

HURDLES TO OBTAINING A LEGAL REMEDY




ACCESS TO JUSTICE

The Canadian legal system faces an access to justice crisis.

Sharpe, Hon. Robert J., Access to Charter Justice, (2013), 63 S.C.L.R. (2d) at 3

Access to justice is sometimes unjustly impeded if there is a slavish adherence to the normal private law regime.

Corner House Research v. Secretary of State for Trade & Industry, [2004] EWHC 3011; [2005] 4 All E.R. 1 (C.A.) at ¶ 28



JUSTICIABLE ISSUE



POLICY ISSUES ARE NOT JUSTICIABLE

- ▶ Legislatures have exclusive authority to enact laws.
- ▶ Courts can only interpret and apply the law.
- ▶ However, the law to be interpreted and applied includes the common law requirement of **Natural Justice** and the **Charter of Rights**

EXCEPTION 1: PITH AND SUBSTANCE

The fact that the legal regime the court is being asked to interpret was shaped by **policy considerations and the need to balance competing interests** does not, and **cannot, preclude the court from exercising its customary role of interpreting the legal instruments that the legislature has provided**. Where policy issues provide the context for, rather than the substance of, the questions before the Court, the matter is justiciable:

Schaeffer v. Wood, 2011 ONCA 716 (CanLII), ¶43 per Sharpe, J.A. citing *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, [2004] S.C.J. No. 75, 2004 SCC 79 (CanLII), at para. 10.

EXCEPTION 2: NATURAL JUSTICE & CHARTER RIGHTS

It is clear that a claim that legislation is invalid or unconstitutional raises a justiciable issue.

Minister of Justice (Can.) v. Borowski [1981] 2 S.C.R. 575 at 580

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) ¶ 54



POTENTIAL CAUSES OF ACTION

- ▶ 1. Nuisance
- ▶ 2. Negligence
- ▶ 3. Breach of Statute, By-Law, Official Plan
- ▶ 4. Breach of Charter Right
- ▶ 5. Breach of Natural Justice
- ▶ 6. Contravention of International Conventions
- ▶ 7. Injurious Affection

DRENNAN v K2 WIND ONTARIO LIMITED PARTNERSHIP

- ▶ 1. HMQ does not operate the wind turbine project and therefore cannot be liable in nuisance.
- ▶ 2. K2 operates under statutory authority granted by HMQ, which is a defence against nuisance.
- ▶ 3. Drennan must establish that serious harm to health has resulted from the Director's decision to issue the REA, but that decision pre-dates operation of the wind project and **cannot be impugned by evidence not before the ERT.**

DRENNAN v K2 WIND ONTARIO LIMITED PARTNERSHIP

- ▶ 4. International conventions are not part of Canadian law unless implemented by statute; breaches are not actionable.
- ▶ 5. The ERT has been designated by the legislature to review decisions of the Director in a judicial manner; issues finally decided cannot be re-litigated.

BREACH OF STATUTE, BY-LAW OR OFFICIAL PLAN

Green Energy Act, 2009, S.O. 2009, CHAPTER 12, SCHEDULE A

s.5(2) **A person is permitted to engage in activities with respect to a designated renewable energy project**, a designated renewable energy source or a designated renewable energy testing project in such circumstances as may be prescribed, **despite any restriction imposed at law that would otherwise prevent or restrict the activity**, including a restriction established by a municipal by-law, a condominium by-law, an encumbrance on real property or an agreement

(4) Subsection (2) ...does not apply, ...with respect to a restriction imposed by an Act or regulation

BREACH OF STATUTE, BY-LAW OR OFFICIAL PLAN

Planning Act, R.S.O. 1990, c. P.13

62.0.2 (3) For greater certainty, **an official plan does not affect a renewable energy undertaking.**

