*Case Name:*

# Incredible Electronics Inc. v. Canada (Attorney General)

**Between**
**Incredible Electronics Inc., 1313242 Ontario Inc., Interstar Communications Limited, Samaratech Group Inc. Tedsat Corp., 3152391 Canada Inc. carrying on business as New Advance Technologies, Abner Martinez carrying on business as TV International, Theodore Goritsas carrying on business as Antenna Satellite, Maria Restrepo carrying on business as Carmenza Gift & Video Centre, Alfredo Julio Panart carrying on business as Imagen Latina, Nikolai Polishuk carrying on business as Wish System, Mustafa Guler carrying on business as MG Electronics, John Couchman, Headly Group Inc. operating as Cybertechnic, the Satellite Communication Association of Canada, Huseyin Perk carrying on business as Turkview Satellite, 90824392 Quebec Inc. operating as Al Rai, Satellite Depot Corporation, Applicants, and**
**Attorney General of Canada, Respondent, and**
**Bell Expressvu Limited Partnership, Astral Media Inc. and Alliance Atlantis Communications Inc., Intervenors**
**And between**
**Bell Expressvu Limited Partnership, Astral Media Inc. and Alliance Atlantis Communications Inc., Applicants, and**
**Incredible Electronics Inc., 1313242 Ontario Inc., Interstar Communications Limited, Samaratech Group Inc. Tedsat Corp., 3152391 Canada Inc. carrying on business as New Advance Technologies, Abner Martinez carrying on business as TV International, Theodore**

**Goritsas carrying on business as Antenna Satellite, Maria Restrepo carrying on business as Carmenza Gift & Video Centre, Alfredo Julio Panart carrying on business as Imagen Latina, Nikolai Polishuk carrying on business as Wish System, Mustafa Guler carrying on business as MG Electronics, John Couchman, Headly Group Inc. operating as Cybertechnic, the Satellite Communication Association of Canada, Huseyin Perk carrying on business as Turkview Satellite, 90824392 Quebec Inc. operating as Al Rai, Satellite Depot Corporation, Respondents**

[2006] O.J. No. 2155

80 O.R. (3d) 723

147 C.R.R. (2d) 79

148 A.C.W.S. (3d) 362

Court File No. 02-CV-228526CM1

Ontario Superior Court of Justice

**P.M. Perell J.**

Heard: May 1 and 2, 2006.
Judgment: May 26, 2006.

(119 paras.)

*Civil procedure -- Parties -- Intervenors -- Motion by the respondent Attorney General and the intervenor, Bell ExpressVu for costs against the applicants allowed in part -- The application, a Charter challenge to legislation prohibiting the reception of foreign television programming by satellite, was dismissed for lack of prosecution -- The applicants who were public interest litigants were not liable for costs; those who did not qualify as public interest litigants were liable for costs -- Bell ExpressVu was entitled to costs, despite its intervenor status; it was an intervenor in name only, and had been protecting its economic interests.*

*Civil procedure -- Costs -- When not awarded -- Motion by the respondent Attorney General and the intervenor, Bell ExpressVu for costs against the applicants allowed in part -- The application, a Charter challenge to legislation prohibiting the reception of foreign television programming by satellite, was dismissed for lack of prosecution -- The applicants who were public interest litigants were not liable for costs; those who did not qualify as public interest litigants were liable for costs -- Bell ExpressVu was entitled to costs, despite its intervenor status; it was an intervenor in name only, and had been protecting its economic interests.*

*Motion by the respondent Attorney General and the intervenor, Bell ExpressVu for costs against the applicants -- The Attorney General claimed substantial indemnity costs of $500,877; Bell ExpressVu claimed costs on a substantial indemnity basis of $1,690,369 -- The underlying application, a Charter challenge to legislation prohibiting the reception of foreign satellite television programming, was not heard on its merits; two applicants were given leave to abandon and the application was ultimately dismissed for failure to prosecute -- The applicants argued that no costs should be awarded, on the grounds that this was a public interest litigation, and that Bell ExpressVu was an intervenor and therefore not entitled to costs -- HELD: The Attorney General and Bell ExpressVu were entitled to costs from Incredible Electronics and other businesses, as they did not qualify as public interest litigants -- The applicants who qualified as public interest litigants were not liable for costs -- Bell ExpressVu was entitled to costs, despite its intervenor status, because it was an intervenor in name only, and had taken the lead in responding to the application in order to protect its economic interests -- The normal rule with respect to interveors did not apply.*

**Statutes, Regulations and Rules Cited:**

Broadcasting Act, S.C. 1991, c. 11,

Canadian Charter of Rights and Freedoms, 1982, s. 1

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131, s. 131(1), s. 131(2)

Ontario Rules of Civil Procedure, Rule 13, Rule 38.03(3), Rule 57.01, Rule 57.01(1), Rule 57.01(1)(O.a), Rule 57.01(1)(0.b), Rule 57.01(1)(a), Rule 57.01(1)(b), Rule 57.01(1)(c), Rule 57.01(1)(d), Rule 57.01(1)(e), Rule 57.01(1)(f), Rule 57.01(1) (f)(i), Rule 57.01(1)(f)(ii), Rule 57.01(1)(g), Rule 57.01(1)(h), Rule 57.01(1)(h)(i), Rule 57.01(1)(h)(ii), Rule 57.01(1)(i), Rule 57.01(2), Rule 57.01(3), Rule 57.01(4), Rule 57.01(4)(a), Rule 57.01(4)(b), Rule 57.01(4)(c), Rule 57.01(4) (d), Rule 57.01(4)(e)

Radiocommunication Act, R.S.C. 1985, c. R-2, s. 9(1)(c)

**Counsel:**

Milton A. Davis for the Applicant Incredible Electronics Inc.

Monica E. Caceres for the Applicants Maria Restrepo and Alfredo Julio Panart

Huseyin Perk in person

Andrew Sanfilippo and Susan M. Sack for the Intervenor Charles Wagman

Peter Southey for the Respondent Attorney General of Canada

Kent E. Thomson and Andrea Burke for the Intervenors Bell ExpressVu Limited Partnership, Astral Media Inc. and Alliance Atlantis Communications Inc.

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**REASONS FOR DECISION**

P.M. PERELL J.:--

*A. Introduction*

**1** This is a motion to determine whether some or all of the 18 named Applicants should be liable to pay costs to the Respondent, the Attorney General of Canada, and to the Intervenors, Bell ExpressVu Limited Partnership, Astral Media Inc., and Alliance Atlantis Communications Inc. (collectively, "Bell ExpressVu").

**2** The Attorney General claims costs on a substantial indemnity basis of at least $500,877.86, and Bell ExpressVu claims costs also on a substantial indemnity basis of at least $1,690,369.52. These claims, which in the aggregate are approximately $2.2 million, are not the final bills of costs and do not, for instance, include the costs of this motion, which took two days to argue. The immediate motion is limited to determining the liability for costs, and the matters of the scale of costs and the quantum of costs are to be determined on subsequent motions. There are collateral or tangential issues about claims for indemnification that may also require subsequent proceedings.

**3** It is significant to observe at the very outset of these Reasons for Decision, that the Attorney General's and Bell ExpressVu's claims for costs are made in an application that never was argued on its merits. Two of the Applicants, Incredible Electronics Inc. and Huseyin Perk, were granted leave to abandon, and the application was dismissed as against the balance of the Applicants because of their failure to bring their application to court for a hearing. The substantive merits of the application, which concerned the application of the *Charter of Rights and Freedoms* to strike down legislation restricting the right of Canadian citizens to receive television programs by satellite transmissions from foreign broadcasters has never been argued and remains undecided.

**4** As will become more apparent later in these Reasons for Decision, the Applicants are not a homogeneous group of individuals and one of the important questions to be determined is whether any of them are public interest litigants. It is convenient at the outset to list them by the order of their appearance in the style of cause. The Applicants are:

(a) Incredible Electronics Inc,
(b) 1313242 Ontario Inc.,
(c) Interstar Communications Limited,
(d) Samaratech Group Inc.
(e) Tedsat Corp.,
(f) 3152391 Canada Inc. carrying on business as New Advance Technologies,
(g) Abner Martinez carrying on business as TV International,
(h) Theodore Goritsas carrying on business as Antenna Satellite,
(i) Maria Restrepo carrying on business as Carmenza Gift & Video Centre,
(j) Alfredo Julio Panart carrying on business as Imagen Latina,
(k) Nikolai Polishuk carrying on business as Wish System,
(l) Mustafa Guler carrying on business as MG Electronics,
(m) John Couchman,
(n) Headly Group Inc. operating as Cybertechnic,
(o) The Satellite Communication Association of Canada,
(p) Huseyin Perk carrying on business as Turkview Satellite,
(q) 90824392 Quebec Inc. operating as Al Rai,
(r) Satellite Depot Corporation

**5** Of these Applicants, costs are not being sought by the Attorney General or Bell ExpressVu against the Applicant John Couchman. This is a very significant feature because it introduced the notion that it may also be appropriate for the Court in exercising its discretion with respect to costs to differentiate between the Applicants. A review of the case law about costs, discussed below, reveals that there is precedent for differentiating between parties on the same or opposing sides of a *lis* in making costs awards, especially in circumstances where one or more of the parties is a public interest litigant.

