

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

AND

**POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF
THE ONTARIO PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL
INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

Respondents

APPLICATION UNDER Rule 14.05(3) of the *Rules of Civil Procedure*

APPLICANTS' COSTS SUBMISSIONS

PART I: OVERVIEW

1. In a context in which the Applicants initiated proceedings for the purposes of seeking police accountability and determining issues of significant public interest, this cost application raises the principles of access to justice. Success by the Respondents in obtaining the significant costs that they are seeking risks placing a chill upon, not only upon these Applicants, but upon anyone seeking to raise issues of police and state accountability through the courts. It is not in the public interest to create a barrier to justice for members of the community who challenge public officers who misuse their power, whether through ignorance, carelessness or worse.

2. These submissions address the Respondent Officers' and Commissioner Fantino's request for costs in the amount of \$74,616.16 and \$17,500.00, respectively, a total of \$92,116.16. Costs in this amount would pose a significant financial hardship for these public interest Applicants, in particular Ruth Schaeffer, who is of limited means.

3. The Applicants request that this Honourable Court exercise its discretion and order no costs on the Motion to Strike and the Application. The Applicants submit that the issues raised by the Application were of fundamental importance to the public interest and, as a result, justify a departure from the normal costs rules.

PART II: FACTS

A. The Applicants

4. The Applicants are the family members of Douglas Minty and Levi Schaeffer, two mentally disabled men who died as a result of two unrelated Ontario Provincial Police ("O.P.P.") shootings on June 22 and 24, 2009 respectively. These family members made an Application to this Honourable Court seeking judicial guidance in respect of the lawfulness of the conduct of the Respondent Officers – conduct that had the consequence of both irreparably prejudicing the S.I.U. investigations and undermining the Applicants' confidence in the investigations.

5. The Applicant, Evelyn Minty, is the 83 year old mother of the deceased, Douglas Minty. She is a widow who resides alone at the residence where her son was shot and killed by the Respondent Officer, Constable Seguin. The Applicant, Diane Pinder, is the younger sister of Douglas Minty.

6. The Applicant, Ruth Schaeffer, is the 53 year old mother of the now deceased, Levi Schaeffer. Prior to the death of her son, Ms. Schaeffer was employed by the Canadian Association of Elizabeth Fry Societies. She was employed as a human rights advocate within penitentiaries.

After the shooting death of her son, she was unable to continue working. As a result, she was on sick leave from June 2009 to approximately May 2010. In September 2010, she resigned from her position with the Canadian Association of Elizabeth Fry Societies. At the time of her resignation she was earning approximately \$39,000.00 per annum.

Affidavit of Ruth Schaeffer, para. 2, Tab 2 of the Applicants' Cost Submission Materials

7. After the completion of her sick-leave benefits, Ms. Schaeffer received regular employment insurance benefits (approximately \$1,440.00 a month) which ended in September, 2010. Ms. Schaeffer does not own any real estate property and has an outstanding loan debt of approximately \$8,500.00. Ms. Schaeffer does not have any savings and has approximately \$1000.00 in a GIC account.

Affidavit of Ruth Schaeffer, paras. 3, Tab 2 of the Applicants' Cost Submission Materials

8. On October 3, 2010, Ms. Schaeffer began employment as a pastry chef. She receives an hourly wage of \$11.50 per hour and works approximately 25 hours per week.

Affidavit of Ruth Schaeffer, para. 4, Tab 2 of the Applicants' Cost Submission Materials

9. To date, the families have amassed significant legal fees without the possibility of recovering damages with respect to the herein Application.

B. History of Proceedings

10. The Respondent Officers argue that the Applicants' "Litigation Strategy" increased the costs of the herein proceeding (paragraph 22 of their factum). In response, the Applicants have detailed the procedural history of this matter in order to illustrate for the Court the role that the "Litigation Strategy" of the Respondent Officers played in extending these proceedings and increasing their costs.

11. As detailed below, the Applicants were faced with many hurdles, raised by the Respondent Officers, with respect to the Applicants' reasonable efforts to provide a full evidentiary record for the Court. This position was taken despite the fact that the Respondent Officers sought to strike the Application on the grounds that, amongst other things, there was an insufficient factual record to adjudicate the Application.

12. For example, when the Applicants examined the witness S.I.U. Investigators, the Respondent Officers made repeated objections on the basis of privilege claims. There was no reasonable legal basis for the privilege claimed, and indeed the Respondent Officers later withdrew their reliance upon privilege as a ground for refusing questions or the production of documents. The parties were required to attend a second day of witness examinations as a result.

13. The procedural history is set out below.

(i) Adjournment #1

14. On November 4, 2009, the Applicants filed the Notice of Application. On the same day, the Application was scheduled to be heard on May 13, 2010.

Affidavit of Asha James, para. 2, Tab 1 of the Applicants' Cost Submission Materials

15. On November 11 and 12, 2009, the Respondents were advised of the Applicants' intention to obtain summonses to examine, pursuant to Rule 39.03, the two S.I.U. investigators assigned to investigate the shootings. The parties were advised that the examinations would take place on November 23, 2009. On November 12, 2009, the Applicants obtained the summonses. Each of the Respondents were served with a copy of the summonses by November 17, 2009.

Affidavit of Asha James, para. 3, Tab 1 of the Applicants' Cost Submission Materials

16. On November 18, 2009, counsel for the Director of the S.I.U. requested an adjournment of the examinations. On November 19, 2009, the Applicants consented to the adjournment on the condition that the examinations would proceed on November 30, 2009.

Affidavit of Asha James, para. 4, Tab 1 of the Applicants' Cost Submission Materials

(ii) Adjournment #2 – The Respondent Officers' Privilege Claim

17. On November 27, 2009, counsel for the Respondent Officers wrote to the Applicants advising that they were claiming *Wigmore* privilege over communications between the Respondent Officers and the S.I.U. investigators. The Respondent Officers did not advise of the factual or legal basis that would support a claim for privilege pursuant to the *Wigmore* test.

Affidavit of Asha James, para. 5, Tab 1 of the Applicants' Cost Submission Materials

18. On the evening of November 29, 2009, counsel for the Director of the S.I.U. again requested an adjournment of the examinations. As a courtesy, the Appellants agreed to adjourn the examinations to December 7, 2009, as counsel for the Director provided an undertaking that the examinations would proceed on December 7, 2009.

Affidavit of Asha James, para. 6, Tab 1 of the Applicants' Cost Submission Materials

19. On December 4, 2009, counsel for the Applicants wrote to counsel for the Respondent Officers seeking the legal basis for the *Wigmore* privilege claimed over communications between the Respondent Officers and the S.I.U. investigators. No response was received.

