Scottish Civil Justice Council

RESEARCH ON THE INCIDENCE OF INTERVENERS

(In PEO related cases)

Issued: 8 August 2025

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VERSION CONTROL:

Version	***Date***	*Comment*
V1.0	*08 August 2025*	*As discussed at the August 2025 SCJC meeting*

INTRODUCTION

Purpose

1. To identify the number of interveners that had sought *leave to intervene* in an environmental case where a Protective Expenses Order (PEO) had been sought.

Background

2. For the purposes of this paper the relevant terminology is:

    - *"Public interest intervener"* – means a person or organisation (that is not a party to the litigation) that makes an application seeking *leave to intervene* in proceedings by way of a written submission that would assist the court.

    - *"Statutory intervener"* – means a public body holding a statutory '*right to intervene',* such as *Environmental Standards Scotland (ESS*), that makes an application seeking *leave to intervene* in any civil proceedings under the separate generic procedure[1] used by *statutory interveners*.

    - *Statutory Office Holder* – means those statutory offices, such as each of the Law Officers for Scotland; that hold a statutory *power to intervene* in certain defined circumstances.

3. The underlying principles regarding *public interest interveners* are :
    - A *public interest intervener* should bear their own costs when preparing a written submission;
    - In Scotland someone who is a party to proceedings cannot seek *leave to intervene* in the same proceedings[2]; and
    - Those "directly affected" by the matters under consideration will have their application for *leave to intervene* rejected if not acting in the public interest.

Making an application for leave to intervene:

4. When a *public interest intervener* wants to raise an issue "of public interest" within a judicial review they would make an application under rule RCS 58.17:

> *58.17 - Public interest intervention*
> *1) This rule applies to a person who—*
> *(a) was not specified in an order made under rules 58.4(1), 58.11(2) or 58.12(2) as a person who should be served with the petition; and*
> *(b) is not directly affected by any issue raised in the petition.*

[1] Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules 2021 and Sheriff Court Rules Amendment) (Statutory Interveners) 2024 (*SSI 2024/ 353*)
[2] *Para 21, Sustainable Shetland v Scottish Ministers, [2013] CSIH 116*

> *(2) That person may apply by application for leave to intervene—*
> *(a) in the decision whether to grant permission;*
> *(b) in a petition which has been granted permission; or*
> *(c) in an appeal in connection with a petition for judicial review.*
>
> *(3) In rules 58.18 to 58.20, "court" means the Lord Ordinary or the Inner House, as the case may be*

5. A £500 limit is applied if the court was to make an expenses award in relation to that initial application for *leave to intervene*.

Lodging the written submission

6. Once the court has granted *leave to intervene* the *public interest intervener* can make their written submission *(usually of 5,000 words or less)*.

7. The safeguards that apply are: the intervention must be made in the public interest; the content of a submission must assist the court; and the time taken to prepare and lodge that submission must not unduly delay the proceedings or prejudice the parties.

8. With effect from 1 October 2024, the addition of informational rule RCS 58A.10 has reinforced the principle that an intervener would be expected to meet the costs of their own intervention:

> *RCS 58A.10 - Expenses of interveners*
>
> *(1)* ***Expenses are not to be awarded in favour of or against a relevant party, except on cause shown.***
>
> *(2) If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.*
>
> *(3) In paragraph (1), "a relevant party" means a party who has—*
> *(a) been granted leave to intervene under rule 58.19(1)(b) or;*
> *(b) been refused or granted lave after a hearing under rule 58.19(1)(c)*

The Aarhus concerns raised:

9. UNECE Decision VII8/s had included a general request for more information:

> *Paragraph 9 (c) -* ***Collect up-to-date data*** *to demonstrate that the requirements in paragraph 2 (a) (b) and (d) above have been fulfilled with respect to the outstanding points of non-compliance in England and Wales, Scotland and Northern Ireland;*

10. In paragraphs 105-106 of their 2021 Compliance Report[3] the Aarhus Convention Compliance Committee (ACCC) then expressed their concern about intervener's expenses as follows:

[3] *"Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I".* https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

> *Paragraph 105 - The Party concerned has confirmed that the costs of interveners are not included in the costs caps and that there is* ***no special provision within the costs regime for interveners****.*
>
> *Paragraph 106 - The Committee finds that the failure of the costs caps to cover any costs that may be payable to interveners does not meet the requirements of paragraph 2 (a), (b) and (d) of decision VI/8k*

11. In other words:

- Is there a risk of an applicant for a PEO having to pay an expenses award to an intervener in an environmental case? and if so
- Would the amount of that award fall within the £5,000 cost cap?

12. In practice it is highly unlikely that an expenses award would be made given the case precedent from 2012 to the effect that *"expenses would not normally be due 'to or by' an intervener"*. In that case Alcohol Focus Scotland sought *leave to intervene* in proceedings initiated by the Scotch Whisky Association regarding the minimum unit pricing of alcohol. One of the 5 reported judgements *([2012] CSOH 156)* was specific to their application for *leave to intervene*. Annex 4 provides that judgement in full and those 4 pages set out the key factors the court considers when deciding whether or not to grant leave; and first documented the courts default position that *"expenses would not normally be due to or by an intervener"*.

The research question:

13. Given that default position the questions for this research to consider were:

- What was the incidence of applications for *leave to intervene* being made in any case where cost protection had been sought?; and
- In any circumstances where the court did grant *leave to intervene* was the default position on expenses applied?

PART 1 – THE RESEARCH METHODOLOGY

The use of manual data collection:

14. In practice applications for a PEO are made by lodging a motion and the low transaction volumes mean data by motion lodged is not yet tracked automatically. Given that constraint; this paper has reused the case tables from the research published in 2024[4].

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[4] https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1

15. Those tables were compiled using "manual" data collection from online searches of media coverage, along with references made within legal publications. That reliance on public domain information does carry a risk of omission so the tables within this paper may exclude some PEO related cases. If readers are aware of any excluded cases then please email: scjc@scotcourts.gov.uk.

The latest research request made:

16. To assess the incidence of interveners in all PEO related cases the information sought for the purposes of preparing this paper was:
    - A breakdown of all applications for *'leave to intervene'* that came before the court in cases where a motion for a PEO had been considered; and
    - A breakdown for the expenses position taken by the court in any cases where *'leave to intervene'* was granted.

