Court File No. COA-23-CV-0016

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

Non-Party (Appellant)

- and -

MARIANA COSTA, CRYSTAL LOVE, ALEXANDRA BADOWICH and ANGELINA MANDEKIC

Applicants (Respondents)

- and -

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Respondent (Respondent)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN CONSTITUTIONAL FOUNDATION and DEMOCRACY WATCH (“JOINT INTERVENERS”)

Interveners

FACTUM OF THE JOINT INTERVENERS

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PART I – OVERVIEW

1. This Appeal is about the legal framework for determining costs where the claimants argue the litigation was brought in the public interest. More specifically, it requires consideration of how this framework operates even in cases where the purported public interest claimant is unsuccessful.

2. The interveners are the Canadian Civil Liberties Association, the Canadian Constitution Foundation, and Democracy Watch (collectively **"Joint Interveners"**). The Joint Interveners are a coalition of public interest organizations that serve not just as interveners in public interest litigation (like many other entities), but also as claimants, co-claimants, counsel to claimants and funders to claimants. They have taken on these roles in provincial superior courts and courts of appeal across Canada, the Federal Court system, and the Supreme Court of Canada. They all engage in public fundraising activities to support their work, often by reference to specific cases.

3. The Joint Interveners have never before participated jointly in a legal proceeding. They have taken the unusual step of coming together in this Appeal because of their considerable concern about the costs endorsement issued by the court below, which:

   a. did not cite or apply the well-established jurisprudence governing costs where claimants argue the litigation was brought in the public interest, even though both parties presented this jurisprudence to the Court, and the unsuccessful Applicants argued that that they should not be subject to a costs award under this jurisprudence;[1]

   b. held that the Appellant, although a non-party that was counsel to the Applicants, was nonetheless liable for costs, in part because it had fundraised in support of the litigation;

   c. held that the Appellant had the capacity to pay costs based on untested evidence regarding its fundraising success; and

   d. did not specify the basis on which costs were awarded against the Appellants, i.e., as counsel, as a non-party acting as a *de facto* party, or on some other grounds.

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[1] Costs Submissions of the Moving Parties, para. 4; Responding Costs Submissions of the Responding Party, paras. 1 to 4.

4. The Joint Interveners submit that the approach taken by the court below on these issues, if affirmed by the Court of Appeal, could deter a wide variety of public interest organizations from commencing public interest litigation as a party. It could also deter these organizations from acting as counsel in such litigation, and from providing financial support to parties who themselves claim to be public interest litigants to defray their counsel costs. As Justice Fairburn explained in granting leave to intervene to the Joint Interveners, "[t]he order appealed from brings squarely into focus the question as to whether fundraising by a public interest organization can change that organization's status when it comes to costs."[2] These organizations often take on novel legal issues to advance the rights and interests of otherwise marginalized populations or to hold government accountable for their actions when the courts are the only or best venue to do so. These are not activities that should be deterred by pronouncements of this Court. As Justice Fairburn also explained, the Joint Interveners:[3]

> have an understandable institutional self-interest [in the within Appeal], one that arises from the public interest that they each represent. As they put it, their institutional missions, each motivated in the public interest, could be put at risk if they became more widely susceptible to costs orders.

5. The Joint Interveners make the following *three* submissions.

6. *First*, the Court of Appeal should incorporate elements of the recent decision of the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia* into the existing legal framework for costs in public interest litigation in Ontario.[4]

7. *Second*, if a public interest organization is an unsuccessful *claimant* in public interest litigation, there is nothing improper if it fundraised in relation to the case, which in many cases will be irrelevant to whether it should pay costs.

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[2] *Justice Centre for Constitutional Freedoms v. Costa*, 2023 ONCA 405, para. 16.
[3] *Justice Centre for Constitutional Freedoms v. Costa*, 2023 ONCA 405, para. 15.
[4] *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia,* 2022 BCCA 354 [*BC Trial Lawyers*]; *Incredible Electronics Inc. v. Canada (Attorney General),* 2006 CanLII 17939 (ON SC) [*Incredible Electronics*]; *St. James' Preservation Society v. Toronto (City)*, 2006 CanLII 22806 (ON SC) [*St. James' Preservation Society*].

8. *Third*, a public interest organization does not become a *de facto* party liable for non-party costs because it has engaged in fundraising efforts to the support the litigation, for example to provide counsel or to defray counsel costs for claimants who claim to be public interest litigants. In any event, a determination that a non-party is a *de facto* party does not obviate the need to consider and apply the legal framework for determining costs in public interest litigation.