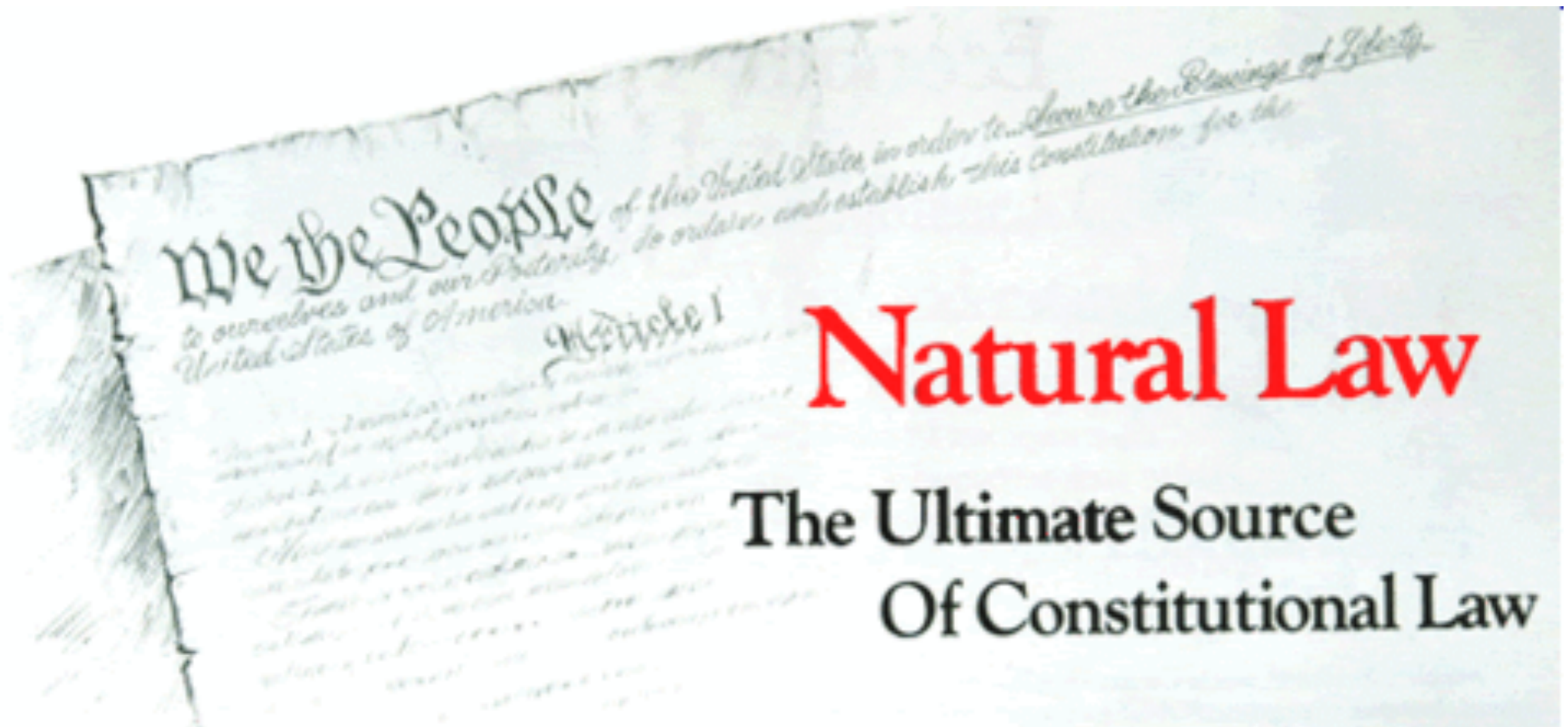
Municipal Act, 2001, S.O. 2001, c. 25

14 (1) **A by-law is without effect to the extent of any conflict with,**
(a) a provincial or federal Act or a regulation made under such an Act; or
(b) an instrument of a legislative nature, including an order, **licence or approval**, made or issued under a provincial or federal Act or regulation.

BREACH OF STATUTE, BY-LAW OR OFFICIAL PLAN

- ▶ Driver et al. v. Wpd Canada Corporation et al.
- ▶ The Ontario Heritage Act focuses on the preservation of heritage properties and archeological sites
- ▶ There are no prescribed standards for cultural heritage assessments
- ▶ The REA regulation has its own cultural heritage scheme

NATURAL LAW



BREACH OF NATURAL JUSTICE

- ▶ 1. Reasonable apprehension of bias
- ▶ 2. The applicant was not heard
- ▶ 3. Decisions not based on factors required to be considered
- ▶ 4. Decisions made for an improper purpose
- ▶ 5. Decisions so unreasonable as to be invalid
- ▶ 6. Improper delegation of statutory power of decision
- ▶ 7. Inflexible Policy

REASONABLE APPREHENSION OF BIAS

... the **apprehension of bias** must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "**what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude**".