17. That earlier research had flagged 28 cases where a motion for a PEO had been considered. For this paper all court opinions by case table were reviewed and the updated tables *(refer annexes 2 & 3)* include any applications made for *'leave to intervene'.*

PART 2 – INTERVENTIONS IN CASES SEEKING AN ENVIRONMENTAL PEO

18. In the 11 years since this *costs protection procedure* was first introduced *(in March 2013)* there have been16 Aarhus cases where the use of an Environmental PEO was considered. Table 1 conveys the subject matter underpinning each case and evidences whether any application for *leave to intervene* was made:

Table 1 – APPLICATIONS TO INTERVENE IN CASES SEEKING AN "ENVIRONMENTAL PEO"

Vol	Case Ref:	All Opinion Ref:	Petitioner	Outcome	Subject Matter	**Application made for leave to intervene?**
Environmental PEOS – made since the cost capping regime was introduced						
1	XA52/13	[2014] CSOH 30	Sally Carroll	PEO granted	Wind farm – turbine within 1.4k	NO
2	P420/14	[2014] CSOH 116 [2015] CSOH 61	Friends of Loch Etive	PEO refused	Rainbow trout farm on Loch Etive	NO
3	P843/14	[2014] CSOH 172A [2015] CSOH 163 [2016] CSIH 33 [2016] CSIH 61	John Muir Trust	PEO refused	Wind farm - Stronelairg, south of Fort Augustus)	NO
4	P807/14	[2015] CSOH 27 [2016] CSIH 22	St Andrews Environmental	PEO granted	Housing on Greenfields site	NO
5	P1328/14	[2015] CSOH 41 [2016] CSIH 10 [2016] CSIH 31	J Mark Gibson	PEO granted	Wind farm – turbine within 4.2k	NO
6	P28/15	[2016] CSOH 103 [2017] CSIH 31	RSPB	PEO granted	Wind farm -110 turbines Inch Cape Offshore	NO
7	P29/15	[2016] CSOH 104 [2017] CSIH 31	RSPB	PEO granted	Wind farm -75 turbines Neart na Gaoithe	NO

8	P30/15	[2016] CSOH 104 [2017] CSIH 31	RSPB	PEO granted	Wind farm -75 turbines Seagreen Bravo	NO
9	P31/15	[2016] CSOH 106 [2017] CSIH 31	RSPB	PEO granted	Wind farm -75 turbines Seagreen Alpha	NO
10	P162/17	[2017] CSOH 135 [2018] CSIH 3	Simon Byrom	PEO refused	Planning Decision – in Conservation Area	NO
11	P375/17	[2018] CSOH 11	Jordanhill Community Council	PEO granted	Planning Decision – residential development	NO
12	P1032/16	[2018] CSOH 108	Matilda Gifford	PEO refused	Undercover policing - of environmental activists	NO
13	P719/18	[2019] CSOH 19	No Kingsford Stadium Ltd	PEO granted	Greenbelt Development – of 20,000 seat Football Stadium	NO
14	P414/20	[2021] CSOH 1 [2021] CSIH 68	Scottish Creel Fishermen's	PEO granted	Not proceedings with proposed inshore fisheries pilot	NO
15	P1102/20	[2021] CSOH 108	Trees for Life	PEO granted	Licencing – for lethal control of beavers	NO
16	P107/23	[2023] CSOH 39 [2024] CSIH 9	Open Sea's Trust	PEO granted	Licencing - Having regard to the National Marine Plan	NO

Notes:
1. Volume: a count of 1 = the first opinion issued in a case
2. Case reference number – is the unique identifier allocated to each case
3. Opinion reference - reflects a format of [YYYY] - court fora – opinion number
4. Petitioner – first person listed in the format of 'pursuer X v defender Y'
5. Outcome: GRANTED = PEO considered and at least 1 granted REFUSED = PEO considered and no PEO made

19. The content of the above table confirms no *'applications to intervene'* were made in any of those 16 environmental cases; and Annex 2 provides each updated case table.

PART 3 – INTERVENTIONS IN CASES SEEKING A COMMON LAW PEO

20. In the 19 years since the first application for a *Common law PEO* was made (in 2005) there had been 12 cases where a *Common law PEO* was considered. Table 2 conveys the principal subject matter of each case and evidences the applications for '*leave to intervene*' that were made:

Table 2 – APPLICATIONS TO INTERVENE IN CASES SEEKING A "COMMON LAW PEO"

Vol	Case Ref:	All Opinion Ref:	Petitioner	PEO Outcome	Subject Matter	**Application made for leave to intervene?**
		Common Law PEOS – made prior to the cost capping regime				
1	P856/05	[2005] CSOH 165	Mary McArthur	PEO refused	Contaminated blood	NO
2	P1225/09	[2010] CSOH 5 [2011] CSOH 163 [2013] CSIH 78	Marco McGinty	PEO granted	Proposed power station (Hunterston)	NO
3	XA53/10	[2011] CSOH 10 [2011] CSOH 131 [2012] CSIH 19 [2012] UKSC 44	Road Sense / William Walton	PEO granted	Aberdeen bypass	NO

4	P876/11	[2012] CSOH 32	Mary Theresa Doogan	PEO refused	Midwives – medical terminations	NO
5	P762/12	[2012] CSOH 156 [2013] CSOH 70 [2014] CSIH 38 [2014] CSIH 64 [2016] CSIH 77	Scotch Whiskey Association	PEO granted	Minimum unit pricing for alcohol	**YES** 1 APPLIC. GRANTED Alcohol Focus Scotland *(public interest intervener)*
6	XA120/14	[2015] CSOH 35	Hillhead Community Council	PEO granted	National Air Quality Strategy	NO
7	P255/13	[2013] CSOH 68 [2013] CSIH 70	Newton Mearns Residents	PEO refused	Housing on Greenfields site	NO
8	P698/12	[2013] CSOH 158 [2013] CSIH 116 [2014] CSIH 60 [2015] UKSC 4	Sustainable Shetland	PEO granted	Wind farm -103 turbines	**YES** 3 APPLIC. REJECTED
1	P1293/17	[2018 CSOH 8 [2018] CSIH 18 [2018] CSIH 62	Andy Wightman MSP	PEO granted	Objection to - EU withdrawal (Brexit)	NO
2	P680/19	[2019] CSOH 68 [2019] CSOH 70 [2019] CSIH 49	Joanna Cherry QC MP	PEO granted	Objection to – proroguing of UK Parliament	**YES** 1 APPLIC. GRANTED Lord Advocate *(statutory office holder)*
3	A76/20	[2020] CSOH 75 [2021] CSOH 16 [2021] CSIH 25	Martin James Keating	PEO refused	Indy ref 2 - without UK consent	NO
4	P395/22	[2022] CSOH 81 [2023] CSIH 9	John Halley	PEO refused	fitness to practice as part time sheriff	NO

Notes:
1. Volume: a count of 1 = the first opinion issued in a case
2. Case reference number – is the unique identifier allocated to each case
3. Opinion reference - reflects a format of [YYYY] - court fora – opinion number
4. Petitioner – first person listed in the format of 'pursuer X v defender Y'
5. Outcome: GRANTED = PEO considered and at least 1 granted REFUSED = PEO considered and no PEO made

21. The above table confirms 5 *'applications to intervene'* had been made in 3 out of those 12 common law cases. Annex 3 provides the updated case tables.