9. The Joint Interveners take no position on the disposition of the Appeal. The Joint Interveners also take no position on whether the proceeding in the court below was in fact public interest litigation or whether the court below correctly concluded that the non-party Appellant was liable for costs.

PART II – ISSUES AND THE LAW

A. RESTATING THE TEST FOR COSTS IN PUBLIC INTEREST LITIGATION

10. This Appeal is a suitable opportunity for this Court to restate and refine the test for public interest litigation, which the Superior Court laid out in *St. James' Preservation Society* and *Incredible Electronics*. In these cases, a claimant who purported to be a public interest litigant had been unsuccessful. The Superior Court held that in public interest cases there were grounds to deviate from the ordinary rule that costs follow the event, such that each party should potentially bear its own costs, and in some instances, an unsuccessful claimant might even receive costs.

11. *St. James' Preservation Society* set out a test that consists of a series of factors:[5]

a. What is the nature of the unsuccessful litigant?
b. What is nature of the successful party?
c. Was the nature of the *lis* in the public interest?
d. Has the litigation had any negative impact on the public interest?
e. What are the financial consequences to the parties?

12. *Incredible Electronics* addressed whether the unsuccessful litigant was in fact a public interest litigant (the first factor in *St. James' Preservation Society*).[6]

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[5] *St. James' Preservation Society*, para. 17. This Court overruled the costs award made by the Application judge in *St. James' Preservation Society*: *The St. James' Preservation Society v. Toronto (City),* 2007 ONCA 601.
[6] *Incredible Electronics*, paras. 90 to 100.

13. This Court has relied on both *St. James' Preservation Society* and *Incredible Electronics* but has not integrated them into a single legal framework. For example, *City of Sarnia* applied *St. James' Preservation Society* to order the unsuccessful claimant – a municipality – to pay the costs of the defendant church.[7] But more recently, *Bogaerts* applied *Incredible Electronics* to decline awarding costs to a successful government appellant.[8]

14. The British Columbia Court of Appeal recently laid down the following test for costs in public interest litigation in *BC Trial Lawyers* in 2022, which is not binding but helpful:

a. Does the proceeding involve issues the importance of which extend beyond the immediate interests of the parties concerned?
b. Does the unsuccessful claimant have a personal, property or pecuniary interest in the outcome of the proceeding, or if they have an interest, does that interest clearly not justify the proceeding economically?
c. Have the issues been previously determined by a court in a proceeding against the same defendant?
d. Does the defendant have a clearly superior capacity to bear the costs of the proceeding?
e. Has the plaintiff engaged in vexatious, frivolous or abusive conduct?

15. This Court should incorporate elements of *BC Trial Lawyers* into the existing legal framework for costs in public interest litigation in Ontario, through the following *four*-part test:

a. The subject-matter of the proceedings: does the proceeding involve a matter of the public interest?
b. The nature of the unsuccessful claimant: is the claimant a public interest litigant?
c. The relative financial capacity of the parties: which party has a greater ability to bear the legal costs of the proceedings?
d. The conduct of the unsuccessful claimant: has the claimant engaged in vexatious, frivolous or abusive conduct?

16. The Joint Interveners develop each aspect of this test.

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[7] *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732, para. 19.
[8] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, para. 92.

The subject-matter of the proceedings

17. The first question is whether the subject-matter of the proceeding involves a matter in the public interest. In answering this question, a court should consider the following factors:

a. Does the proceeding raise matters of importance to the general public that go beyond the interests of the parties to the dispute?[9]

b. Does the proceeding address a novel and important legal issue?[10]

c. Do the proceedings concern the liability of a public or private sector entity?[11]

In relation to the last factor, since public interest cases typically involve public law questions, they in general address the legal liabilities of public sector entities, although there may be exceptions.

The nature of the unsuccessful claimant

18. The second question is whether the unsuccessful claimant is in fact a public interest litigant. In answering this question, the court should consider the following factors:

a. Does the litigant have any personal, property or pecuniary interest in the outcome of the proceeding?[12]

b. If the litigant has an interest, is that interest modest in comparison to the costs of the proceedings?[13]

c. Does the litigant represent the interests of a politically marginalized or otherwise vulnerable minority?[14]

19. In *Incredible Electronics*, Justice Perell held that a "public interest group" would meet the definition of a public interest litigant if it met the following definition:[15]

> 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

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[9] *Incredible Electronics*, para. 92; *St. James' Preservation Society*, paras. 27, 29.
[10] *St. James' Preservation Society*, para. 28.
[11] *St. James' Preservation Society*, paras. 22 to 23.
[12] *St. James' Preservation Society*, para. 18; *BC Trial Lawyers*, para. 29.
[13] *St. James' Preservation Society*, para. 18; *Incredible Electronics*, para. 98; *BC Trial Lawyers*, para. 31.
[14] *Incredible Electronics*, para. 99.
[15] *Incredible Electronics*, para. 93, quoting *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)*, 1992 CanLII 2825 (AB KB).