- ▶ **Committee for Justice and Liberty v. National Energy Board, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, at p. 394**

INSTITUTIONAL BIAS

Although the concept of institutional impartiality has never before been recognized by this Court, the constitutional guarantee of an "independent and impartial tribunal" has to be broad enough to encompass this. Just as the requirement of judicial independence has both an individual and institutional aspect. . .so too must the requirement of judicial impartiality.....Therefore, whether or not any particular judge harboured pre-conceived ideas or biases, **if the system is structured in such a way as to create a reasonable apprehension of bias on an institutional level, the requirement of impartiality is not met.**

▶ **Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 SCR 3**

EPA INSTITUTIONAL BIAS (1)

Environmental Protection Act, R.S.O. 1990, c. E.19, Part V.0.1 Renewable Energy

47.1 In this Part, “**environment**” has the same meaning as in the Environmental Assessment Act.

47.2 (1) **The purpose of this Part is to provide for the protection and conservation of the environment.**

47.4 (1) An application for the issue or renewal of a renewable energy approval shall be prepared in accordance with the regulations and submitted to the Director.

47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is **in the public interest to do so,**

- (a) issue or renew a renewable energy approval; or
- (b) refuse to issue or renew a renewable energy approval.



EPA INSTITUTIONAL BIAS (2)

Environmental Assessment Act, R.S.O. 1990, c. E.18

1. (1) In this Act, “environment” means,
 - (a) air, land or water,
 - (b) plant and animal life, including human life,
 - (c) the social, economic and cultural conditions that influence the life of humans or a community,
 - (d) any building, structure, machine or other device or thing made by humans,
 - (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or
 - (f) any part or combination of the foregoing and the interrelationships between any two or more of them,in or of Ontario; ...

EPA INSTITUTIONAL BIAS (3)

142.1 (1) This section applies to a person resident in Ontario who is **not entitled under section 139 to require a hearing by the Tribunal** in respect of a decision made by the Director under section 47.5.

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3).

(3) A person may require a hearing under subsection (2) **only on the grounds** that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) **serious harm to human health**; or

(b) **serious and irreversible harm to plant life, animal life or the natural environment.**

ESA INSTITUTIONAL BIAS

The MNRF has never denied a permit to harm a threatened or endangered species; the permit-by-rule system only requires proponents to minimize (not eliminate or compensate for) harm to affected species at risk; this approach is undermining the survival of Ontario's species at risk...

The MNRF also turns a blind eye to whether proponents comply with these weakened rules. Making it worse, the ministry keeps the public in the dark about what activities it allows.

Environmental Commissioner of Ontario,



EQUALITY



EQUAL TREATMENT BEFORE THE LAW

- ▶ It is often forgotten or overlooked that the rule of law is the fount of equality. **The right to equal treatment before the law** for everyone, whether high or low, government or citizen, is what **guarantees our freedoms, protects our property and underwrites our citizenship.**
- ▶ Bill Emmott, "The Fate of the West", NY 2017 at p. 218

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

CANADIAN BILL OF RIGHTS

1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- **(a)** the right of the individual to life, liberty, security of the person and **enjoyment of property, and the right not to be deprived thereof except by due process of law**;
- **(b)** the right of the individual to equality before the law and the protection of the law;
- **(c)** freedom of religion;
- **(d)** freedom of speech;
- **(e)** freedom of assembly and association; and
- **(f)** freedom of the press.

CHARTER OF RIGHTS, § 15

15. (1) Every individual is equal before and under the law and has **the right to the equal protection and equal benefit of the law** without discrimination and, **in particular**, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.