PART 4 – COMMON THREADS (WITHIN THE MEDIA COVERAGE)

22. Some recurrent threads have arisen within the press. The secretariat has fact checked each thread to assess whether there is a need for further research.

Thread 1 – a lack of information on intervener expenses introduces uncertainty and that can have a chilling effect?

23. The Court of Session publishes all of its judgements online; consistent with the expectations set under article 9 (5) of the Aarhus Convention. The policy intention in doing so is to build public awareness through the wealth of environmental information contained within those judgments; particularly the factors the courts take into account when making decisions. In the context of a potential litigant

who wanted to assess their exposure to the expenses of an intervener; the relevant information is publicly available within the application made by Alcohol Focus Scotland in 2012 *(refer annex 4).*

24. Legal practitioners and those members of the public who know where to look would have accessed the information they sought directly from that 2012 opinion. That said, the Council was aware that replicating that same information within an 'informational rule' would assist those not so familiar with where to look. Hence the Councils 2024 decision to insert RCS 58A.10 into the PEO Rules.

25. The addition of that informational rule means thread 1 does not need to be researched further.

Thread 2 - There was a case were the court awarded cost to a third party intervener?

26. This thread appears to be a misunderstanding that arises if a member of the public starts with the thought that I would like to "intervene" in proceedings and therefore I would be classed as an "intervener". Whilst that assumption may appear logical it does not fit with Scots law which separates out an "intervener" as being someone that is not a "party". As you cannot be both, the law will categorise you as either one or the other:

    - *A "party"* - is someone that has joined the proceedings and, given the "loser pays" principle, is willing to take on the financial risks applicable to a party.

    - *An "intervener"* - is someone that wishes to assist the court by making a short written submission in the public interest without becoming a formal party to the proceedings and taking on that financial risk.

27. Whilst thread 2 may suggest the need to raise "public awareness" it does not indicate a need for further research.

Thread 3 – there was a case where the court awarded costs of £350,000 to an intervener; which was reduced to £50,000 on negotiation?

28. This thread originates from case P843/14 regarding a judicial review by the John Muir Trust *(petitioner)* regarding the Scottish Ministers *(respondent)* decision not to hold a public inquiry when granting consent to Scottish & Southern Energy (SSE) *(interested party)* for a 67 turbine wind farm at Stronelairg.

29. For a potential litigant who is unable to raise funding of a six figure sum to pursue litigation then the John Muir Trust case would be indicative of a level of expenses likely to fall within the *"prohibitively expensive"* test at RCS rule 58A.1 (3).

30. That case is relevant to a discussion on what constitutes a *prohibitive expense.*

31. That case is not relevant to a discussion on the costs incurred by an "intervener" making a written submission to assist the court. In terms of the John Muir Trust case; the relevant case table in annex 3 confirms that:
    - The SSE was correctly referenced as an *'interested party'* and would have been ineligible to join that case as a *public interest intervener*; and
    - The case file confirms that no applications for '*leave to intervene'* were made in those proceedings.

32. As this thread has also conflated the terms "intervener" and "third party" it does not warrant further research.

PART 5 - THE RESEARCH OUTCOMES

<u>The incidence of interveners in environmental cases</u>

33. For the 16 environmental cases that sought cost protection:
- The incidence rate by case is 0% *(No applications made in 16 cases)*

34. Gaining an awareness that no applications for *leave to intervene* were made in those 16 cases should reassure any potential litigant that the perceived financial risk is negligible (for those who act in good faith).

<u>The incidence of interveners in common law cases</u>

35. For the 12 common law cases that sought cost protection:
- The incidence rate by case is 42% *(5 applications made in 12 cases)*
- The rejection rate for applications made is 60% *(3 applications in 5)*
- The approval rate for applications made is 40% *(2 applications in 5)*

36. As that is such a small sample size the absolute numbers are more informative:

- 0 x applications were made for *leave to intervene* in cases that had sought an Environmental PEO;

- 5 x applications were made for *leave to intervene* in cases that had sought a Common Law PEO and of those 5 applications: 3 were rejected[5] and only the following 2 were granted:

    - 1 x intervention by a *'statutory office holder'* - where a written submission was made by the Lord Advocate in a case about the proroguing of the UK Parliament during Brexit; and

[5] *1 for the Trump Organisation, 1 for the RSPB and 1 for Graham Senior- Milne*

- 1 x intervention by a *'public interest intervener'* - where a written submission was made by Alcohol Focus Scotland in a case about the minimum unit pricing of alcohol.

37. When making its decision on expenses within that single intervention made by a *'public interest intervener'* the default position on expenses was applied:

> *"I also make an order under Rule 58.8A (7) that* ***no party will be liable to another in expenses in respect of the Minute and written intervention*** *or any procedure following thereon."*
> *(Source - paragraph 14 of the opinion provided at annex 4)*

CONCLUSIONS

Research question 1 - What was the incidence of applications for leave to intervene being made in any case where cost protection had been sought?

38. The mathematical answer to the first research question is 4% *(1 application granted in 28 PEO related cases)*. That percentage reflects that during this research period (2005-2024) there had only been the 1 non-environmental case where costs protection was in place and a *public interest intervener* was granted *leave to intervene*.

Research question 2 - In any circumstances where the court did grant leave to intervene was the default position on expenses applied?

39. The answer to the second research question is yes. It was that 1 non-environmental case that established the courts default position on *intervener's expenses*. Given the nature of the case precedent *(refer annex 4)* readers can expect that there would be *"no expenses awarded to or by an intervener"* in any future cases where *leave to intervene* is granted by the court.

Conclusions regarding the Aarhus concern[6] raised on intervener's expenses

40. The content of this report contributes towards the further data sought by the UNECE under paragraph 9 (c) of decision VII8/s.

41. Given the default position established by case precedent this research conveys that potential litigants do not face a material risk of the court awarding *intervener's expenses* providing they do act in good faith. There have been no

[6] At para 105-106 of the *"Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I". https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf*

such awards made to date; and in future they may only arise if the court decides to award expenses as a sanction against those who have not acted in good faith.

42. Legal practitioners and others aware of case precedent would be in a position to assess that risk as negligible. With effect from 1 October 2024 the Council has added the "special provision" requested by the ACCC *(at para 105)* by adding RCS rule 58A.10. That new rule now conveys the courts default position to any potential litigant not so familiar with accessing information from the judgments that have been published by the court.

