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January 30, 2004

DELIVERED

The Honourable Mr. Justice Juriansz
Ontario Superior Court of Justice
Judge's Administration
Room 334
361 University Avenue
Toronto, ON
M5G 1T3

Dear Mr. Justice Juriansz:

Re: Ahenakew et al v. MacKay – Court File No.: 03-CV-259202CM1

These are the submissions made on behalf of the applicants in respect of the costs of this application.

We apologize at the outset for their length; a number of issues have been raised by the respondents who seek between $150,000 and $190,000 in costs for a one day application.

As Your Honour observed at several points in your judgment on the merits, there was a important public interest at stake in this case and it was plainly of national significance. Further, the case turned on a novel point. Accordingly, the applicants submit that this is an appropriate case for the Court to exercise its discretion not to award costs.

In the alternative, if the Court determines that costs should be awarded, it is submitted that the amount sought (which includes payment for 592 hours of preparation time) are grossly excessive and unreasonable. Finally, the applicants submit that if any costs are properly awarded, there is no reason to depart from the ordinary rule that costs should be payable on a partial indemnity scale.

EACH SIDE SHOULD BEAR ITS OWN COSTS

In litigation involving the public interest, Courts have often found it appropriate that each side bear its own costs, regardless of success. Justice Sharpe described the principle in some length in *Mahar* v. *Rogers Cablesystems* Ltd. (1995), 25 O.R. (3d) 690 (Gen. Div.):

> There will always be debate about what is the public interest, but it is fair to characterize this proceeding as a public interest suit. While the ordinary cost rules apply in public interest litigation, those rules do include a discretion to relieve the loser of the burden of paying the winner's costs and that discretion has on occasion been exercised in favour of public interest litigants.
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> Orkin, The Law of Costs, 2nd ed., (1994), at pp. 2-33 to 2-34, describes the discretion as follows:
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> > An action or motion may be disposed of without costs when the question involved is a new one, not previously decided by the courts on the theory that there is a public benefit in having the court give a decision; or where it involves the interpretation of a new or ambiguous statute; or a new or uncertain or unsettled point of practice; or where there were no previous authoritative rulings by courts; or decided cases on point; or where the application concerned a matter of public interest and both parties acted in complete good faith ... (References omitted)
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> The matter was considered in depth by the Ontario Law Reform Commission in its Report on Class Actions (1982), where the following summary was given of the court's discretion in this area (vol. III, p. 649):
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> > While the general rule is well established in our legal system, there are well accepted exceptions that justify a denial of costs to a victorious party, even where there has been no misconduct by him or his lawyer. In some cases, a successful party may not be awarded costs where the issue determined is novel, where the court has been asked to interpret a new or ambiguous statute, or where the action is a "test case". The existence of certain exceptions indicates that the general rule is not immutable, but a rule that, however deeply entrenched, occasionally defers to special considerations dictating that its application is inappropriate. (References omitted)
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> The matter is also discussed by Fox, "Costs in Public-Interest Litigation" (1989), 10 *Advocates Quarterly* 385. Despite this discretion, public interest litigants are often required to pay costs when they are unsuccessful. The respondent relies on *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 28 C.P.C. (3d) 253, 94 B.C.L.R. (2d) 331 (S.C.), affirmed ... 7 B.C.L.R. (3d) 375, 126 D.L.R. (4th) 437 (C.A.) That case involved a well-established and well-financed public interest

> litigant and the court emphasized that the discretion was to be exercised on a case-by-case basis. Smith J. expressly noted that the public interest motivation "will always be a relevant and important factor" and that "the court must retain the flexibility to do justice in each case". It is also worth noting that while the Court of Appeal did not interfere with Smith J.'s order requiring the Sierra Club to pay costs, the appeal itself was dismissed on the basis that each party bear its own costs. In *Garland v. Consumers' Gas Co.* (1995), 22 O.R. (3d) 767, 17 B.L.R. (2d) 239n (Gen. Div.), Winkler J. held that the losing party should not be required to bear the costs of Consumers' Gas Co. While that case was disposed of under the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, s. 31(1), Winkler J. noted that it had always been open to the court to consider the factors listed in the *Act*, which incorporates the common law principles referred to above. It is also worth noting certain similarities between that case and the case at bar. The defendant had succeeded in having the case disposed of in its favour early in the proceedings, in that case by obtaining summary judgment dismissing the action prior to it being certified as a class proceeding. Moreover, that case also involved a claim by a representative plaintiff contesting the legality of certain charges for a utility provided to the public by a private entity under a regulated regime.