> interested . . . and to enforce constitutional statutory or common law rights in regards to such matters.

For example, *BC Trial Lawyers* held that the unsuccessful claimant, the Trial Lawyers Association of British Columbia (**"TLABC"**), *was* a public interest litigant because it "is an organization with a demonstrated history of meritorious public interest litigation" and was "not simply a group of lawyers seeking to preserve their own interests".[16]

The relative financial capacity of the parties

20. The third question is the *relative* financial capacity of the parties to bear the legal costs of the proceedings. *St. James' Preservation Society* explained that the "adverse impact on a public advocacy group has been considered as a reason not to order the unsuccessful party to pay costs" and added "[t]his would seem most appropriate where the unsuccessful litigant has a history of public interest advocacy, which might be hindered or eliminated by an order to pay costs".[17] *BC Trial Lawyers* clarified, however, that the real issue is relative financial capacity.[18]

21. In *BC Trial Lawyers* itself, the British Columbia Court of Appeal was asked to assess the relative financial capacity of the TLABC and the two defendants, the Attorney General of British Columbia and the Insurance Corporation of British Columbia (who instructed and paid the legal fees of nominally identified individual defendants). The Court concluded that defendants had "a markedly superior capacity to bear the costs" of the proceedings.[19] The Court noted in support of this conclusion that "[p]ublic interest litigants do not need to be impecunious or reliant on *pro bono* counsel to benefit from costs consideration", and contrasted the TLABC (whom it concluded was a public interest litigant) with "a grassroots non-profit" against whom an award of costs "would likely have left it in more difficult financial circumstances than would be the case" for the TLABC.[20]

The conduct of the unsuccessful claimant

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[16] *BC Trial Lawyers*, para. 32.
[17] *St. James' Preservation Society*, para. 33, citing *The Valhalla Wilderness Society v. R.*, 1997 CanLII 2099 (BC SC), para. 10.
[18] *BC Trial Lawyers*, para. 41.
[19] *BC Trial Lawyers*, para. 44.
[20] *BC Trial Lawyers*, paras. 39 and 40.

22. The fourth and final question is whether the unsuccessful claimant has engaged in vexatious, frivolous or abusive conduct. If they have, this may count as a reason to not exempt them from the ordinary rule that costs follow the event.

B. FUNDRAISING BY PUBLIC INTEREST ORGANIZATIONS IN RELATION TO LITIGATION

23. There is nothing improper about a public interest organization fundraising in relation to its litigation activities. Fundraising activities may reference, or be specifically in relation to, particular cases, for the practical reason that such appeals motivate donors. This is an entirely lawful activity. Indeed, fundraising in support of litigation activities is a form of protected expression under section 2(b) of the *Charter*. Moreover, the Joint Interveners ask this Court to take judicial notice of the reality that donations are integral to the financial viability of many public interest organizations involved in litigation.

24. It is against this backdrop that the Joint Interveners highlight the comments of the court below regarding fundraising by the Appellant in relation to these proceedings:

> [14] In this case, as Seneca points out, JCCF has "advertised it extensively on its website" and has "fundraised to support this case". In the latter regard, as confirmed by its financial statements, also filed with Seneca's materials, JCCF has gone from having assets of $133,271 as of 2014 to having raised donations upwards of $2.6 million in the last couple of years, and net assets as of 2020 of $1,742,314, almost $1.7 million of which was held as cash. In 2020, according to its income statement, it had an excess of revenue over expenses in that year of almost $500,000.
>
> [15] In its materials, Seneca provides links to various pronouncements on the JCCF website relative to this case. A posting on August 24, 2021 is representative. It trumpets various tenets of what ultimately formed the applicants' case before me (many of which I rejected in my decision on the injunction motion). The post announces that:
>
> > "The Justice Centre is preparing a lawsuit against Seneca on behalf of these students, and intends to aggressively defend their Charter rights. Seneca's policy is not only unconstitutional, but also not science or evidence-based…"

> [16] It is apparent based on these materials that the JCCF actively and continuously promoted this case on its website, and inserted itself in the "cause" being litigated, rather than maintaining the posture of dispassionate advocate.

