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 REPLY

A. Applicants are not Public Interest Litigants

1. There was no public interest component to the application filed. The applicants opposed the merger of the Progressive Conservative Party of Canada (the "Party") with another registered political party. The applicants' case was based entirely on the common law of private unincorporated associations. They were advocating that a contract existed between all members of the Party and that each member, by virtue of this contract, had veto power over certain matters of association governance, including the resolution to merge.

2. The applicants served no interests beyond their own. In fact, every other member of the Party was named as a respondent in the proceeding. Further, among the numerous declarations sought by the applicants, no declaration sought recognition as public interest litigants. The applicants did, however, seek to have the respondents pay their costs on a substantial indemnity basis (see paragraph 1(m) of the application).

3. The applicants seek to rely on a definition of public interest litigants they say is recited in *Odhavji Estate v. Woodhouse*, [2003] S.C.J. 74, presumably for the purpose of bringing themselves inside it. However, the applicants omit the first words of the sentence and leave out the finding of the court that follows. In fact, the court makes no finding as to the definition of a public interest litigant in that case. The quote reproduced by the applicants is a recitation of a proposed definition and the only finding of the court was that the plaintiffs failed to meet even their own proposed definition of a public interest litigant.

Odhavji Estate v. Woodhouse, [2003] S.C.J. 74 at para. 76.

B. No General Rule that Public Interest Avoids Costs

4. Even if this court were to decide that the applicants were fulfilling some sort of public interest, that does not relieve them from the normal costs consequences of failed litigation. The case law the applicants seek to rely on clearly states that the ordinary costs rules apply to public interest litigation.

Mahar v. Rogers Cablesystems Ltd. at p.11

5. As is evidenced by the case law the applicants seek to rely on, most cases where unsuccessful public interest litigants have been relieved from the normal requirement to pay costs are suits against the government.

6. The applicants were only able to locate one case where the unsuccessful party was relieved from costs in a proceeding against a private entity. The circumstances of that case are very different from the ones in this application. In *Mahar v. Rogers Cablesystems, supra,* the court denied the successful party costs on the basis that the litigation had a public interest component and that the respondent enjoyed a statutory monopoly from which it derived substantial benefits. It is also significant that the operation of the statutory monopoly was at issue in that proceeding. Unlike Rogers Cablesystems, the Party enjoyed no statutory monopoly and was a not a profit oriented organization, and is not the type of respondent who should be made to bear its own costs.

7. Immediately following the quote from the *Woodhouse* case on page three of the applicants' submissions, they state that there is a policy that "litigation involving issues of serious public importance should not be beyond the reach of the ordinary citizen." It is important to note that, as the case law submitted by the applicants makes clear, such a policy has only been applied to Charter litigation. Further the rationale stated in the case law concerned itself with the potential chilling effect costs awards might have on Charter litigation. There is no concern that costs awards will deter persons from bringing proceedings against politicians and political parties. Substantial indemnity costs were awarded against the unsuccessful parties in *R. v. Santa, Mangano v. Moscoe,*

and *Munro v. Canada*. Those awards did not deter the applicants in this case or others who have commenced litigation against politicians and political parties.

C. Costs Not Grossly Excessive

8. The respondents submit that their costs are not "grossly excessive" or "obvious overkill". Among other considerations, the complexity of the proceeding and the importance of the outcome to the parties is to be considered is awarding costs. The outcome of this proceeding and the timing of the outcome were of tremendous importance to both parties. Further, the issues raised by the applicants were factually and legally complex.

9. The applicants' assertion that the appropriate costs on a motion of this nature are in the range of $5000 to $7500 is inconsistent with recent costs awards and fails to consider the nature of the application they initiated. This application can not be compared to an interlocutory motion or routine proceeding. This application sought, among many other things, a permanent injunction against "all who have notice of the order". Had the applicants been successful the results would have been extreme. Party members and officials would have been permanently restricted from freely dealing with the financial affairs of the Party and a merger overwhelmingly supported by members would have been derailed. This application is more akin to a complex motion for summary judgment or an application where a large amount of money is at stake.

10. The respondents submit that the following examples of recent costs awards under the new tariff provide guidance on the quantum of costs that are appropriate in the circumstances of this case:

- In *MacAlpine v. Ontario Progressive Conservative Party et. al.*, [2003] Court File No. 03-0101 unreported (Ont. S.C.J.), Pierce J. ordered substantial indemnity costs to the successful parties in a simple motion to strike. Only five of the six defendants sought costs and Pierce J. awarded a total of $47,695.62 against the unsuccessful plaintiff.

- In *Hrair Shahinian v. Precinda Inc. and Precinda Ltd.*, [2003] Court File No. 03-CL-4888 unreported (Ont. S.C.J.) Blair J. (as he then was) described the application at issue as being "of at least moderate complexity and importance" and awarded $50,000 in costs on a partial indemnity scale, plus disbursements, plus GST. The application in that matter was argued in one day.

- In *Risorto v. State farm Mutual Automobile Insurance Co.* (2003), 64 O.R. (3d) 135 (S.C.J.), Winkler J. awarded $75,000 in costs on a partial indemnity scale to the successful party in a summary judgment motion that took one day to argue and involved evidence consisting of three affidavits totalling nine pages.

11. The respondents submit that this matter was far more complex than any of the above noted cases and was at least as important as any of them. The consequences of the applicants succeeding were also extreme that the respondents could not afford to cut corners (see comments of Malloy J. in *Stojanov v. Holland*, [2001] O.J. No. 4905 (S.C.J.)). The respondents therefore submit that their bill of costs is not "grossly excessive" or "obvious overkill" and is appropriate in the circumstances.