CHARTER, § 15 – ANALOGOUS GROUND OF DISCRIMINATION

To demonstrate discrimination, a claimant must show (1) that the differential treatment is based on one or more of the grounds enumerated in s. 15(1) **or one or more grounds that are analogous thereto**, and (2) that the differential treatment imposes a burden or withholds a benefit in a manner that fails to recognize s. 15(1)'s purpose of maintaining the **claimant's essential dignity** as an individual member of Canadian society

Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 SCR 625

DISCRIMINATION BASED ON RURAL RESIDENCE (1)

The fact that discrimination is only partial does not convert it into non-discrimination. For example, federal legislation that treated some, but not all, Indians more harshly than whites would be discriminatory. Equally, an employer's decision not to hire a particular black solely because of his blackness would run afoul of provincial human rights legislation even though the employer hired other blacks. **Legislation or the practice of individuals cannot be saved because they work only a partial discrimination.**

Brooks v. Canada Safeway Ltd., [1989] 1 SCR 1219, 1989 CanLII 96 (SCC):

DISCRIMINATION BASED ON RURAL RESIDENCE (2)

Pursuant to regulations under the Environmental Protection Act, R.S.O. 1990, c. E19, Class 4 wind facilities can only be installed in locations a minimum of 550m from the nearest noise receptor (occupied building) which restricts placement to rural areas of Ontario.

O. Reg. 359/09, s. 55(3) Table

DISCRIMINATION BY STATUTE (1)

1. The Green Energy Act, 2009, S.O. 2009, c. 12 , Sched. A, s.5 strips residents of **statutory rights to enact, rely on and claim the benefit of sound land use planning principles**
2. The Planning Act, R.S.O. 1990, c. P.13, s. 62.0.2 eliminates the right of unwilling host municipalities and their residents to exercise sound planning principles in respect of **industrial uses of land** within their jurisdiction
3. R.R.O. 1990, Reg. 334, s. 15(1) exempts renewable energy projects from the Environmental Assessment Act, R.S.O. 1990, c. E.18, **substituting self-assessment by the proponent of each such project**

DISCRIMINATION BY STATUTE (2)

4. The Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4, s.76 prohibits any action by owners of abutting lands for **damages caused by fires originating from renewable energy projects**

5. The Assessment Act, R.S.O. 1990, c. A-31, Regulation 282/98, s.42.5 deems the assessed value for the 2017, 2018, 2019 and 2020 taxation years of a \$2.2 million wind turbine tower to be \$50,460 multiplied by the installed capacity in megawatts of the generator attached to the wind turbine tower (in this case 2 Mw), so that the **unwilling host municipality is entitled to assess rates at only 4.6% of the current value of the industrial wind turbine, to the benefit of the Intervenor.**

DISCRIMINATION BY IMPACT

- ▶ 1. Health
- ▶ 2. Environment
- ▶ 3. Water
- ▶ 4. Economy
- ▶ 5. Roads
- ▶ 6. Property Values
- ▶ 7. Taxes
- ▶ 8. Heritage
- ▶ 9. Safety

INTERNATIONAL CONVENTIONS



INTERNATIONAL CONVENTIONS (1)

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948 ARTICLE 2.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or other status....

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. **All are entitled to equal protection against any discrimination** in violation of this Declaration and against any incitement to such discrimination.

Article 17.

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) **No one shall be arbitrarily deprived of his property.**

INTERNATIONAL CONVENTIONS (2)

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 2

(2). Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, **to adopt such laws or other measures as may be necessary** to give effect to the rights recognized in the present Covenant.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, **the law shall prohibit any discrimination** and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, **property**, birth or other status.

INTERNATIONAL CONVENTIONS (3)

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to **an adequate standard of living** for himself and his family, including adequate food, clothing and **housing**, and to the continuous improvement of living conditions...

Article 28

The provisions of the present Covenant **shall extend to all parts of federal States without any limitations or exceptions.**

INTERNATIONAL CONVENTIONS (4)

DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, 1972

Principle 2

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. **Nature conservation, including wildlife, must therefore receive importance in planning for economic development.**

Principle 15

Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining **maximum social, economic and environmental benefits for all...**

INTERNATIONAL CONVENTIONS (5)

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, 1992

Principle 10

Environmental issues are best handled with the **participation of all concerned citizens**, at the relevant level. At the national level, each individual shall have appropriate **access to information concerning the environment that is held by public authorities**, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. **Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.**

