Court File No. 03-CV-259202CM1

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

ETHEL AHENAKEW, ALBERT BELLEMARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA McCRAKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS AND JOHN PERRIN

Applicants

- and -

PETER MacKAY
on his own behalf and on behalf of all members of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondents

RESPONDENTS' WRITTEN COSTS SUBMISSIONS

NATURE OF SUBMISSIONS

1. These written submissions of the respondents are delivered with the respondents' bill of costs, compendium and book of authorities.

2. The respondents respectfully request that this court exercise its discretion under s. 131(1) of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure* to award costs to the respondents on a substantial indemnity basis.

SUBSTANTIAL INDEMNITY COSTS ARE APPROPRIATE

A. Applicants' Attempts to Litigate in the News Media

3. In awarding costs, it is not just the conduct of the parties before the court which is to be taken into consideration. Attempts to litigate in the news media are a relevant consideration and justify costs on a substantial indemnity basis. Borins J. clearly articulated this in *Munro v. Canada*, saying:

> There is another factor, to which I did not refer in my reasons for judgment, which are appropriate to take into consideration in the exercise of my discretion in regard to costs. ... There was evidence before the court on the motion that the applicants and their counsel held a press conference on July 27, 1993, which was the date on which the notice of application was issued and prior to the time it was served on the respondents. Where a party to a proceeding attempts to litigate his or her case in the news media, this is a relevant factor to be taken into consideration in awarding costs.
>
> *Munro v. Canada (Attorney General)*, 1994 CarswellOnt 3254 at para. 5, (Ont. Gen. Div.) online: eCarswell.

4. Farley J. similarly awarded substantial indemnity costs against an applicant for issuing an "unwarranted press release" that "merely enlarged the arena of conflict to two theatres."

> *Manago v. Moscoe*, [1991] O.J. No. 1257 at p. 5 (Gen. Div.)

5. In *R. v. Santa*, Pierce J. awarded substantial indemnity costs for the same reasons stating:

> I cannot accept that Mr. Audziss made an innocent error in issuing a press release. It was his intention to litigate in the press, rather than in the courts. Mr. Audziss was well aware that such a press release would be deemed newsworthy. That was its very purpose. Mr. Santa's position as a city councillor made it news. There are many litigants before the courts who wish a determination on the merits and who do not issue press releases. The timing of the news release, before the applicant was even served with process, and the reference to criminal charges is particularly aggravating. ... Mr. Santa is entitled to substantial indemnity with respect to his cost of this application, including attendances by his counsel to rectify the misinformation in the media occasioned by the press release.
>
> *R. v. Santa*, [2002] O.J. No. 3002 at para 20-21 (S.C.J.)

6. In this case the applicants engaged in attempts to litigate in the news media before they commenced their application, then before during and after the oral hearing. In doing so the applicants released information to the media before disclosing it to the court and the respondents and made many allegations against the respondents; including bias, fraud, deceit, misappropriation of funds, vote rigging and unconstitutional actions. These allegations were made against elected public officials, members in good standing of various provincial bar associations, duly elected Party officials and others. Such conduct is deserving of condemnation and ought to attract an award of substantial indemnity costs.

> *R. v. Santa, supra.*
>
> *Munro v. Canada, supra.*
>
> *Stojanov v. Holland*, [2001] O.J. No. 4905 (S.C.J.)

7. Examples of just a few of the instances where the applicants sought to litigate this matter in the media and instructed their counsel to do so are included in the compendium and include:

a. Prior to the application being served on the respondents, the applicants publicly commented on the application, released copies to the news media and announced a press conference at the office of their solicitors to discuss it. The respondents in fact learned of the application and the identity of the applicants'

counsel from the media and contacted the applicants' counsel requesting service.

Compendium Tab 10
Affidavit of Dominique Bellemare, para. 107

b. At a press conference on November 21, 2003, counsel for the applicants stated, among other things, that the respondent Mr. MacKay, an elected member of the House of Commons and a member in good standing of the Nova Scotia Barristers' Society, was engaged in a "coup". This accusation was reproduced in both print media and on television nationally. He also cited case law to the media that had yet to be provided to the respondents.

Compendium Tabs 15 & 16

c. On November 30, 2003, one of the applicants appeared on the CTV television program "Question Period". On that program he discussed the applicants' legal arguments and case law and accused the respondents of fraud regarding the voting procedures for the national meeting of members. These allegations of fraud were reproduced in print media the following day.

