JCPC 2020/0016IN THE PRIVY COUNCIL
FROM THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

BETWEEN

RESPONSIBLE DEVELOPMENT FOR ABACO (RDA) LTD.
Appellant

AND

(1) THE RT. HON. PERRY CHRISTIE Prime Minister, Minister of Finance, and Minister Responsible for Crown Lands
(2) THE HON. PHILIP E. BRAVE DAVIS Minister of Works and Urban Development, and Minister of Conservation
(3) THE HON. GLENYS HANNA-MARTIN Minister of Transport and Aviation
(4) THE HON. KENRED DORSETT Minister of the Environment and Housing
(5) THE TOWN PLANNING COMMITTEE Ministry of Works and Urban Development
(6) SOUTH ABACO DISTRICT COUNCIL
(7) MR CHARLES ZONICLE (Acting) Director of Physical Planning
(8) MR. RICHARD HARDY (Acting) Director of Department of Lands and Surveys
(9) MR MARQUES WILLIAMS Port Administrator for Abaco
(10) ABACO CLUB INVESTMENTS LLC
(11) THE ABACO SPORTING CLUB LIMITED
(12) WINDING BAY DEVELOPMENT LTD.
Respondents

Intervention Submission

Introduction

1. This appeal concerns a point of general public importance, namely the correct approach to apply in respect of applications for security for costs in environmental and other public interest judicial review challenges. The subject matter of this particular appeal concerns a proposed development of

an area of significant natural beauty in The Bahamas. Economic and commercial pressure from development companies, tourism revenue, and residential and commercial property demands are just some of the factors placing significant pressure on open space and areas of natural beauty in the Caribbean. Climate change, increased hurricane activity, and rising sea levels, further threaten natural areas and make it critical that people in the Caribbean have access to the courts to enforce rights of consultation and other substantive interests related to protecting such areas.

2. The Open Society Justice Initiative ("OSJI") and the Environmental Law Alliance Worldwide U.S. ("ELAW")[1] respectfully submit this written submission to offer broader insight into the right to access justice and the need to remove financial barriers to public interest litigants especially when they, like the appellants before the Board, are raising concerns about government decision making and constitutional issues.

Courts in the Caribbean and Commonwealth Countries are Reducing Financial Barriers to Public Interest Litigation

3. There is, in our submission, a growing trend towards reducing financial barriers for public interest litigants. Several decisions of the courts in the Caribbean and Commonwealth jurisdictions have acknowledged that requiring security for costs or requiring bonds for preliminary injunctions impose significant obstacles to judicial access. Refusals to award costs against public interest litigants who have lost, even in jurisdictions in which the loser traditionally pays, further signal an effort to reduce economic burdens for these litigants. In doing so, courts have noted the importance of avoiding chilling effects on public interest litigation and preserving access to justice and to the courts. At the very least, we would submit that these are highly material and relevant factors which the courts should take into account when faced with an application for security for costs in public

[1] For more information about OSJI and ELAW, see Appendix I.

interest litigation. In support of these propositions the following are some of the cases that we would bring to the attention of the Board.

4. The Canadian Court of Appeal for Ontario in *Yaiguaje v. Chevron Corporation*[2] set aside a lower court's order for security for costs after considering the justness of such an order when Ecuadorian community members sought recognition and enforcement of an Ecuadorian court judgement holding an oil company accountable for environmental harm from petroleum development in the Amazon. The Court outlined the standard for deciding motions for security for costs, stating that judges are obliged to first consider the specific provisions of the rules governing such motions and then effectively to take a step back and consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront.[3]

5. The Court cautioned: "Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of [the rules] have been met."[4] Recognizing that the Ecuadorian community members were bringing public interest litigation that does not financially benefit them directly, the novel nature of the claim, and the oil company's considerable revenues, the Court of Appeal set aside the security order.[5]

6. In *Merribee Pastoral v. ANZ Banking Group*[6] which is a case where insolvent plaintiffs raised constitutional questions, the Australian High Court decided against ordering security for costs. In this case, insolvent corporations who allegedly owed large sums to the defendant Bank challenged the constitutional validity of cross-vesting legislation. The Court considered the various factors relevant to decide whether to order costs, and stated that, although the impecuniosity of a party is relevant, it