25. These comments are a source of great concern for the Joint Interveners. The court below was clearly critical of the Appellant for having "inserted itself" into the fray of the litigation through its fundraising activities. In the court's view, the Appellant should have "maintained the posture of dispassionate advocate", presumably by not fundraising. The Joint Interveners fear that in the future, this *dictum* will be cited against public interest organizations that fundraise for litigation, as a reason for holding them liable for costs *even if* they are unsuccessful public interest claimants. For example, a court could erroneously conclude that fundraising was a form of inappropriate conduct in answering the fourth question (paras. 15 and 22) under the Joint Interveners' proposed test. The Joint Interveners respectfully request that this Court confirm, in the strongest possible terms, that it is not inappropriate for public interest organizations to fundraise for litigation where they are parties.[21]

C. FUNDRAISING BY PUBLIC INTEREST ORGANIZATIONS AS COUNSEL TO PUBLIC INTEREST CLAIMANTS OR TO PROVIDE FINANCIAL SUPPORT TO DEFRAY CLAIMANTS' COUNSEL OR OTHER LITIGATION COSTS

26. Some public interest organizations, including some of the Joint Interveners, serve on occasion as counsel to public interest litigants and/or provide financial support to claimants to defray their counsel or other litigation costs. Moreover, they fundraise for those activities.

27. The simple fact of fundraising should not lead a court to conclude that a public interest organization is a *de facto* party, which could face a costs award in the event the claim does not succeed. In determining whether a public interest organization is subject to non-party costs, courts should apply the test articulated in *1318847 Ontario Limited*.[22] The Joint Interveners request the Court to confirm, in the strongest possible terms, that fundraising by public interest organizations in conjunction with serving as counsel or supporting claimants' counsel should not lead a court to

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[21] The court below made a finding of fact regarding the financial capacity of the Appellants to pay costs on the basis of information that was not contained in an affidavit subject to cross-examination. If a court is considering making an adverse costs award against a public interest organization, it must give notice, so that the organization can tender complete and comprehensive evidence of its finances (revenues *and* expenditures) and the financial impact of any costs award on its operations. Moreover, this evidence could be subject to cross-examination.

[22] *1318847 Ontario Limited v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, paras. 60 to 64.

automatically conclude that the public interest organization is a *de facto* party potentially subject to a costs award.

28. In *Hawke*, a public interest organization serving as counsel for claimants conceded and/or assumed it was a *de facto* party for the purposes of the determination of costs.[23] The Respondent, Western University, had sought costs against the unsuccessful Applicants, students who had challenged the university's proof of COVID-19 vaccine policy and were represented by the Democracy Fund. The Court's decision to award costs against the Democracy Fund must be read in light of this concession and/or assumption.

29. In any event, if the court does conclude that a public interest organization is a *de facto* party, the mere fact of fundraising should not be treated as sanctionable conduct that warrants an award of non-party costs under the court's inherent jurisdiction to award such costs in "[s]ituations of gross misconduct, vexatious conduct or conduct by a non-party that undermines the fair administration of justice".[24]

30. Finally, in such circumstances, the court should apply the proposed legal framework for determining costs in cases where the claimant argues that the litigation was brought in the public interest, as set out above (at para. 15).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of June, 2023

HĀKI CHAMBERS GLOBAL
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Lawyer for the Joint Interveners

[23] *Hawke v. University of Western Ontario*, 2022 ONSC 7017; Costs Submissions of the Applicants, *Hawke v. University of Western Ontario*, Court File No CV-22-1321, para. 9 (November 1, 2022).
[24] *1318847 Ontario Limited*, para. 76.

SCHEDULE A – AUTHORITIES

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

British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia, 2022 BCCA 354.

Hawke v. University of Western Ontario, 2022 ONSC 7017.

Incredible Electronics Inc. v. Canada (Attorney General), 2006 CanLII 17939 (ON SC).

Justice Centre for Constitutional Freedoms v. Costa, 2023 ONCA 405.

Ontario (Attorney General) v. Bogaerts, 2019 ONCA 876.

Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia, 2015 ONCA 732.

St. James' Preservation Society v. Toronto (City), 2006 CanLII 22806 (ON SC).

The St. James' Preservation Society v. Toronto (City), 2007 ONCA 601.

SCHEDULE B – STATUTES, REGULATIONS & BY-LAWS

N/A

Justice Centre for Constitutional Freedoms -and- *Seneca College of Applied Arts and Technology*

Appellants

Respondent

-and- *Mariana Costa, Crystal Love,*
Alexandra Badowich and Angelina Mandekic

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