Affidavit of Asha James, para. 7, Tab 1 of the Applicants' Cost Submission Materials

20. Examinations were conducted on December 7, 2009. However, counsel for the Director of the S.I.U. objected to many questions on the basis of privilege and relevance. During the

examination of the S.I.U. investigators, counsel for the Respondent Officers objected to the production of certain documents on the basis of privilege. The Applicants brought a motion to compel answers to questions refused.

Affidavit of Asha James, para. 8, Tab 1 of the Applicants' Cost Submission Materials

21. In an effort to ensure that the Application hearing date was not lost as a result of delay, the Applicants wrote to the Court requesting that the matter be case managed. That request was granted and Master Abrams was assigned to manage the Application.

Affidavit of Asha James, para. 9, Tab 1 of the Applicants' Cost Submission Materials

(iii) Respondents' Motion to Strike

22. On January 12, 2010, the Respondent Officers served a Notice of Motion seeking to strike the Application. A case conference call was held with Master Abrams on January 19, 2010. During the conference call, counsel for the Respondent Officers requested that the refusals motion, continued examinations and the hearing of the Application be deferred until a decision on the Motion to Strike could be obtained. After hearing submissions from both parties, Master Abrams ordered that the refusals motion and the continued examinations proceed in advance of May 13, 2010, and that the Motion to Strike and the Application would be heard together on May 13, 2010. Master Abrams set a timetable for the delivery of materials on the refusals motions and scheduled March 10, 2010, as the date for the refusals motion.

Affidavit of Asha James, para. 10 & 11, Tab 1 of the Applicants' Cost Submission Materials

23. Master Abrams ordered the above because, amongst other things, one of the grounds in the Respondent Officers' Notice of Motion to Strike the Application was that "the Applicants' claims

lack a sufficient factual basis and are therefore abstract and hypothetical” (ground 9(c) of the Respondent Officers’ original Notice of Motion).

Affidavit of Asha James, para. 12, Tab 1 of the Applicants’ Cost Submission Materials

(iv) The Second Case Management Conference

24. During the exchange of undertakings and refusals charts, an issue arose as to the scope of the motion to be argued on March 10, 2010. The Respondent Officers and the Director of the S.I.U. were of the view that only the privilege issue would be addressed on March 10, 2010. As a result, a telephone case conference with Master Abrams was scheduled for February 24, 2010, so as to resolve the scope of the refusals motion.

Affidavit of Asha James, para. 13, Exhibit I, Tab 1 of the Applicants’ Cost Submission Materials

25. On February 24, 2010, counsel for the Respondent Officers wrote to Master Abrams advising that they were withdrawing their claim that the Application lacked a “sufficient factual basis”. The Respondent Officers sought to have Master Abrams reconsider her decision to order that the motion to strike and the Application itself would be heard at the same time. Despite the Respondent Officers’ new position, Master Abrams ordered that the refusals motion be argued on March 15, 2010, (vacating the March 10, 2010, date) and that the Application and the Motion to Strike would be heard together on May 13, 2010.

Affidavit of Asha James, para. 14, Tab 1 of the Applicants’ Cost Submission Materials

(v) **Privilege Claim Withdrawn**

26. On February 26, 2010, counsel for the Respondent Officers wrote to counsel for the Applicants and withdrew their claims of privilege with respect to the communications between the Respondent Officers and the S.I.U. investigators.

Affidavit of Asha James, para. 15, Tab 1 of the Applicants' Cost Submission Materials

27. The above noted history reflects the fact that the positions advanced by the Respondent Officers have contributed to increasing the costs of these proceedings, in particular by requiring a second day of examinations of witnesses and several case conferences on the basis of legal positions that were either later withdrawn or rejected by the case management Master. There can be no doubt that the evidentiary record was necessary for both the Motion to Strike and the Application as this Honourable Court relied upon the evidentiary record in holding that it could decide the Motion to Strike without the benefit of hearing argument on the merits of the Application.

Reasons for decision, Justice Low, May 18, 2010 at para. 6, Tab 5 of the Applicants' Cost Submission Materials

PART III: SUBMISSIONS ON COSTS

28. On the issue of costs, this Honourable Court has a high level of discretion to ensure that justice between the parties is achieved. The Applicants submit that the issues raised in the herein Application are of significant public importance and militate in favour of the Court dismissing the costs requests made by the Respondent Officers and the Commissioner of the Ontario Provincial Police.

A. Costs and Access to Justice

29. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, the Supreme Court of Canada recognized that costs in public interest litigation require special treatment. The Supreme Court held that there are substantial benefits to be obtained in departing from the normal “two-way” costs regime in cases of “public interest litigation”:

Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

....

The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy Dist. Ct. J. applied Rule 57.01(2), a provision of Ontario's Rules of Civil Procedure that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia Rules of Court, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

British Columbia (Minister of Forests) v. Okanagan Indian Band, at [2003] 3 S.C.R. 371 para. 27-30

30. The cost of litigation has a significant bearing on whether public interest issues will be brought before a court. Leading commentators have concluded that the traditional model for costs, wherein costs awards follow the result, discourages litigation generally and public interest litigation specifically.

Friedlander, “*Costs and the Public Interest Litigant*”, [1995] 40 McGill L.J.55, at pp. 85-91

Report on the Law of Standing, supra, p. 146-7, 157; *Ontario, Report of the Task Force on Legal Aid, Part I* (1974), at pp. 99, 100; *Tariff "A"*, (Ontario) Rules of Civil Procedure – Part I Costs Grid

31. Thus while traditional cost rules inhibit access to publicly important litigation, the salutary effects of access to public interest litigation are considerable and fundamental to a functioning democracy:

- i) Access to public interest litigation ensures that all viewpoints in a society are expressed in the process of judicial decision making. If, for example, business groups are disproportionately represented in litigation, “judges may be more inclined to view business’ claims with favour”.
- ii) Public interest litigants serve an important informational component as they represent interests that are important to society whose perspectives would not otherwise be represented in court.
- iii) The participation of public interest litigants is necessary to solidify the court’s role in the democratic process. As stated by Professor Monahan, the very function of judicial review is “to ensure that the political process is open to those of all viewpoints on something approaching an equal basis”.
- iv) Exposure to litigation can render political decisions legitimate. Even if a public interest action fails, the judicial process can lessen the public dissonance that may have attached to the initial political decision. As stated by P.L. Bryden, “[e]veryone knows that judicial decisions create winners and losers. And nobody likes to lose. At the same time we have a strong sense that losing is not quite so bad if we have had a fair chance at playing the game.”
- v) Access to public interest litigation means access to justice for disadvantaged groups. As stated by Professor Tribe, “decision processes made essential by the government must not simultaneously be denied because of poverty of those who are obliged to rely on such processes”.