Secretariat to the Scottish Civil Justice Council
August 2025

BIBLIOGRAPHY

Aarhus Compliance:

The detailed concerns of the Aarhus Convention Compliance Committee *(ACCC)* are narrated at paragraphs 82-113 of the:

- *"Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I".*
  https://unece.org/sites/default/files/2024-03/ECE_MP.PP_2021_59_E.pdf

Existing Rules:

Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013
https://www.legislation.gov.uk/ssi/2013/81/contents/made

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015
https://www.legislation.gov.uk/ssi/2015/408/contents/made

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018
https://www.legislation.gov.uk/ssi/2018/348/contents/made

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024
https://www.legislation.gov.uk/ssi/2024/196/contents/made

Previous Research: *(by the SCJC)*

Research on the cost caps used in practice *(Aug 2024, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1

Research on the type of cases seeking a PEO *(Sep 2024, SCJC)*
https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930---research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1

***Relevant Court Opinions*:**

Scotch Whisky Association v Scottish Ministers [2012] CSOH 156:
https://www.bailii.org/scot/cases/ScotCS/2012/2012CSOH156.html

Sustainable Shetland v Scottish Ministers [2013] CSIH 116:
https://www.bailii.org/scot/cases/ScotCS/2013/2013CSIH116.html

Johanna Cherry MSP & others v Advocate General [2019] CSOH 70
https://www.bailii.org/scot/cases/ScotCS/2019/2019_CSOH_70.html

GLOSSARY

The relevant terms used for the purposes of this paper are:

Term	*Meaning*
Aarhus Case	Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention. *That currently covers:* • *Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and* • *Appeals under statute to the Court of Session.*
ACCC	*Acronym for* – the Aarhus Convention Compliance Committee (ACCC)
CSIH	*Acronym for* –Inner House of the Court of Session (CSIH).
CSOH	*Acronym for* – the Outer House of the Court of Session (CSOH).
Common Law PEO	An application made under the common law. These PEO applications can be applied for in any civil proceedings.
Environmental PEO	An application made under the *costs protection procedure* established by the PEO Rules. These PEO applications can be applied for in civil proceedings taken in the public interest that have an impact on the environment.
Intervener	A term in Scots Law that means – a person or organisation, that is not a party to proceedings, that makes an application seeking *leave to intervene* in those proceedings by way of a written submission that would assist the court.
On cause shown	A term in Scots Law that means – "where a valid reason has been demonstrated to the satisfaction of the court".
PEO	*Acronym for* – a Protective Expenses Order (PEO). Scotland uses an adversarial legal system, with the general principle for expenses being that "expenses follow success" *(which equates to "loser pays")*. In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO where it is in the "interests of justice" to do so.
PEO Rules	RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews). Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: https://www.legislation.gov.uk/ssi/2013/81/introduction/made
SCTS	*Acronym for* – the Scottish Courts and Tribunal Service
UKSC	*Acronym for* – the UK Supreme Court (UKSC).
UNECE	*Acronym for* – the United Nations Economic Commission for Europe (UNECE).

ANNEX 1 – KEY MILESTONE DATES

2005 – The first common law application for a PEO was made but rejected. Within that written court opinion[7] the court confirmed that it was competent for a PEO to be granted in Scotland provided the relevant tests as defined in case precedent were met. In practice that did not happen until four years later.

2010 – The first Common Law PEO was granted[8] in Scotland.

2013 – The implementation of the Aarhus Convention saw calls made to establish a simple "fixed cost capping regime" for Aarhus related environmental cases. The Scottish Government undertook a Public Consultation in 2011 which led to the initial version of the PEO Rules[9] as commenced from 25 March 2013.

2024 – In the 11 years since this *costs protection procedure* was established there have been 3 subsequent amendments made to those rules:

- *In 2015* – the procedure was amended to ensure the type of claims covered was consistent with a judgement of the UK Supreme Courts:

- *In 2018* – the procedure was amended to move away from the high costs of mandatory hearings to a more streamlined and cost effective process that supporting most decisions being made "on the papers"; and to support judicial discretion by adding the flexibility for the court to move the cost caps up or down "on cause shown"; and

- *In 2024* – the procedure was amended: to enable a request for confidentiality to be made; to allow a PEO to be carried forward on appeal irrespective of who was appealing; and to replicate the courts default position on expenses from case precedent *(to the effect that expenses are not normally due "to or by" an intervener).*

[7] *McArthur v Lord Advocate [2005] CSOH 165 (regarding: deaths from contaminated blood)*
[8] *McGinty v Scottish Minsters [2010] CSOH 5 (regarding: a proposal for a power station in Hunterston).*
[9] *Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015 (SSI 2015/408)*

ANNEX 2 – CASE TABLES (for common law PEOs)

For the period from 2005 to 2024:

1	Mary McArthur			
	Opinion – 09 DEC 2005	[2005] CSOH 165	Case Ref:	**P856/05**
	Case Name	Mary McArthur & others v Lord Advocate & Scottish Ministers		
	Court Procedure	Judicial Review		
	Type of motion	Common law PEO		
	Common law concern	Contaminated blood scandal		
	Legal basis of challenge	s1(1)(b) Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		
	Notes:	*1. This opinion did confirm that it was competent to make a PEO in Scotland*		

2	Marco McGinty			
	Opinion – 20 JAN 2010 Opinion – 04 OCT 2011 Opinion – 13 SEP 2013	[2010] CSOH 5 [2011] CSOH 163 [2013] CSIH 78	Case Ref	**P1225/09**
	Case Name	Marco McGinty v Scottish Minsters		
	Court Procedure	Judicial Review + Onwards Appeal to UKSC		
	Type of motion	Common law PEO		
	Environmental concern	Environmental impact - of a new thermal power station (at Hunterston), as part of the National Planning Framework		
	Legal basis of challenge	s3A - Town and Country Planning (Scotland) Act 1997		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED** (JAN 2010)		
	Applications to Intervene	No		
	Notes:	*1. This PEO was the first granted in Scotland (on 20 Jan 2010)*		

3	Road Sense / William Walton			
	Opinion – 22 FEB 2011	[2011] CSOH 10 [2011] CSOH 131 [2012] CSIH 19 [2012] UKSC 44	Case Ref:	**XA53/10**
	Case Name	*Originally* - Road Sense and Walton v Scottish Ministers *Changed to* – William Walton v Scottish Ministers		
	Court Procedure	Statutory Appeal + Onwards appeal to UKSC?		
	Type of motion	Common law PEO *(as this environmental case predates the cost capping regime)*		
	Common law concern	Environmental Impact – Aberdeen Bypass		
	Legal basis of challenge	Sch. 2 - Roads (Scotland) Act 1984		
	PEO cost cap (applicant)	£40,000		
	PEO cost cap (respondent)	Not stated		
	PEO outcome	**GRANTED**		
	Applications to Intervene			
	Notes:			

