CITATION: City of Elliot Lake (Integrity Commissioner) v. Patrie, 2023 ONSC 1349
COURT FILE NO.: 28237-19
DATE: 2023-02-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CITY OF ELLIOT LAKE (INTEGRITY COMMISSIONER) Applicant	*Raivo Uukkivi,* for the Applicant
– and –	
CHRIS PATRIE Respondent	*Peter Berlingieri*, for the Respondent
	HEARD: In Writing

APPLICATION UNDER SECTION 8(1)
OF THE *MUNICIPAL CONFLICT OF INTEREST ACT*,
R.S.O. 1990, c. M.50

RASAIAH J.

DECISION ON COSTS

OVERVIEW

[1] The court found former Elliot Lake city Councilor Chris Patrie ("the Respondent") to have breached ss. 5(1) and (2) of the *Municipal Conflict of Interest Act* (the "*MCIA*"). The penalty imposed was an order to (1) remove him from office; and (2) disqualify him from holding office for two years.

[2] The Integrity Commissioner for the City of Elliot Lake (the "Applicant") mainly seeks costs on a partial indemnity basis. The Applicant also seeks costs – on a substantial indemnity basis – for travel occasioned by the Respondent's insistence on being cross-examined in-person.

[3] The Respondent states that the penalty imposed is punishment enough. He states that no costs should be awarded.

SUBMISSIONS

[4] The Applicant submits that this was a complex case involving an elected official who allowed his financial self-interest to override his public obligation.

[5] The Applicant primarily seeks its costs of this proceeding on a partial indemnity basis. The Applicant seeks its costs on a substantial indemnity basis for unnecessary travel and cross-examination logistics due to the Respondent's refusal to be cross-examined unless senior counsel drove to Sault Ste. Marie and Elliot Lake in the height of the Covid-19 pandemic when video was available, and quarantines were in effect.

[6] The Applicant submits that:

a. the Elliot Lake taxpayer was put to considerable expense in the proceedings; the Respondent was the architect of the high quantum; the Respondent's conduct throughout this process was obstructive and unreasonable; the positions taken resulted in significant and unnecessary costs; and the circumstances do not warrant deviation from the partial indemnity scale of costs.

b. The Respondent made groundless allegations of bias concerning Mr. Cassan, the Applicant's usual solicitor making him a potential witness and created a potential conflict between himself, and the Applicant so the Applicant was forced to obtain a municipal law expert elsewhere.

c. The Respondent engaged in financial and reputational attacks on the Applicant and its counsel which introduced unnecessary complexity to the proceeding prompting the Applicant to retain counsel in Toronto to protect the integrity of the process and avoid further allegations of bias or conflict. Accordingly, the costs claimed in this proceeding are marginally higher. The Applicant states that the Respondent, by conflicting out the local expert, retaliating against a neutral investigator and threatening it, or its directors, with every means at his disposal compelled the retainer of Toronto counsel.

d. The Respondent failed to respond to a notice of video examination property served and demanded that cross-examinations take place in person in Sault Ste. Marie and Elliot Lake.

e. The Applicant's counsel appealed to reason by raising this court's use of Zoom in criminal and civil proceedings to that date but was rebutted. He offered Sudbury as a compromise and was rebuffed. The Respondent added unnecessary delay and significant costs thrown away in respect of these cots.

f. The issues were of general importance. The Applicant submits that it is the most serious case of municipal conflict of interest brought before the courts of Ontario. The case involved interference with a municipality's multimillion-dollar land purchase by a financially interested councillor. The case sets the high-water mark

for future investigations and what parties should expect for penalties when they contravene their ethical codes of office.

g. The Applicant submits a costs award is of comparable social importance; the result will inform the training of councillors and the cost-benefit analysis some may undertake when weighing ethical considerations as a member of council; the funds recouped (or not) will drive the utility of ethics complaints (i.e., whether enforcing ethics at all is worth the cost to the municipality) and act as a general deterrent in accordance with the common law traditions associated with costs awards. Councillors acting with intent or reckless indifference as to their ethical obligations should not be encouraged by a lack of financial consequences for self-dealing, and there must be no positive incentive for them to use the considerable powers of office to forestall, thwart or otherwise complicate an investigation into themselves.