Friedlander, “*Costs and the Public Interest Litigant*”, [1995] 40 McGill L.J.55, at pp. 85-91

Tollefson, “*Costs and the Public Interest Litigant: Okanagan Indian Band and Beyond*”, 1 2006 Canadian Journal of Administrative Law and Practice, at pg. 49

Fenrick, “*Habermas, Legal Legitimacy, And Creative Cost Awards in Recent Canadian Jurisprudence*”, (Spring, 2007) 30 Dalhousie L.J. 165 at pg. 5

32. In the case of *Euteneier v. Lee*, the Ontario Court of Appeal found that although the appellant was unsuccessful on the appeal, given the public importance of the issues brought forward by the appeal, the appellant should not be liable for the costs of the victorious party:

Given these facts, I agree with the submission by counsel for the respondent that it was reasonable for the respondent to attempt to hold the appellants responsible for

their conduct. The fact that she was ultimately unsuccessful in her action and on the appeals therefrom does not diminish the gravity of her treatment by the police while she was in custody, or its implications for the public at large. This case raised complex issues of general public importance involving the duties, obligations and requisite standard of care owed by the police to persons whose liberty is constrained in a police lock-up facility. Thus, notwithstanding the respondent's personal pecuniary interest in the outcome of this case, the public interest was also engaged in these proceedings. In any event, the respondent's financial interest in this case was clearly modest in comparison to the overall costs of the proceedings.

Euteneier, [2005] O.J. No. 5107, (C.A), para 6

33. In determining whether or not a proceeding is “public interest litigation” a court must consider the circumstances of the litigation from the perspectives of “access to justice” and “public benefit.” If, in applying these metrics, a court determines that the proceeding fits the general profile of “public interest litigation”, it then has discretion to depart from the usual approach to costs.

Chris Tollefson, Darlene Gilliland & Jerry DeMarc, “*Towards a Costs Jurisprudence in Public Interest Litigation*”, (2004) 83 Can. Bar Rev. 473; B.L. Berger at pg . 482

34. It is not in the public interest to create a barrier to justice for unfortunate members of the community who challenge public officers who misuse their power, whether through ignorance, carelessness or worse. Where litigations raise *bona fide* issues of law that are important to the community, it is appropriate for our Court to exercise its discretion in the matter of costs and depart from the normal rules on costs.

Veysey v. Maplehurst Correctional Complex, [2007] O.J. No. 285 at para. 11

35. In Canada, there have been a number of public interest cases where the victorious government or public authority has not received costs from the unsuccessful public interest litigant notwithstanding that the victorious public authority achieved its victory in a way that was above reproach.

Allman v. Northwest Territories (Commissioner), [1983] N.W.T.R. 231, 46 A.R. 61 (S.C.)

Harrison v. University of British of Columbia, [1986] B.C.J. No. 2001, 30 D.L.R. (4th) 206 (S.C.), additional reasons on costs [1987] 2 W.W.R. 378 (S.C), revd [1998] B.C.J. No. 13, 21 B.C.L.R. (2d) 145 (C.A.), affd [1990] 3 S.C.R. 451, [1991] S.C.J. No. 123;

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), [2004] 1 S.C.R. 76;

Sierra Club of Western Canada v. British Columbia (Attorney General), [1991] B.C.J. No. 2613, 83 D.L.R. (4th) 708 (S.C.);

Valpy v Ontario (Commission on Election Finances) (1989), 67 O.R. (2d) 748, [1989] O.J. No. 66 (Div. Ct.).
Gombu v. Ontario (Assistant Information and Privacy Commissioner), [2002] O.J. No. 2570, 163 O.A.C. 185 (Div. Ct.)

36. In addition, there are number of cases where a government or public authority that was the successful party (or intervenor) in public interest litigation has been ordered to pay costs to the unsuccessful party notwithstanding that the victorious public authority achieved its victory in a way that was above reproach.

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1989] O.J. No. 205 (Dist. Ct.), affd (1992), 10 O.R. (3d) 321, [1992] O.J. No. 1915 (C.A.), affd [1995] 1 S.C.R. 315, [1995] S.C.J. No. 24

Horsefield v. Ontario (Registrar of Motor Vehicles) (1999), 44 O.R. (3d) 73, [1999] O.J. No. 967 (C.A.)

Schachter v. Canada, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68.

37. Finally, there are a number of cases where Canadian courts have not ordered costs against an unsuccessful litigant with a “private interest” when the litigation raises important legal questions or is a test case.

Sutcliffe v. Ontario (Minister of the Environment), [2004] O.J. No. 4494, 191 O.A.C. 370 (C.A.);

Dickason v. University of Alberta, [1992] 2 S.C.R. 1103, [1992] S.C.J. No. 76, 95 D.L.R. (4th) 439.

38. Canadian courts have long recognized that the law should develop in a manner that is consistent with protecting matters of public interest. In the context of defamation claims, the Supreme Court of Canada has recognized exceptions to liability on the basis that libel suits can have a “chilling effect” on publications about matters of “public interest”:

The second rationale — getting at the truth — is also engaged by the debate before us. Fear of being sued for libel may prevent the publication of information about matters of public interest. The public may never learn the full truth on the matter at hand.

To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: *Brown*, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment “is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews”: *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, per Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

Grant v. Torstar Corp., 2009 SCC 61 at para. 54 and 105

39. The administration of justice is properly served when issues of public importance and injustices are revealed to the public.

In the view of the trial judge, the ethical guidelines provided in Chapter 21 were more consonant with the law of fair comment than “... suggestive of a duty so clear as to license defamation through qualified privilege.” While I agree that not all public statements made by a lawyer are clothed in privilege upon merely the invocation of the duty to improve the administration of justice, a lawyer faced with a patent injustice, such as the violation of her clients’ Charter rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner. Such duty may well provide a basis for qualified privilege.

Campbell v. Jones [2002] N.S.J. No. 450 (C.A.) at para. 51 and 56

B. The Applicants are Public Interest Litigants

40. It is respectfully submitted the Applicants should not be subject to cost consequences because they are “public interest litigants”.

41. In determining whether this Honourable Court should exercise its discretion to depart from the normal rules regarding costs, this Honourable Court must be satisfied that the Applicants are “public interest litigants” and that the proceedings can be categorized as “public interest litigation”.

42. In *Odhavji Estate v. Woodhouse*, the Supreme Court of Canada recognized two types of public interest litigants: (a) litigants who have no direct pecuniary or other material interest in the proceedings (e.g. a non-profit organization); and (b) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the costs of the proceedings.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74

43. This classification scheme suggests that two aspects of a public interest litigant are that: (a) he or she is a partisan in a matter of public importance; and (b) he or she has little to gain financially from participating in the litigation. It seems clear from the case law and the literature that the conventional view is that a public interest litigant must, to some extent, manifest unselfish motives.