**6** As will be detailed below, Incredible Electronics was granted leave to abandon the application, and it now seeks an order that this abandonment be without costs.

**7** The Applicant Huseyin Perk was also granted leave to abandon. He appeared in person, and he seeks an order that there be no order as to costs. During argument counsel for Bell ExpressVu and for the Attorney General conceded that the court might view the position of Mr. Perk as similar to that of Mr. Couchman.

**8** The Applicants Maria Restrepo and Alfredo Julio Panart were represented by counsel, and they also seek an order that the application be dismissed without costs or they ask that they be treated in the same manner as Mr. Couchman. Ms. Restrepo and Mr. Panart also ask for an order that if they are held liable for costs, those costs should be paid by Incredible Electronics or by a Mr. Charles Wagman. That request, however, will have to be addressed in a subsequent proceeding.

**9** Mr. Wagman, who is not a named Applicant but who for a period was the solicitor of record for all the Applicants, was granted leave to make submissions on this motion, and his counsel submitted that the appropriate order was that the application be dismissed without costs payable to the Attorney General or Bell ExpressVu.

**10** Mr. Wagman was granted leave to make submissions because, as noted, the Applicants Ms. Restrepo and Mr. Panart have put him on notice that they will seek to be indemnified by him should they be found liable for costs. Other Applicants may eventually take the same position. Counsel for Incredible Electronics, however, advised the Court that Incredible Electronics would not be seeking indemnification from Mr. Wagman.

**11** The balance of the Applicants did not file material or appear at the return of this motion, although they were given notice of it. Undoubtedly, their position would be that they should not be liable for costs, and this position was advanced for them by Incredible Electronics, Ms. Restrepo, Mr. Panart, Mr. Perk, and Mr. Wagman.

**12** The major arguments of those seeking that there be no order as to costs are that:

(a) the Applicants should not be obliged to pay costs to the Attorney General or Bell ExpressVu because public interest litigation should not be beyond the reach of the ordinary citizen and this application was brought by them in the public interest;
(b) the normal rule that intervenors should not recover or pay costs should be applied to Bell ExpressVu; and
(c) Bell ExpressVu should not recover costs because it expanded the scope of the application to serve its own selfish commercial interests and thereby so increased the expense of the application that it became financially prohibitive to litigate and the Applicants had no choice but to succumb to a procedural defeat without admitting defeat on the substantive issue.

**13** The major arguments of those seeking costs are:

(a) The Applicants (save for Mr. Couchman) were not engaged in public interest litigation but rather they were intent on furthering their own pecuniary interests and since their application was dismissed, they should be ordered to pay costs;
(b) The Applicants should be liable for costs because during the course of the uncompleted application, the Attorney General and Bell ExpressVu uncovered that the Applicants had falsely portrayed their grey market activities as being honest, when, in truth, their acts were deceptive, deceitful, and harmful, and, moreover, some of the Applicants were revealed to have actually engaged in black not grey market activities; and
(c) The Applicants' submission that they abandoned their public interest litigation because of prohibitive expense is disingenuous because the true reason that they discontinued was that the unlawfulness of their activities had been exposed. As the losers of the litigation, they should pay costs to the winners.

**14** Apart from the remarkably high quantum of the claims for costs for an application that was never argued on its

merits, a review of the factual background and of the procedural history of this application yields a collection of remarkable features that bear upon the Court's discretion with respect to awarding costs. In particular, the facts provide a factual record to examine the exercise of the Court's discretion in what is alleged to be public interest litigation. I will describe those features throughout these Reasons for Decision, but note here that they led me to craft an order as to costs that differentiates between the Applicants.

**15** For the reasons that follow, I make the following order.

(a) The Applicants John Couchman and Huseyin Perk shall not be liable for costs because they qualify as public interest litigants;

(b) The Applicant Incredible Electronics shall be liable for the costs of the Attorney General and of the Intervenors, Bell ExpressVu Limited Partnership, Astral Media Inc., and Alliance Atlantis Communications Inc. (collectively, "Bell ExpressVu") because it does not qualify as a public interest litigant;

(c) The Applicants 1313242 Ontario Inc., Interstar Communications Limited, Samaratech Group Inc., Tedsat Corp., 3152391 Canada Inc. carrying on business as New Advance Technologies, and Abner Martinez carrying on business as TV International, Theodore Goritsas carrying on business as Antenna Satellite, Maria Restrepo carrying on business as Carmenza Gift & Video Centre, Alfredo Julio Panart carrying on business as Imagen Latina, Nikolai Polishuk carrying on business as Wish System, Mustafa Guler carrying on business as MG Electronics, Headly Group Inc. operating as Cybertechnic, The Satellite Communication Association of Canada, 90824392 Quebec Inc. operating as Al Rai, and Satellite Depot Corporation (the "Show Cause Applicants") shall be liable for the costs of the Attorney General and of Bell ExpressVu, but any member of the Show Cause Applicants may be relieved of liability if he, she, or it by motion commenced within 20 days after service of these Reasons for Decision satisfies the Court that he, she, or it is a public interest litigant and that the Court should exercise its discretion to make no order as to costs.

(d) Subject to any further order of this Court to direct another manner of service, if the Attorney General or Bell ExpressVu seek costs from any Show Cause Applicants, then the Attorney General or Bell ExpressVu shall personally serve a copy of these Reasons for Decision on the Show Cause Applicant from whom costs are sought.

**16** To explain the reasons for this order, I have divided these Reasons for Decision into parts. In the next part, I will set out the factual background and the procedural history of this application. As I go along, I will include some comments and conclusions about the arguments made by the parties in favour or against awarding costs to the Attorney General and Bell ExpressVu. Next, in a series of parts, I will review the law and the literature about the exercise of the Court's discretion about costs in public interest litigation, and again I will make some comments relevant to my determination of the questions about who should be liable for costs and about to whom the costs should be payable. The law part will include the explanation for the costs award, described above, and will be followed by the conclusion of these Reasons for Decision.

*B. Factual Background and Procedural History*

**17** In Canada, the business of broadcasting and distributing television signals is regulated by the *Broadcasting Act*, S.C. 1991, c. 11 and the *Radiocommunication Act*, R.S.C. 1985, c. R-2. Under this regime, Bell ExpressVu Limited Partnership and Star Choice Communications Inc. (not a party to this application) are the two entities licenced to use satellites to broadcast encrypted television signals for reception in homes in Canada. They use satellites to transmit encrypted signals on what is known as a direct-to-home ("DTH") basis to subscribers who can watch the broadcasts on their home television sets. The subscriber needs equipment to receive and decrypt the signals, and the subscriber pays a fee to Bell ExpressVu Limited Partnership or Star Choice Communications Inc. for packages of television channels.

The Intervenor Astral Media Inc. provides groups of television channels, and the Intervenor Alliance Atlantis Communications Inc. is a large studio producing movies and television programs that are broadcast on the channels. The Canadian DTH broadcasters have a monopoly, and they earn an enormous amount of money.

**18** In the United States (and elsewhere in the world), there are also DTH broadcasters, including an entity in the U.S. known as DIRECTV. The signals from the satellites of U.S. DTH broadcasters may penetrate Canadian airspace, and with decryption equipment, Canadians are able to view the U.S. broadcasts on television sets in Canada.

**19** The reception of the U.S. broadcaster's signals would be legal, if it was permitted by both the Canadian regulator, the Canadian Radio-television and Telecommunications Commission ("CRTC"), and also the U.S. regulator and if the Canadian viewer subscribed and paid the foreign DTH broadcaster for its service. However, at the moment, American DTH broadcasters are not licensed in Canada or in the United States to provide their service to persons residing in Canada.

**20** The absence of express permission by Canadian regulators has not, however, stopped many Canadian citizens from enjoying the services provided by the U.S. DTH broadcasters. Thus, a so-called "black market" and a so-called "grey market" have developed in Canada. The "black market" is clearly an illegal activity because in the black market, the Canadian viewer purchases decryption equipment and simply intercepts the signal of the U.S. DTH broadcaster without paying for it. The Canadian viewer rather pays just the supplier of the decryption equipment for the equipment.