4	Mary Theresa Doogan			
	Opinion – 29 FEB 2012	[2012] CSOH 32	Case Ref:	**P876/11**
	Case Name	Mary Theresa Doogan & others v Lord Advocate & Scottish Ministers		
	Court Procedure	Ordinary Cause		
	Type of motion	Common law PEO		
	Common law concern	Midwives – objecting to participation in medical terminations		
	Legal basis of challenge			
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		

ANNEX 2 – CASE TABLES (for common law PEOs)…*continued*

5	Scotch Whisky Association			
	Opinion – 26 SEP 2012 Opinion – 03 MAY 2013 Opinion – 30 APR 2014 Opinion – 11 JUL 2014 Opinion – 21 OCT 2016	[2012] CSOH 156 [2013] CSOH 70 [2014] CSIH 38 [2014] CSIH 64 [2016] CSIH 77	Case Ref:	**P762/12**
	Case Name	Scotch Whisky Association - petitioner		
	Court Procedure	Judicial Review + **1 application to intervene**		
	Type of motion	Common Law		
	Common law concern	Minimum unit pricing for alcohol		
	Legal basis of challenge	Alcohol (Minimum Pricing) (Scotland) Act		
	PEO cost cap (applicant)	Nil		
	PEO cost cap (respondent)	Nil		
	PEO outcome	**GRANTED**		
	Applications to Intervene	Leave to intervene in [2012] CSOH 156: GRANTED - Alcohol Focus Scotland *(leave granted for written submission)*		
	Notes:	*1. PEO decision issued by interlocutor dated 26/09/2012* *2.* [2012] CSOH 156 *Court granted permission to AFS on 26 /09/2012 to intervene by way of written submission not exceeding 5,000 words + no party liable to another in expenses re the intervention or any procedure following thereon.*		

6	Hillhead Community Council			
	Opinion – 08 APR 2013	[2015] CSOH 35	Case Ref:	XA120/14
	Case Name	Hillhead Community Council & others v Glasgow City Council		
	Court Procedure	Statutory appeal		
	Type of motion	Common law PEO *(by agreement between the parties)*		
	Common law concern	National Air Quality Strategy		
	Legal basis of challenge	Para. 35 - Schedule 9 - Road Traffic Regulations Act 1984		
	PEO cost cap (applicant)	£1,000		
	PEO cost cap (respondent)	£15,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
		1. [2015] CSOH 35 *(para. 2) – this is an environmental case but the parties agreed a common law PEO was more appropriate to their circumstances*		

7	Newton Mearns Residents Flood Protection Group			
	Opinion – 01 MAY 2013 Opinion – 07 JUN 2013	[2013] CSOH 68 [2013] CSIH 70	Case Ref:	P255/13
	Case Name	Newton Mearns Residents Flood Protection Group		
	Court Procedure	Judicial Review		
	Type of motion	Common law PEO *(by agreement between the parties)*		
	Environmental concern	Housing development on greenfield site (54 houses)		
	Legal basis of challenge			
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		
	Notes	*1. [2013] CSOH 68 - Para 8 – "important to note the motion is not made under the recently enacted PEO rules"*		

ANNEX 2 – CASE TABLES (for common law PEOs)…*continued*

8	Sustainable Shetland			
	Opinion – 24 SEP 2013 Opinion – 03 DEC 2013 Opinion – 09 JUL 2014 Opinion – 09 FEB 2015	[2013] CSOH 158 [2013] CSIH 116 [2014] CSIH 60 [2015] UKSC 4	Case Ref:	P698/12
	Case Name	Sustainable Shetland v Scottish Ministers + Viking Energy Partnership		
	Court Procedure	Judicial Review + Reclaiming Motion + **2 applications to intervene**		
	Type of motion	Common law PEO *(PEO of 7 November 2012 predates the cost capping regime)*		
	Common law concern	Environmental Impact – 103 Wind Turbines (Viking wind Farm) including: - Habitat Management Plan - Wildlife including the impact on Whimbrel - decision not to hold a public inquiry		
	Legal basis of challenge	s36 - Electricity Act 1989 + Wild Birds Directive 2009		
	PEO cost cap (applicant)	£5,000 / £5,000 / £Nil		
	PEO cost cap (respondent)	£30,000 / £60,000 / £45,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	Leave to intervene in [2013] CSIH 116: REJECTED - Trump Organisation – as they had a private interest REJECTED - RSPB – as they had not taken the opportunity to intervene at first instance & were looking to introduce new facts at the appellate stage		
	Notes:	*1. Whilst the 4 opinions are silent on PEOs - details were confirmed from the PEOs made on 7 November 2012 / 19 June 2013 / 3 December 2013*		

9	Andy Wightman MSP and Others			
	Opinion – 08 FEB 2918 Opinion – 20 MAR 2018 Opinion – 01 MAY 2018	[2018] CSOH 8 [2018] CSIH 18 [2018] CSIH 62	Case Ref:	**P1293/17**
	Case Name	Andy Wightman MSP and Others v Secretary of State		
	Court Procedure	Reclaiming Motion + Reclaiming Motion		
	Type of motion	Common law PEO		
	Common law concern	Objecting to - EU withdrawal (Brexit)		
	Legal basis of challenge	Article 50 of the Treaty on European Union		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

10	Joanna Cherry QC MP			
	Opinion – 30 AUG 2019 Opinion – O4 SEP 2019 Opinion – 11 SEP 2019	[2019] CSOH 68 [2019] CSOH 70 [2019] CSIH 49	Case Ref:	**P680/19**
	Case Name	Joanna Cherry QC MP & Others v Advocate General		
	Court Procedure	Judicial Review + Reclaiming Motion + **2 applications to intervene**		
	Type of motion	Common law PEO		
	Common law concern	Objecting to – proroguing of UK Parliament		
	Legal basis of challenge			
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	Leave to intervene in [2019] CSOH 70 **1 GRANTED** – Lord Advocate (statutory intervener, written submission) **1 REJECTED** – Graham Senior- Milne		

ANNEX 2 – CASE TABLES (for common law PEOs)…*continued*

11	Martin James Keating			
	Opinion – 30 JUL 2020 Opinion – 05 FEB 2021 Opinion – 30 APR 2021 Judgement summary -	[2020] CSOH 75 [2021] CSOH 16 [2021] CSIH 25	Case Ref:	**A76/20**
	Case Name	Martin James Keating V Advocate General for Scotland		
	Court Procedure	Ordinary cause + ordinary cause + judicial review		
	Type of motion	Common law PEO		
	Common law concern	Independence referendum (without UK consent)		
	Legal basis of challenge	Scotland Act 1988		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		
	Notes:			