Incredible Electronics Inc. v. Canada (Attorney General), 80 O.R. (3d) 723 at para 92

Office and Professional Employees' International Union Local 378 v. British Columbia (Hydro and Power Authority), [2004] B.C.J. No. 623

44. With respect to the first element of the test, courts have held that the “public interest litigant” must be partisan in a matter of public importance:

One trait of a public interest litigant seems obvious. A public interest litigant, at a minimum, must, in a dispute under the adversary system, take a side the resolution of which is important to the public. There is much more to being a public interest litigant because a private interest litigant may also take a side in dispute important to the public, but one necessary trait of a public interest litigant is that he or she be a partisan in a matter of public importance. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, supra, at para. 38 LeBel J. noted that in determining whether public interest litigants deserved special treatment with respect to costs, a factor was the nature and significance of the issues for which they were partisans. He stated:

[T]he more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues

of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. (emphasis added)

Incredible Electronics Inc. v. Canada (Attorney General), 80 O.R. (3d) 723 at para 92

British Columbia (Minister of Forests) v. Okanagan Indian Band, at [2003] 3 S.C.R. 371 para. 38

45. A party may still be a “public interest litigant” even if the party has a “private interest” in the proceeding. The focus is not on the interest the party has in the litigation, but rather whether the issues raised have a broader importance to the community:

Although this element of at least diminished private or selfish interests will work as a criterion in many cases, it seems to me that this element does not always identify a public interest litigant. For example, although the monetary amounts may be small, a litigant claiming social assistance benefits could be said to have everything to gain financially, but most everybody would agree that litigation involving social assistance benefits could qualify as public interest litigation. Another example, taken from *British Columbia (Minister of Forests) v. Okanagan Indian Band*, *supra*, is a claimant advancing an aboriginal rights claim, which may have considerable financial consequences to the claimant. Self-interest did not bar the Indian bands from obtaining an interim costs award. The majority of the court characterized the bands' as parties to public interest litigation because "the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues" (para. 38).

Incredible Electronics Inc. v. Canada (Attorney General), 80 O.R. (3d) 723 at para 96

The more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues.

British Columbia (Minister of Forests) v. Okanagan Indian Band, at [2003] 3 S.C.R. 371 para. 38

46. With respect to the second element of the test, it is important to note that a party need not be completely altruistic in commencing a proceeding in order to be characterized as a “public interest litigant”:

These examples suggest that altruism and having **little to gain financially work better as indicia** than as criteria for qualification as a public interest litigant. Put somewhat differently, altruism may be a sufficient, but it is not a necessary, criterion for qualification as a public interest litigant. Perhaps, other virtues such as courage, loyalty, patriotism, dedication to a worthy cause and the pursuit of justice may qualify the litigant as a public interest litigant.

At this point in its legal development, there is a certain je-ne-sais-quoi quality to the nature of a public interest litigant, but having read the literature and having thought about it, it seems to me that sometimes a relevant but not determinative feature is that the public interest litigant is either the "other", a marginalized, powerless or underprivileged member of society, or the public interest litigant speaks for the disadvantaged in society, even if he or she has his or her own selfish reasons for litigating. (emphasis added)

Incredible Electronics Inc. v. Canada (Attorney General), 80 O.R. (3d) 723 at paras. 98-99

47. It is submitted that the Applicants meet both aspects of the test for a "public interest litigant."

(i) The Applicants are partisan in a matter of public importance

48. There can be no doubt that the Applicants were partisan in this matter. The Applicants sought declarations that the actions of the Respondent Officers as well the Commissioner of the O.P.P. violated various sections of the *Police Services Act* and the *S.I.U. Regulations*. The Respondent Officers and the Commissioner of the O.P.P. vigorously opposed the declarations sought.

49. The herein Application raised issues that extend beyond the immediate interests of the parties involved. The practices employed by police officers with respect to S.I.U. investigations are an issue of great public concern. This was exemplified by the number of interveners that sought leave with respect to the hearing of the Application and the media attention on the matter. The intervenor materials reflect the broad interests engaged by the Application:

Should the Application be determined on its merits, the ruling of the Court will have a direct impact on the rights and duties of members of the OACP and their

officers. The OACP membership has a substantial interest in the outcome of this Application

OACP Notice of Motion, para 6, Tab 6 of the Applicants' Cost Submission Materials

If this case proceeds to a determination on its merits, the Applicants are seeking the court's ruling on issues of fundamental fairness, and important procedural issues, in SIU-led criminal investigations of police officers discharging their essential public functions. The ruling of this court will therefore, have a direct impact on important rights, duties and responsibilities of all 33,000 PAO members across the province, whenever they find themselves caught up in an SIU-led criminal investigation. The entire PAO membership therefore has a substantial interest in the outcome of this application.

Given the significance and province-wide potential impact of the issues raised in this case, the perspectives of the PAO membership will inform the Court's deliberations in important ways. The PAO brings a breadth of perspective that is unmatched by the parties in this case.

PAO Notice of Motion, paras. 5 and 7, Tab 7 of the Applicants', Applicants' Cost Submission Materials

50. In its ruling of June 23, 2010, this Honourable Court stated:

The issue lies at the intersection of a number of values, interests and rights that are not easily balanced. Among them are the interest in ensuring public security, the value of an effective civilian oversight of police action, the interest in ensuring accountability on the part of those in whom extraordinary powers have been vested, the rights of police officers to counsel and to silence where they are potentially accused persons by reason of actions performed in the course of their duties, the appropriate protections to be accorded to those who are called upon to undertake extraordinary risk.

Reasons for Decision, Justice Low, June 23, 2010, para 57, Tab 4 of the Applicants' Cost Submission Materials

51. The issues raised in the herein Application have long been the subject of "significant disagreement among stakeholders in the policing arena." The issues have been raised in the following reports on the S.I.U.:

1. Report on the Special Investigations Unit prepared for the Attorney General of Ontario, 1998, The Honourable George W. Adams, Q.C.;

2. Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario, February 26, 2003, The Honourable George W. Adams, Q.C.;
3. Oversight Unseen, Report of the Ombudsman of Ontario, Sept 2008

Reasons for Decision, Justice Low, June 23, 2010, para 48, Tab 4 of the Applicants' Cost Submission Materials

52. Despite the above reports, the practices of police officers with respect to their participation in S.I.U. investigations has remained unchanged and have been the subject of criticism from the current S.I.U. director, Ian Scott. Mr. Scott raised his concerns about the practices of note-taking in his report on the Schaeffer Investigation to the Attorney General:

As previously mentioned, Cst. Wood was the subject officer. He provided his notes to the SUI but declined to be interviewed. Accounting to his notes, he was instructed by D/Sgt

Wellock shortly after the incident not to write up his notes until he spoke to legal counsel. He then spoke to Ontario Provincial Police Association lawyer Andrew McKay at 1712 hrs the same day and was advised to prepare notes for him. He met with Mr. McKay at 0900 on June 26th, 2009, two days after the incident, and provided his notes to him. According to the subject officer's notes, Mr. McKay: "adv[ised] notes are excellent and to complete notebook". In our others, after receiving Mr. McKay's approval, he took his notes back from his counsel and wrote up his memo book based upon a combination of his confidential notes to counsel and his discussions with him. At 0930, the only other witness to this shooting, A/Sgt Pullbrook, attended the same location to confer with Mr. McKay.