**21** Until relatively recently, the legality of the "grey market," has been described as being grey, that is, somewhere between black (illegal) and white (legal), but there has been a public perception (which Bell ExpressVu says is the propagation of a myth) that it is a legal activity. The identifying element of the grey market is that the Canadian viewer does pay the U.S. DTH broadcaster for its service, although as the discussion later will reveal, the U.S. DTH broadcaster will be kept in the dark about the fact that its service is being used in Canada. Typically, the grey marketer contacts the American DTH broadcaster and provides it with a U.S. mailing address on behalf of the Canadian viewer.

**22** Both the black marketers and the grey marketers are competitors and a serious threat to the property and enterprise interests of the DTH broadcasters, and Bell ExpressVu has taken steps and expended considerable resources to protect its place in the marketplace, as may be evidenced by the immediate proceedings where it engaged impressive legal counsel, expert witnesses, and private investigators in order to intervene in the proceedings and to forcefully challenge the legal and factual position of the Applicants.

**23** The present proceedings, however, are part of a larger history. In 1999, in an action commenced in British Columbia, Bell ExpressVu Limited Partnership sued Mr. Richard Rex and others for an injunction to restrain them from carrying on their activities in the grey market. The injunction was refused by the British Columbia Courts; see: *Bell ExpressVu Limited Partnership v. Rex* (2000), 191 (4th) 662 (B.C.C.A.), affg. [1999] B.C.J. No. 3092 (S.C.). That the injunction was refused provides some evidence that some courts did not regard grey market activities as necessarily illegal. In this last regard, see also *R. v. Branton* (2001), 154 C.C.C. (3d) 139 (Ont. C.A.).

**24** However, in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, the Supreme Court of Canada reversed the lower courts and ruled that as a matter of interpretation, s. 9(1)(c) of the *Radiocommunication Act* prohibited the decryption of encrypted signals emanating from U.S. and other foreign broadcasters and thus made the activities of grey marketers unlawful.

**25** However, expressly because of the absence of an adequate factual record, the Supreme Court of Canada declined to decide whether s. 9(1)(c) of the *Radiocommunication Act* contravened the *Canadian Charter of Rights and Freedoms* as an infringement of freedom of expression, whether any infringement could be justified under s. 1 of the *Charter*, and, if not justified, whether s. 9(1)(c) should be struck out of the statute. In the penultimate paragraph of his judgment for the Court, Iacobucci, J. stated:

> It may be that, when this matter returns to trial, the respondents' [Mr. Rex's] counsel will make an

> application to have s. 9(1)(c) of the *Radiocommunication Act* declared unconstitutional for violating the *Charter*. At that time, it will be necessary to consider evidence regarding whose expressive rights are engaged, whether those rights are violated by s. 9(1)(c), and if they are whether they are justified under s. 1.

**26** The Supreme Court's decision in *Bell ExpressVu Limited Partnership v. Rex* was released on April 26, 2002. The timing of the events that followed is at least interesting, but during argument of the motion now before the Court, the counsel for the Attorney General and for Bell ExpressVu argued that understanding the subsequent chronology would inform the court as to how it should exercise its discretion about awarding costs of the now abandoned and dismissed application. In part, this submission was aimed at encouraging the Court to examine the motivation of the parties and whether they were acting out of self-interest or altruistically in the public interest. Counsel for counsel for Incredible Electronics, Mr. Wagman, Ms. Restrepo and Mr. Panart also encouraged me to examine the motivation of the parties. I will say more about these factors later.

**27** Returning to the factual and procedural history, the Applicants were not parties to the British Columbia litigation, but they had obviously anticipated the ruling of the Supreme Court because on the same day as the Court released its decision, they commenced an application for a declaration that s. 9(1)(c) contravened the *Charter*. The evidence is that with one exception, all of the Applicants were distributors or retailers of equipment to receive signals broadcast from satellites. The one exception is John Couchman, who was an individual who received subscription-programming signals from a supplier who was not licensed under the *Broadcasting Act.* In other words, Mr. Couchman was just a television viewer.

**28** Of the Applicants who were distributors or retailers, Mr. Perk did not sell equipment to decrypt encrypted signals. Rather, he sold equipment to receive television signals that did not need to be decrypted. His purpose in doing so was to enable members of the Turkish community in Canada to enjoy broadcasts from their country of origin. The precise circumstances of the other Applicants is, for me, a matter of uncertainty, because, as I will recount later, most did not deliver affidavits and some delivered affidavits that were struck out, and some delivered affidavits but were not cross-examined on their evidence.

**29** It is worth noting that the application was announced to the press by Mr. Alan Gold, a prominent member of the Canadian Bar from Toronto, who had represented Mr. Rex in the Supreme Court of Canada. Mr. Gold was to act as counsel for the Applicants along with Mr. Wagman, who was the solicitor of record for the Applicants.

**30** For reasons that will become more understandable later when the history comes to the abandonment and dismissal of the application and when the discussion turns to the applicable legal principles, it is necessary to set out here the competing allegations about how the Applicants proposed to finance their litigation. I say "allegations" because unfortunately, this is a matter of contention amongst the Applicants, not all of whom have been heard from, and also with one Dawn Branton, the principal of 1254719 Ontario Ltd., which carried on business as Tech Electronics, another grey marketer but one that was not made an Applicant.

**31** I must be careful not to make any final finding of fact about the financing because it is at the centre of the yet to be determined collateral and tangential disputes mentioned above. I can, however, say that it is uncontested that the arrangements fell apart, and for the present purposes of resolving whether the Applicants should pay costs to the Attorney General and Bell ExpressVu, I do not need to make a final determination of why the arrangements fell apart or whether there are claims for indemnity or damages amongst any combination of Incredible Electronics, Mr. Wagman, Dawn Branton, 1254719 Ontario Ltd., Ms. Restrepo, Mr. Panart, and the unrepresented litigants as a result of the costs order described above and explained below. For present purposes, I set out the allegations mainly because they are important to understanding why the application was not argued on the merits.

**32** Fortunately, here I can be relatively brief. The allegations with respect to the financing are as follows:

(a) It is alleged that there was an agreement between Mr. David Fuss, the principal of Incredible Electronics and Ms. Branton, the principal of 1254719 Ontario Ltd. that they would share the burden of paying Mr. Wagman and carrying the burden of the expenses of the application;
(b) It is alleged that the other Applicants understood that they would not be responsible for the Applicants' own legal costs and expenses but that they were made to understand that they might be "liable for costs if the Court sees fit" to quote from a recruitment form that was signed by the Applicants. Thus, it is alleged that they understand that they might be exposed to liability for a costs claim by the opponents to their application.
(c) There is, however, a live dispute about what the unrepresented Applicants and also Mr. Fuss were made to understand about their exposure to costs and about their role in the proceedings.

**33** Almost immediately after having their application issued, the Applicants moved for, and were granted, an eight-day interim injunction by Carnwath, J.

**34** The application having been commenced and an interim injunction obtained, on May 7, 2002, pursuant to Rule 13, Blair, R.S.J. granted Bell ExpressVu leave to intervene as added parties.

**35** Pausing here, from the fact that Mr. Gold was counsel for both Mr. Rex in the British Columbia litigation and for the Applicants in the new Ontario proceedings, Bell ExpressVu now argues that the Applicants had intentionally started the Ontario proceedings to keep Bell ExpressVu out of the "game," as it had been described by Mr. Gold in a statement to the press. If keeping Bell ExpressVu on the sidelines was the plan, it did not succeed, and I mention here that I see no justification for awarding costs to Bell ExpressVu and against the Applicants just because of the Applicants' failed plan.

**36** Blair, R.S.J. awarded Bell ExpressVu its costs for the motion to intervene, but his order was silent with respect to the costs of the application itself. Although orders made under Rule 13 will sometimes address whether an intervenor is responsible to pay costs or entitled to claim them, Blair R.S.J.'s order was silent about the costs of the action apart from giving Bell ExpressVu the rights of a party. Typically, a party, as such, may recover or be obliged to pay costs, but since the order is silent, I assume that Blair, R.S.J. meant to leave the point open for later determination.

**37** Put somewhat differently, I have approached the matter before me on the basis that notwithstanding their party status, Bell ExpressVu must justify any entitlement to costs. In this regard, I note the obvious points that: Bell ExpressVu and the Attorney General were the successful parties; the Applicants were the unsuccessful party; and normally costs are in the cause. Incredible Electronics and others of the Applicants, of course, argue that the case at bar is not normal and there should be no order as to costs.

**38** That Blair, R.S.J. awarded Bell ExpressVu the costs of the motion for leave to intervene and that Bell ExpressVu subsequently was awarded costs of several interlocutory steps is also, in my view, not determinative of whether they should receive costs for the dismissal of the whole application.