Principle 15

In order to protect the environment, the **precautionary approach** shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

INTERNATIONAL CONVENTIONS (6)

...the Convention [on the Rights of the Child] has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

INTERNATIONAL CONVENTIONS (7)

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the Charter's protection". I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

...the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

INJURIOUS AFFECTION (1)

Expropriations Act, R.S.O. 1990, c. E.26

- 1 (1) In this Act,...“injurious affection” means,
- (a) where a statutory authority acquires part of the land of an owner,
 - (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
 - (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
 - (b) **where the statutory authority does not acquire part of the land of an owner,**
 - (i) such reduction in the market value of the land of the owner, and
 - (ii) such personal and business damages,resulting from the construction **and not the use** of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute...

INJURIOUS AFFECTION (2)

Expropriations Act, R.S.O. 1990, c. E.26

21 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

22 (1) Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim **within one year after the damage was sustained or after it became known** to the person, and, if not so made, the right to compensation is forever barred.

NUISANCE REVISITED (1)

The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: **to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both *substantial* and *unreasonable***. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances.

...a private nuisance cannot be established where the interference with property interests is not, at least, substantial. To justify compensation, however, the interference must also be unreasonable.

Generally, the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable.

Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC 13, [2013] 1 S.C.R. 594

NUISANCE REVISITED (2)

While temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy

In considering the reasonableness of an interference that arises from an activity that furthers the public good, **the question is whether, in light of all of the circumstances, it is unreasonable to expect the claimant to bear the interference without compensation.**

STANDING



PUBLIC INTEREST STANDING (1)

The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) ¶ 1



PUBLIC INTEREST STANDING (2)

In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a **serious justiciable issue**, whether the party bringing the action has a **real stake or a genuine interest in its outcome** and whether, having regard to a number of factors, the **proposed suit is a reasonable and effective means to bring the case to court**: The courts exercise this discretion to grant or refuse standing in a liberal and generous manner.

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) ¶ 1, citing with approval

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236, at p. 253.

Minister of Justice (Can.) v. Borowski [1981] 2 S.C.R. 575 at 598

Sharpe, Hon. Robert J., *Access to Charter Justice*, (2013), 63 S.C.L.R. (2d) at 4 & 5

Schaeffer v. Wood, (2011) ONCA 716; 107 O.R. (3d) 721 at ¶ 37

PUBLIC INTEREST GROUP

What is meant by a "public interest group" is an organization which has no personal, proprietary or pecuniary interest in the outcome of the proceeding, and which has as its object the taking of public or litigious initiatives seeking to effect public policy in respect of matters in which the group is interested and to enforce constitutional statutory or common law rights in regards to such matters.

Incredible Electronics Inc. v. Canada (Attorney General), 2006 CanLII 17939 (ON SC) ¶ 93, citing with approval *Reese v. Alberta (Ministry of Forests, Lands and Wildlife)*, 1992 CanLII 2825 (AB QB), 13 CPC (3d) 323 at pp. 326-27 C.P.C., per McDonald J.



PUBLIC INTEREST ACCESS TO COURTS

The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that **there must be practical and effective ways to challenge the legality of state action.**

This applies equally to challenges to the statutory authority for administrative action. The basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge.

Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) ¶¶ 31-33.

Finlay v. Canada (Min. of Finance), [1986] 2 S.C.R. 607 at 632

Schaeffer v. Wood, (2011) ONCA 716; 107 O.R. (3d) 721 at ¶ 38; rev'd on other grounds,

Wood v. Schaeffer, [2013] 3 SCR 1053, 2013 SCC 71 (CanLII)



COSTS



INEQUALITY OF ACCESS TO LAW

- ▶ The rule of law is challenged by inequalities of income and wealth because of the unequal access to costly justice that wealth can provide, and by the **ability of huge corporations to bully and manipulate the law in their own interests.**
- ▶ Bill Emmott, "The Fate of the West", NY 2017 at p. 218