A/Sgt Pullbrook was designated a witness officer, provided his notes and submitted to a compelled interview. He too was represented by Mr. McKay, who advised him at 1810 hrs on the day of the incident not to write up his notes. According to his notes, A/Sgt Pullbrook made his June 24th, 2009 note book entries based upon his confidential notes to counsel on June 26th, 2009. Needless to say, neither officer provided the S.I.U. investigators with their first set of notes. I might add that Mr. McKay acted for all of the other witness officers in this matter.

This note writing process flies in the face of the two main indicators of reliability of notes: independence and contemporaneity. The notes do not represent an independent recitation of the material events. The first drafts have been 'approved' by an OPPA lawyer who represented all of the involved officers in the matter, a lawyer who has a professional obligation to share information among his clients when jointly retained by them. Nor are the notes the most contemporaneous ones – they were not written as soon as practicable and the first

drafts remain in the custody of their lawyer. I am denied the opportunity to compare the first draft with the final entries. Accordingly, the only version of the material events are association lawyer approved notes. Due to their lack of independence and contemporaneity, I cannot rely upon these notes nor A/Sgt Pullbrook's interview based upon them for the truth of their contents.

Application Record. Tab 4(C), Pgs 93-94

53. The impugned practices continue in Ontario. In particular, on two separate occasions since this Honourable Court's decision, the Director of the S.I.U. has had to again publicly decry the impugned note taking procedures:

SIU Closes Investigation into Ottawa Firearm Injury

Director Scott added, "I have a concern about the preparation of some of the witness officers' notes in this matter. (The subject officer did not provide his notes nor submit to an interview as is his right.) The SIU was notified of this incident at 10:55 p.m. on June 22, 2010. By 11:25 p.m., before the arrival of any SIU investigators, an association lawyer had spoken to a number of the witness officers, and as noted by one of them in his notes, 'okay[ed] all submissions'.

"The case law around notes, training on this issue at the Ontario Police College and the recommendations of Mr. Justice Salhany from the Taman Inquiry make it clear that notes are to be written independently. Notes are the basis of all subsequent interviews and court testimony related to that incident. Here, we have an officer who wrote up his notes after they were approved by a lawyer, a lawyer who has a professional obligation to share information among jointly retained clients. This practice detrimentally affects my ability to assess the reliability of the information imparted by the witness officers because I cannot be certain whether that information is based upon their independent recollection or tainted by information received through their counsel. It clearly undermines the intent of s. 6 of O.Reg 673/98 of the Police Services Act which mandates segregation and non-communication among involved officers when the SIU is called in to investigate. I will be asking the Chief to inquire into this practice and provide me with a written response on this issue."

Affidavit of Asha James, para. 25, Tab 1 of the Applicants' Cost Submission Materials

SIU Closes Investigation into Kenora Firearm Injury

Director Scott added, "While it was possible to garner enough information in this incident to make an informed decision due to the voluntarily provided statements of civilian witnesses, the issue of a police association lawyer interfering with the note writing process has again arisen. Two witness officers who initially

responded to the shooting were off-duty. One of the officers provided medical aid to Ms. Proulx and the other assisted with scene security, placing themselves on-duty. Both officers spoke to police association counsel later that night and were advised by counsel not to write up their notes. In one case, a witness officer was told 'not to make notes but do notes to counsel.' As a result, neither wrote up their police notes until the following day when ordered to do so by a superior officer. While I commend the superior officer for making such an order, it is disturbing that the advice of an association lawyer not to write up notes appears to be trumping the duty of officers to write contemporaneous notes, particularly when their observations relate to an incident as serious as this one."

Affidavit of Asha James, para. 24, Tab 1 of the Applicants' Cost Submission Materials

54. The declarations sought by the Applicants would have had an impact on the conduct of all police officers in Ontario in respect of conduct that is demonstrably "widespread" across Ontario. Thus, there can be little doubt that the Application raised issues that, if adjudicated upon, would have had significance not only to the parties but to the broader community.

Transcript of the Examination of Denis O'Neill, April 15, 2010 at pg. 94 and pg. 102

55. Both the Ontario Provincial Police Association and the Ontario Association of Chiefs of Police recognize the broad impact of the Application:

Your Board of Directors has been at the forefront of **protecting your rights and recognizes the broad implications posed** in this proceeding sides in favour of the positions of Falconer and Director Scott. With this in mind we have retained the firm of Paliare Roland to represent our rights and assert our interest in this proceeding. I am happy to report that counsel for the OPP Association, Toronto Police Association, OPP, OACP and PAO is joining them. (emphasis added)

Affidavit of Asha James, para. 22, Exhibit R, Tab 1 of the Applicants' Cost Submission Materials

In planning for the OACP Conference Program in Kingston, the Conference Committee intentionally left a portion of the program agenda open to be able to identify at the last-minute, **the most pressing issue facing today's police leaders. That issue, without a doubt, is the ongoing , Schaeffer-Minty court case, currently being heard in the Superior Court. There is a lot at stake.** There is media attention. (emphasis added)

Affidavit of Asha James, para. 23, Exhibit S, Tab 1 of the Applicants' Cost Submission Materials

56. In light of the above, it is respectfully submitted that the issues raised in the Application are issues of public importance that extend beyond the interests of the parties involved.

(ii) The Applicants have little to gain financially from participating in the Application

57. As detailed in paragraphs 30 and 31 of this Honourable Court's reasons for decision, the Applicants' submitted evidence that the Application was commenced for altruistic reasons:

Ruth Schaeffer, the mother of Levi Schaeffer filed an affidavit in support of the application. In relation to the applicants' interest in the subject matter of the application, Mrs. Schaeffer deposes,

My son's death has been devastating for my family. Our grief has been made worse by the actions of the officers in their interaction with S.I.U. after the shooting. We feel that because of the actions of the Subject and Witness officers and their superiors we will never know why my son died. It is impossible for me to trust any claims made by the police officers who last saw Levi alive. In addition to the reasons set out in our Notice of Application, my family and I are seeking this Court's assistance in the hope that other families do not suffer the stress and anxiety we are experiencing from being unable to learn the circumstances surrounding the death of our love one.