**39** On May 10, 2002, Blair R.S.J. dissolved the interim interlocutory injunction. The interlocutory injunction having been dissolved, the parties and the Court addressed the matter of creating a record for the hearing of the *Charter* question and the related issues. The discussion of this phase of the history can be compressed by noting that the application was case managed first by Blair, R.S.J. and also by Stinson, J. (and now by me) and by noting that, amongst many directions or orders by the Court, the parties were given a fixed hearing date of September 29, 2003, and the deadline of August 1, 2003, to file the application record.

**40** I pause again to note that a significant portion of the oral and written argument advanced the submission that Bell ExpressVu overwhelmed the Applicants and that it did not put up a fair fight, which was the explanation offered as to why the Applicants ultimately gave up their application. In my opinion, however, Bell ExpressVu cannot be faulted for

expanding the scope of the application from that proposed by the Applicants in their notice of application or in marshalling its forces in order to succeed. In an adversary system, a litigant may desire to choose his or her legal and factual battlefield but the opposition is entitled to resist and to choose more or other legal and factual territory. From my review of the issues in this application there were legitimate and appropriate reasons tactically, strategically, and substantively, for Bell ExpressVu and the Attorney General not to accept the factual record offered by the Applicants. Moreover, while it may have discomfited the Applicants and increased the expense of the litigation, the exploration of these issues was consistent with and indeed necessary in order to provide the factual record that the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex* insisted was necessary before the *Charter* issues could be addressed by the Court.

**41** Within two weeks of starting their application, the Applicants knew that they faced a powerful foe that had the means and the motive to vigorously contest the claims being advanced. They could reasonably anticipate that a *Charter* case was going to be hard fought and unlikely to be kept within the narrow parameters that the notice of application might have set. The issue of whether any infringement of freedom of expression was "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" is an issue that is by its nature almost infinite in its scope, and it is beyond naïve to suggest that this *Charter* case could be kept within some narrow legal and factual boundaries. From the get-go, the case involved the regulation of broadcasting in the world. The Applicants knew all this and did not retreat, but decided to prosecute their application. There was nothing improper in how the Attorney General or Bell ExpressVu conducted their response. In my opinion, how Bell ExpressVu and the Attorney General conducted the litigation does not provide a basis for denying them costs, if they are otherwise entitled to such an order.

**42** There are 15 months from April 26, 2002, to August 1, 2003, and this was the time allotted to the parties to make the record for the Court.

**43** The Applicants filed 30 affidavits. Abner Martinez carrying on business as TV International, John Couchman, and Huseyin Perk carrying on business as Turkview Satellite delivered affidavits and were subjected to cross-examination. It is convenient to note here that although all of the Applicants lent their name to the application, their respective involvement and participation in the carriage and conduct of the application differed. Most of the Applicants delivered no affidavit. Incredible Electronics (David Fuss), Interstar Communications Limited (Chris Budziszewski), and Maria Restrepo carrying on business as Carmenza Gift & Video Centre delivered affidavits, but as events unfolded were not cross-examined. I will return to this point, but one of the factors that underlies the costs order made above as it applies to the Show Cause Applicants is that the court does not know a great deal about whether some of them might qualify as public interest litigants.

**44** The Attorney General filed six affidavits. Bell ExpressVu filed 27 affidavits. The cross-examinations began with the witnesses of the Attorney General and Bell ExpressVu. Mr. Wagman cross-examined 22 witnesses over a period of three months.

**45** The cross-examinations of the Applicants' witnesses then began. There were 25 affiants who had delivered the 30 affidavits for the Applicants. Bell ExpressVu and the Attorney General sought to examine 23 affiants, but only nine persons ever appeared for their cross-examinations. To put it mildly, these cross-examinations and the creation of a factual record did not go well for the Applicants. This outcome can, in part, be explained by the fact that Bell ExpressVu, amongst other things, had hired private investigators, who as undercover operatives attended at the business premises of some of the affiants to obtain information to impeach them as witnesses.

**46** The investigations of the private investigators revealed that some of the Applicants were engaged in black market not just grey market activities. Incredible Electronics, Abner Martinez carrying on business as TV International, and Maria Restrepo carrying on business as Carmenza Gift & Video Centre were shown to have engaged or been involved in black market activities.

**47** The investigations also revealed that the grey market was far from an innocent activity. For present purposes, it is

perhaps sufficient to point out just three blameworthy aspects of the practice:

(a) often grey market activities were just a cover for black market activities;
(b) grey market activities involved elaborate schemes of false addresses and U.S. corporations that were a front for Canadian corporations with the intent of the grey marketer deceiving the foreign DTH broadcaster into believing that it was selling its service to a customer to whom the foreign DTH broadcaster was permitted to sell it. It is to be recalled that DTH broadcasters are regulated and may only sell their services in accordance with the licence granted by their regulator;
(c) although in the grey market, the foreign DTH broadcaster would be paid for supplying its services, it was, nevertheless, being victimized because unintentionally it was breaching its regulatory licence and unintentionally it was breaching its contractual and copyright arrangements with third parties. In other words, the DTH broadcaster not only was breaching (albeit unintentionally) the terms of its licence to broadcast but it was also breaching (albeit unintentionally) the terms of contracts with third parties about the copyright and intellectual property associated with the programs being broadcast.

**48** In May and June 2003, the Applicants became a house divided. In May, Incredible Electronics filed a notice of change of solicitors, and it replaced Mr. Wagman as its solicitor of record with Mr. Milton Davis, its current lawyer. During this period, affiants began to fail to attend the dates scheduled for their cross-examinations, and on May 15, 2003, Bell ExpressVu obtained an order scheduling cross-examinations of 16 affiants. Only two of these cross-examinations ever occurred.

**49** On June 16, 2003, Mr. Wagman had himself removed as solicitor of record. This left 17 Applicants unrepresented and 14 affiants, including Mr. Fuss, without having undergone cross-examination. Bell ExpressVu brought a motion to have their affidavits struck from the record.

**50** On June 25, 2003, Blair, R.S.J. permitted Mr. Fuss to withdraw his affidavits and Blair, R.S.J. struck the affidavits of the other 13 affiants. In his order of June 25, 2003, Blair, R.S.J. also granted the Intervenors [Bell ExpressVu]:

(a) their costs thrown away in preparing for and attending at cross-examinations of the Applicants' affiants who did not attend for cross-examinations as scheduled in an amount to be fixed by the judge with responsibility for determining the costs of the overall Application; and
(b) their costs of their motion to strike the Applicants' affidavits and to compel David Fuss to attend for cross-examination, in an amount to be fixed by the judge with responsibility for determining the costs of the overall application.

**51** On July 16, 2003, Incredible Electronics advised that it intended to abandon the application.

**52** On August 6, 2003, Bell ExpressVu obtained an order that required the unrepresented Applicants to take steps by August 22, 2003, to move the application forward, failing which Bell ExpressVu and the Attorney General were at liberty to move for an order dismissing the application with costs. They unrepresented Applicants took no steps.

**53** On September 24, 2003, Blair, R.S.J. dismissed the application as against the unrepresented Applicants. The issue of liability for costs was left to be determined at a later date. Also on September 24, 2003, pursuant to rule 38.08 of the *Rules of Civil Procedure*, Blair, R.S.J. granted Incredible Electronics and Mr. Perk leave to abandon the application. Blair, R.S.J., however, once again, left the issue of liability for costs to be determined at a later date. That date has arrived.

*C. The Law with respect to the Court's Discretion to Award Costs - Introduction and Relevant Rules of Civil Procedure*

**54** I begin the discussion about costs and the law with respect to the Court's discretion to award costs by saying that I appreciated the arguments from all counsel and from Mr. Perk. All the oral and written arguments were presented with polish and exemplary professionalism, including solicitude for and fairness to the Applicants who failed to appear.

**55** There was universal agreement that the Court has a wide discretion about awarding costs. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 states:

> 131(1) *Costs* -- 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.
>
> (2) *Crown costs* -- In a proceeding in which Her Majesty in is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

**56** The major rule about the Court's discretion to award costs is rule 57.01, which reveals the breadth of matters that the Court may consider in exercising its broad discretion. This rule states:

> 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;
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
> (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;
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and

(i) any other matter relevant to the question of costs.

(2) *Costs Against Successful Party* -- 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.

(3) *Fixing Costs: Tariffs* -- When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

(3.1) *Assessment in Exceptional Cases* -- [omitted]

(4) *Authority of Court* -- Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;
(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;
(c) to award all or part of the costs on a substantial indemnity basis;
(d) to award costs in an amount that represents full indemnity; or
(e) to award costs to an unrepresented party.

(5) *Bill of Costs* -- [omitted]

(6) *Costs Outline* -- [omitted]
(7) *Process for Fixing Costs* -- [omitted]

**57** Also relevant is rule 38.03(3), which provides that "where an application is abandoned or deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise."