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[2] [2017] ONCA 827.
[3] *Id.* at para. 22.
[4] *Id.* at para. 23.
[5] *Id.* at paras. 26-27.
[6] [1998] HCA 41

does not "entitle" its opponent to an order for costs; and that additional factors for consideration include whether a moving party has delayed its application for such an order and whether the proceeding raises "matters of general public importance quite apart from the interests of the parties."[7] The Court stated that:

> Although I regard the case as finely balanced, I have ultimately concluded that security for costs should not be ordered. I take into account the admitted impecuniosity of the plaintiffs and the long course of the litigation in which the parties have been embroiled. I do not feel able to draw any inferences, in the evidence before me, that external funding of the litigation exists which would be likely to continue were security for costs to be ordered. The consideration critical to my decision is the obvious importance to the plaintiffs, and also to the public, of an early resolution of the constitutional questions left without effective answer by the decision of the Court in [a previous decision]. Those questions are bound to arise soon…
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> I would not be inclined to put in the way of the resolution of this important constitutional question which the plaintiffs are equipped and wish to argue against the Bank, an impediment requiring them to provide security for the costs of the Bank. Given that they admit to insolvency, such an order might effectively bar their access to this Court and to its resolution of the application of the Constitution which they invoke. As it seems to me, it is desirable that the challenge which they bring should be resolved quickly so that the many proceedings under way in courts throughout this country are relieved of the uncertainty which has been produced by the present state of authority, or lack thereof.[8]

7. Accordingly, the Court dismissed the Bank's application for security for costs and required the Bank to pay the plaintiffs' costs of the application.[9]

8. In *Entresol Louis Cyrano & Ors v. Saltlake Resorts Ltd.*, the Supreme Court of Mauritius granted an interlocutory injunction to four fishermen who were exercising their statutory right to appeal the government's grant of an environmental impact assessment ("EIA") licence to Saltlake Resorts.[10]

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[7] *Id.* at paras. 26(2), 26(4)(a), 26(4)(c) (internal citations omitted).

[8] *Id.* at paras. 31-2 (internal citations omitted).

[9] *Id.* at para. 34.

[10] *Entresol Louis Cyrano & ORS v. Saltlake Resorts Ltd.,* 2004 SCJ 305, Supreme Court of Mauritius (15 November 2004).

The Court stated that the injunction, which barred developers from continuing project works, was "just and convenient" since it would preserve the status quo and avoid an outcome in which "the right of appeal is illusory and rendered nugatory."[11] The Court then declined to "require the applicants to 'fortify' their undertaking in damages to the respondent company."[12] The Court agreed with the plaintiffs' counsel that "applicants who are of limited means should not be denied the remedy of an injunction on the ground that an undertaking given by them in damages may prove of no or little value."[13] In refusing to 'fortify' the undertaking as to the damages the court relied on the English Court of Appeal in *Allen v Jambo Holdings* [1980] 1 WLR 1252 which had decided that the fact that a cross-undertaking is of no value is merely a factor to take into account in assessing "the course to be taken… which would involve the least risk of ultimate injustice." Whilst *Allen v. Jambo* is not authority for any wider proposition on public interest litigation, the fact that a case is of significant public importance and that such a claim would be stifled by an order for fortification would clearly be an important factor to consider in deciding where there is "least risk of ultimate injustice."

9. Refusals by the courts to award costs at the end of the case, even in loser-pays jurisdictions, further supports the trend (or at the very least the willingness in appropriate circumstances) of reducing economic burdens for public interest litigants. Several key decisions advancing this principle arise from Commonwealth countries. We would submit that the policy reasons underpinning the refusal of the courts to make an order for the payment of costs against a litigant in public interest litigation, should also underpin (or at least be relevant) to the decision of the courts when considering whether to make an order for security for costs.

10. For example, in England, the English Court of Appeal refused permission to appeal the Administrative Court's refusal to order costs against the appellant-plaintiff Greenpeace despite finding for the respondent-defendant

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[11] *Ibid. penultimate paragraph.*
[12] *Ibid.*
[13] *Ibid.* (citing *Allen v. Jambo Holdings Ltd.* [1980 1 WLR] 1252).