Also filed in support of the application was the affidavit of Diane Pinder, sister of Douglas Minty. In relation to the applicants' interest in the subject matter of the application, Ms. Pinder deposes,

My family and I trusted that as an independent civilian agency with the authority to require cooperation from the police, the S.I.U. would be well placed to get to the bottom of how my brother died and whether the shooting was justified. The actions of the Subject Officer and his superiors in their interaction with S.I.U. have seriously undermined my confidence and that of my family's in the integrity of the S.I.U. investigation. As a result, we will never be confident that we know the true facts surrounding my brother's death. These doubts have made it very difficult for us to move forward in the grieving process.

Doug's violent death has been difficult enough for me and my family to face; these actions by the officers have simply aggravated our grief. In addition to the reasons set out in the Notice Application, my family and I commenced the herein Application in the hope that no other family will have to endure this.

58. The Applicants commenced these proceedings because (a) they wanted to understand the reasons why their family members were shot and killed; and (b) to ensure that no other family had to endure the same pain and suffering that they had to endure as a result of the Respondent Officers' conduct. Despite concluding that the Application could not address the Applicants' concerns, this Honourable Court held that the Applicants' reasons for commencing the Application were genuine and *bona fides*:

The families of the deceased men are in grief over their loss and, I believe, are *bona fide* in their desire to understand what happened. It is evident, however, that if the objective of the applicants is to know in greater detail the circumstances surrounding the deaths of Mr. Minty and Mr. Schaeffer, declarations one way or the other in this application cannot result in achieving that objective or in bringing the applicants closer to it. An adjudication of the application will not have the result of making more or different information available. The S.I.U. investigation has been completed.

Reasons for decision, Justice Low, June 23, 2010 at para.36, Tab 4 of the Applicants' Cost Submission Materials

59. The Respondent Officers argue that the Applicants are not "public interest litigants" because, during oral argument, the Applicants took the position that a decision on the Application could be used to determine whether to pursue a civil action (see paragraphs 3, 26, 33, 35 of the Respondent Officers' factum). With respect, the Respondent Officers' position does not address whether the Applicants had any pecuniary interest in the Application itself. The Applicants were entitled to seek damages as part of the Application but chose not to. The Applicants had no financial interest in the Application.

60. Even if it is accepted that the Applicants had a pecuniary interest in the Application, it is respectfully submitted that this pecuniary interest in a potential civil claim is far too remote and is modest in comparison to the costs of the proceedings.

61. Moreover, the Applicants did not indicate that they would pursue a claim against the Respondent Officers. As noted by this Honourable Court, the submission advanced by the Applicants was that a decision on the Application could assist the Applicants in determining whether to commence a civil action:

As for the utility of a declaration to the applicants, it is said that there will be some utility in that if the court holds that the respondent officers have violated legislation, then the applicants will know that if they should decide to sue in the tort of misfeasance in public office, their action will not be doomed to failure for absence of conduct that is objectively unlawful.

Reasons for decision, Justice Low, June 23, 2010 at para. 69, Tab 4 of the Applicants' Cost Submission Materials

It is respectfully submitted that the mere possibility of a future claim does not equate with having a significant pecuniary interest in the Application.

62. In light of the above, the Applicants respectfully submit that they are "public interest litigants".

C. Public Interest Litigation

63. In determining whether a proceeding can be characterized as "public interest litigation" a court should consider the following factors: (i) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; (ii) the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically; (iii) the issues have not been previously determined by a court in a proceeding against the same defendant; (iv) the defendant has a clearly superior capacity to bear the costs of the proceeding; and (v) the litigant has not engaged in vexatious, frivolous or abusive conduct.

Ontario Law Reform Commission, Report on Standing (Toronto: Ministry of the Attorney General, 1989)

British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner), [2005] B.C.J. No. 1484, 2005 BCCA 368

Barclay (Guardian Ad Litem of) v. British Columbia, [2005] B.C.J. No. 979

64. “Public interest litigation” does not necessarily have to involve a government entity and can occur between two private parties. In *Mahar v. Rogers Cablesystems Ltd.*, 25. O.R. (3d) 690, the applicant brought an application pursuant to Rule 14.05 (3)(d) and (h) of the *Rules of Civil Procedure*. The applicant sought a series of declarations relating to fees charged by the respondent. The court found in favour of the respondent and when it came to the issue of costs, the court considered whether or not the applicant should be immunized from an adverse costs award. The court stated, “while the material does not indicate that the application was brought by or with the backing of any public interest group, the evidence before me indicates that it was brought by the applicant in pursuit of what he conceives to be the public interest rather than for any personal gain.”

Mahar v. Rogers Cablesystems Ltd. (1995), 25 O.R. (3d) 690, at pg. 11

65. Although the application in the above case was brought between two private parties, the court found that this did not detract from the fact that the application was brought to benefit the broader public interest and held that it was an appropriate case for the court to exercise its discretion and not award costs against the applicant.

Mahar, at pgs. 11, 13

66. It is submitted that the Application meets all aspects of the test for “public interest litigation.”

- (i) **The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved**

67. The Applicants repeat and rely upon the arguments found in paragraphs 48-56 above in support of their position that the Application raised issues of importance beyond the immediate interests of the parties involved.

- (ii) **The litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.**

68. The Applicants repeat and rely upon the arguments found in paragraphs 57-62 above in support of their position that the Applicants did not have a significant “pecuniary interest” in the outcome of the Application.

- (iii) **The issues have not been previously determined by a court in a proceeding against the same defendant.**

69. Although the issues raised in the herein Application have been the subject of numerous reports with respect to S.I.U. investigations, they have not been litigated before the courts.

70. The issues raised in the herein Application were novel and required judicial interpretation of the *Police Services Act* as well as the Law Society of Upper Canada’s *Rules of Professional Conduct* to determine if the conduct of the Respondents was lawful.

- (iv) **The defendant has a clearly superior capacity to bear the costs of the proceeding.**

71. The Respondent Officers are backed by a very powerful police association. The Ontario Provincial Police Association (“OPPA”) has approximately 5,579 uniform members and 2,626 civilian members. The OPPA’s philosophy is to advance the interests of its members in every manner.

72. OPPA President, Karl Walsh, has taken an active role in defending the practices of the Respondent Officers. In a response to a press release by S.I.U. Director Ian Scott on September 20, 2009, Mr. Walsh stated: “We must reply to this attack in order to protect the officers, their lawyer and their right to legal counsel.”(OPPA Press Release: OPPA Replies to and Challenges Statements Made by SIU Director, October 5, 2009). The OPPA is an association with vast financial resources and has retained counsel for the Respondent Officers.

Affidavit of Asha James, para. 22, Exhibit R, Tab 1 of the Applicants’ Cost Submission Materials

73. The resources of the OPPA far outweigh those of the Applicants. In particular, the Applicant, Ruth Schaeffer, is of modest means and would not be in a position to satisfy a significant costs award.

(v) The litigant has not engaged in vexatious, frivolous or abusive conduct

74. The Applicants have commenced an Application of significant public importance. When citizens lose loved-ones during altercations with law enforcement officers, those citizens have a justifiably held belief that those same officers tasked with enforcing the law, will follow the law with respect to their statutory obligations under the *Police Services Act*.