*D. General Rules, Nomenclature, and Framework to the Problem to Public Interest Litigation*

**58** The parties provided me with case law about the exercise of the Court's discretion with respect to costs, including case law that discusses the general rules and the conventions about costs. Perhaps, the most general of these rules is that costs at a partial indemnity scale typically follow the event, which is to say that although there is no absolute entitlement to costs, normally costs are ordered to be paid by the unsuccessful party to the successful party on a partial indemnity scale: *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135 (C.A.); *Pike's Tent and Awning Ltd. v. Cormdale Genetics Inc.* (1998), 27 C.P.C. (4th) 352 (Ont. Gen. Div.).

**59** The normal rule obviously favours the Attorney General and Bell ExpressVu in the immediate case, but their opponents provided me with authorities that discussed circumstances where the normal rule that costs follow the cause should not be followed. The Applicants' focus of attention was on public interest litigation, which, I will define as litigation that involves the resolution of a legal question of importance to the public as opposed to private-interest litigation, which, I will define as litigation that involves the resolution of a legal question of importance mainly only to the parties. The position of the Attorney General and Bell ExpressVu was essentially that under the normal rule or under

any special rule for public interest litigation, the Applicants should be liable for costs.

**60** There is a body of excellent academic literature that addresses the fundamental question that the parties debated, which is whether Canadian law requires special rules to guide the exercise of the Court's discretion when awarding costs in public interest litigation. See: C. Tollefson, "Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond" (2006), 19 Can. J. Admin L. Prac. 39; C. Tollefson, D. Gilliland, and J. DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004), 83 Can. Bar Rev. 473; B. L. Berger, "Putting a Price on Dignity: The Problem of Costs in *Charter* Litigation" (2002), 26 Adv. Q. 235; C. McCool, "Costs in Public Interest Litigation: A Comment on Professor Tollefson's Article; When the Public Interest Loses" (1996), 30 U.B.C. L. Rev. 309; C. Tollefson, "When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995), 29 U.B.C. Law Review 303; L. Friedlander, "Costs and the Public Interest Litigant" (1995), 40 McGill L.J. 55; L. Friedlander, "Toward a Cost Awards Policy in Civil *Charter Litigation"* (1994), 5 *Windsor Review of Legal and Social Studies* 41; L.M. Fox, "Costs in Public Interest Litigation" (1989), 10 Adv. Q. 385; R. Anand and I. Scott, "Financing Public Participation in Environmental Decision Making" (1982), 60 Can. Bar Rev. 81.

**61** There is also some important law reform literature with useful commentary about public interest litigation. See: *Task Force on Legal Aid* (Report, Part I, 1974) (Osler, J. chair); Ontario Law Reform Commission, *Report on Standing* (Toronto: Minister of the Attorney General, 1989).

**62** Before discussing the case law provided to me by the parties, several cases from my own research, and the literature, it is helpful to set out: (a) some general principles that frame the problem of determining whether public interest litigation requires special rules for the exercise of the Court's discretion; and (b) some nomenclature that is useful in discussing possible approaches to public interest litigation.

**63** As a matter of general principle, costs compensate the successful litigant for the expense to which he or she has been put by the suit having been improperly resisted or improperly brought: *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.). The Court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnity successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.); *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.); *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C.C.A.).

**64** Costs are designed as to be a tool to administer justice and to control access to justice. In *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra*, which concerned whether an Indian Band should receive an advance award of costs in order to litigate an aboriginal land claim, LeBel, J. for a majority of the Supreme Court of Canada stated in para. 26:

> 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.

**65** To borrow terminology from the academic literature, the traditional Canadian and English approach to costs employs a "two-way" approach to costs. In other words, defending on the success or failure of the litigation, the litigant

will have the benefit or take on the burden of the costs award in the litigation. The "two ways" are entitlement and liability for costs in accord with the success or failure in the litigation. (A difference between Canada and England is that the benefit in Canada is a partial indemnity for the costs incurred and in England the benefit is a complete indemnity.)

**66** There are other approaches to the costs of litigating. In the United States, with some statutory exceptions, the parties to litigation bear the burden of their own costs. This is known in the academic literature as a "no-way" regime because a party is never liable for another's legal costs. This approach removes the deterrent effect of an adverse costs award as a factor in a litigant's decision whether to prosecute or defend a claim.

**67** Yet another approach is what is known as the "one-way" approach. Under this approach, a public interest litigant will recover costs if he or she succeeds but will not be liable to pay costs if he or she fails. This approach retains the incentive of a costs award for successful litigation but removes the deterrent effect of an adverse costs award as factors in a litigant's decision about whether to prosecute or defend a claim. There is an argument, discussed below, that a one-way approach is advantageous for public interest litigation because a two-way approach presents a serious financial obstacle to the public interest litigant.

**68** In a prescient report written in 1974 by a task force on legal aid, Osler, J., the chair of the task force, wrote:

> [W]e are embolded to suggest at this point that it is no longer self evident that cost should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against the losing party operates unequally as a deterrent ... [especially] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual or private interests at stake: *Task Force on Legal Aid* (Report, Part I, 1974) at p. 99

**69** The Ontario Law Reform Commission in its 1989 *Report on Standing, supra,* also noted that the cost rules posed a formidable deterrent to public interest litigation.

**70** Using the nomenclature of the academic literature, the case at bar raises the question of whether the normal "two-way" approach to costs is appropriate for public interest litigation and for the public interest litigant. In the immediate case, the Applicants are, in effect, asking that a one-way regime approach be adopted for public interest litigation.

**71** It may be noted that a one-way regime approach was the recommendation of the Ontario Law Reform Commission. The Commission recommended that a one-way rule should be applied when it was established that: (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; (b) the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically; (c) the issues have not been previously determined by a Court in a proceeding against the same defendant; (d) the defendant has a clearly superior capacity to bear the costs of the proceeding; and (e) the litigant has not engaged in vexatious, frivolous or abusive conduct.

*E. The Case Law About Costs in Public Interest Litigation*

**72** C. Tollefson, D. Gilliland, and J. DeMarco, in "Towards a Costs Jurisprudence in Public Interest Litigation" (2004), 83 Can. Bar Rev. 473 at p. 476 submit that: "the most critical variable affecting the long-term health of public interest litigation in this country is whether and to what extent we are committed to developing a coherent and distinct costs jurisprudence in public interest litigation."

**73** In *Re Sierra Club of Western Canada and Chief Forester* (1994), 117 D.L.R. (4th) 395 (B.C.S.C.), aff'd. 126 D.L.R. (4th) 437 (B.C.C.A.), a case that I will discuss later in these Reasons for Decision, Smith, J. observed that there

are no categorical rules about the exercise of the Court's discretion in cases of public-interest litigation; rather there are many relevant factors and every case must be decided in accord with its own facts. Smith, J. stated at pp. 406-7:

> In my view, the authorities cited do not set out any rule which must guide the exercise of my discretion. Rather, they set out examples of relevant factors to be taken into account and illustrate that the factors emphasized by [the Sierra Club's counsel] will be given more or less weight depending on their relationship to other pertinent considerations. In the result, whether to depart from the ordinary rule that costs follow the event is a matter within my discretion. The exercise of that discretion must be informed by proper principles, but it is nonetheless a decision to be made with regard to the particular facts before me.

**74** With the *caveat* that because costs are a matter of judicial discretion, it is to be expected the case law about costs will not demonstrate a consistent pattern, nevertheless, a review of the case law does reveal erratic and unpredictable results in cases of public interest litigation, as the following summary reveals.

(a) There are public interest cases where the victorious government or public authority has received costs from the unsuccessful public interest litigant, even though the unsuccessful litigant raised a serious and unresolved question that was in the public interest to have resolved: *Vriend v. Alberta* (1996), 141 D.L.R. (4th) 44 (Alta. C.A.); *Campbell v. British Columbia (Attorney General)*, [2001] B.C.J. No. 2068 (S.C.); *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 13 C.P.C. (3d) 323 (Alta. Q.B.).

(b) There are public interest cases where the victorious government or public authority has not received costs from the unsuccessful public interest litigant notwithstanding that the victorious public authority achieved its victory in a way that was above reproach: *Allman v. Commissioner of the N.W.T.*, [1983] N.W.T.R. 231 (S.C.); *Harrison v. U.B.C.* (1986), 30 D.L.R. (4th) 206 (B.C.S.C.), additional reasons on costs, [1987] 2 W.W.R. 378 (B.C.S.C), rev'd. (1988), 21 B.C.L.R. (2d) 145 (C.A.), aff'd. [1990] 3 S.C.R. 451; *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76; *Sierra Club of Western Canada v. British Columbia (A.G.)* (1991), 83 D.L.R. (4th) 708 (B.C.S.C.); *Valpy v Ontario (Commission on Election Finances)* (1989), 67 O.R. (2d) 748 (Div. Ct.). (Parenthetically, it may also be noted that governments frequently do not ask for costs in cases of public interest litigation.)