FINDING A LAWYER

- ▶ Rule 15.01(2) A party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the court.
- ▶ <https://www.probonoontario.org/>
- ▶ www.ontariocourts.ca/scj/at-court/assistance/
- ▶ <https://www.oba.org/ProBono/Home>
- ▶ <https://www.osler.com/en/why-osler/pro-bono-matters>
- ▶ <https://www.cba.org/Sections/Pro-Bono/Pro-Bono-Resources-in-Canada/Resources>
- ▶ <https://www.law.utoronto.ca/programs.../programs/pbsc-pro-bono-students-canada>

COURTS OF JUSTICE ACT

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and **the court may determine by whom and to what extent the costs shall be paid.**

RULES OF CIVIL PROCEDURE (1)

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, **in addition to the result in the proceeding** and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
 - (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- and...
- (i) any other matter relevant to the question of costs

RULES OF CIVIL PROCEDURE (2)

57.01(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

- (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
- (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
- (c) requiring the lawyer personally to pay the costs of any party.

Apart from statutory jurisdiction, superior courts have inherent jurisdiction to order non-party costs, on a discretionary basis, in situations where the non-party has initiated or conducted litigation in such a manner as to amount to an abuse of process.

1318847 Ontario Limited v. Laval Tool & Mould Ltd., 2017 ONCA 184 at ¶ 66

TRADITIONAL COST RULES

Traditional cost rules are designed to foster three fundamental purposes: (a) to indemnify **successful** litigants for the costs of litigation; (b) to encourage **settlements**; and (c) to discourage **frivolous suits** and inappropriate behaviour by litigants.

Sharpe, Hon. Robert J., Access to Charter Justice, (2013), 63 S.C.L.R. (2d) at 6

TRADITIONAL COSTS NOT APPLICABLE TO PUBLIC INTEREST

Traditional cost rules do not fit the model of public interest litigation because: (a) the interests involved are not usually those of private parties in pursuit of **monetary remedies**; (b) there is a **lack of symmetry of resources** as between the public interest rights seekers and government defenders; and (c) Charter claims are **not ordinarily susceptible to compromise**.

Sharpe, Hon. Robert J., *Access to Charter Justice*, (2013), 63 S.C.L.R. (2d) at 7
Re Mahar and Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690 at 704-5 (SCJ)

ADVERSE COST AWARDS

Like the traditional rules for standing, traditional cost rules tend to discourage rather than encourage litigation. Public interest litigants tend to be poorly funded. They are often dependent on the efforts of pro bono counsel and rarely have any prospect of a monetary award. **If the lack of means to start the suit is not enough, the threat of an adverse costs award if the case fails can be a powerful disincentive to launch the case in the first place.**

Sharpe, Hon. Robert J., *Access to Charter Justice*, (2013), 63 S.C.L.R. (2d) at 6
The St. James' Preservation Society v. City of Toronto and Rector and Churchwarden of St James' Cathedral, Toronto (2006)
CanLII 22806 (OSC) at ¶ 13; rev'd (2007) ONCA 601.

EXORBITANT ADVERSE COSTS

In an application for judicial review that was never heard on its merits, the Attorney General claimed costs on a substantial indemnity basis of **\$500,877.86** and the private respondent claimed costs on a substantial indemnity basis of **\$1,690,369.52**.

Incredible Electronics Inc. v. Attorney General of Canada (2006), 80 O.R. (3d) 723 (OSCJ) ¶ 3

HIT BY A TRAIN

From the perspective of a public interest litigant, not having to pay costs to the Attorney General but having to pay costs to the corporation profiting from the rights in question would be similar to avoiding a car only to be hit by a train.

Incredible Electronics v. Canada (Attorney General) (2006), 80 O.R. (3d) 723 at ¶ 108 - 109

Giving costs special treatment in public interest litigation is consistent with the liberalization of the rules about who has standing in public law matters. **Applicants should not be subject to the normal two-way costs regime if they can satisfy the court that they are public interest litigants.**

Incredible Electronics v. Canada (Attorney General) (2006), 80 O.R. (3d) 723 at ¶81-83 & 100
Greenspace Alliance v. City of Ottawa, 2011 ONSC 472 (Div. Ct.) at ¶ 14.