Secretary of State for the Environment, Food and Rural Affairs on the substantive issues.[14] In this case, Greenpeace sued the Secretary of State for its decision to ban bass pair trawling within the 12 mile zone and the introduction of a licensing system for UK vessels within the 12 to 200 mile zone in an effort to reduce cetacean bycatch.[15] Greenpeace challenged the order claiming in part that it was ultra vires. The Administrative Court determined the Secretary of State acted within its authority.[16] The Administrative Court refused to make an order for costs against Greenpeace.[17] The Court of Appeal affirmed the lower court's finding that the Secretary of State acted within its authority and then turned to the cross appeal challenging the decision not to order costs. The Court quoted the learned judge of the lower court who explained that although it is unusual for there to be no order for costs, "it is important that there should be free access to this court when genuine questions arise as to the lawfulness of government actions."[18] He then determined that "justice will be done if I made no order for costs in this case."[19] The Court of Appeal then refused permission to appeal the lower court's decision not to order costs against Greenpeace.[20]

11. And in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, the Supreme Court of Kenya departed from the general rule of judicial practice in the superior courts that costs follow the event and instead ordered the parties to bear their own costs.[21] The Court reached its decision after reviewing comparative law treatises, including Halsbury's Laws of England, 4th ed Re-Issue (2010), and other judicial decisions. The Court broadly concluded that "matters in the domain of public-interest litigation

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[14] *Greenpeace Ltd. v. Secretary of State for the Environment, Food and Rural Affairs*, [2005] EWCA Civ 1656 at paras. 40-42.
[15] *Id.* at Appendix para. 26.
[16] *Id.* at para. 12.
[17] *Id.* at para. 38.
[18] *Id.*
[19] *Ibid.*
[20] *Id.* at paras. 40-42. The Court of Appeal did order the appellant to pay the respondent's cost for the appeal of the substantive issues. *Id.* at para. 42.
[21] *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others* [2014] eKLR, Petition No. 4 of 2012 (4 March 2014), paras. 7, 28(b).

tend to be exempted from award of costs."[22] Additionally, the Court stated that, despite the general principle that costs follow the event, a court may depart from the general rule to "accommodate[e] the *special circumstances of the case,* while being guided by *ends of justice.* The *claims of the public interest* will be a relevant factor, in the exercise of such discretion, as will also be the *motivations and conduct of the parties*, prior-to, during, and subsequent-to the actual process of litigation."[23]

12. In another Kenyan case, involving Constitutional interpretation on the subject of election scheduling, among other issues, the High Court of Kenya determined that despite the general rule in private litigation that costs follow the event, different rules apply in cases of enforcement of fundamental rights and freedoms and the Constitution.[24] The Court highlighted the Constitutional right of free and unfettered access to the court for the enforcement of their fundamental rights and freedoms, noting that "the imposition of costs would constitute a deterrent and would have a chilling effect on the enforcement of… [r]ights."[25] Additionally, in public interest litigation,

> a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost.[26]

The Court continued, "Our approach to the issue of costs in cases concerning the enforcement of fundamental rights and freedoms and for the enforcement of the Constitution is that the court has discretion in awarding costs. Like all forms of discretion, it must be exercised … in light of the particular facts of the case and giving due regard to the values set out in …

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[22] *Id.* at para. 15.
[23] *Id.* at para. 18.
[24] *Harun Mwau and Others v. Attorney-General and Others,* Nairobi High Court Petition No. 65 of 2011, [2012] eKLR at para. 177 (internal citations omitted).
[25] *Id.* at para. 179.
[26] *Id.* at para. 180.

the Constitution[.]"[27] In this case, because neither party lost and "all Kenyans won" because the case brought clarity to a constitutional question, all parties were ordered to bear their own costs.[28]