h. Section 223.4(18) of the *Municipal Conflict of Interest Act* is intended to ensure that appropriate applications are commenced. It does not speak to court costs.

i. The Applicant acknowledges that the Respondent has the right to raise procedural defences but submits that the strategic decision as to which defences to raise comes with the Applicant's concomitant costs of addressing those defences. The issues raised by the Respondent were variously rejected as being: "technical arguments"; brought in the improper forum; without legal basis; out of time; and potentially inapplicable even if successful. These arguments ultimately necessitated the Applicant's Reply factum together with associated research, analysis, drafting and argument.

j. The Respondent failed to admit obvious facts or substantiate his case; his confusing evidence, his positions and justifications were difficult to reconcile with is stated intentions; and the costs of this application would have been significantly lower if the Respondent had simply admitted the simple facts that the truth was reflected in those recordings and that putting the Hub behind his property would probably be good for his property value. These were obvious facts that should have been admitted.

[7] The Applicant therefore requests its costs of $161,921.08 on a partial indemnity scale, which figure includes an additional $4,405.50 on a substantial indemnity scale pursuant to Rule 57.01(h.1) related to the cross-examination logistics. If the court does not grant substantial indemnity for cross-examination logistics, the amount sought is $156,942.87.

[8] The Respondent submits that:

a. No costs should be awarded against the Respondent. He has been successfully prosecuted for a conflict of interest under the *Municipal Conflict of Interest Act*. He is not a claimant or a plaintiff; he did not choose to be a litigant. The normal rules with respect to costs do not and should not apply.

b. The Respondent is a high-profile public individual who has paid a steep price for his political convictions. No greater punishment could be exacted than his removal from public office. Any costs award in the circumstances of this proceeding is highly punitive, disproportionate, and would fail to take notice of the disparity and imbalance between the parties.

c. The Integrity Commissioner is not a normal litigant nor a successful litigant; it is by statute a prosecutorial litigant which has unlimited resources at its disposal, and which can fully recover all its costs from the municipality. That is the purpose of section 223.4.1(18) of the *Municipal Act* which provides as follows:

> Costs
>
> (18) the Commissioner's costs of applying to a judge shall be paid by the following:
>
> 1. If the member is alleged to have contravened section 5, 5.1, 5.2 or 5.3 of the *Municipal Conflict of Interest Act* as a member of council of a municipality, the municipality ... (emphasis added) ...

[9] The Respondent submits that if the "normal rules" apply on costs:

a. In respect of the costs sought, this court must be concerned about the chilling effect that such an award will have on the willingness or ability of any individual to serve for public office.

b. Exposure to a significant cost award could cause any individual considering or holding public office to hesitate, be reluctant, or err on the side of caution every time and run for the protection of an Integrity Commissioner's ruling for fear of being off side of the *Municipal Conflict of Interest Act.*

c. Respectfully, the court was cognizant of the context of political office and the fact that one of the general functions of elected politicians is to sponsor and advocate for the positions they take as officeholders.

d. The Respondent's former counsel's actual costs for this proceeding are in the range of $55,000 applying an actual rate of $325.00 per hour. This is a measure of legal fees for this type of proceeding in this community. The court should exercise both caution and reluctance in accepting a fee regime that is excessive and out of proportion to the expectations of the respondent and this community.

e. To the extent that the court is inclined to award costs to the Integrity Commissioner, the respondent submits that those costs, all inclusive, should be no greater than $36,000.

f. However, the respondent submits that no costs should be awarded against Chris Patrie. The respondent submits: The court has heard extensive evidence as to

contentious and the close and personal context of municipal politics in Elliot Lake; the Respondent has lost his seat; he is humiliated and embarrassed; and that is enough.

DISCUSSION/ANALYIS

[10] This court was invited to consider whether the normal costs regime and the applicable jurisprudence is appropriate in these circumstances. I find that it is.