75. Practices by government actors that abuse public process and circumvent the rule of law are issues of importance to the Canadian public and are issues that call for the court to make a fair and just determination of the issues before it in accordance with the best interest of the public.

76. It is respectfully submitted that the Application was neither vexatious, frivolous or an abuse of conduct. A finding that the Applicants lacked standing to commence the Application or that the issues raised by the Application are not justiciable is not tantamount to a finding that the Application was vexatious, frivolous or an abuse of conduct.

D. “Public Interest Standing” is not determinative of “Public Interest Litigation”

77. The test for determining whether litigation can be characterized as “public interest litigation” is significantly different from determining whether a party has “public interest standing”. Indeed, many of the factors relied upon by this Honourable Court in refusing to grant the Applicants standing are not relevant factors in determining whether the Application raised issues of significant public interest. It is the Applicants’ respectful submission that the following factors, detailed in the Motion to Strike decision, are not factors to be considered in determining whether the Application can be characterized as “public interest litigation”:

The application does not raise a question concerning the validity of any piece of legislation. There is no allegation that any administrative action has been taken in the absence of statutory authority.

The actions said to be unlawful are the manner of exercise by police officers of their rights to retain counsel and the timing of performance by police officers of certain of the duties inherent in their employment as officers of the OPP.

The retention of counsel by police officers who are or may be designated as subject officers under the regulation is the exercise of a private right. It is not an administrative action.

The manner and timing in which the police officers perform their duties is an employment issue between them and their employer. Accordingly, the first part of the test is not satisfied.

The second part of the test is inapplicable as the validity of a statute has not been called into question and there is no allegation of administrative action without statutory authority

Even if both the first and second parts of the test had been satisfied, and in my view they have not, the applicants have not satisfied the third part of the test as there are clearly several reasonable and effective ways to bring the issue before the courts, the most obvious of which is the civil action in tort for misfeasance in public office. In the context of such a civil action, the legal nexus between the applicants and those respondents against whom they seek relief (i.e. the cause of loss and damage to one by the other) can be set out and, as mentioned above, the issue of whether there has been unlawful conduct will necessarily be litigated because the cause of action cannot be established without it. There are also complaints procedures both against the solicitor, Mr. McKay, and against the police officers that can be pursued, appealed, and appropriate cases, judicially reviewed.

Reasons for decision, Justice Low, June 23, 2010 at paras. 84-89, Tab 4 of the Applicants' Cost Submission Materials

78. None of the above noted factors are necessary for a determination of the two main elements of a "public interest litigant" for the purposes of costs (i.e. that the matter is of public importance and that the party has little to gain financially). In addition, the above noted factors do not address the main considerations a court must engage in determining whether the matter can be categorized as "public interest litigation" (i.e. the four factors detailed in *Incredible Electronics*).

E. The Applicants' Litigation Strategy was Reasonable and Necessary

79. The Respondent Officers argue that the Applicants' litigation strategy increased the costs of this proceeding (see paragraphs 22 and 33(d) of the Respondent Officers' factum). In particular, the Respondent Officers argue that the Motion to Strike should have been heard well before the Application and the examinations. In taking this position, the Respondent Officers ignore the following:

- (a) That this Honourable Court relied upon the evidentiary record created by the examinations in determining that the Motion to Strike could be ruled upon without the benefit of argument on the Application;
- (b) That the Respondent Officers' original Notice of Motion relied upon the absence of facts in requesting that the Application be struck; and
- (c) The Supreme Court of Canada jurisprudence suggesting that where "there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time that the Application" (*Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607)

80. The Applicants respectfully submit that they acted reasonably in both conducting the examinations before the arguing of the Motion to Strike and requesting that the motion be heard with the Application. It is respectfully submitted that this Honourable Court would not have been in a position to decide the Motion to Strike separately from the Application without the benefit of the

full evidentiary record. Of course, the full uncontested evidentiary record was only obtained by conducting the examinations and obtaining the relevant documents in the refusals motion. This position was adopted by Master Abrams as an appropriate and efficient manner to proceed.

E. Quantum of Costs

81. If this Honorable Court finds that the Respondent Officers and the Commissioner are entitled to costs, then the Applicants respectfully submit that the costs claimed by both parties are excessive and should be significantly discounted.

82. Rule 57.01(1) lists a broad range of factors for the court to consider when determining costs. The factors include the result achieved in the proceeding, the complexity of the proceeding, the importance of the issues and whether any step in the proceeding was improper, vexatious or unnecessary.

83. The fixing of costs is not simply a mechanical exercise. In particular, the rule 57.01(3) makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The Ontario Court of Appeal has held that “the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant”.

Boucher v. Public Accountants Council (Ontario), (2004), 71 O.R. (3d) 291 (C.A.) at para. 26

(i) Rule 57.09(a)(0.b) – Reasonable Expectations

84. The Applicants respectfully submit that a total costs claim in the amount of \$92,116.16 was not within the reasonable expectations of the parties. The Applicants respectfully submit that the hours spent by counsel for the Respondent Officers and the Commissioner exceed the reasonable expectations of the parties.

85. When fixing costs, a court should not second guess successful counsel on the amount of time that should or could have been spent to achieve the same result, unless the time spent is so, “grossly excessive as to be obvious overkill”.

Tri-S Investments v. Vong, [1991] O.J. No. 2292 (S.C.J.)

86. It is respectfully submitted that the hours claimed by counsel for the Respondent Officers and the Commissioner are “grossly excessive”. The Respondent Officers are claiming a total of 347.70 hours in respect of the Motion to Strike and the Application. The Commissioner, who made no submissions (written or otherwise), on the Motion to Strike is claiming 99.5 hours in respect to the Application.

87. In preparation for the hearing before this Honourable Court, the Respondent Officers filed two factums: one on the Motion to Strike and the other on the Application. Although the issues raised in the Application and the Motion to Strike were complex, they do not justify the amount of time being claimed by counsel for the Respondent Officers.

88. In comparison, counsel for the Applicants has a total of 342.2 hours on the file. While at first blush this number is similar to the time claimed by the Respondent Officers, it should be noted that the Applicants were required to conduct a number of litigation steps that were not required by the Respondent Officers. The Applicants’ time includes the following breakdown:

- (a) 68.0 hours spent on the research and preparation of the Application
- (b) 51.3 hours spent on preparation and conducting cross-examinations of the S.I.U. investigators.
- (c) 48.6 hours spent on preparation and conducting refusals motion before Master Abrams
- (d) 174.30 hours spent on preparation of factums, application records, motion records and oral argument on Motion to strike and Application.