13. The High Court of Trinidad and Tobago in its case of *Sooknanan*[29] held that "any challenge involving the environment to the extent and nature of this claim must be clothed with public interest."[30] In *Sooknanan*, the applicant was a non-profit organisation established for the purpose of promoting sustainable development, and ensuring proper environmental management.[31] The applicant sought review of the Environmental Management Authority's ("EMA") decision to grant a Certificate of Environmental Clearance ("CEC") to a petroleum company without an EIA. The applicant brought evidence that the seismic surveys authorised by the CEC were likely to have negative impacts on marine life and the livelihoods of fishermen.[32] Respondents acknowledged that the seismic surveys could cause adverse impacts but argued that they would be mitigated and that there was no need for an EIA based on the location and nature of the activity.[33] The law in Trinidad and Tobago establishing the EMA allows the EMA to decide whether an EIA is necessary.[34] The Court ultimately agreed with the EMA that it could issue the CEC without an EIA.[35] Yet while the applicants did not succeed in their claims, they were protected by the Judicial Review Act section 5(6)[36] with regard to costs.

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[27] *Id.* at para. 182.

[28] *Id.* at para. 183.

[29] *Sooknanan and Fishermen and Friends of the Sea v. Environmental Management Authority and Minister of Energy*, The High Court of Trinidad and Tobago, Claim No. CV2014-00813 (hereinafter "*Sooknanan*")

[30] *Id.* at para. 74.

[31] *Id*. at paras. 5, 11(b).

[32] *Id.* at paras. 11(e)-(g).

[33] *Id.* at paras. 16(e), 42.

[34] *Id.* at para. 27.

[35] *Id.* at para. 42.

[36] "Where a person or group of persons aggrieved or injured by reason of any ground referred to in paragraphs (a) to (o) of subsection (3), is unable to file an application for judicial review under this Act on account of poverty, disability, or socially or economically disadvantaged position, any other person or group of persons acting bona fide can move the Court under this section for relief under this Act." The Judicial Review Act, 2000, of Trinidad and Tobago, Section 5(6). See also "Where an application is filed under section 5(6), the Court may not make an award of costs against an unsuccessful

Noting that an Interested Party joined the respondents, that applicants overcame an "otiose" challenge to their requested relief, and that parties engaged in days' worth of hearings and submissions, the Court concluded that the application was not frivolous or vexatious.[37] Accordingly, despite dismissing the applicant's claim, the Court made no order as to costs.[38]

14. The Court of Appeal of Lesotho has stated that courts may depart from the ordinary rules of cost awards in cases addressing constitutional issues. In *Attorney-General of Lesotho v. Mopa*, the respondent-defendant requested postponement of the case against him in the Maseru Local Court so he could engage a legal practitioner and was denied on the grounds that section 20 of Proclamation 62 of 1938 allowed litigants in civil cases no right to legal representation. The respondent sought a declaratory order from the High Court that this was inconsistent with the Constitution.[39] The High Court upheld the respondent's claim that the prohibition on legal representation in civil proceedings was invalid.[40] The appellant-plaintiff then contended before the Court of Appeal that the Constitution entrenched no right to legal representation.[41] The Court concluded that the Constitution provides unequivocally for a right to a fair hearing in all civil proceedings, that section 20 of Proclamation 62 of 1938 infringes on that right, and that the infringement was not justified.[42] The High Court declined to make any order as to costs, because a constitutional issue was at stake. The Court of Appeals, in deciding on the matter of costs, stated:

> In ordinary litigation, the essential principle is that the award of costs is in the discretion of the court, and that a successful litigant should generally be awarded his or her costs. In constitutional litigation an additional principle applies. This is that litigants should not be deterred by the threat of adverse costs orders from approaching a court to litigate an alleged violation of the Constitution. If the issues raised by

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applicant, except where the application is held to be frivolous or vexatious." *Id.* at Section 7(8).

[37] *Id.* at 73.

[38] *Id.* at 75-76.

[39] *Attorney-General of Lesotho v. Mopa* [2002] LSHC 3.