An additional important point about public interest litigation was recently articulated by the Supreme Court of Canada in *Odhavji Estate v. Woodhouse* [2003] S.C.J. 74:

> [T]here are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g. a non-profit organization); and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings.

The policy behind the exercise of the discretion is that litigation involving issues of serious public importance should not be beyond the reach of the ordinary citizen.[1]

The dispute at issue in this case bears all of the hallmarks of public interest litigation where costs are not awarded. The applicants are of ordinary (and in some cases extremely modest) means and had no pecuniary interest in the outcome of the proceeding. The case concerned the future course of an established national political party which has played a critical role in the development of Canadian democracy. The legal issue on which the Court determined the case, namely the provisions of the *Elections Act*, were novel.

In your judgment on the merits, Your Honour has already noted the important public interests at issue in the litigation:

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[1] *M. v. H.* (1996), 137 D.L.R. (4th) 569 (Ont. Ct. Gen. Div.) and see *Canadian Newspapers Co. Ltd. v. A.G. (Canada)* (1986), 56 O.R. (2d) 240 (H.C.J.) at 242 and see *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.) at 526, reversed on other grounds, (1989), 67 O.R. (2d) 536 (C.A.), appeal dismissed [1991] 2 S.C.R. 211.

> ¶7 ...***The social interest of members in ensuring that the organization's affairs are conducted in accordance with its governing Constitution is apparent.*** Citizens exercise important rights in participating in political activity through membership in political parties.
>
> ...
>
> ¶13 I am satisfied that the situation is sufficiently developed to give rise to an actual dispute between the parties. ***Both sides have important interests at stake.*** The leadership of the PC Party has embarked on a path to merge the party. The applicants are opposed to the course of action being taken. Counsel for both sides indicated to the Court that it would be of assistance to have a decision before the vote is taken tomorrow. ***Given their national significance, there is good reason to determine the questions raised by this actual dispute***, and I am satisfied that the Court's decision will be of practical effect in resolving the dispute.

It is therefore submitted that on the bases of the national public importance of the issues and the fact that the case turned on a novel point and the interpretation of newly enacted legislation, the Court ought to make an order that each side bear its own costs.

THE COSTS SOUGHT ARE GROSSLY EXCESSIVE

The principle underlying an award of costs is that a successful party is to be indemnified, either partially or substantially, for what he or she has spent.

At the same time, the Court must promote access to justice. People of ordinary means should be able to bring *bona fide* disputes to the Court without facing ruinous costs orders merely because they are unsuccessful.

Further, an unsuccessful party cannot be held accountable to pay a costs bill that "is so grossly excessive as to be obvious overkill." *LPIC v. Geto Investments Limited* [2002] O.J. No. 921

See also *Tri-S Investments v. Vong,* [1991] O.J. No. 2292 (Gen. Div.) at p. 12:

> The fact that a successful party decided to spend huge resources in preparation of a matter does not necessarily mean that an unsuccessful party will be responsible for paying costs in that amount. While the Court must take into account the costs tariff, the overarching principle is one of reasonableness, both from the point of the view of parties seeking access to the Courts, as well as the reputation of the administration of justice as a whole.

In *Buchanan v. Geotel Communications Corp.*, [2002] O.J. No. 3063 (S.C.J.), the Court

articulated this principle as follows:

> ...the bottom line is that the proposed costs are excessive. They are excessive from two perspectives: costs of this magnitude will make litigation inaccessible as a method of dispute resolution; costs of this magnitude are also disproportionate to the value of the legal work necessary to represent a client in this dispute. If counsel do not use more restraint in deciding how much to invest in litigation, they will put both the bar and the Courts out of business which will profoundly harm the public whom we both serve.