12	John Halley			
	Opinion – 09 NOV 2022 Opinion – 10 FEB 2023	[2022] CSOH 81 [2023] CSIH 9	Case Ref:	P395/22
	Case Name	John Halley v Scottish Ministers		
	Court Procedure	Judicial Review		
	Type of motion	Common law PEO		
	Common law concern	Government Funding - to defend fitness to practice as part time sheriff		
	Legal basis of challenge	s34 (1) - Judiciary and Courts (Scotland) Act 2008. s21 - Courts Reform (Scotland) Act 2014		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		

ANNEX 3 – CASE TABLES (for environmental PEOs)

For the period from 2013 to 2024:

1	Sally Carroll			
	Opinion – 12 JUL 2013 Opinion – 17 JAN 2014 Opinion – 07 OCT 2015	[2014] CSOH 30 [2014] CSOH 6 [2015] CSIH 73	Case Ref:	**XA52/13**
	Case Name	Sally Carroll v Local Review Body of Scottish Borders Council		
	Court Procedure	Statutory Appeal		
	Type of motion	Environmental PEO		
	Environmental concern	Environmental impact – of wind turbines within 1km of a residence		
	Legal basis of challenge	s239 – Town and Country Planning (Scotland) Act 1997		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

2	Friends of Loch Etive			
	Opinion – 22 JUL 2014 Opinion – 27 MAY 2015	[2014] CSOH 116 [2015] CSOH 61	Case Ref:	**P420/14**
	Case Name	Friends of Loch Etive v Argyll and Bute Council		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Environmental concern	Environmental impact – of permitting a rainbow trout farm on Loch Etive		
	Legal basis of challenge	- not stated		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED** *(ability to proceed in the absence of a PEO)*		
	Applications to Intervene	No		

3	John Muir Trust			
	Opinion – 31 OCT 2014 Opinion – 04 DEC 2015 Opinion – 29 APR 2016 Opinion – 22 JUL 2016	[2014] CSOH 172A [2015] CSOH 163 [2016] CSIH 33 [2016] CSIH 61	Case Ref:	**P843/14**
	Case Name	John Muir Trust v SSE Generation Ltd & SSE Renewable Developments (UK) Ltd		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Environmental Impact – wind farm (Stronelairg, south of Fort Augustus)		
	Legal basis of challenge	Reg.14A - Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		

4	St Andrews Environmental Protection Association			
	Opinion – 20 MAR 2015 Opinion – 10 JAN 2018	[2015] CSOH 27 [2016] CSIH 22	Case Ref:	P807/14
	Case Name	St Andrews Environmental Protection Association Ltd v Fife Council		
	Court Procedure	Judicial Review + Judicial Review		
	Type of motion	Environmental PEO		
	Common law concern	Planning Decision - Housing Development on Greenbelt Land		
	Legal basis of challenge	s25 & s37(2) - Town and Country Planning (Scotland) Act 1997		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
	Notes:	*1. As the 2 opinions were silent on PEO's, the details were confirmed from a PEO made on 18 June 2015*		

ANNEX 3 – CASE TABLES (for environmental PEOs) …*continued*

5	J Mark Gibson			
	Opinion – 14 APR 2015 Opinion – 10 FEB 2016 Opinion – 15 APR 2016	[2015] CSOH 41 [2016] CSIH 10 [2016] CSIH 31	Case Ref:	P1328/14
	Case Name	J Mark Gibson v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Environmental impact – of wind turbines 4.2km from house, and 4.6km from the Dark Sky Observatory (Dersalloch Wind Farm)		
	Legal basis of challenge	s36 - Electricity Act 1989		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

6	RSPB			
	Opinion – 18 JUL 2016 Opinion – 16 MAY 2017	[2016] CSOH 103 [2017] CSIH 31	Case Ref:	P28/15
	Case Name	Royal Society for the Protection of Birds v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Planning Decision – 110 turbines (Inch Cape Offshore Wind Farm)		
	Legal basis of challenge	s36 - Electricity Act 1989 + Reg. 22 - Marine Works (Environmental Impact Assessment) Regulations 2007		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

7	RSPB			
	Opinion – 18 JUL 2016 Opinion – 16 MAY 2017	[2016] CSOH 104 [2017] CSIH 31	Case Ref:	P29/15
	Case Name	Royal Society for the Protection of Birds v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Planning Decision – 75 turbines (Neart na Gaoithe Offshore Wind Farm)		
	Legal basis of challenge	s36 - Electricity Act 1989 + Reg. 22 - Marine Works (Environmental Impact Assessment) Regulations 2007		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

8	RSPB			
	Opinion – 18 JUL 2016 Opinion – 16 MAY 2017	[2016] CSOH 105 [2017] CSIH 31	Case Ref:	P30/15
	Case Name	Royal Society for the Protection of Birds v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Planning Decision – 75 turbines (Seagreen Bravo Offshore Wind Farm)		
	Legal basis of challenge	s36 - Electricity Act 1989 + Reg. 22 - Marine Works (Environmental Impact Assessment) Regulations 2007		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

ANNEX 3 – CASE TABLES (for environmental PEOs) …*continued*

9	RSPB			
	Opinion – 18 JUL 2016 Opinion – 16 MAY 2017	[2016] CSOH 106 [2017] CSIH 31	Case Ref:	P31/15
	Case Name	Royal Society for the Protection of Birds v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Planning Decision – 75 turbines (Seagreen Alpha Offshore Wind Farm)		
	Legal basis of challenge	s36 - Electricity Act 1989 + Reg. 22 - Marine Works (Environmental Impact Assessment) Regulations 2007		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

10	Simon Byrom			
	Opinion – 20 OCT 2017 Opinion – 10 JAN 2018	[2017] CSOH 135 [2018] CSIH 3	Case Ref:	P162/17
	Case Name	Simon Byrom v Edinburgh City Council		
	Court Procedure	Judicial Review + Appeal		
	Type of motion	Environmental PEO		
	Common law concern	Planning Decision – in Conservation Area		
	Legal basis of challenge	Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		
	Notes:	*1. CSIH opinion - Para 2 – notes PEO motion of Jan 2018 was refused*		

11	Jordanhill Community Council			
	Opinion – 14 FEB 2018	[2018] CSOH 11	Case Ref:	P375/17
	Case Name	Jordanhill Community Council v Glasgow City Council		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Environmental concern	Planning Decision – residential development		
	Legal basis of challenge	Town and Country Planning (Scotland) Act 1997		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
	Notes -	*1. Opinion [2018] CSOH 11 does not reference to the motion for a PEO*		