Compendium Tab 17

d. On December 1, 2003 the applicants published an article in the Globe and Mail newspaper entitled "Why We Are Going to Court". In that article they accused the respondents of "subverting democracy", "rigging the voters' list", "improper use of party funds", "hijacking" and "gerrymandering".

Compendium Tab 18

e. Following the release of the reasons for decision on December 5, 2003, and in spite of the fact that the applicants had withdrawn their request for a declaration regarding the voting procedure, one of the applicants appeared on the CBC radio program "As It Happens" to discuss the decision and alleged that the respondents had "fraudulently rigged" the vote. He also clearly misstated the relief sought in the application by denying the fact that the applicants sought a permanent injunction.

Compendium Tab 19

8. These are precisely the types of actions for which awards of substantial indemnity costs are made. In *R. v. Santa, supra*, *Mangano v. Moscoe, supra,* and *Munro v. Canada, supra,* applications and actions were commenced against politicians and

political parties. In two of those cases the moving parties held press conferences prior to serving the respondents and in all three cases the courts found the moving parties had attempted to litigate in the press, rather than exclusively in the court. In all three cases substantial indemnity costs were awarded against the moving parties. The applicants have engaged in similar conduct in this case and an award of substantial indemnity costs is similarly appropriate.

B. Evidence Tendered in Support of the Application

9. The only evidence tendered in support of the application were affidavits sworn by David Orchard. Those affidavits contained hearsay, misrepresentations, speculation, unfounded allegations of bias and irrelevant political rhetoric. Further, it omitted key facts that significantly qualified the positions the applicants sought to raise as material points. The respondents further note that this evidence was tendered in the context of an application where the applicants certified that there were no material facts in issue.

10. It was necessary for the respondents to file a lengthy responding affidavit and to cross-examine Mr. Orchard in order to identify the speculation, baseless hearsay and opinions that were set out as facts in his affidavits and to correct the errors contained therein. For example:

- at paragraphs 9 and 10 of his first affidavit, Mr. Orchard asserts that he is confused about the meaning of the Agreement-in-Principle and that it is unclear. Yet, when cross-examined, he states that easily understood the Agreement-in-Principle the first time he read it and that he never sought clarification of its meaning because he did not need to (see transcript questions 32-39, 62-78 and 469).
- at paragraphs 66-75 of his first affidavit Mr. Orchard criticizes the rules and procedures contained in a document he attaches as Exhibit I. On

cross-examination Mr. Orchard disclosed that he obtained the document from Ms. Repo and he made no inquiries to satisfy himself that the document Ms. Repo sent him was, in fact, the final set of rules and procedures. (see transcript questions 180-184). The respondents' unchallenged evidence was that Mr. Orchard was in error and his Exhibit I was a draft document that was not accepted (see Bellemare affidavit para 103)

- At paragraph 60 of his first affidavit Mr. Orchard alleged that John Scott ruled a motion by Ms. Repo challenging the Agreement-in-Principle out of order at the October 25, 2003 meeting of Management Committee. The respondents' unchallenged evidence was that Mr. Orchard was in error; Ms. Reop's motion was voted upon and defeated 31-1. (see Bellemare affidavit paras 35 and 102)

11. Had Mr. Orchard been completely truthful and restricted his affidavit to relevant facts that were within his knowledge, the respondents' costs could have been substantially reduced. This evidence unnecessarily enlarged the matters in issue and the arena of dispute and warrants an award of substantial indemnity costs.

Stojanov v. Holland, *supra*, at para. 6.

12. The applicants further sought declarations they had no evidence to support, specifically the declaration sought at paragraph 1(e) of the application. In paragraph 1(e) the applicants sought a declaration that the process for voting on the Agreement-in-Principle was unconstitutional and would be of no force and effect. A substantial part of the respondents' record was dedicated to responding to that particular allegation and claim for relief. It was not until the end of reply submissions that counsel for the applicants withdrew paragraph 1(e) from the application. Such an unsupportable allegation and late abandonment ought to attract substantial indemnity costs. As stated by Dambrot J.:

> To completely absolve the plaintiff of responsibility for unfounded allegations because of this withdrawal at the courtroom door would fail to deter reckless allegations from being pleaded in the first instance, or maintained after they are known to be without foundation.
>
> *Mele v. Thorne Riddell*, [1997] O.J. No. 443 at p. 3 (Gen. Div.)