[40] *Ibid.*

[41] *Ibid.*

[42] *Ibid.*

> such a litigant are advanced in good faith and not vexatiously, and are important and controversial … the court is concerned not to penalise the applicant.[43]

15. Likewise, courts in Australia have decided against awarding costs in cases of public interest litigation. The High Court of Australia adopted the rule that where special circumstances arise, such as when a case properly characterised as public interest litigation is before the court, the court may depart from ordinary cost allocation rules.[44] The High Court reached this important conclusion in a case where it was called on to review a Land and Environment Court of New South Wales' decision declining to award costs against a public interest plaintiff. In *Oshlack*, an environmental activist challenged the development consent granted for a residential housing development out of concern that the development would impact the endangered koala.[45] The petitioner was unsuccessful in overturning the development consent, but the lower court declined to award costs to the planning council as the prevailing party. The lower court explained:

> The basis of the challenge was arguable, raising serious and significant issues resulting in important interpretation of new provisions relating to the protection of endangered fauna. The application concerned a publicly notorious site amidst continuing controversy. Mr. Oshlack had nothing to gain from the litigation other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna. Important issues relevant to the ambit and future administration of the subject development consent were determined, including the developer's acceptance of the need for an EIS for stage 2. These issues have implications for the Council, the developer and the public.[46]

16. The lower court also acknowledged that efforts in Australian law to encourage public enforcement of environmental law via litigation by

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[43] *Ibid.* The Court of Appeal acknowledged it was appropriate for the lower court to decline to make a costs order and did not disturb that decision. However, with regard to the costs in the Appeal, the Court determined that the additional rule did not apply, because the appellant was the government, and was unlikely to be deterred from litigation from a costs order, whereas the respondent was a non-state actor vindicating his constitutional rights. Accordingly, the appeal was dismissed, with costs. *Ibid.*

[44] *Oshlack v. Richmond River Council* [1998] HCA 11 (costs decision).

[45] *Oshlack v. Richmond River Council* [1994] NSWLEC 20 (lower court decision).

[46] *Ibid.*

relaxing traditional standing requirements would be undermined by adhering to the traditional costs rule. In particular, the lower court stated:

> There is little point in opening the doors to the courts if litigants cannot afford to come in… The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court.[47]

17. Finally, the court noted "overseas consideration of the influence of costs on the ability of citizens to enforce breaches of environmental law" and noted efforts in other countries (specifically within the European Union) to reduce cost barriers to good faith public interest litigation.[48]

18. Canadian courts have also demonstrated a willingness to avoid awarding costs against unsuccessful plaintiffs in cases involving environmental issues of importance to the public.

19. The Ontario Superior Court of Justice discussed some of the reasons to depart from ordinary cost rules in public interest litigation. Notably, the Court declined to impose costs despite dismissing the public interest litigant's case for lack of jurisdiction.[49] The Court noted:

> [P]ublic interest litigants are in a different position than parties involved in ordinary civil proceedings. The incentives and disincentives created by costs rules assume that the parties are primarily motivated by the pursuit of their own private and financial interests. An unrelenting application of those rules to public interest litigants will have the result of significantly limiting access to the courts by such litigants. Such a consequence would be undesirable….[50]

20. In *Sierra Club of Western Canada v. British Columbia*, two environmental organisations sought to protect old-growth forests by challenging the chief forester's decision to grant extensions of logging and road building permits

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[47] *Ibid.* (internal citations omitted). The court later reiterates: "procedural reform to the awarding of costs following the event is necessary if individuals or groups are not to be inhibited from resorting to the courts." *Ibid.*

[48] *Ibid.*

[49] *Mahar v. Rogers Cablesystems Ltd.*, [1995] O.J. No. 3035.

[50] *Ibid.*

to a private logging company. The Supreme Court of British Columbia upheld the chief forester's decision and denied the organisations' petition for judicial review.[51] The government of British Columbia and the private logging company sought to recover their costs in defending the case. The Court denied the request and directed each party to bear their own costs.[52] The Court stated that the case was one of "significant public interest," and "to penalise the Petitioners who have acted responsibly by attempting to resolve the issues according to law, through awarding costs against them" would not be proper.[53]