C. The Ability of the Unsuccessful Party to Pay Costs

12. The applicants have submitted, as a relevant consideration, that some of them are "of modest means". To the extent the means of parties is a relevant consideration at all, the court must then consider that the Party was millions of dollars in debt at the time the applicants initiated this proceeding. Further, although some applicants may be of modest means, others are persons of substantial means. Costs are awarded against the applicants as a group, and are not individually apportioned. The modest means of some are balanced by the wealth of others in the group.

13. The respondents also bring to the court's attention the fact that the applicants solicited donations to fund their litigation. On the CTV program *Question Period* on November 30, 2003, one of the applicants stated that they had solicited donations to fund the litigation and that people "had responded in droves" (see Compendium re: Costs, tab 17, page 2). If the means of the parties is a relevant consideration then the applicants assembling a "war chest" of donations to fund the litigation should also be considered as a factor mitigating their allegedly modest means.

14. Finally, the respondents submit that costs awards are compensatory in nature. The means of an unsuccessful party ought not to be a relevant consideration, particularly where that party is the one who has initiated the proceeding. Further, there is no evidence on the record to support any impecuniosity on the part of the applicants as a group.

D. No Improper Conduct by Respondents

15. The allegations of improper conduct made by the applicants in their costs submissions are inaccurate and unfounded.

16. The respondents' materials did not allege that Mr. Orchard tampered with documentary evidence. Mr. Bellemare noted in his affidavit that Mr. Orchard failed to disclose how he came to be in possession of a confidential draft document he was not privy to and also failed to disclose that the electronic draft stamp had been removed. Mr. Orchard then filed a reply affidavit to answer the questions raised by Mr. Bellemare. Only Mr. Orchard used the word "tamper" and alleged that criminal conduct had taken place.

17. The applicants claimed that unsubstantiated allegations were made that Mr. Orchard filed a false affidavit. Many portions of Mr. Orchard's affidavit were proven to be false. Mr. Orchard was incorrect about the rules and procedures for the December 6 meeting, he was incorrect about what happened at the Management Committee meeting on October 25, 2003 and he was incorrect in his recitations of political history. The inaccuracies of Mr. Orchard's first affidavit were set out in the affidavit of Dominique Bellemare and were unchallenged by cross-examination. At his cross-examination, however, Mr. Orchard admitted that he understood what the Agreement in Principle meant even though he swore in his first affidavit that he did not.

18. The applicants' costs submission also makes new allegations that the Conservative Fund of Canada is wrongly withholding funds from Mr. Orchard's last leadership bid. That allegation is raised at first instance in the costs portion of this

proceeding and is unsupported in the evidence before the court, irrelevant to the application argued on December 4, 2003 and has nothing to do with the fixing of costs. Neither the Conservative Fund of Canada nor the former Progressive Conservative Fund are parties to this proceeding. This is clearly not an appropriate forum for Mr. Orchard to air his grievances with the Conservative Fund of Canada.

19. While the respondents do not wish to expand the issues before the court in the costs submissions of this proceeding, they feel compelled to bring to the court's attention that the description of the candidate donation procedures in the applicants' costs submissions are incorrect. Further, and despite the fact that the leadership process for the Progressive Conservative Party of Canada officially closed on December 7, 2003, the Conservative Fund continues to communicate with and assist Mr. Orchard and his organization in sorting out the finances they have processed and attempted to process through the Conservative Party in order to obtain tax benefits for Mr. Orchard's supporters.

E. Challenged Costs and Disbursements

20. The applicants have challenged the respondents' bill of costs based on the fact that the respondents were involved in an arbitration at the same time this application was proceeding. The respondents wish to reiterate that only dockets for this application proceeding have been included in the bill of costs.

21. The applicants have also stated that time was charged for the second appearance before Nordheimer J. on November 26, 2003. This is incorrect. Unlike the applicants, the respondents did not seek costs for that appearance and it is not included

in the bill of costs. The bill of costs reflects the first appearance before Nordheimer J., which took longer than the fifteen minutes the applicants have suggested.

22. The applicants have challenged the photocopying charges submitted by the respondents. The rate charged for copying is $0.25 per page, $0.12 per tab and $0.50 per sheet of cover stock. These charges are standard. Although the respondents have not engaged in a page and tab count of all the documents sent to the court and to the applicants, the amounts reflect the photocopying and tab charges attributed to this matter for the days those documents were produced.

23. The staff overtime charge is not an attribution of overhead. The short timeline of this proceeding required secretarial staff to stay late to work exclusively on this matter. The overtime charges reflects the actual hours of overtime spent by secretarial staff on this matter. This is claimed under item 35 of Tariff A as a disbursement reasonably necessary for the conduct of the proceeding.

24. The applicants have also challenged the disbursements for computer searches. The legal points raised by the applicants have not been discussed at length in Canadian jurisprudence and the respondents' research included international materials that were only available electronically. Although some research was completed on Quicklaw, other electronic sources were used for international materials. These disbursements are claimed as disbursements reasonably necessary for the conduct of the proceeding under item 35 of Tariff A.

25. The respondents, once again, state that the bill of costs reflects charges reasonably and fairly incurred in responding to this application.

ALL OF WHICH IS SUBMITTED THIS THE 6th DAY OF FEBRUARY, 2004.

Paul Bates

Arthur Hamilton

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