C. Allegations of Bias

13. The applicants filed affidavit evidence and made submissions alleging personal bias against three respondents who sat on a Progressive Conservative Party arbitration panel and against the party's internal dispute resolution process in its entirety. This court found the allegations of bias to be without merit.

14. The applicants were aware that those same allegations had been made in a separate proceeding, brought by a group of PC Party members which included one of the applicants, and were found to be without merit. In repeating these allegations, the applicants were clearly alleging improper conduct on the part of the panel members and attacking their integrity. Such conduct is unacceptable and ought to attract substantial indemnity costs. In awarding solicitor-and-client costs against a party who had recklessly attacked the integrity of a professional, Dambrot J. held:

> [t]he only assets of a professional are knowledge and integrity. To strike at the integrity of a professional recklessly is a serious matter which should attract consequences in order to discourage such conduct.
>
> *Mele v. Thorne Riddell, supra.*

15. All three members of the arbitration panel against whom the unfounded allegations of bias were made are lawyers in good standing with their respective provincial bar associations. This fact was known to the applicants when they made the

allegations. Such attacks on the integrity of professional persons are prejudicial to their character and reputation and ought to attract substantial indemnity costs when found to be without merit.

> *Murano v. Bank of Montreal*, [1998] O.J. No. 2897 at p. 16-17 (C.A.)
>
> *Stojanov v. Holland, supra.*
>
> *Mele v. Thorne Riddell, supra*
>
> *131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, [1992] O.J. No. 3879 at paras. 10-15 (Gen. Div.)

PARTIAL INDEMNITY

16. In the alternative, the respondents submit they should fully recover their costs on a partial indemnity scale. The costs are commensurate with the serious nature and large breath of the application, and reflect the high quality of written and oral submissions that were prepared and presented to the court in the face of a very compacted timeframe.

A. Nature of the Application

17. The applicants sought numerous discretionary remedies, many of them extraordinary in nature. In total the applicants' sought nine declarations, one reference, an order appointing a representative respondent and a permanent injunction enjoining and restraining anyone from dealing with the PC Party assets in a manner "inconsistent" with the declarations sought.

18. The breadth of the application and the extraordinary remedies sought required significant work to be completed and a large amount of resources to be expended in

order to effectively respond. Further, the seriousness of the allegations being made against the respondents and the implications for the respondents in the event the applicants were successful, put the respondents in a position where, in the words of Malloy J., "they could not afford to cut corners".

Stojanov v. Holland, *supra*, at para 5.

19. The Respondents submit that their costs are consistent with those sought by the applicants in this proceeding before Nordheimer J. on November 26, 2003 when the intervention of two persons was successfully opposed. Although the applicants did not prepare a responding record and made only brief arguments in an appearance lasting less than one hour, they sought $1,000 in costs against the intervenors. The respondents, who also opposed the intervention, sought no costs from the intervenors and have not included the hours spent at that appearance in their bill of costs which accompanies these submissions.

B. Timing of the Application

20. The application was served on short notice and a month after the events giving rise to it took place. The initial return date was less than two weeks prior to the event the application sought to influence. Although this court found that the delay in bringing the application was not so inordinate as to refuse it being heard, the respondents submit that the compressed timeframe imposed by the applicants' delay must to be considered in the award of costs.

21. When the applicants threatened litigation a month before taking action, the respondents were able to begin anticipatory legal research. However, until being

served with the application there was little the respondents could do to prepare responding materials.

22. The short timeline unavoidably increased the number of lawyers and students required to work on the file. The respondents needed to simultaneously research, draft, edit and assemble a responding record, factum and book of authorities as well as prepare for and conduct a cross-examination on the affidavits filed in support of the application. This workload necessitated a team approach to preparation. It is accepted in the cost tariff and in Ontario case law that a "team approach" is permissible and not a reasonable basis for precluding recovery for reasonable time spent.

> *Eastwalsh Homes Ltd. v. Anatal Development Corp.*, [1995] O.J. No. 565 at paras. 13-15 (Gen. Div.)

BILL OF COSTS

23. The respondents have attached docket entries to support their bill of costs and note that care has been taken not to include time entries for work determined to be duplicitous or unrelated to the proceeding initiated by the applicants.

24. Disbursements have been categorized and totalled. Itemized accounting ledgers and invoices are available to support any challenged disbursement.

25. The respondents submit that the bill of costs is reasonable and fairly represents the appropriate costs to be awarded in this matter.