Similarly, Mr. Justice Killeen issued the following warning to lawyers in *Pagnotta v. Brown* [2002] O.J. 3033 (S.C.J.):

> From my perspective, if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine cases, they may feel free to do so subject to their client's approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following trial. Judges and assessment officers have a duty to fix or assess costs at reasonable amounts and in this process they have a duty to make sure that the hours spent can be reasonably justified. The losing party is not to be treated as a money tree to be plucked willy nilly by the winner of the contest.

In this case, the amount of costs sought by the respondents bears no relationship to the level of preparation which was reasonable given the matters in issue. A total of 592 hours of lawyer and student preparation time is included in the bill of costs for a one day application. In the normal course, a successful party might reasonably expect to receive between $5,000 and $7,500.00 in total costs for a one day application.

Without a full blown assessment of the bill of costs and cross-examination on the dockets, it is impossible to have any clear idea of what work was done over the course of 592 hours, however even without entering into that kind of pain-staking process, the inflated nature of this bill of costs is clear:

> (i) The notice of application was served on Friday, November 21 and the application argued in full on the merits 13 days later, on December 4.
>
> The docketed time in respect of which the respondents seek indemnification includes 142.7 hours of time docketed between October 23 and November 20, 2003 before the respondents were even aware of the proceeding for which their counsel were preparing. That is, the respondents began to prepare for the proceeding even before the applicants consulted counsel.
>
> Not including the time docketed before the application was issued and not

including the 13th day, on which a separate counsel fee is sought, the respondents seek reimbursement for 450 hours docketed in the 12 days between the date of service and the date of argument. This is the equivalent of 37.5 hours per day including Saturdays and Sundays. During the 12 day interval, counsel for the respondents were also engaged in the parties internal arbitration and attended in Ottawa for the arbitration hearing.

(ii) Two counsel have billed for a half-day appearance before Justice Nordheimer on November 26, 2003.

On that date, counsel spoke to scheduling matters at 10:00 a.m. for approximately 15 minutes and then returned in the afternoon, for approximately 90 minutes to deal with a motion by certain persons who sought leave to intervene in the proceedings. The respondents sent two counsel to deal with the very straightforward motion.

For this appearance, the respondents seek $4,800.00 notwithstanding that Justice Nordheimer specifically ordered that no costs were to be awarded in respect of the motion. Interestingly, he did so because the proposed interveners were "making a good faith effort to address an issue that is of obvious importance to them" as members of the Progressive Conservative Party.

(iii) The cross-examination of the applicant David Orchard on his affidavit was less than one-half day, and yet 28.2 hours have been docketed to the exercise of preparing and conducting the examination. Once again, two counsel attended, although obviously only one could cross-examine the witness.

(iv) The hourly rates sought in the respondent's bill of costs provide a further illustration of its excessive nature. Each lawyer is billed at the maximum rate on the partial indemnity scale, with only the slimmest reductions for the most junior lawyers on the substantial indemnity scale. For example, Laurie Livingstone, a lawyer with one year of experience, is billed at the maximum rate for lawyers with up to 10 years experience.

It is submitted that an appropriate award of costs in this case on a partial indemnity scale is in the range of $7,500.00.

As to disbursements, there is no indication as to the photocopying rate being charged, however given the volume of material filed at the hearing, it apparently includes a substantial profit margin and does not appear to be in the nature of a true out of pocket

disbursement. Further, an overhead item (staff overtime) is being sought. This is not an assessable disbursement. The same is true with respect to computer research, as most firms now pay a flat rate for Quicklaw regardless of actual use, meaning that it is an overhead item and not an actual charge paid out by the firm on a particular file (although Quicklaw provides metering so the 'charges' can be passed through to clients as if they were a true disbursement, which they are not if the firm is paying a fixed rate).

CONDUCT OF THE PARTIES

In their costs submissions, the respondents make extensive submissions about the applicants' conduct.

It cannot be that parties to litigation, in matters which also involve a substantial and entirely legitimate political element, are precluded from continuing to engage in public political debate simply because legal proceedings are pending.

It is submitted that the only conduct which is ordinarily relevant to the exercise of the Court's discretion in dealing with costs is conduct within the litigation itself (e.g. unproven and irresponsible allegations of fraud, deliberately enlarging proceedings or refusing to accept reasonable settlement offers).