[11] Section 223.4.1 of the *Municipal Act,* 2001, S.O. 2001, c. 25 states:

> **Inquiry by Commissioner re s. 5, 5.1, 5.2 or 5.3 of *Municipal Conflict of Interest Act***
>
> **223.4.1** (1) This section applies if the Commissioner conducts an inquiry under this Part in respect of an application under subsection (2).
>
> **Application**
>
> **(2)** An elector, as defined in section 1 of the *Municipal Conflict of Interest Act*, or a person demonstrably acting in the public interest may apply in writing to the Commissioner for an inquiry to be carried out concerning an alleged contravention of section 5, 5.1, 5.2 or 5.3 of that Act by a member of council or a member of a local board.
>
> **Costs**
>
> **(18)** <u>The Commissioner's costs of applying to a judge shall be paid by the following:</u>
>
> 1. If the member is alleged to have contravened section 5, 5.1 or 5.2 of the *Municipal Conflict of Interest Act* as a member of council of a municipality, <u>the municipality</u> [underline mine].

[12] The provision above was added to the *Municipal Act* in 2017, after the *Modernizing Ontario's Municipal Legislation Act* received Royal Assent: *Modernizing Ontario's Municipal Legislation Act* 2017, S.O. 2017, c. 10.

[13] Section 223.4.1(18) provides that a municipality must pay the Commissioner's legal costs for bringing an application before a judge. Notably, the legislation itself does not preclude the Commissioner from receiving a costs award to offset its legal fees.

[14] This case was public interest litigation. However, an Integrity Commissioner is entitled to costs awards. They have been ordered in the jurisprudence on the issue.

[15] Costs orders of a percentage of a partial indemnity basis or partial indemnity basis appears to be the norm: *The Corporation of the Townships of Brudenell, Lyndoch and Raglan (Integrity Commissioner) v. Budarick* ("*Budarick*") 2022 ONSC 2331; *Audziss v. Santa*, 2003 CanLII 6340 (ON SC); *Mino v. D'Arcey* (Gen. Div.), 1991 CanLII 7293 (ON SC); *Jaffary v. Greaves*, 2008 CanLII 36159 (ON SC).

[16] In *The Corporation of the Townships of Brudenell, Lyndoch and Raglan (Integrity Commissioner) v. Budarick* ("*Budarick*"), 2021 ONSC 7635, appeal dismissed 2022 ONSC 640, the Respondent was a member of council. Her son received a service charge for maintaining an open fire in contravention of the municipality's fire ban. A report by the Integrity Commissioner found that the Respondent improperly influenced the decisions of Council dealing with her son's service charge. In finding a breach of the *MCIA,* the court found that the respondent intentionally used her position as a member of Council to obtain a financial advantage for her son. In deciding costs, the court considered the fact that:

a. The issues in the application were important and moderately complex;

b. The respondent's conduct was intentional and persistent when it would have been prudent not to cling to an untenable position:

[17] In *Budarick*, at 2022 ONSC 2331, the Integrity Commissioner sought costs on a partial indemnity basis of $40,993.50, or alternatively, $55,098.50 on a substantial indemnity basis. In determining the appropriate quantum for costs, the Court wrote that

a. Costs orders on a partial indemnity basis are the norm; substantial indemnity and full indemnity costs tend to be exceptional.

The court ordered $25,000 in costs in favour of the Integrity Commissioner.

[18] In determining costs, the overriding principle in awarding costs is reasonableness: *Davies v. Clarington (Municipality) et al.,* 2009 ONCA 722 at para. 52 (*"Davies*").

Success

[19] The Applicant was the substantially successful party on the application. It is well settled law that generally, a successful party is entitled to recover a reasonable allowance for costs from an unsuccessful party.

Importance, Complexity, Denials & Refusals to Admit

[20] I do agree that the issues were of general importance per the Applicant's submissions, and complex due to the number of issues raised and the volume of materials that required preparation of and consideration as a result.

[21] There was no precedent for the factual matrix of the case, I agree.

[22] As alluded to in my decision on the application, I agree that some of the conduct of the Respondent and way he gave his evidence and positions were difficult to reconcile, adding to the complexity and necessitating Reply materials.

[23] In paragraph 268 of my decision, I noted:

> *While I agree that it is not Patrie's style to outright lie, the fact is that he chose to deny many events as I have set out herein, to later acknowledge parts of same in some fashion and/or answer questions in a confusing manner and/or simply with justifications as opposed to direct answers, when faced with evidence that could not be refuted, including his own statements, videos and recordings.*

Conduct: Distinguishing between hard-fought litigation and counterproductive conduct

[24] In *Davies*, at para. 45, the Ontario Court of Appeal underlined that

> [A] distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counterproductive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may. In *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.), substantial indemnity costs were justified as a means "to discourage harassment of another party by the pursuit of fruitless litigation" ...:

[25] As alluded to in my decision on the application, some (not all) of the steps/the Respondent conduct in my view amounted to hard-fought litigation and issues he had a right to press and contest. I also found there were some steps of council that produced irregularities.