21. Courts in Canada have adopted additional measures protecting public interest plaintiffs: they may award an interim cost order to the plaintiff prior to final disposition in the case and without regard to the outcome, an approach endorsed by the Canadian Supreme Court in *Minister of Forests v. Okanagan Indian Band*.[54] Speaking to the traditional cost rule, which reflects the principle of indemnifying the successful party, the Court explained that the rule continues to govern the issue of costs "in cases where there are no special factors that would warrant a departure from them."[55] However, the Court adopted the view expressed in other cases that the traditional rule is "outdated" because it does not accommodate other reasons that might influence a court's discretion, such as promoting access to justice and encouraging efficient litigation.[56] With regard to public interest litigation, the Court stated:

> Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common . . . . In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure

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[51] *Sierra Club of Western Canada v. British Columbia*, [1991] 83 D.L.R. (4th) 708.
[52] *Ibid.*
[53] *Ibid.*
[54] *Minister of Forests v. Okanagan Indian Band* [2003] 3 S.C.R. 371 (hereinafter "*Okanagan Indian Band*").
[55] *Id.* at para. 22.
[56] *Id.* at paras. 23-24.

> that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.[57]

The Supreme Court of Canada then took this idea one step further and declared that in exceptional cases, a public interest plaintiff may be entitled to an interim cost award to "forestall[] the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed."[58]

22. In South Africa, the Constitutional Court addressed cost orders for public interest plaintiffs and held that in non-frivolous cases against the government to protect constitutional rights, an unsuccessful plaintiff should not be ordered to bear the government's costs.[59] In this case, a biodiversity conservation group, Biowatch Trust, sought information from government agencies about genetically-modified crops in South Africa. Officials refused to release the information, which prompted Biowatch Trust to file a court action compelling the government to release the requested information as required by access to information laws. Concerned about the release of information about their activities, the agrochemical company Monsanto intervened in the litigation.

23. Although Biowatch Trust was mostly successful in gaining release of the information, and the High Court found the government to have violated its legal duties, the High Court made no cost order against the government. Moreover, the High Court directed Biowatch Trust to pay Monsanto's costs because the Court was displeased with the imprecise scope of Biowatch Trust's information requests. Biowatch Trust appealed the High Court's costs order to the Constitutional Court, which declared that Biowatch Trust was not responsible for paying Monsanto's costs.

24. In doing so, the Constitutional Court declared that in good faith and non-frivolous cases against the government to assert constitutional rights, the

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[57] *Id.* at para. 27.
[58] *Id.* at para. 31.
[59] *Biowatch Trust v. Registrar, Genetic Resources* [2009] ZACC 14 at para. 22.

government should pay the plaintiff's costs if it loses, and each side should bear its own costs if the government wins.[60] The Court continued:

> The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.[61]

25. Courts of various countries both within and outside the Commonwealth have taken steps to reduce economic burdens on public interest litigants at various stages of litigation. Courts have done so for policy reasons to "enforce [] constitutional rights,"[62] to avoid chilling the enforcement of rights,[63] to allow courts "to resolve matters of consequence to the community as a whole,"[64] to allow "free access" to judicial review and to justice,[65] to "contribute [] to a

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[60] *Id.* at para. 22.
[61] *Id.* at para. 23.
[62] *Minister of Forests v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at para. 27.
[63] *Harun Mwau and Others v. Attorney-General and Others*, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR at para. 179; see also *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14 at para. 23.
[64] *Okanagan Indian Band* at para. 27.
[65] *Greenpeace Ltd. v. Secretary of State for the Environment, Food and Rural Affairs*, [2005] EWCA Civ 1656 at para. 38.

proper understanding of the law,"[66] among other motivations, as described above. These policy considerations we would submit are apposite when a court is faced with an application for security for costs in public interest litigation such the case before the Board on this appeal.

26. We therefore submit the foregoing information to the Board as it considers the important issues raised by this case.

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[66] *Harun Mwau* at para. 180.

Appendix I: Who we are

1. The Open Society Justice Initiative ("OSJI") is an operating public interest law centre dedicated to upholding human rights and the rule of law through litigation, advocacy, research, and technical assistance, with offices in New York, London, and Berlin. It is part of the Open Society Institute ("OSI"), a tax-exempt, non-partisan, a 501(c)(3) not-for-profit organization, headquartered in New York City, established in 1993 as a private operating and grant-making foundation that develops and implements a range of programs in civil society, education, media, public health, and human and women's rights, as well as social, legal, and economic reform. Established to foster the development of open societies around the world, OSI is at the centre of the informal network of foundations, programs and organizations active in more than 60 countries worldwide.