VARIATION OF TRADITIONAL RULES

The Supreme Court of Canada has demonstrated a judicial recognition of the need to re-think the automatic application of traditional procedural rules to public interest litigation by (a) awarding advance costs in favour of the public interest litigant and (b) **ordering no costs against an unsuccessful public interest litigant who brought an important issue of constitutional law before the court.**

Sharpe, Hon. Robert J., *Access to Charter Justice*, (2013), 63 S.C.L.R. (2d) at 8 & 9

Little Sisters Book and Art Emporium v. Canada, [2007] 1 S.C.R. 38 at 58 ¶ 34

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 SCR 76, 2004 SCC 4 (CanLII) at ¶ 69

PROTECTIVE COSTS ORDER

A protective costs order is appropriate in cases of general public importance where it is **in the public interest** for the courts to review the legality of novel acts by the executive in a context where it is **unreasonable to expect that anyone would be willing to bear the financial risks inherent in a challenge.**

Corner House Research v. Secretary of State for Trade & Industry, [2004] EWHC 3011; [2005] 4 All E.R. 1 (C.A.) at ¶ 52 and ¶ 74



PROTECTIVE COSTS ORDER AGAINST GOVERNMENT

A protective cost order can be justified where the respondent is a government, a public authority or a regulator as they are **already within the public sector and can be expected to act for the public good.**

Incredible Electronics v. Canada (Attorney General) (2006), 80 O.R. (3d) 723 at ¶ 106

Corner House Research v. Secretary of State for Trade & Industry, [2004] EWHC 3011; [2005] 4 All E.R. 1 (C.A.) at ¶ 24

The St. James' Preservation Society v. City of Toronto and Rector and Churchwarden of St James' Cathedral, Toronto (2006) CanLII 22806 (OSC) at ¶ 22; rev'd (2007) ONCA 601.

Greenspace Alliance v. City of Ottawa, 2011 ONSC 472 (Div. Ct.) at ¶ 19.

PROTECTIVE COSTS ORDER AGAINST PROPONENT(1)

Judicial review of an administrative decision to award a contract to a third party to develop electric facilities is a dispute between the public interest litigant and the state. Even if the outcome may affect the commercial interests of the third party, it is not a party and may intervene only to show how it may be adversely impacted by the relief sought. **Those whose commercial interests could be engaged may have to absorb the costs of becoming involved.**

Ogichidaakwe (Grand Chief) v. Ontario Minister of Energy, 2015 ONSC 7582 (Div. Ct.)



PROTECTIVE COSTS ORDER AGAINST PROPONENT (2)

In cases that involve challenges to the way government has allocated rights in public resources to private interests for the purposes of profit, there is a strong public interest in ensuring that these arrangements are subjected to regular and careful public supervision, including judicial scrutiny, and in such an instance, **for a corporation to participate as a respondent, voluntarily or otherwise, in litigation is a relatively small price to pay for holding rights to and profiting from a valuable public resource.**

Incredible Electronics v. Canada (Attorney General) (2006), 80 O.R. (3d) 723 at ¶ 108 - 109
Valhalla Wilderness Society v. HMTQ (1997) BCSC 6789

PROTECTIVE COSTS ORDER SHOULD BE EARLY

A protective costs order may be made at any stage of the proceedings. There is nothing in the language of the *Courts of Justice Act*, s. 131.(1) or of Rule 57 of the *Rules of Civil Procedure* to prohibit the exercise of the discretion at an earlier stage than the conclusion of the proceedings where the interests of justice so require.

Corner House Research v. Secretary of State for Trade & Industry, [2004] EWHC 3011; [2005] 4 All E.R. 1 (C.A.) at ¶ 10 & 74

and see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at 397 at ¶ 37 where advance costs were awarded on a preliminary motion.



MAKE THE PROPONENT INTERVENE

The usual rule is that an intervener neither receives nor pays costs. Those whose commercial interests could be engaged may have to absorb the costs of becoming involved.

Ogichidaakwe (Grand Chief), et al. v. Ontario Minister of Energy, et al., 2015 ONSC 7582 (Div. Ct.) at ¶ 8

Daly v. OSSTF, 1999 CanLII 7319 (ON CA) at ¶ 6

Courts must be vigilant to ensure that an order for costs that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits.

Yaiguaje v. Chevron Corporation 2017 ONCA 827 at ¶ 23