12	Matilda Gifford			
	Opinion – 21 NOV 2018	[2018] CSOH 108	Case Ref:	P1032/16
	Case Name	Matilda Gifford		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Environmental concern	Undercover policing - of environmental activists		
	Legal basis of challenge	- not stated		
	PEO cost cap (applicant)			
	PEO cost cap (respondent)			
	PEO outcome	**REFUSED**		
	Applications to Intervene	No		

ANNEX 3 – CASE TABLES (for environmental PEOs) …*continued*

13	No Kingsford Stadium Ltd			
	Opinion – 01 MAR 2019	[2019] CSOH 19	Case Ref:	P719/18
	Case Name	No Kingsford Stadium Ltd v Aberdeen Football club		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Common law concern	Greenbelt Development – of 20,000 seat Football Stadium		
	Legal basis of challenge	s25 (1) a & s37 - Town and Country Planning (Scotland) Act 1997		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
	Notes:	*1. Whilst the opinion was silent on PEOs, the details were confirmed from a PEO made on 20 November 2018*		

14	Scottish Creel Fishermen's Association			
	Opinion – 08 JAN 2021 Opinion - 23 DEC 2021	[2021] CSOH 1 [2021] CSIH 68	Case Ref:	**P414/20**
	Case Name	Scottish Creel Fishermen's Association v Scottish Ministers		
	Court Procedure	Judicial Review + Reclaiming Motion		
	Type of motion	Environmental PEO		
	Environmental concern	Challenge to a decision of Marine Scotland; to not take forward a proposed inshore fisheries pilot		
	Legal basis of challenge	Inshore Fishing (Scotland) Act 1984 +Sea Fish (conservation) act 1976 + Sea Fisheries Act 1968 + ministerial orders		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		

15	Trees for Life			
	Opinion – 21 OCT 2021	[2021] CSOH 108	Case Ref:	P1102/20
	Case Name	Trees for Life		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Common law concern	Licencing – for lethal control of beavers		
	Legal basis of challenge	Conservation (Natural Habitats, etc.) Regulations 1994 (SI 1994/2716) - as amended by Conservation (Natural Habitats, etc.) Regulations 2019 (SSI 2019/64).		
	PEO cost cap (applicant)	£5,000		
	PEO cost cap (respondent)	£30,000		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
	Notes:	*1. Whilst the opinion was silent on PEOs, the details were confirmed from a PEO made on 10 February 2021*		

16	Open Sea's Trust			
	Opinion – 23 JUN 2023 Opinion - 25 APR 2024	[2023] CSOH 39 [2024] CSIH 9	Case Ref:	P107/23
	Case Name	Open Sea's Trust v Scottish Ministers		
	Court Procedure	Judicial Review		
	Type of motion	Environmental PEO		
	Common law concern	Fishing Licences - Having regard to the National Marine Plan		
	Legal basis of challenge	Marine (Scotland) Act 2010 + Sea Fishing (Licences and Notices) (Scotland) Regulations 2011 + Fisheries Act 2020		
	PEO cost cap (applicant)	£Nil		
	PEO cost cap (respondent)	£Nil		
	PEO outcome	**GRANTED**		
	Applications to Intervene	No		
	Notes:	*1. Whilst the opinion was silent on PEOs, the details from a PEO made on 19 April 2023 confirmed that neither party is responsible for the expenses of the other*		

ANNEX 4 –REPORTED COURT OPINION

(On the 1 application for 'leave to intervene' that was granted by the court)

OUTER HOUSE, COURT OF SESSION

[2012] CSOH 156 P762/12

OPINION OF LORD HODGE
in the Petition

THE SCOTCH WHISKY ASSOCIATION AND OTHERS Petitioners;

for Judicial Review of the Alcohol (Minimum Pricing) (Scotland) Act 2012 and of related decisions

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Petitioners: Ms M Ross; Brodies LLP
Respondents: Duncan, QC; Scottish Government Legal Directorate
Minuters: Poole, QC; Patrick Campbell & Co

26 September 2012

[1] **This is an application by Alcohol Focus Scotland ("AFS") for permission to intervene in the public interest** in a judicial review application by The Scotch Whisky Association and two European bodies which represent producers of spirit drinks and the wine industry and trade respectively ("the petitioners"). The petitioners' application is for judicial review of the Alcohol (Minimum Pricing) (Scotland) Act 2012 ("the 2012 Act") and related decisions. The petitioners' challenge to the 2012 Act includes assertions (i) that it was outwith the legislative competence of the Scottish Parliament, and (ii) that there was no evidential basis for the belief that the 2012 Act by imposing a minimum price would reduce the harmful consumption of alcohol or improve the public health of the general population.

[2] AFS seeks to lodge a written submission which will not exceed 5,000 words and will be supported by documents if the other parties to the proceedings have not produced those documents. AFS does not seek to be represented at any hearings in the judicial review application or take part in the proceedings in any other way. It seeks to include in its proposed written submission arguments: (1) that there is evidence that the 2012 Act and related decisions have a public health purpose and will bring public health benefits; (2) that under the Scotland Act 1998 the Scottish Parliament has power to enact public health measures, including the 2012 Act; and (3) that the 2012 Act does not contravene the prohibition in EU law of quantitative restrictions on imports between Member States and all measures having equivalent effect. In particular in relation to this third ground AFS seeks to focus on (i) the relevance of the health concerns to justification of the 2012 Act, (ii) the role of the protective principle in justification, (iii) the "least restrictive alternative" principle and alternative measures which have been taken in Scotland, both of which are relevant to an assessment of proportionality and (iv) the position in other countries.

[3] AFS also applies for an order at the outset of its involvement that there will be no liability for expenses by any party in respect of its Minute and written intervention, including any procedure following on the written intervention.

[4] The petitioners oppose the application to intervene. First, they argue that AFS receives a significant part of its funding from the Scottish Government and that it is not truly independent. They submit that it is not clear what AFS can bring to the proceedings to supplement the arguments which the Lord Advocate and the Advocate General for Scotland will put forward. Accordingly, AFS has not shown that the propositions which it is likely to advance would assist the court. Secondly, if the court were not to accept that submission, the petitioners submit that AFS's intervention should be confined to a demonstration that there was evidence that the 2012 Act would have public health benefits. In relation to the motion to exempt parties from liability in expenses in relation to the minute and intervention, the petitioners submit that the intervention, whose terms are not yet known, would cause them to incur expense. It is not appropriate to exclude liability in expenses at this stage. In any event, because a significant proportion of AFS's funds are from public sources, any protection should take the form of a cap on liability rather than its outright exclusion.