If, in dealing with the costs of this proceeding, the Court is inclined to consider the conduct of the parties, it is submitted that the proper focus of the inquiry is conduct within the proceeding itself and not matters entirely extraneous to the litigation, such as public political debate and commentary. On this score, it is submitted that it is the conduct of the respondents which is relevant, and that it disentitles them to any award of costs.

As this Court found, this proceeding raised serious legal and social issues requiring resolution by the Court. In large measure, the respondents dealt with the application by launching *ad hominem* attacks on one of the 23 applicants, David Orchard. The respondents made unsubstantiated allegations that he had tampered with documentary evidence and filed a false affidavit, and accused the applicants of abusing the process of the Court. It is submitted that the Court ought not to countenance such conduct with an award of costs.

If conduct extraneous to the litigation is relevant, it is noteworthy that since the application was launched, the respondents have frozen or diverted donations which were being made to Mr. Orchard to defray his substantial outstanding debts of over $200,000.00 in respect of his leadership campaign. The candidates are required by party rules to submit all donations to the party's national office, which tithes 15%, and remits the balance to the candidate. Moneys donated to Mr. Orchard by his supporters in respect of his leadership bid were being processed and turned around in the ordinary course until the end of

November. Since this proceeding, the return to Mr. Orchard of more than $50,000.00 of his supporters' funds has been wrongly held back.

SCALE OF COSTS

Finally, as to the scale of costs, it is submitted that there is no basis for awarding substantial indemnity costs.

As set out in the judgment on the merits, Your Honour was:

> "... not persuaded by the respondents' argument that Mr. Orchard might be motivated by political consideration. He is but one of the applicants. In any event, in this dispute, it would be hard to expect people not to be motivated by political consideration given the inherent nature of the dispute. My task is to focus narrowly on the real and important legal issues raised, and to remain strictly impervious to all political considerations."

If Your Honour is inclined to give any serious consideration to the request for substantial indemnity costs, we request that you read the memo of law at Tab A setting out the law as to when such awards are appropriate. This case cannot be brought within any established principles for awarding costs on a substantial indemnity costs and as set out at Tab A, it is submitted with respect that the authorities cited by the respondents do not stand for the propositions advanced by counsel.

The applicants are private citizens of ordinary means, who did not act out of self-interest, but rather sought relief which they believed to be in the interests of an important public institution. The respondents are plainly entitled to hold and advocate different views, but they are not entitled to penalize the applicants in costs, merely by virtue of having succeeded in the proceeding.

Sincerely,

Steven M. Barrett

Sean Dewart
SD:ja
opeiu 343

c.c. Paul Bates
Andrew Hamilton

SACK GOLDBLATT MITCHELL
MEMORADUM

TO: Sean Dewart

FROM: Charlene Wiseman

DATE: January 29, 2004

RE: Ahenakew et al v. MacKay

The respondents have sought costs on a substantial indemnity basis on the grounds that the applicants attempted to "litigate in the news media."

The suggestion is that the applicants' conduct in communicating with the public about the issues raised in this case was so inappropriate that it warrants the Court's censure in the form of an unusually high cost award.

The respondents have seriously mis-characterized both the circumstances of the case and the applicable law.

The threshold for awarding substantial indemnity costs is extremely high. Where costs are awarded, the ordinary course is to award them on a partial indemnity scale. The law is settled that it is only in exceptional cases, involving extreme misconduct on the part of the unsuccessful party, that the rule is departed from.

The Supreme Court of Canada has approved the following statement of principle:

> "Solicitor and client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." *Young v. Young,* [1993] 4 S.C.R. 3

Orkin has summarized the circumstances in which courts have awarded costs on a substantial indemnity basis as follows:

> "The conduct must be unconscionable rather than merely neglectful. The conduct of the offending party must be reprehensible, motivated by bad faith, or bordering on chicanery; the conduct must be egregious, even within the context of hard-fought litigation." (2nd ed., (1994) at p. 2 - 150)

Contrary to the respondents' suggestion, there is no tendency to award substantial indemnity costs against those who engage the media in the context of litigation.

Rather, the question in each case is whether the use of the media, in the particular circumstances of the case, is "reprehensible, scandalous or outrageous."

In this case, the applicants' conduct in communicating with the public through the vehicle of the media was entirely appropriate given the nature of the application.

