

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DAVID ORCHARD

Plaintiff

- and -

THE CONSERVATIVE PARTY OF CANADA

Defendant

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The defendant denies that the plaintiff is entitled to the relief sought in paragraph 1 of the statement of claim.
2. The plaintiff has consented to a stay of the relief sought in paragraph 1(c) and 1(f) of the statement of claim.
3. The defendant admits the allegations contained in paragraphs 2, 3, 5, 6, and 8 of the statement of claim.
4. The defendant denies the allegations contained in paragraphs 4, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 23, 24, 25, 26, 27, and 28 of the statement of claim.
5. The defendant has no knowledge in respect of the allegations contained in paragraphs 18, 19, 20, and 21 of the statement of claim.
6. The plaintiff acknowledges in paragraph 7 of the statement of claim that the duties and obligations as between the plaintiff and the Progressive Conservative Party of Canada ("PC Party"), the defendant being the successor of the PC Party, are governed by the "Progressive Conservative Party of Canada Leadership Selection

Process – 2002/2003 Rules and Procedures for Leadership Candidates” (the “Selection Process Rules”).

7. At all material times the defendant has acted in a reasonable, prudent, and diligent manner in accordance with its duties and obligations under the Selection Process Rules.

8. The plaintiff continues to be in breach of his duties and obligations under the Selection Process Rules. Such breaches include, but are not limited to, the following:

- (a) Rule 3.1 – reporting requirements;
- (b) Rule 3.2 – payment obligations;
- (c) Rule 3.3 – reporting requirements; and
- (d) Rule 5.2 – payment obligations.

Plaintiff's Failure to Comply with Reporting Obligations

9. The plaintiff was obligated to comply with certain financial reporting obligations pursuant to Rule 3 of the Selection Process Rules. Contrary to paragraph 14 of the statement of claim, the plaintiff has not complied with his financial reporting obligations.

10. The plaintiff was required to file monthly expenditure reports (“MER”), including an accompanying balance sheet, within ten calendar days of the end of each month. The plaintiff has failed to comply with this obligation.

11. The plaintiff elected to submit MER using the “cash accounting” method. The “cash accounting” method recognizes an expense only after payment has been made in respect of same. As such, notwithstanding that an obligation arose for the plaintiff in respect of an expense, he would not, in breach of his obligations under the Selection Process Rules, report that expense on his MER until payment for same had actually been made.

12. A final MER was to be submitted June 16, 2003. Due in part to the plaintiff's use of the “cash accounting” method, it was necessary for the plaintiff to submit MER

beyond June 2003. The plaintiff submitted an MER in July and August 2003, but has refused and/or failed to submit further MER.

13. The plaintiff acknowledges in paragraph 20 of the statement of claim that he “has debts remaining from his leadership campaign”. Outstanding debts represent amounts that have not yet been paid by the plaintiff. Under the “cash accounting” method, such unpaid debts are not yet recognized as expenses. As such, the plaintiff must continue to submit MER in relation to those expenses, but has refused and/or failed to do so.

14. The plaintiff’s refusal and/or failure to submit MER after August 2003, despite acknowledging the continued existence of expenses, has made it impossible for the defendant to calculate subsequent reciprocal obligations arising under the Selection Process Rules.

15. The defendant is dependant upon the plaintiff to comply with his financial reporting obligations in order that it may calculate the appropriate deductions that must be made prior to remitting donations back to the plaintiff. The plaintiff’s refusal and/or failure to comply with his financial reporting obligations have denied the defendant the information necessary to calculate financial obligations under the Selection Process Rules.

16. The plaintiff has further failed to comply with his reporting obligations pursuant to Rule 3.3 of the Selection Process Rules.

17. Pursuant to the Selection Process Rules, the defendant is entitled to a full and complete accounting of all expenses incurred by the plaintiff in association with the leadership selection process. The plaintiff has failed to comply with this obligation.

Plaintiff’s Debt Obligations to the Defendant

18. Pursuant to Rule 3.2 of the Selection Process Rules, the plaintiff was required to submit payment with each MER in the amount of fifteen percent (15%) of all expenditures detailed in that MER (the “Expense Levy”).

19. The plaintiff has refused and/or failed to submit the Expense Levy in accordance with his obligations under Rule 3.2 of the Selection Process Rules.

20. The plaintiff owes the defendant an outstanding Expense Levy of approximately \$36,450.47 based on submitted MER as at August 2003.

21. The plaintiff has refused and/or failed to continue submitting MER despite acknowledging the existence of outstanding expenses. The plaintiff owes an additional undisclosed amount of Expense Levy to the defendant in respect of expenses paid by the plaintiff since August 2003. The amount of this additional Expense Levy is known to the plaintiff, but the plaintiff refuses and/or fails to disclose such amounts to the defendants despite his obligations to do so under the Selection Process Rules.