[26] In paragraph 271 of my decision, I wrote:

> *I did not place weight on some of the ways that Patrie took issue with the way the investigation was conducted and/or opposed affirming the IC's role and/or stating he would take action against the IC related to the investigation as amounting to self standing aggravating factors. It is open to a defendant to challenge actions, challenge the state, and steps in an investigatory process. In my view he has the right to question them, whether he is right or not. Further, there were some irregularities that arose and issues that were clumsily dealt with arising after fresh amendments to the Act. As such, I do not characterize the objections of Patrie to the appointment, the process, the bylaw, and his upset wanting to take legal action as being self standing aggravating factors, but the evidence I do agree is relevant in that it is indicative of lack of appreciation for his actions in this specific case, and so is involving himself in action to attempt to defund E4M or a participate in the vote on the retroactive bylaw. That being said, he was not the only one that participated in the vote who was subject to a complaint investigated by them.*

[27] However, in this case, I have noted the Respondent ostensibly forced new counsel to be retained in Toronto. Further, he did insist on having certain proceedings take place in-person, namely the cross-examinations. He also did raise issues that were rejected as being: "technical arguments"; brought in the improper forum; without legal basis; out of time; and potentially inapplicable even if successful. These actions were certainly counterproductive, adding cost to the proceeding unnecessarily.

Amount Claimed

[28] I agree that the costs sought by the Applicant are high, reflecting 425.07 hours of work on this case by senior and junior counsel(s) and various clerks.

[29] As stated, I acknowledge and have considered that the Respondent ostensibly forced new counsel to be retained in Toronto and have considered this in respect of the rates charged and typical partial indemnity rates for this region. It was submitted that there was no other local expert that could be retained on this record, which has not been disputed.

[30] While the practice of use of a junior counsel is not criticized by me at all in this case, I do accept that full recovery (either substantially or partially) is not necessarily approved on a cost analysis to the full extent used and conversely, senior counsel's hours are a consideration with the availability of and use of junior counsel where appropriate. Again, this should not be interpreted as me concluding that there is anything wrong with the practice, in fact in this case, my view is given the issues and complexity, the use of junior counsel was very warranted, but I have considered the foregoing points and believe it is reasonable to do so based on the bill of costs filed, as well as consider the quasi-prosecutorial nature of the Applicant's role.

[31] As stated, I agree that several issues were raised and the volume of materials that required preparation and consideration as a result were significant; and finally, that some of the conduct of the Respondent and way he gave his evidence and positions were difficult to reconcile, adding to the work required, and necessitating Reply materials. There were many materials/alleged actions of the Respondent to review and prepare/present on this case for the court's consideration. Extensive cross-examinations were conducted. At least six people, were cross-examined on affidavits filed in-person which would also go to reasonable expectation as to costs being higher than the norm, in my view.

[32] There is no guiding case with comparable complexity to this case. I also considered the Applicant's concession that there was no precedent case for this within case.

[33] As to costs for "unnecessary travel and cross-examination logistics" due to the Respondent's insistence on in-person proceedings, a lawyer is not entitled to bill travelling time at their normal hourly rate where a retainer requires them to do so: *Lewis v. Jones,* 2015 ONSC 7857 at para. 13.

[34] At paragraph 311.5, Orkin in *The Law of Costs* states:

> Where a solicitor's retainer requires him to travel on behalf of the client, he is not entitled to be paid at the same rate for travelling time as he is for solicitor's work... Full rates charged for travelling time have been reduced on assessment, either by a reduction in the amount of time to be allowed, or by allowing the full amount of time recorded but reducing the rate substantially below the solicitor's normal billing rates...

[35] I appreciate that in this case, the Applicant argues that travel expenses were wholly unnecessary and avoidable. I did note that the docket entries of Mr. Berlingieri appear to charge for travel time for the cross-examinations at full rate and appear to be included in the Respondent's bill of costs filed. No explanation was provided.