While there is no question that the application raised *bona fide* legal issues, it also had an inherently political dimension, as the application judge pointed out. At issue in this case was nothing less than the future of Canada's oldest political party. The applicants' objected to the proposed merger of the Progressive Conservative Party with the Canadian Alliance not just on legal grounds, but (they said) because it failed to reflect the interests of PC Party members and Canadian society as a whole. The applications judge himself took note (without taking exception) of the case's political dimension in the following passages:

> "I was not persuaded by the respondents' argument that Mr. Orchard might be motivated by political consideration. He is but one of the applicants. In any event, in this dispute, ***it would be hard to expect people not to be motivated by political consideration given the inherent nature of the dispute.*** My task is to focus narrowly on the real and important legal issues raised, and to remain strictly impervious to all political considerations" [Emphasis added]
>
> ...
>
> "The social interest of members in ensuring that the organization's affairs are conducted in accordance with its governing constitution is apparent. Citizens exercise important rights in participating in political activity through membership in political parties."
>
> ¶ 7 and 15

Given the inherently political nature of this dispute, the applicants' communications with the public in the media was in no way "reprehensible, scandalous or ourtrageous." This is not a case in which the applicants sought to "litigate in the news media" by politicizing an essentially legal dispute in order to humiliate or intimidate the opposing party into abandoning its position.

Rather, the applicants were, fittingly, pursuing both a legal and a political resolution to a dispute which was in essence both legal and political. The political aspect of this dispute was not fabricated by the applicants to suit their own private ends to influence the Court, but was an essential component of the matters in issue.

That is, the matters were of legitimate public interest. Indeed, in light of the applicants' sincerely-held views that the imminently upcoming merger was inimical

to the Progressive Conservative Party's fundamental values and interests, it would have been wholly inappropriate for the applicants' to have confined their objections to the merger to the legal sphere.

The Cases Relied on by the Applicant are Inapplicable or Distinguishable

The respondents cite four cases in support of its contention that a litigant's use of the media warrants a substantial indemnity cost award. As set out below, the cases advanced by the respondent are either inapplicable to, or distinguishable from, the issue of substantial indemnity costs in this case.

The respondents incorrectly describe of *Munro v. Canada (Attorney General),* 1994 CarswellOnt 3254 as having "clearly articulated" the principle that "attempts to litigate in the news media are a relevant consideration and justify costs on a substantial indemnity basis."

In fact, this case concerns the issue of whether costs *per se* should be awarded against the unsuccessful applicant, and does not even touch upon the issue of substantial indemnity costs. Furthermore, the fact that the applicant had communicated with the media about the case was but one of several factors that the judge considered in deciding to award costs to the respondent. The judge also considered that the applicants had engaged in procedural misconduct, including "abuse of the process of this court" by advancing the same proceeding twice, using two different names.

Far from supporting the applicants' contention that the use of the media during litigation warrants a substantial indemnity costs award, the case suggests that use of the media, ***even when coupled with*** abuse of process, is still not enough to justify a costs award on a substantial indemnity basis.

In *Mangano v. Moscoe*, [1991] O.J. No. 1257 (Gen. Div.), while the court awarded costs to the respondent on a substantial indemnity basis on the grounds that the applicant had made an "unwarranted press release," the judge does not refer set out the facts which explain why the offenidng press relase was unwarranted. It is therefore impossible to compare the conduct of the applicant in *Mangano* to the conduct of the applicants in this case and to apply that case to the present circumstances in any meaningful way. For the reasons set out above, the applicants' communications with the media in this case were clearly not "unwarranted" given the inherently (and legitimately) political nature of this dispute.

The respondents also refer to *Stojanov v. Holland,* [2001] O.J. No. 4905 (Sup. Ct. J.) and *R. v. Santa,* [2002] O.J. No. 3002 in support of the proposition that a litigant

who uses the media to condemn highly esteemed members of society should be ordered to pay costs on a substantial indemnity basis.

In both of these cases, the impugned statements were found not just to be damning and serious, but completely false (in *Stojanov*) or utterly unfounded (in *Santa*).

In this case, while the respondents may disagree with the tone or the content of the statements made by the applicants to the media, there is no indication whatsoever that the statements were false or unfounded. This is certainly not something that can be proven or disproven on the record before the Court.