2. OSJI uses strategic litigation and other forms of legal advocacy to empower people, defend the rule of law, and advance human rights around the world. We promote equality, criminal justice, economic and environmental justice, access to information and a vibrant civic space. Our staff is based in Abuja, Berlin, Brussels, The Hague, London, New York, Paris, and Washington, D.C.

3. OSJI has represented scores of individuals before national, regional, and international courts, in cases that have sought not only to vindicate individual claims, but to establish and strengthen the law's protection for all. In addition, we have filed third-party interventions and amicus curiae briefs before various courts and tribunals on significant questions of law where our thematically-focused expertise may be of assistance.

4. OSJI has acted as counsel or intervenor in over sixty seven cases before the European Court of Human Rights, [1] the Inter American System on Human Rights,[2] the African regional and sub-regional human rights bodies, the UN Committee Against Torture, the UN Human Rights Council,[3] the Court of Justice of the

[1] Open Society Justice Initiative, Case database, European Court of Human Rights: https://www.justiceinitiative.org/litigation?filter_court=6
[2] Open Society Justice Initiative, Case database. Interamerican System on Human Rights, https://www.justiceinitiative.org/litigation?filter_court=9%2C8
[3] Open Society Justice Initiative, Case database, UN treaty bodies. https://www.justiceinitiative.org/litigation?filter_court=13%2C11%2C12

European Union,[4] and most recently a case before the European Committee on Social Rights.[5] OSJI has also served as counsel, technical advisor, and third-party intervener in around 45 human rights cases before domestic jurisdictions.

5. The U.S. office of the Environmental Law Alliance Worldwide ("ELAW") is a 501(c)(3) non-profit organization registered in the U.S. state of Oregon. For 30 years, ELAW has assisted grassroots efforts around the world to protect communities and the environment. Through this work, ELAW is in a unique position to monitor globally significant legal developments and to disseminate these to other regions (including through intervention). ELAW has made third-party submissions before national and regional courts and tribunals on questions of law where we possess expertise that may be of assistance on a variety of issues, including access to justice, climate change, and environmental impact assessment processes.

6. For example, in 2016, ELAW filed submissions in the Philippine Commission on Human Rights' investigation into the human rights implications of climate change and the responsibility of listed corporations in *Re Greenpeace Southeast Asia and Others*, Case No. CHR-NI-2016-001. In 2020, ELAW filed an Amicus Curiae brief jointly with Amnesty International USA, the Center for International Environmental Law, and the New York University School of Law's Global Justice Clinic along with individual experts in international environmental law addressing justiciability of challenges to national climate policies in *Juliana v. The United States*, Ninth Circuit Court of Appeal, Case No. 18-36082 (On Interlocutory Appeal from the United States District Court for the District of Oregon (No. 6:15-cv-01517-AA). ELAW also submitted an Amicus Curiae brief filed before the Oslo District Court in 2017 to share jurisprudence from courts and tribunals from other jurisdiction that were relevant to the case in *Natur og Ungdom v. Norway*, Oslo District Court case 20-051052SIV-HRET. The brief was also submitted to the Supreme Court on appeal. Late last year, ELAW submitted an Amicus Curiae brief addressing access to courts for citizens concerned about development that impacts

[4] Open Society Justice Initiative, Case database, Court of Justice of the European Union https://www.justiceinitiative.org/litigation?filter_court=3

[5] Open Society Justice Initiative, *OSEPI v. Bulgaria* https://www.justiceinitiative.org/litigation/open-society-european-policy-institute-v-bulgaria

the environment with the Supreme Court of Mexico related to el amparo en revisión 54/2021 la Primera Sala de la Suprema Corte de Justicia.

7. ELAW's focus on access to justice and the protection of communities and the environment motivates ELAW to bring to the Judicial Committee of the Privy Council decisions from courts and tribunals in other countries in which the courts have recognized that excessive cost orders create a barrier to access to justice in public interest cases.