[36] While the courts have consistently declined to apportion costs at a lawyer's <u>full rate</u> for travel, given the circumstances, this case is distinguishable on its specific facts in my view. I state this, considering that no explanation has been provided as to why it was necessary to conduct cross-examinations in person when they could have, and more cases are now in fact moving to video-conferenced examinations, which was not a factual consideration in many of the previously assessed cases on travel costs.

Reasonable Expectations

[37] The reasonable expectations of the parties should be considered: r. 57.01(1)(0.b).

[38] I acknowledge based on his former solicitor's bill of costs filed that the Respondent argues that he could not have reasonably expected to pay costs in excess of $100,000.

[39] I am not persuaded that the bill of costs as a comparison realistically presents or can be found to represent reasonable expectations for this case.

[40] I recognize the rate of Mr. Berlingieri as reflect of hourly rates in this region. However, as stated, in this case, the retention of out-of-town counsel was necessary on the record before me, and one with experience in such matters.

[41] Further, I noted and recalled that another counsel had aided and/or worked on this matter on behalf of the Respondent, and no complete record of that work was presented in the bill of costs filed or is claimed in the bill of costs filed. The docket entries do not outline the extent of use of junior counsel but contains some references here and there to Mr. Lindenbach's involvement in Mr. Berlingieri's entries for solely his time at his full rate. Some entries allude to the Respondent as being present with this junior counsel and Mr. Berlingieri together. I recall a cross-examination transcript citing Mr. Lindenbach as the counsel conducting one of the cross-examinations. Having said that, given this case, as I have indicated above, I do not find it unreasonable to have a junior counsel involved given the complexities and find one could reasonably expect the use of same based on the specific facts of this case. In this case too, the Respondent appears to have had actual knowledge of the use of junior counsel and there is nothing on the record objecting to this practice or specifically in this case, other than the suggestion that the amount claimed is excessive.

[42] I find the Applicant's disbursements do not appear to be unreasonable considering all the steps taken in the case, and the materials required to be filed by the Applicant, which was substantially more than that required of the Respondent. The affidavits filed were of persons with direct knowledge of the allegations/acts complained of. They in my view were necessary and relevant affidavits to the issues in the case.

Other

[43] I agree that this case is quasi-prosecutorial, and public interest litigation.

[44] I also considered that the Respondent's seat was vacated, and that proportionality is a factor, but do not find same as precluding an award for costs if appropriate.

[45] The Respondent's above outlined conduct in this case does not warrant a no-cost award.

[46] I remained mindful that in the *Budarick* case, costs were ordered on the lower end and only a portion of partial indemnity costs were ordered, despite the Respondent's counterproductive conduct in that case.

[47] I also noted that in *Budarick*, and the other cases that the issues were not as complex as this case and issues, not so numerous as in this case.

[48] The Respondent suggests that the court was cognizant of the context of political office and the fact that one of the general functions of elected politicians is to sponsor and advocate for the positions they take as officeholders. This is true; however, this does not extend to excuse inappropriate conduct and/or compensable conduct in a litigation process, in my view.

[49] No offers to settle were submitted for my consideration if any were made.

[50] No submissions were made on time to pay any award for costs made.

CONCLUSION

[51] Based on the above, I am of the view that some costs should be awarded in this case but not in the amounts requested for reasons stated and considerations I have applied to the analysis.

[52] Having considered the above, submissions of counsel, and the factors set out in Rule 57.01, including the principle of proportionality and the amount that a losing party would reasonably expect to pay, I find that in this case, an award of costs of $80,000 is a fair and reasonable amount for legal fees inclusive of HST plus the disbursements of $9,143.77 that could have been reasonably expected on the specific facts of this case.

[53] Accordingly, this court orders that the Respondent shall pay to the Applicant for costs of this application fixed in the amount of $89,143.77 inclusive of disbursements and HST.

Rasaiah J.

Released: February 24, 2023

CITATION: City of Elliot Lake (Integrity Commissioner) v. Patrie, 2023 ONSC 1349

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF ELLIOT LAKE (INTEGRITY COMMISSIONER)

- and –

CHRIS PATRIE

DECISION ON COSTS

Rasaiah J.

Released: February 24, 2023