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File No. K0535925

VIA E-MAIL

Stu Eley
Provincial Council for Ontario: Boy Scouts of Canada
265 Yorkland Blvd., 2nd Floor
Toronto, ON M2J 5C7

Dear Mr. Eley:

Re: Claxton Article

You have asked for my comments regarding the costs assertions contained in an article posted by scouter, Ted Claxton, dated February 27, 2006 and entitled "What's the Risk of Protecting our Property?"

Your concerns about some of the statements regarding litigation costs are indeed well founded. There are several significant statements that are quite incorrect. The overall tenor of the article, which suggests that the prospects are slim that any individual might be required to contribute to the costs, is quite wrong.

The author correctly indicates in the third paragraph that the court could impose upon those persons who initiate a legal action "the full legal costs incurred by the Provincial Incorporated Body", the presumed Respondent in the Application which the author is promoting. In the next sentence of that paragraph, the author asserts that "these costs could range up to $60,000.00". If the statement is intended only as the author's estimate of what those legal costs might be, he is simply voicing an opinion which may, in time, prove to be either correct or incorrect. If, however, the author is intending to convey that "$60,000.00" is the upper limit of the costs that could be awarded, this statement is false. There is no artificial limit or cap on the amount of costs that may be awarded, and the court has complete discretion to award such costs as it determines to be appropriate.

The fourth paragraph contains some very significant misleading statements. The suggestion that the prospect of "any individual being required by the court to contribute to costs is slim to remote" is inaccurate. There are significant examples of cases in which representative Plaintiffs were ordered to pay very substantial sums. The courts have recognized that the approach to costs in a representative action should be the same as in any other civil proceeding, and that the normal rule that costs will follow the event should apply. The normal rule is that a successful party is entitled to have its

legal costs paid to it by the unsuccessful party. Usually this amounts to a partial indemnity of the actual legal fees incurred by the successful party. There are thousands of cases that illustrate the normal rule.

There are also many available examples that illustrate the application of the normal rule in representative actions. For example, in *Pearson v. Inco* [2004] O.J. 3074, the Divisional Court ordered that "Inco's costs of the appeal are fixed at $60,149.08, payable forthwith by Pearson", the representative Plaintiff who brought suit unsuccessfully against Inco on behalf of a group of approximately 8,000 property owners. It should be noted that such orders are made against the representative Plaintiff directly in his or her personal capacity as it is the representative Plaintiff that is the named party initiating the action, rather than a group or class that the representative Plaintiff claims to represent. If there are persons who are members of a class or group who are funding a representative Plaintiff, they are certainly entitled to step forward and put the representative Plaintiff in funds to discharge the costs award. This is simply a private matter between the representative Plaintiff and those persons who have agreed to fund the litigation. The court, however, will direct its cost award against the representative who is actually named as the party in the Application, and it cannot name some other person who is not specifically named in the Application.

At an earlier stage in the same litigation, *Pearson v. Inco*, Justice Nordheimer fixed the costs of a motion against the Plaintiff, Pearson, in the amount of $184,332.14 and ordered that the costs were to be paid "by the Plaintiff within 30 days".

Gariepy v. Shell Oil Company [2002] O.J. 3495 is another recent example where the court specifically rejected the notion that a representative Plaintiff should be entitled to a "free shot" at litigation because he or she brings the application intending to represent the interests of members of a group or class. In this case, the court determined that the Defendants were entitled to the costs incurred on the normal partial indemnity scale, and the court fixed the amount of costs at $175,000.00 to be paid by the representative Plaintiff, Gariepy, within 30 days.

Elliott v. Canadian Broadcasting Corporation et al [1994] O.J. 308 is a case where the representative Plaintiff, Donald Elliott, sued the CBC and others involved in a production of the film "The Valour and the Honour". The film attracted a great deal of notoriety because it argued that the lives of Canadian servicemen had been needlessly sacrificed during World War II. The representative Plaintiff sued on behalf of a group of veterans. The action was dismissed and the representative Plaintiff was ordered to pay $95,000.00 in costs. Justice Montgomery quoted the following passage from an earlier case, *Cobbold v. Time Canada Ltd.* (1980) 109 D.L.R.(3rd) 611, as a caution for those who launch proceedings as representatives of a class:

> "Those who are disposed to attach themselves to causes which can be made the subject-matter of a class action should not overlook the fact that a class or representative action is simply a procedural mechanism. It allows, within the framework of one action, the determination of the claims of many people who seek the same or similar relief from a Defendant. It does not provide any of the

> people with new substantive rights. It does not place any member of the class in a different position from the point of view of proving his or her case. In this respect, each member of the class is in the same position as if he or she brought an action on their own. It is my opinion that the same considerations are to be applied to costs."

For some reason, people who launch representative actions often do so believing that they are merely representatives who are not personally exposed to the cost consequences of a failed action. The examples clearly illustrate that representative Plaintiffs will suffer the same cost consequences as other failed litigants.

There are many other cases demonstrating that the normal rule is that such costs may and will be awarded against an individual who stands as a representative Plaintiff in accordance with the normal cost principles employed in civil proceedings.

In the fifth paragraph, the author states that if the intended application is lost, the "possibility of the group being required to pay is a certainty". While the general sentiment regarding the obligation of an unsuccessful litigant to pay the costs of a successful litigant is correct, as noted above, the court will order payment to be made by the representative Plaintiff rather than a "group" which the representative Plaintiff purports to represent.

The fifth paragraph of the article must be read very carefully since the author does not specify precisely what he means when he uses the word "group". Within the context of scouting, the word "group" presumably refers to a scout group which may have access to funds held in an account in the name of Boy Scouts of Canada. In the fifth paragraph, the author appears to be suggesting that scout groups might be required to contribute to payment of the legal costs if a representative action is launched and it is unsuccessful. These statements are very misleading and may be confusing to scout members who are being solicited by the author to support such an application. Scout funds cannot be used under any circumstance to fund the litigation. In effect, this would result in the organization's own funds being used to discharge a potential liability owed to the organization, not by scout groups, but by those individuals who launched and supported the litigation. The group or class to which the representative Plaintiff might look to recover the costs of the litigation are those individuals who voluntarily signed on to become part of the support group for the representative Plaintiff. Such responsible groups are not synonymous with the scout groups in North Waterloo, and no individual can commit an entire scout group to undertake litigation and be responsible for its costs. This is something that must be done on a personal basis by individuals who together would constitute the group that is in support of the litigation, and the funds to pay for that litigation and for any costs award that might be made against the representative Plaintiff would come from the individuals who constituted that support group. Any funds taken from a scout group in support of such action would be a clear breach of Scouts Canada policies and procedures and would be actionable in law.

Consequently, it appears that the overall thrust of the article is to downplay the real and substantial cost risks associated with litigation leaving the impression that, at the end of

the day, such costs, if awarded, might be paid by the scout groups rather than the individuals who have combined together to initiate the action. As noted above, such a conclusion is ill-founded.

It is rather puzzling that local scout leaders would adopt such a confrontational and adversarial approach that will have damaging consequences. Certainly, if an Application is commenced, Scouts Canada and Provincial Council for Ontario will have no choice but to vigorously defend against the Application since they are duty bound to protect the interests and assets of scouting. The net effect regrettably is that very substantial sums of money will be spent in legal proceedings, and existing relationships within the organization will be severely strained.

Please contact me if you wish to discuss any of these comments in greater detail. I do think it would be prudent for you to protect the interests of your individual members by ensuring they are well informed regarding the true cost consequences of such actions.

Yours truly,

GOWLING LAFLEUR HENDERSON LLP

Ron Craigen

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