Discussion

[5] Rule 58.8A of the Rules of the Court of Session governs applications for public interest interventions. It is not disputed that the policy behind the rule is that some judicial review applications raise issues of public interest which affect persons beyond the petitioners and the respondents in a particular application and that the intervention of those persons with focused submissions on relevant issues might assist the court in reaching its determination. Rule 58.8A, which was introduced in 2000, has rarely been invoked. This is in contrast with the experience of the United Kingdom Supreme Court which frequently authorises public interest interventions. It may be that concerns about liability in expenses have been a deterrent in this jurisdiction, although in recent years the court has asserted its power to make protective expenses orders.

[6] The Rule empowers the court to permit a public interest intervention if it is satisfied on three matters (RC 58.8A (6)). First, both the judicial review application and the issue which the would-be intervener wishes to address must raise a matter of public interest. Secondly, the propositions which the would-be intervener wishes to advance are relevant to the judicial review application and are likely to assist the court. Thirdly, the intervention will not unduly delay or otherwise prejudice the rights of the parties, including their potential liability for expenses. The three criteria are cumulative. I consider each in turn.

[7] The petitioners accept that the judicial review application raises a matter of public interest and do not suggest that the matters which AFS wishes to address are matters of public interest. I agree with that concession. The industries which the petitioners represent include companies which make a substantial contribution to the national economy and their products when used responsibly contribute to human happiness. But the abuse of alcoholic drinks and the harm which the abusers cause to themselves and others is a matter of general public concern both in this jurisdiction and throughout the United Kingdom.

[8] The petitioners' principal attack, which is the first of the three arguments which I set out in paragraph [4] above, is on the second criterion. I am not persuaded that it has substance. AFS is a company limited by guarantee and a registered charitable organisation which provides up to date information and advice on alcohol issues, raises awareness of alcohol-related problems, provides training courses and seeks to influence national policy in relation to alcohol. In recent years it has received core grant funding from the Scottish Ministers which has amounted to between 30% and 40% of its income. As a result the Scottish Ministers have an interest in the use of that funding; see the recommendations in the 2012 external review of AFS by Griesbach & Associates. But that does not make AFS the mouthpiece of the Scottish Ministers. Ms Poole submits, and I accept, that AFS acts as a pressure group in relation to alcohol policy and has a view that is distinct from the views of

the Scottish Ministers. The external review stated that "AFS has positioned itself as the leading independent voice on alcohol in Scotland. It has had an influence on the current direction of alcohol policy in Scotland, and is beginning to have an influence across the UK and internationally." (Executive Summary p.3 para 14) Ms Poole explains that AFS has allocated £3,000 to the proposed intervention and that that money would be drawn from income from its charitable activities and not from its publicly-funded core grant.

[9] I recognise that it is difficult to judge, except in very general terms, whether the intended propositions will assist the court until the would-be intervener has formulated them in the intervention. I have to reach a view on the basis of what AFS has stated in its Minute and in an email message (Pro 15) about the focus of its intended submissions. In my view it is likely that the court would derive some assistance from AFS's perspective both in relation to the evidence which is said to support the 2012 Act and also from its proposed legal submissions (headings (2) and (3) in paragraph [2] above). The probability that the submissions will overlap those of the respondents in some respects does not prevent them being of assistance. I am therefore satisfied that the second criterion of Rule 58.8A (6) is met.

[10] The court has allocated a six-day hearing starting on 23 October 2012 for the first hearing in the judicial review. AFS proposes to lodge its submissions by 4 October 2012 and any supporting documents, which the other parties have not produced, on 17 October 2012. Its intervention if permitted will not delay the hearing. In the context of the various issues which the parties will debate at the hearing I am not persuaded that the petitioners' response to AFS's submission will significantly extend the length of the hearing so as to threaten its completion within the allocated time. Nor am I persuaded that the petitioners will incur significant extra cost in responding to the proposed submission. I am satisfied therefore that the submission would not cause undue delay or prejudice to the rights of the parties. The third criterion is therefore met.

[11] Rule 58.8A(7) empowers the court to impose terms and conditions in the interests of justice, including the making of provision in relation to any additional expenses incurred by the parties as a result of the intervention. Ms Poole seeks to invoke that power to obtain at the outset an order that no party will incur liability to another in respect of the intervention but that each will bear its own costs.

[12] Since 2006 this court has shown itself willing in appropriate cases to make protective expenses orders to a party in suitable cases which raise issues of general public interest: McArthur v Lord Advocate 2006 SLT 170, Marco McGinty, Petr [2010] CSOH 5. In my view the court can adopt a similar approach in exercise of its power under Rule 58.8(7). I consider that if an individual or organisation wishes to make a public interest intervention with the protection of such an order he, she or it has an obligation to act responsibly to minimise the cost to other parties of the intervention. The court should be assiduous to prevent the misuse of the opportunity which the Rule and a protective expenses order confer. To that end it is helpful if a would-be intervener, as AFS has in this case, places limits on the method of its proposed intervention and focuses the issues which it proposes to raise. If a would-be intervener does not do so the court can use its powers under Rule 58.8A(7) to impose conditions on the proposed intervention.

[13] I am persuaded that it is appropriate to make the order which Ms Poole seeks now. I do not treat as significant the fact that AFS receives substantial public funding. That is spent on its charitable activities and it has operated in recent years with an annual deficit. AFS has committed itself to use resources which were not obtained from public funds to supply the modest sum (£3,000) which it intends to spend on its intervention. I do not think that it is appropriate to await the intervention before making an order in relation to expenses. Ms Poole states, and I accept, that

AFS would not make the intervention at all unless it is protected against an award of expenses. **I have regard to the method and limited nature of the proposed intervention in the context of the various issues raised in the judicial review application, including those on which AFS will make no submission. I am satisfied that it is in the interests of justice to make an order providing that there should be no liability by any party in expenses in relation to the intervention rather than one which caps AFS's liability.** In reaching this view I have also had regard to the considerations (i) that the issues raised in the judicial review application are of general public importance, (ii) that there is a public interest in the resolution of those issues, (iii) that AFS has no private interest in the outcome of that application (iv) that the resources available to the petitioners and the limited nature of the proposed intervention mean that that intervention will not impose a significant extra burden on the petitioners in the context of their judicial review challenge and (v) that AFS would be acting reasonably in not making its intervention in the absence of the order which it seeks.

Conclusion

[14] I therefore grant permission to AFS to intervene in this petition by way of written submission not exceeding 5,000 words on the issues raised in the Minute as clarified by the email (Pro 15). I appoint AFS to intimate and lodge in process its submission by close of business on 4 October 2012 and to lodge any supporting documentation, which the other parties have not produced, by close of business on 17 October 2012. **I also make an order under Rule 58.8A (7) that no party will be liable to another in expenses in respect of the Minute and written intervention or any procedure following thereon.**