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Applicants

- and -

PETER MacKAY
on his own behalf and on behalf of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondents

BILL OF COSTS OF THE RESPONDENTS

Lawyers appearing on Bill of Costs:

Partners	**Year of Call**
Robert Kligman (research partner)	1980
Paul Bates	1983
Arthur Hamilton	1997
Associate	
Laurie Livingstone	2002
Student-at-Law	
Brad Chapman	

1. Initial Preparation

To review client documents, meeting with clients, initial research, teleconferences with clients, email correspondence with clients and review of media reports regarding applicants' legal action:

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Robert Kligman	10.2 @	$350 = $3,570.00	$420 = $4,284.00
Paul Bates	8.9 @	$350 = $3,115.00	$450 = $4,005.00
Arthur Hamilton	46.6 @	$225 = $10,485.00	$300 = $13,980.00
Laurie Livingstone	37.5 @	$225 = $8,437.50	$250 = $9,375.00
Brad Chapman	40.1 @	$60 = $2,406.00	$90 = $3,609.00
		$28,013.50	**$35,253.00**

2. Preparation of Responding Record

To all matters regarding preparation of responding record including review of application record, research, drafting, interviewing affiant, review of media interviews by applicants and their counsel, taking instruction from client, marshalling exhibits, meeting with client, reporting to client:

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Robert Kligman	12.7 @	$350 = $4,445.00	$420 = $5,334.00
Paul Bates	26.2 @	$350 = $9,170.00	$450 = $11,790.00
Arthur Hamilton	49.2 @	$225 = $11,070.00	$300 = $14,760.00
Laurie Livingstone	46.1 @	$225 = $10,327.50	$250 = $11,525.00
Brad Chapman	62.1 @	$60 = $3,726.00	$90 = $5,589.00
		$38,738.50	**$48,998.00**

3. Preparation for Cross-Examination and Conducting Cross-Examination

To review affidavit of David Orchard, review supplementary affidavit of David Orchard, preparing questions for cross-examination, corresponding with opposing counsel, assembling exhibits:

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Paul Bates	14.3 @	$350 = $5,005.00	$450 = $6,435.00
Arthur Hamilton	13.9 @	$225 = $3,127.50	$300 = $4,170.00
		$8,132.50	**$10,605.00**

4. Preparation for Hearing:

To review of applicants' factum, drafting respondent's factum, preparing oral argument, research, review of cross-examination transcript, preparing book of authorities, meeting with client, taking instructions from client, corresponding with opposing counsel:

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Robert Kligman	23.8 @	$350 = $8,330.00	$420 = $9,996.00
Paul Bates	31.3 @	$350 = $10,995.00	$450 = $14,085.00
Arthur Hamilton	45.8 @	$225 = $10,305.00	$300 = $13,740.00
Laurie Livingstone	51.3 @	$225 = $11,542.50	$250 = $12,825.00
Brad Chapman	72.8 @	$60 = $4,368.00	$90 = $6,552.00
		$45,540.50	**$57,198.00**

5. Attending at Hearing November 26, 2003 – before Nordheimer J.

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Paul Bates	½ day	$1,400.00	$2,400.00
Arthur Hamilton	½ day	$1,400.00	$2,400.00
		$2,800.00	**$4,800.00**

6. Attending at Hearing December 4, 2003 – before Juriansz, J.

Lawyer	Hours	Partial Indemnity	Substantial Indemnity
Paul Bates	Full day	$2,100.00	$3,500.00
Arthur Hamilton	Full day	$2,100.00	$3,500.00
Laurie Livingstone	Full day	$2,100.00	$3,500.00
		$6,300.00	**$10,500.00**

FEES SUMMARY

	Partial Indemnity	Substantial Indemnity
Sub-Total	**$129,525.00**	**$177,054.00**
GST	**$9,066.75**	**$12,393.78**
TOTAL FEES	**$138,591.75**	**$189,447.78**

DISBURSEMENTS (inc. taxes)	
Photocopies	**$4,254.78**
Computer Searches	**$1,486.60**
Telephone and Fax	**$245.66**
Staff Overtime	**$1,145.54**
Agency & Filing Fees	**$126.45**
Transcripts	**$2,125.56**
TOTAL DISBURSEMENTS	**$10,508.34**

	Partial Indemnity	Substantial Indemnity
TOTAL FEES AND DISBURSEMENTS	**$149,100.09**	**$199,956.12**