22. The plaintiff acknowledges in paragraph 20 of the statement of claim that he has outstanding expense debts. When such undisclosed debts are paid they will trigger disclosure under the "cash accounting" method and, as such, will result in further Expense Levy obligations.

23. The total debt obligation owed by the plaintiff to the defendant includes the following:

- (a) \$36,450.47 relating to outstanding MER as at August 2003;
- (b) the Expense Levy payable on all undisclosed expenses paid for by the plaintiff since August 2003 for which no MER has been filed, the exact amount of this debt obligation is known to the plaintiff; and
- (c) the Expense Levy payable on all undisclosed expenses currently due, but not yet paid for by the plaintiff, the exact amount of this debt obligation is known to the plaintiff.

24. Despite being obligated to render payment of the Expense Levy, the plaintiff has refused and/or failed to do so. Contrary to his obligations under the Selection Process Rules, the plaintiff refuses and/or fails to disclose financial figures, which

would enable the defendant to calculate the precise debt owed to it by the plaintiff in respect of the Expense Levy.

Calculation of Amounts to be Exchanged

25. Pursuant to Rule 2.10 of the Selection Process Rules, the plaintiff's entitlement to monies from the PC Canada Fund in relations to donations submitted was subject to a deduction of a fifteen percent (15%) administrative fee and "... any amounts payable or due and owing by the Leadership Candidate in accordance with these Rules and Procedures."

26. In paragraph 15 of the statement of claim the plaintiff refers to donations made since December 2003. Such donations were submitted after four consecutive months of the plaintiff failing to comply with his financial reporting obligations, and in the face of outstanding debt obligations for both known and unknown Expense Levy amounts. The defendant specifically denies the quantum of donations allegedly submitted and puts the plaintiff to the strict proof thereof.

27. The plaintiff submitted donation cheques to the defendant that were non-negotiable. Such cheques were non-negotiable due to insufficient funds and/or alterations to the face of the cheques. Such non-negotiable donation cheques could not be processed by the defendant and, as such, the plaintiff is not entitled to remuneration pursuant to the Selection Process Rules in respect of same.

28. The plaintiff acknowledges in paragraph 16 that only those donations made on or before December 31, 2003 would be processed and receipted by the defendant. To comply with the practice and procedure accepted by Canada Customs and Revenue Agency and Elections Canada, a donation must be both dated during the subject year, and "in transit" during that same year. A donation dated 2003, but not sent until 2004 cannot be receipted for 2003. Some of the donations referred to in paragraphs 15 and 16 of the statement of claim were dated in 2003, but not submitted until 2004. Such donations were not "in transit" in 2003 and, therefore, are not eligible to be receipted in 2003. The inability by the plaintiff to fulfill any "promise"

to his donors in this regard is a direct result of the plaintiff's failure to submit those donations to the defendant in a timely manner.

29. Donations and receipting pursuant to the Selection Process Rules do not continue in 2004.

30. The defendant pleads that the plaintiff is not entitled to any remittance pursuant to Rule 2.10 of the Selection Process Rules. Any valid donations, i.e. those donations that are negotiable, dated in 2003, and "in transit" during 2003, are subject to a fifteen percent (15%) administration fee, and then further subject to a deduction for any and all amounts owed by the plaintiff under the Selection Process Rules. Amounts owed by the plaintiff to the defendant under the Selection Process Rules include the Expense Levy obligations.

31. The defendant has no outstanding financial obligation to the plaintiff under the Selection Process Rules. Any outstanding donation amounts, after applicable administrative fees have been applied, are subject to and, completely set off by, the plaintiff's outstanding financial obligations to the defendant pursuant to the Expense Levy.

32. The defendant pleads that the outstanding Expense Levy results in the plaintiff being financially indebted to the defendant.

33. Further and in the alternative, in the event that any amount may be owed to the plaintiff pursuant to the Selection Process Rules, which is not admitted but specifically denied, the defendant pleads and relies upon the doctrines of equitable and legal set off in accordance with section 111 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, such set off entitlement relating to any and all monies owed to the defendant by the plaintiff.

Plaintiff Forfeited His Deposit

34. Contrary to the allegation made in paragraph 17 of the statement of claim, the plaintiff is not entitled to the return of his compliance deposit, such deposit being

inaccurately described as the "refundable portion of the Plaintiff's deposit" by the plaintiff.