Applicants' Bill of Costs, Tab 3 of the Applicants' Cost Submission Materials

89. With respect, counsel for the Respondent Officers' request for costs is excessive. The Respondent Officers are requesting costs for the half-day appearance of Mr. Fenrick at a refusals motion. Mr. Fenrick attended at the refusals motion and took no position on the motion and made no submissions. As such, the time required for this attendance should be removed from any costs award (i.e. 5 hours).

90. In addition, Mr. Centa's role in this Application was limited to attending on a half-day discovery of the S.I.U. investigators for the purpose of objecting to the production of documents on the basis of privilege; a claim that the Respondent Officers that was later withdrawn. In the circumstances, the Applicants respectfully submit that Mr. Centa's time on this file should be removed entirely from any cost award (i.e 15.2 hours).

91. The Applicants further submit that the hours spent by the Respondent Officers on the Motion to Strike and the Application are excessive. Removing the time detailed in paragraphs 87 and 88 above, the Respondent Officers claim costs for approximately 327.50 hours of time spent on preparing the factums, Motion Records, Application records and arguing the Motion to Strike. With respect to these same activities, the Applicants spent 174.30 hours. As such, the Respondent Officers spent 153.2 hours more than the Applicants.

92. A review of the Commissioner's request for costs also demonstrates the excessive nature of the Respondent Officers' request. The time spent by counsel for the Commissioner, while still excessive, is over 3.5 three times lower than the hours claimed by counsel for the Respondent Officers. While the Commissioner's counsel did not have to prepare materials on the Motion to Strike, that difference alone cannot explain the 228 more hours spent by counsel for the Respondent Officers.

93. In the circumstances, the Applicants respectfully submit that the Respondent Officers' costs claim is grossly excessive.

94. The Commissioner requests costs for 99.5 hours of time spent on attending at the refusals motion (no written materials were provided by the Commissioner), preparing a factum on the main Application and attending for 2 ½ days on the Motion to Strike. At the Motion to Strike, counsel for the Commissioner merely indicated that he adopted the submissions of counsel for the Respondent Officers. Counsel for the Commissioner did not have to prepare a factum on the Motion to Strike, nor was there any need to prepare for oral argument on the Motion to Strike. Counsel's attendance on the Motion to Strike and the refusals motions were necessary. As such, 17.5 hours of his time (5 hours for each day in court) is legitimately claimed, leaving 81.5 hours being claimed for the preparation of a 24 page factum. The Applicants respectfully submit that Commissioner's request for costs is excessive.

(ii) Rule 57.01 (d) – the importance of the issues

95. As detailed in paragraphs 47-55 above, the Application raised matters of great public importance. The Application sought guidance with respect to the legality of the manner in which police officers conduct themselves during the course of S.I.U. investigations. In both cases, the subject officers and witness officers were expressly authorized and instructed to delay completion of their notes. In both cases, subject and witness officers shared the same counsel, and the officers created two sets of notes, only one of which was produced to either the S.I.U. or the O.P.P. The Applicants raised reasonable arguments that this conduct was not in compliance with the law.

96. It is respectfully submitted that the issues raised by the Application are issues that extend far beyond the interest of the Applicants and are matters of public importance.

(iii) Rule 57.01(e) (g) (h)

97. As detailed in paragraphs 15-27 above, the positions advanced by the Respondent Officers created unnecessary hurdles to the production of the evidentiary record and unduly complicated this proceeding.

98. It is respectfully submitted that the conduct of the Respondent Officers is a factor that this Honourable Court should consider in determining the quantum, if any, of costs that should be awarded.

99. The positions advanced by the Respondent Officers had the following results:

- (a) Multiple adjournments of the scheduled discoveries of the S.I.U. investigators; and
- (b) The assertion, without explanation, of a claim of privilege that was later withdrawn delayed the production of document, resulted in a unnecessary refusals motion and a second day of examinations.

100. The positions taken by the Respondent Officers served to lengthen and complicate the proceedings. As such, the costs claimed by the Respondent Officers ought to be discounted accordingly.

D. Financial Position of the Ruth Schaeffer

101. The Applicants' ability to satisfy a significant costs order is a factor that this Honourable Court can rely upon in determining the appropriate quantum of costs:

If costs awards, to be paid by the losing party, reach the level, as they have done in Ontario, that they can bankrupt an ordinary person, never mind an impecunious one, there is a danger that confidence in the justice system will be undermined and it will increasingly be seen, and not without good reason, as a system for business and the wealthy, but not for the mass of people whose tax dollars fund the system. The loser-pay costs system can act as a serious barrier to justice, deterring deserving as well as frivolous cases. Many jurisdictions get along quite well without a "loser pay" system.

Perhaps we should become one of them and deter frivolous cases and improper conduct in other ways. But that great a change in our system is not for me to create and I return to the real world.

Walsh v. 1124660 Ontario Ltd., [2007] O.J. No. 2773 at para. 14

The decision in *Myers* rejects a rule based on impecuniosity but one reason it gives for doing so is that such a rule would be incompatible with the general rule that costs are in the discretion of the judge. The decision does not say that it would be an improper exercise of judicial discretion to take impecuniosity (or hardship) into account. It states in paragraph 22 the important consideration that the Court should avoid "a situation in which litigants without means can ignore the rules with impunity". In general terms, it can be said that such a situation can be avoided if hardship considerations are allowed only to reduce the costs, where appropriate, but not to eliminate them.

In the present case, there would unquestionably be a hardship for the plaintiffs if they were ordered to pay costs in the amounts sought by the defendants for their respective joint and several costs claims against their respective borrower plaintiffs. The award would likely go largely unsatisfied and in that respect would be merely a pyrrhic victory for the defendants. It is reasonable to suppose that an award in the magnitude indicated by the defendants' claims would also have a chilling effect upon the plaintiffs' ability to pursue their claims against the other remaining defendants.

Baldwin et al. v. Daubney et al., [2006] O.J. No. 3919 at paras. 48-49

102. The Applicant, Ruth Schaeffer, is in no position to satisfy a costs award by this Honourable Court. She is of limited means, with no property and little to no savings. In light of Ms. Schaeffer's financial position, a costs award will undoubtedly cause her severe hardship. In the circumstances, the Applicants respectfully submit that the amount claimed by the Respondent Officers and the Commissioner should be reduced to reflect the significant hardship a costs award will have on Ms. Schaeffer.

103. It is submitted that should this Honourable Court determine that costs are appropriate, costs fixed at \$7,500 each to the Respondent Officers and Commissioner would be a fair and reasonable amount for the Applicants to pay in light of the factors detailed above.

PART IV: ORDER REQUESTED

104. In light of the above, the Applicants respectfully request an order dismissing the Respondent Officers' and the Commissioner's request for costs. In the alternative, the Applicants respectfully request that costs to the Respondent Officers and Commissioner be fixed at \$7,500.00 each.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto, this 3rd day of November 2010.



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