides a criterion for distinguishing the busybody animated purely by malice and vindictiveness from a person who is challenging a powerful person or company, not out of an animus against them, but out of a desire to vindicate important public environmental and human rights.

Given these important differences, *St. James* and *Incredible Electronics* may be combined to yield the following analytical framework for deciding issues of costs in public interest litigation. When making costs awards in public interest cases, courts should consider:

- a. The nature of the unsuccessful litigant, including:
  - i) Is the litigant vindicating a purely private interest? (*St. James*, para. 18)
  - ii) Does the litigant have a bona fide belief that the litigation is in the public interest? (*St. James*, para. 19)
  - iii) Is the litigant purely a busybody or interloper? (*St. James*, para. 20)
  - iv) Are there litigants that are better suited to bring the litigation? (*St. James*, para. 21)
  - v) Does the litigant display courage and dedication to a worthy cause and the ends of justice? (*Incredible Electronics*, para. 98)
  - vi) Is the litigant a member of a disadvantaged group or speaking on behalf of the disadvantaged in society? (*Incredible Electronics*, para. 99; mentioned in *St. James*, para. 30)
- b. The nature of the successful litigant—for instance, the involvement of a government actor may make it more obvious that the litigation relates to general issues of important public policy (*St. James*, para. 22);
- c. The nature of the litigation. Here, the question is whether it is in the public interest, regardless of which party was successful. Factors to consider include:
  - i) Do the issues extend beyond the immediate interests of the parties involved? (*St. James*, para. 27)
  - ii) Is the issue one that should be litigated in order to address a new and unsettled issue, and does the litigation have merit rather than being speculative? (*St. James*, para. 28)
  - iii) Does the litigation address issues of practical importance? (*St. James*, para. 29)

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<sup>119</sup> *Incredible Electronics*, *supra* note 111 at para 98.



- iv) Is there broader public support for the position advanced by the public interest litigant? (*St. James*, para. 30)
- v) Has the public benefited from the consideration by the court of the issues raised in the litigation? (*St. James*, para. 31)
- d. Does the litigation have an adverse impact on the public interest? (*St. James*, para. 32)
- e. Would an adverse costs award have a detrimental financial impact on the unsuccessful party? For instance, would the awarding of costs against the party hinder the party in future or ongoing public interest advocacy? (*St. James*, para. 33)

It is important to note that a party's interest in the outcome of litigation does not preclude the court from finding that the litigation is in the public interest. Perell J. makes this point in *Incredible Electronics*, where he cites cases in which the public interest litigant had a personal interest, but the litigation was nonetheless found to be in the public interest, thereby justifying a costs award favourable to the litigant.<sup>120</sup> McCool supported Perell J.'s position, arguing that "the public interest is not something that can only be legitimately advanced by those who have no 'special' or 'direct' interest in it."<sup>121</sup> Tollefson, Gilliland and DeMarco have made a similar argument.<sup>122</sup> The recognition of the principle that public interest litigants can still have a personal interest in the outcome of the case would have been important in the Sharbot Lake protest cases, as the settlers had an interest in ensuring their land did not suffer negative environmental consequences, as well as a pecuniary interest in ensuring that the value of their land was not diminished by the proximity of uranium exploration or mining. Nevertheless, they were clearly public interest litigants, as they were also motivated by a desire to vindicate aboriginal rights and protect environmental rights for the benefit of all Canadians.

## 5. CONCLUSIONS

What I have tried to demonstrate in this article is that a lawyer interested in defending aboriginal, human rights and environmental law protestors against mining companies in Ontario must be an expert in many areas, including the law of injunctions, contempt of court and the law of costs. These areas of law have a significant impact on access to justice for litigants seeking to promote and protect aboriginal rights and the environment. All three represent potential hurdles that private individuals and corporations may place in the way of groups seeking to vindicate human and environmental rights. What I have sought to do is to raise three discrete issues that environmental and aboriginal groups will face when defending protestors. I identify these with the hope that through advancing the jurisprudence, through strategic legal action, and through advocating for legal change and pursuing anti-SLAPP suit legislation, Ontario's legal regime will eventually offer sufficient procedural and substantive safeguards.

<sup>120</sup> *Ibid* at para 96. Perell J quotes *Rakowski v Malagerio*, (2007) 28 BLR (4th) 146 at para 8, 155 ACWS (3d) 530 (Ont Sup Ct).

<sup>121</sup> Carolyn McCool, "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article, 'When the 'Public Interest' Loses: The Liability of Public Interest litigants for Adverse Costs Awards'" (1996) 30 UBC L Rev 309 at 314. See also Tollefson, *supra* note 83 at 190, 192.

<sup>122</sup> Chris Tollefson, Darlene Gilliland and Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004) 83 Can Bar Rev 607.

Such a regime could then serve as a model for the rest of Canada in terms of the level of protection it affords to protesters trying to protect the environment, human rights, and the rights of aboriginal peoples.