(c) There are also private-interest cases where the victorious party has not received costs from the unsuccessful litigant because an important legal point or test case had been put before the Courts by the unsuccessful party: *Gombu v. Ontario (Assistant Information and Privacy Commissioner)*, [2002] O.J. No. 2570 (Div. Ct.); *Sutcliffe v. Ontario (Minister of the Environment)*, [2004] O.J. No. 4494 (C.A.); *Dickason v. Governors of the University of Alberta* (1992), 95 D.L.R. (4th) 439 (S.C.C).

(d) There are cases where a government or public authority that was the successful party (or intervenor) in public interest litigation has been ordered to pay costs to the unsuccessful party notwithstanding that the victorious public authority achieved its victory in a way that was above reproach: *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1989] O.J. No. 205 (Dist. Ct.), aff'd. (1992), 10 O.R. (3d) 321 (C.A.), aff'd. [1995] 1 S.C.R. 315; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.); *Schachter v. Canada*, [1992] 2 S.C.R. 679. The *Rules of Civil Procedure* also recognize that costs may be awarded against a successful party in a proper case: rule 57.01(2).

(e) There are cases that stand for the proposition that intervenors are outside the regular costs regime and that the normal rule for intervenors is that they neither receive nor pay costs: *Harper v. Harper*, [1979] 98 D.L.R. (3d) 600 (S.C.C.); *Young v. Young*, [1993] 4 S.C.R.

3; *Toronto Police Association v. Toronto (Metropolitan) Police Services Board*, [2000] O.J. No. 2236 (Div. Ct.) *M. v. H.* (1996), 137 D.L.R. (4th) 569 (Ont. Gen. Div.); *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832* (1980), 70 Man. R. (2d) 59 (Q.B.); *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2001] O.J. No. 1110 (S.C.J.) (Parenthetically, it may also be noted that successful intervenors frequently do not ask for costs.)

(f) Notwithstanding the above so-called normal rule for intervenors in public interest litigation, there are cases where intervenors in public interest cases have been ordered to pay costs: *Lavigne v. O.P.S.E.U.* (1986), 55 O.R. (2d) 449 and (1987), 60 O.R. (2d) 486 (Ont. H.C.), reversed 67 O.R. (2d) 536 (C.A.), aff'd. [1991] 2 S.C.R. 211 - but see discussion below; *M. v. H.*; *supra*; *Daly v. Ontario (Attorney General)*, [1999] O.J. No. 3405 (C.A.).

(g) Notwithstanding the above so-called normal rule about intervenors and costs in public interest litigation, there are cases where a successful intervenor has received costs: *Hines v. Nova Scotia (Registrar of Motor Vehicles*) (1990), 105 N.S.R. (2d) 240 (T.D.); *Hi-Fi Novelty Co. v. Nova Scotia (A.G.)* (1993), 121 N.S.R. (2d) 63 (T.D.).

**75** From this disparate group of cases, several deserve particular attention because these cases were relied on by the various parties in the oral and written argument of the case at bar. One of these cases is *Lavigne v. O.P.S.E.U.* (1986), 55 O.R. (2d) 449 and (1987), 60 O.R. (2d) 486 (Ont. H.C.), reversed on other rounds, 67 O.R. (2d) 536 (C.A.), aff'd. [1991] 2 S.C.R. 211. This case concerned a collective agreement between the Respondent Council of Regents, a government actor, and the Respondent Union O.P.S.E.U.

**76** In the judgment at first instance of the *Lavigne* case, White, J. ruled that the applicant's, Mr. Lavigne's, freedom of association had been abridged by the compulsory dues check-off provision of the collective agreement. In the litigation, the Ontario Labour Congress, the Ontario Federation of Labour, and the National Union of Provincial Government Employees had been granted intervenor status. The unsuccessful Intervenors and the unsuccessful O.P.S.E.U. argued that the successful Applicant should be denied costs because he had received financial support from a third party organization, the National Citizens Coalition. White, J. rejected this argument and stated at p. 526:

> In my view, it is desirable that *Charter* litigation not be beyond the reach of citizens of ordinary means. The citizen of ordinary means is a term that covers, of course, the vast bulk of Canadians. There are few individuals, regardless of their walk of life, who could afford *Charter* litigation of the type experienced in this application. I accept the validity of the applicant's proposition that, of necessity, the individual must seek assistance from third party organizations at times to assist in asserting his or her constitutional rights. Otherwise, the individual unaided by a third party organization, such as N.C.C. would be a David pitted against a Goliath.

**77** Many times during argument, I heard the quote from *Lavigne* that "it is desirable that *Charter* litigation not be beyond the reach of citizens of ordinary means." There can be no quarrel with that statement: see *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra*. However, strictly speaking, the *ratio decidendi* of this part of White, J.'s judgment in *Lavigne* is that a successful applicant in a *Charter* case should not be denied costs, which are usually meant to be an indemnity, on the ground that he or she had financial backers and did not need to be indemnified. White, J. stated at p. 527: "To the extent that ... a specific interest group puts responsible *Charter* litigation within the reach of the individual Canadian, they should not, even indirectly, be deterred." I also do not quarrel with that proposition, but the case at bar does not involve a successful litigant of ordinary means being denied costs but rather involves the question of whether an unsuccessful litigant of possibly ordinary means should pay costs to successful litigants of extraordinary means.

**78** White, J.'s reasoning and his policy comments are helpful to the Applicants in the immediate case, but, strictly speaking, the *Lavigne* case does not assist them because unlike Mr. Lavigne, the Applicants were never successful.

Worse for the Applicants' argument, however, is the fact that White J.'s judgment was reversed by the Court of Appeal, and Mr. Lavigne was ordered to pay costs to OPSEU and to three intervenors. The Supreme Court affirmed the judgment of the Court of Appeal.

**79** *Re Sierra Club of Western Canada and Chief Forester* (1994), 117 D.L.R. (4th) 395 (B.C.S.C.), aff'd. 126 D.L.R. (4th) 437 (B.C.C.A.) is another important case referred to during argument. In this case, the well known forestry company MacMillan Bloedel Limited was the Respondent to a judicial review and statutory interpretation action brought by the Sierra Club, the well known environmental group. MacMillan Bloedel's position could be analogized to the position of Bell ExpressVu in the immediate case in the sense that it was ultimately successful and its motivation was to a very great extent driven by self-interest and commercial concerns. Giving the Applicants the benefit of any doubt, their position could be analogized to the position of the Sierra Club, which was unsuccessful in its application and motivated by public interest in the environment rather than any personal interest. However, this altruism did not spare the Sierra Club from liability for costs for unsuccessfully litigating against a private commercially-motivated litigant. After a review of many cases, Smith, J. decided that the Sierra Club should pay costs to MacMillan Bloedel.

**80** Although the conclusion of the analysis is that the Applicants do not fare well under the precedents of *Lavigne v. O.P.S.E.U.* and *Re Sierra Club of Western Canada and Chief Forester, supra*, the summary of the disparate case law reveals that there are other lines of authority that support their arguments. Most particularly, the Applicants' have ample support for the proposition that the nature of public interest litigation requires special treatment.

**81** The Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra,* endorsed the policy that costs in public interest litigation require special treatment. See also *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Gen. Div.). Moreover, giving costs special treatment in public interest litigation is consistent with the liberalization of the rules about who has standing in public law matters. See: *Thorson v. Canada (A.G.) (No. 2)*, [1975] 1 S.C.R. 138; *MacNeil v. Nova Scotia (Board of Censors)*, [1976] 2 S.C.R. 265; *Canada (A.G.) v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

**82** Professor Tollefson, in his article, "When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" (1995), 29 U.B.C. Law Review 303 states at p. 319:

> Over the last twenty years, but particularly in the last decade or so, the phenomenon of public interest litigation in Canada was expanded dramatically. This development has generally been welcomed by the legal community. At least rhetorically, there has been strong support for enhancing the opportunities of disadvantaged or marginalized interests to make their voices heard in the judicial process. And while access to justice has been broadly recognized as a highly-valued social good in itself, a variety of other public benefits are also generally perceived as being associated with broader public participation in the legal system.

**83** In my opinion, in the case at bar, the proposition that public interest litigation requires special treatment should guide the exercise of my discretion. Put differently, in my opinion, the Applicants should not be subject to the normal two-way costs regime if they can satisfy the Court that they are special interest litigants.