35. The compliance deposit is governed by Rule 1.7 of the Selection Process Rules, which reads as follows:

The total amount of fifteen thousand (\$15,000) paid as a compliance deposit pursuant to Article 1.2.4 shall be refundable, provided that **the compliance deposit may be forfeited if all the Rules and Procedures for the leadership selection process are not adhered to in their entirety** and will be forfeited if the Leadership Candidate fails to receive more than five (5%) percent of the delegate votes cast on the first ballot for Leader at the Leadership Convention.

Emphasis Added

36. The plaintiff has not complied with the Selection Process Rules. Through the plaintiff's repeated failure to comply with his reporting and payment obligations under the Selection Process Rules, his compliance deposit has been forfeited.

37. Further, and in the alternative, if the compliance deposit is found not to have been forfeited, which is not admitted but specifically denied, the plaintiff's violations of the Selection Process Rules resulted in various deductions from the compliance deposit, which were acknowledged by the plaintiff during the leadership selection process.

Defendant Acted in Good Faith

38. At all material times the defendant has acted in a reasonable, prudent, diligent manner, and in good faith with respect to the candidacy of the plaintiff.

39. In paragraph 22 of the statement of claim the plaintiff alludes to an alleged conspiracy without pleading any facts or providing specifications of same. The defendant denies the allegations made in paragraph 22 of the statement of claim and pleads that at all material times it had knowledge of the plaintiff's repeated failure to comply with the Selection Process Rules, and the plaintiff's outstanding Expense Levy debts.

40. The plaintiff has pleaded malice in paragraph 24 of the statement of claim. Contrary to Rule 25.06(8) of the *Rules of Civil Procedure*, full particulars have not been pleaded. Alternatively, insufficient particulars have been pleaded. The allegations made in paragraph 24 are specifically denied and the plaintiff is put to the strict proof thereof.

41. The allegations made in paragraph 25 of the statement of claim are specifically denied and the plaintiff is put to the strict proof thereof.

No Fiduciary Relationship Existed

42. No fiduciary relationship existed between the defendant and the plaintiff.

43. As acknowledged by the plaintiff in paragraph 7 of the statement of claim, the duties and obligations as between the plaintiff and defendant are stipulated in the Selection Process Rules. The defendant specifically denies that it owed a fiduciary duty to the plaintiff and puts the plaintiff to the strict proof thereof.

Punitive and Aggravated Damages

44. The plaintiff has failed to provide any or sufficient particulars with respect to their pleading of aggravated and punitive damage.

45. The defendant specifically denies the allegations made in paragraphs 27 and 28 of the statement of claim and puts the plaintiff to the strict proof thereof.

46. At all material times the defendant has acted in compliance with its obligations under the Selection Process Rules.

47. At all material times the plaintiff has been in default of his obligations under the Selection Process Rules, and indebted financially to the defendant.

48. Further and in the alternative, the defendant pleads that the plaintiff is not entitled to prejudgment interest given his delay and failure to provide necessary accounting records and information with which the debt obligations could be

accurately calculated. The defendant pleads and relies upon section 130 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43.

49. The defendant respectfully request that this action be dismissed with costs payable to it on a substantial indemnity basis.

COUNTERCLAIM

50. The defendant claims from the plaintiff:

- (a) damages in an amount, particulars of which are not presently known but will be specified prior to trial, pursuant to the plaintiff's obligations to the defendant under Rule 3.2 of the Selection Process Rules;
- (b) damages in an amount, particulars of which are not presently known but will be specified prior to trial, for breach of the Selection Process Rules;
- (c) an accounting of all expenses incurred by the plaintiff in association with the leadership selection process including details as to when such expense obligations arose and when they were paid, and further, an accounting of the resulting amounts owing to the defendant;
- (d) prejudgment and postjudgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended;
- (e) costs on a substantial indemnity basis; and
- (f) such further and other relief as this Honourable Court deems just.

51. The defendant repeats and relies upon the allegations made in the statement of defence.

April 12, 2004

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Arthur Hamilton
LSUC#: 39474W
Tel: 416-860-6574
Fax: 416-640-3009

Solicitors for the defendant, the
Conservative Party of Canada

TO: **Roach, Schwartz & Associates**
Barristers & Solicitors
688 St. Clair Avenue West
Toronto, Ontario
M6C 1B1

Peter Rosenthal
Tel: (416) 657-1465
Fax: (416) 657-1511

Solicitors for the plaintiff

David Orchard
Plaintiff and
The Conservative Party of Canada
Defendant

Court File No: 04-CV-263730CM2

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**STATEMENT OF DEFENCE AND
COUNTERCLAIM**

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Arthur Hamilton
LSUC#: 39474W
Tel: 416-860-6574
Fax: 416-640-3009

Solicitors for the defendant, the Conservative
Party of Canada