**84** In the next section, I will discuss whether the Applicants qualify as public interest litigants, in which case, the special treatment is that they should not be liable for costs to the Attorney General or to Bell ExpressVu. The discussion in the next section will explore the nature of public interest litigation and the characteristics of a public interest litigant. It will also explore the rationale for not differentiating between the Attorney General and Bell ExpressVu if the Applicants qualify as public interest litigants.

**85** Conversely, if the Applicants do not qualify as public interest litigants then, in my opinion, they are liable to pay costs to the Attorney General. Whether, they should also be liable to Bell ExpressVu depends on the application of the so-called normal rule for intervenors. I will discuss that additional problem in the section following the next.

*F. Defining Public Interest Litigant and the Public Interest Litigant*

**86** There are many aspects to the proposition that public interest litigation requires special treatment, but one of them is the prototype characteristics of the parties to public interest litigation. In litigation that involves the resolution of a legal question of importance to the public, typically the parties will be some combination of: (a) a government, a public authority, or a regulator; (b) a public interest litigant; (c) a private interest litigant; (d) a private interest intervenor; and (e) a public interest intervenor.

**87** Assuming for the moment that that the immediate case qualifies as public interest litigation, the government was represented by the Attorney General, who was joined as a Party Respondent. Backed by the financial resources of the state, the Attorney General is an empowered litigant.

**88** If not joined as a party, governments will also participate in public interest litigation as intervenors. It is, however, important to note that governments as intervenors are special status intervenors. When a constitutional question is involved, the Attorney General may intervene as of right under s. 109 of the *Courts of Justice Act*. In an application for judicial review, the Ontario Attorney General is entitled to notice and to be a party pursuant to s. 9(1) of the *Judicial Review Procedure Act,* R.S.O. 1990, c. J.1. In contrast, the immediate case, Bell ExpressVu has no similar right, and its intervenor status was achieved pursuant to Blair, R.S.J.'s order made under Rule 13.

**89** Intervenors are also frequent participants in public interest litigation. Intervenors frequently will qualify as public interest litigants, but, intervenors may also participate as private-interest litigants. In the immediate case, Bell ExpressVu Limited Partnership, Astral Media Inc., and Alliance Atlantis Communications Inc. (collectively, "Bell ExpressVu") were joined as Intervenors, but the nature of Bell ExpressVu's involvement is a matter of considerable debate, the discussion of which I will postpone for the following section, save to say that the case law has developed a so-called normal rule for intervenors in public interest litigation, which is that intervenors neither receive or pay costs. In the case, at bar, it was a matter of considerable debate whether Bell ExpressVu was within or outside the normal rule.

**90** Naturally enough and by definition, public interest litigation needs to have a public interest litigant. One of the major, if not the major question in the case at bar, is whether any of the Applicants qualify as public interest litigants.

**91** One trait of a public interest litigant seems obvious. A public interest litigant, at a minimum, must, in a dispute under the adversary system, take a side the resolution of which is important to the public. There is much more to being a public interest litigant because a private-interest litigant may also take a side in dispute important to the public, but one necessary trait of a public interest litigant is that he or she be a partisan in a matter of public importance. In *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra*, at para. 38 LaBel, J. noted that in determining whether public interest litigants deserved special treatment with respect to costs, a factor was the nature and significance of the issues for which they were partisans. He stated:

> [T]he more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues

**92** In the immediate case, the public interest component of this application was not treated as trite point because there was a debate about whether the Applicants or Bell ExpressVu qualified as public interest litigants. That debate will be considered further below, but, in my opinion, whether as a private interest litigant or as public interest litigant, both the Applicants and also Bell ExpressVu were partisans in a matter of significance not only to the parties but to the broader community. Even apart from its focus on an important freedom guaranteed by the *Charter*, freedom of expression, the application could have affected individual Canadians and Canadian society. It raised important public policy questions

about the media, the dissemination of information, cultural sovereignty, and the regulation of the broadcasting and entertainment industries. I regard the application as raising matters that went far beyond the private interests of any of the parties. The importance of the matter to the public, however, does not resolve the point of whether the Applicants or Bell ExpressVu were public interest litigants. Partisanship in a matter of public interest is a necessary but not a sufficient characteristic of a public interest litigant.

**93** In *Reese v. Alberta (Ministry of Forests, Lands and Wildlife), supra,* at pp. 326-7, In McDonald, J. defined the term "public interest" group. He stated:

> What is meant here 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.

**94** In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, the Court refused to recognize the plaintiff as a public interest litigant in a tort action against public authorities. However, at para. 76 of its judgment, the Court recognized two types of public interest litigants: (a) litigants who have no direct pecuniary or other material interest in the proceedings (e.g. a non-profit organization); and (b) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the costs of the proceedings. This classification scheme suggests that two aspects of a public interest litigant are that: (a) he or she is a partisan in a matter of public importance; and (b) he or she has little to gain financially from participating in the litigation. In determining whether a litigant is a public interest litigant, however, one of the contentious points is the extent to which a litigant must be altruistic.

**95** It seems clear from the case law and the literature that the conventional view is that a public interest litigant must, to some extent, manifest unselfish motives. This is expressed in the idea that the public interest litigant has little to gain financially from participating in the litigation. For example, in *O.P.E.I.U., Local 378 v. British Columbia Hydro & Power Authority*, [2004] B.C.J. No. 623, 2004 BCSC 422, the petitioning union challenged legislation about labour out-sourcing arrangements. The union was unsuccessful in its petition, but it argued that the proceeding was public interest litigation and that it should not be required to pay costs. Neilson, J., however, ordered the union to pay costs. He concluded that the petition was brought primarily because of the effect of out-sourcing on the employment and security interests of the union's membership and the public purposes of the litigation were secondary. Conversely, in *Pauli v. ACE INA Insurance* (2004), 242 D.L.R. (4th) 420 (Alta. C.A.), the plaintiffs, none of whom individually would gain more than $1,000 if successful, challenged whether automobile insurers could charge a deductible in certain circumstances. Reversing the trial judge, the Manitoba Court of Appeal held that there should be a no costs order because the chilling effect of ordering costs would discourage litigants whose stake is relatively small from pursuing a potentially meritorious representative action.

**96** Although this element of at least diminished private or selfish interests will work as a criterion in many cases, it seems to me that this element does not always identify a public interest litigant. For example, although the monetary amounts may be small, a litigant claiming social assistance benefits could be said to have everything to gain financially, but most everybody would agree that litigation involving social assistance benefits could qualify as public interest litigation. Another example, taken from *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra,* is a claimant advancing an aboriginal rights claim, which may have considerable financial consequences to the claimant. Self-interest did not bar the Indian bands from obtaining an interim costs award. The majority of the Court characterized the bands' as parties to public interest litigation because "the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues" (para. 38).

**97** In *Canadian Newspapers Co. Ltd. v. Attorney General of Canada* (1986), 55 O.R. (2d) 737, the Applicants successfully challenged the constitutionality validity of a provision of the *Criminal Code.* The Attorney General argued

that the successful litigant should be denied costs when it was not litigating purely in the public interest, that is, when it was not litigating as a public interest group, but because of its self-interest in the outcome. The court rejected the argument.

**98** These examples suggest that altruism and having little to gain financially work better as indicia than as criteria for qualification as a public interest litigant. Put somewhat differently, altruism may be a sufficient but it is not a necessary criterion for qualification as a public interest litigant. Perhaps, 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.

**99** At this point in its legal development, there is a certain *je-ne-sais-quoi* quality to the nature of a public interest litigant, but having read the literature and having thought about it, it seems to me that sometimes a relevant but not determinative feature is that the public interest litigant is either the "other", a marginalized, powerless, or underprivileged member of society or the public interest litigant speaks for the disadvantaged in society, even if he or she has his or her own selfish reasons for litigating.

**100** A related contentious point about the traits of a public interest litigant, and one that is relevant to the rationale for a special rule for public interest litigants, is the relevance of their financial situation and their tolerance for financial obligations and financial risk. Once again, this factor may be a relevant but not determinative measure of whether a litigant qualifies as a public interest litigant. A few public interest litigants may be affluent and be prepared to use their wealth to be a litigant in public interest litigation. A few public interest litigants may be subsidized by government programs or by lawyers willing to provide their services *pro bono*. It seems to me that the point is not so much whether the public interest litigant is affluent or impecunious but whether having regard to the benefit of ensuring their participation, they ought to be immunized from an adverse costs consequence. That said, the financial and other circumstances of the public interest litigant should be disclosed to the Court in order for it to determine whether the public interest litigant ought to be given special treatment.

**101** I have not found any case that defines authoritatively who is a public interest litigant, but, in the immediate case, it is my assessment that Mr. Couchman and Mr. Perk qualify as public interest litigants.

**102** In my opinion, Incredible Electronics does not qualify as a public interest litigant. It had much to gain by succeeding in the litigation, and it does not fit the profile of a genuine public interest litigant. The fact that the action involved an issue of public interest does not alter that Incredible Electronics was litigating in the main for its own substantial commercial purposes.

**103** In his cross-examination, Mr. Fuss admitted that his company has a commercial interest (Transcript p. 26) and he stated (Q. 203) that Dawn Braxton had "a significant commercial interest in the outcome of the case", from which I infer Incredible Electronics had an equal or greater significant commercial interest. I also draw the inference that this application was motivated by commercial self-interest from the questions that Mr. Fuss refused to answer on his cross-examination about the financial position and performance of Incredible Electronics and any associated entities. In other words, I draw an adverse inference from Incredible Electronics' refusal to answer questions that would have assisted the Court in determining whether having regard to its financial circumstances it ought to benefit from a one-way costs award. I note, however, that the fact that there was evidence that Incredible Electronics was engaged in black market activities was not a significant factor in my decision that it was a private interest litigant.

**104** Apart from their nominal role as an Applicant, I do not have enough information to classify most of the "Show Cause Applicants." The difficulty in classification is the prime reason for my specialized treatment of the Show Cause Applicants in the costs order set out in the introduction of these Reasons for Decision. This is a developing area of the law, and if given the opportunity to do so, the Show Cause Applicants may be able to show that they ought to be classified as a public interest litigant.

**105** When I first drafted these Reasons, I considered whether Abner Martinez carrying on business as TV

International and Maria Restrepo carrying on business as Carmenza Gift & Video Centre should be taken out of the "Show Cause Applicants" and treated in the same fashion as Incredible Electronics. Like Mr. Martinez, Ms. Restrepo had delivered an affidavit, but unlike him, she was not cross-examined. Mr. Martinez was cross-examined, but the cross-examination did not explore the extent of his private interest, as opposed to his public interest in participating in the application. I have now decided that given the amounts in issue, Mr. Martinez and Ms. Restrepo should be given a fresh opportunity to show that they are public interest litigants. Therefore, I included them in the Show Cause Applicants.

**106** This brings the discussion to the matter of why I have concluded that those who qualify as public interest litigants should not be liable to pay costs to both the Attorney General and also Bell ExpressVu. The entry point to the discussion here is an appreciation of the effect of a one-way costs award on the parties who are not public interest litigants. The effect of the order is that if the other parties are successful then, nevertheless, for the good of the public, they are denied the costs that usually are the spoil of the victor. There is some sense to this outcome when the victorious litigant is a government, a public authority, or a regulator. They are already within the public sector and can be expected to act for the public good. However, it is not self-evident why a victorious private interest litigant from the private sector should be compelled to subsidize its opponent.

**107** The concern that private interest litigants should not have to subsidize public interest litigation was expressed by Smith, J. in *Re Sierra Club of Western Canada and Chief Forester, supra,* at p. 408, where he explained why the successful MacMillan Bloedel should recover costs from the Sierra Club, which had unsuccessfully challenged the government's decision to grant extensive timber rights to MacMillan Bloedel. Smith, J. stated:

> On the other hand, MacMillan Bloedel is a private citizen, not a public agency. It is entitled to go about its business within the law. It based its plans on the interpretation of the legislation accepted and applied for many years by the ministry. A decision in favour of the petitioner would have had dramatic financial consequences for MacMillan Bloedel and for many of its employees and the communities in which they live. MacMillan Bloedel had no practical option but to defend against the petitioner's application. It was not drawn into the fray by any fault of its own, nor by any desire to act in the public interest to obtain clarification of the law.

**108** Professor Tollefson, in his article, "When the Public Interest Loses: The Liability of Public Interest Litigants for Adverse Costs Awards" criticized this line of reasoning in *Re Sierra Club of Western Canada and Chief Forester*. Professor Tollefson, challenged whether MacMillan Bloedel should be regarded as a private interest litigant. Professor Tollefson stated at pp. 315-316 of his article:

> While it is difficult to think of MacMillan Bloedel as a "public agency," it is equally difficult to think of it merely as a "private citizen." The reality is that it is neither. Given its substantial private financial resources (especially relative to the petitioner) and the substantial nature of its stake in the public resource at the centre of the case, to award costs to MacMillan Bloedel on the basis of its supposed status as a private citizen is to substitute a conclusion for any analysis. ...
>
> It is also critical to bear in mind the unique nature of the issues characteristically presented in cases of this kind. These cases usually involve challenges to the way government has allocated rights in public resources to private interests for the purposes of profit, whether that "resource" is a right to pollute the air, to harvest Crown timber or to dam a river. There is a strong public interest in ensuring that these arrangements are subjected to regular and careful public supervision, including judicial scrutiny. For a corporation like MacMillan Bloedel to participate as a respondent - voluntarily or otherwise - in litigation, as in *Sierra Club,* is a relatively small price to pay for holding rights to and profiting from a valuable public resource.

**109** I am persuaded by this argument, and I think it applies to the circumstances of Bell ExpressVu in the immediate case. Put simply, having regard to its monopoly position, it is appropriate to treat Bell ExpressVu as a public authority to which the one-way costs award rule should apply.

**110** I also note the practical point that in the case at bar from the perspective of the public interest litigant, not having to pay costs to the Attorney General but having to pay costs to Bell ExpressVu would be similar to avoiding a car only to be hit by a train, and the policy imperatives that justified special treatment for public interest litigants would be negated if Bell ExpressVu received costs from any genuine public interest litigants.

*G. The So-called Normal Rule for Intervenors*

**111** I turn finally to the matter of why Incredible Electronics and any of the Show Cause Applicants who do not qualify as public interest litigants should have to pay costs to Bell ExpressVu.

**112** Incredible Electronics argues that even if it does not qualify as a public interest litigant, the so-called normal rule for intervenors should be applied to exclude Bell ExpressVu from receiving costs.

**113** Counsel for Incredible Electronics, for Mr. Wagman, and for Ms. Restrepo and Mr. Panart all placed reliance on the following quote from Ferg, J. in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832, supra.*

> While intervenors are generally welcomed by the courts in these often very difficult, protracted and complicated constitutional matters, which can and often do involve the public interest, I am of the view that while they should be free to intervene they should neither claim costs, nor be exposed to costs for their intervention in litigation commenced by private parties. A private party should be permitted to have a constitutional determination without being exposed to very substantial costs of another strange, albeit, interested party which chooses voluntarily to stick its nose into the fray.

**114** I do not think that this quote is helpful in the circumstances of the immediate case. Bell ExpressVu does not fit the description of a strange, albeit, interested party that voluntarily decided to stick its nose into the fray. As noted above, the application now before the Court was part of a long history involving Bell ExpressVu, and even if that were not true, Bell ExpressVu was not an intermeddler in somebody else's fray. Although the legal dispute was about freedom of expression, the fray was about whether Bell ExpressVu was to have the Applicants and others as competitors in the satellite broadcasting industry. Moreover, Bell ExpressVu was added with the rights of a party and within moments of the start of the application, it assumed the first chair for the responding side of the application. It was an intervenor in name only.

**115** Counsel for Incredible Electronics, Mr. Wagman, Ms. Restrepo and Mr. Panart intimated that Bell ExpressVu's motivation to protect its monopoly or oligopoly should automatically disentitle it to receive costs. I disagree with this premise. Subject to my conclusion above about public interest litigants, Bell ExpressVu is as entitled as anybody else to use legal proceedings to protect its property and enterprise interests and to ask for costs, particularly if it is successful.

**116** Also with respect, I have little doubt that had the *Charter* issue been argued on the merits and had the Applicants been successful, they would be arguing that the so-called normal rule applicable to intervenors should not be applied and Bell ExpressVu should be liable for costs. I also think that that would have been a quite powerful argument in all the circumstances, especially for the public interest litigants under the one-way rule. Thus, I do not find the cases about more typical intervenors determinative of the case at bar.

**117** In my opinion, subject once again to my conclusion about any public interest litigants, it is appropriate to exercise the Court's discretion to award costs to Bell ExpressVu, even though it is named in the style or cause as an intervenor.

*Conclusion*

**118** Before the release of these Reasons for Decision, the next phases of this application were to be a hearing to determine the scale of costs and then a determination of the quantum of those costs. These Reasons for Decision interpose an additional step of determining the liability of any Show Cause Applicants who seek to be classified as public interest litigants.

**119** My suggestion to the parties is that after the Attorney General and Bell ExpressVu have served these Reasons for Decision on the public interest litigants and after the passage of 20 days, a case conference be arranged to schedule the remaining and any other phases of these proceedings. If this is not satisfactory, an earlier case conference may be requested by any of the parties.

P.M. PERELL J.

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