SUPREME COURT OF YUKON

Citation: *Frost v Blake*, 2021 YKSC 62

Date: 20211208
S.C. No. 21-A0013
Registry: Whitehorse

BETWEEN:

PAULINE FROST

PETITIONER

AND

ANNIE BLAKE and H. MAXWELL HARVEY, CHIEF ELECTORAL OFFICER OF THE YUKON TERRITORY

RESPONDENTS

AND

CHRISTOPHER RUSSELL SCHAFER

INTERVENOR

Before Chief Justice S.M. Duncan

Counsel for the petitioner	James R. Tucker and Luke S. Faught
Counsel for the respondent Annie Blake	Shaunagh Stikeman
Counsel for the respondent, H. Maxwell Harvey, Chief Electoral Officer of the Yukon Territory	Mark E. Wallace
Counsel for the intervenor, Christopher Schafer (not appearing; written submissions only)	Vincent Larochelle

REASONS FOR DECISION

Introduction

[1] This is an application by the respondent Annie Blake, seeking $42,840 in costs from the petitioner, Pauline Frost. The petitioner opposes, saying there should be no award of costs because of the public interest nature of the litigation and litigants;

alternatively, they propose a costs award in the amount of $10,164. The respondent chief electoral officer is not seeking costs and takes no position in this application.

[2] This decision involves a determination of whether this is public interest litigation involving public interest litigants and the effect of that determination on costs.

[3] It also requires an interpretation of the *Rules of Court* of the Supreme Court of Yukon related to costs and their application to the facts of this case.

Background

[4] The result of the territorial election held on April 12, 2021, in the electoral district of Vuntut Gwitchin was a tie. There were two candidates: Pauline Frost for the Yukon Liberal Party and Annie Blake for the New Democratic Party. Each received 78 votes. The tie vote was confirmed by judicial recount on April 19, 2021. A draw was held, as required by the *Elections Act*, RSY 2002, c. 63 (the "*Act*"). Annie Blake's name was drawn and she was declared elected as the member of the legislative assembly for the Vuntut Gwitchin electoral district on April 19, 2021.

[5] Pauline Frost brought an application under s. 356 of the *Act*, on April 22, 2021, challenging the validity of the election on the basis it was not conducted in accordance with the *Act*. The relief sought was a court declaration that the election was invalid and the office was vacant. This result would have required a by-election to be held in the Vuntut Gwitchin electoral district.

[6] The grounds of the application seeking a declaration of invalidity of the election in Vuntut Gwitchin were that the votes of two people were improperly counted because they did not meet the residency or identification requirements in the *Act*. At the outset of the hearing, counsel for Pauline Frost advised they were abandoning the ground of

entitlement of one of the voters, leaving an objection to the vote of only one person, Christopher Schafer.

[7] Christopher Schafer was incarcerated in Whitehorse Correctional Centre ("WCC") at the time of the election. Originally from Old Crow in the Vuntut Gwitchin electoral district, and a citizen of Vuntut Gwitchin First Nation, he has been incarcerated in British Columbia or the Yukon, or under a long-term supervision order, or subject to conditions on his residence or activities, since 1999. He was 44 years old at the time of the application.

[8] Christopher Schafer applied for and received an inter-district special ballot allowing him to vote in the Vuntut Gwitchin electoral district while he was in WCC. Pauline Frost argued unsuccessfully that Christopher Schafer demonstrated an intention to reside in Whitehorse, not Old Crow; and that elections officials did not follow the required processes or comply with the *Act* in issuing Christopher Schafer an inter-district special ballot and by failing to reject it as invalid for lack of authorized identification. She also alleged unsuccessfully that the chief electoral officer failed to respond appropriately to a letter from counsel for the Yukon Liberal Party sent three days before the election questioning Christopher Schafer's eligibility to vote. Finally, she unsuccessfully alleged that the Elections Yukon policy guidelines for determining residency of inmates in WCC were inappropriate and contradicted the *Act*.

[9] This Court held that Christopher Schafer was properly found to be a resident of Old Crow by the returning officer for the purpose of the *Act*. The actions of the elections officials in determining his ability to vote and allowing him to vote did not amount to breaches of procedures in the *Act* designed to establish his entitlement to vote. Even if

they did, the actions were taken in good faith and did not materially affect the result of the election. The chief electoral officer's response to counsel for the Yukon Liberal Party was legally appropriate. The policy guidelines applicable to inmates' residency were found to be consistent with the *Act* and appropriate.

[10] Procedurally, this matter was heard quickly, with the cooperation of all counsel, because of the nature of the proceeding, the clear intention from the *Act* to have challenges to election validity decided without delay, and the desire for certainty for the electorate in Vuntut Gwitchin and for the composition of the legislative assembly. The application was brought by way of petition filed on April 22, 2021, and was heard on June 23 and 24, 2021.

[11] There were eight court appearances, including case management conferences and oral delivery of interlocutory decisions. Three of the appearances were interlocutory applications: application for intervention by the two voters whose voting ability was being challenged, application by Annie Blake to seal the proceedings related to one of the voters, application by Annie Blake to submit expert reports, and application by Pauline Frost to amend the petition.

[12] Eight affidavits were filed by Pauline Frost and 13 affidavits were filed by Annie Blake. The chief electoral officer, Maxwell Harvey, filed six affidavits. Two affidavits were filed on behalf of both Blake and Harvey, and for the purpose of this application they will be attributed to Blake.

Issues

[13] Does the normal rule of costs follow the event apply to the facts of this case, or is there a public interest aspect to this litigation that affects the costs determination?

[14] If costs are awarded, how should they be calculated? What Scale applies and what units should be granted? Or is there an alternative way to determine the quantum?

Discussion

a) Court's discretion

[15] The *Act* is clear that the costs of an application such as this one are in the court's discretion (s. 363(3)). The *Act* makes no provision for the government or the chief electoral officer to pay costs where an election is found to be valid. Under the *Act,* only if the court declares that an election is invalid shall the costs of the applicant be paid by the chief electoral officer.

[16] Rule 60(9) provides that unless the court orders otherwise, costs of and incidental to a proceeding shall follow the event (subject to subrule (12) which is not applicable to these facts).

[17] Party and party costs, and not special costs, are requested in this case. Appendix B to the *Rules of Court* sets out the criteria for determining whether costs should be calculated according to Scale A, B, or C. Section 2(a)-(c):

> 2 (a) Where a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (b), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
>
> (b) In fixing the scale of costs the court shall have regard to the following principles:
>
> (i) Scale A is for matters of little or less than ordinary difficulty;
>
> (ii) Scale B is for matters of ordinary difficulty;

> (iii) Scale C is for matters of more than ordinary difficulty.
>
> (c) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
>
> (i) whether a difficult issue of law, fact or construction is involved;
>
> (ii) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (iii) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

b) General purpose of costs

[18] The traditional rationale for the rule that costs follow the event is three-fold. The first is the compensatory purpose, premised on a belief that the case has a winner and a loser, and the loser pays some of the winner's costs, out of fairness to the winner. The second is the more punitive purpose: to sanction or discourage inappropriate behaviour by litigants in their conduct of the proceeding. To fulfill this purpose, a successful party to the litigation may be denied costs because of their misconduct, or the unsuccessful party may have to pay elevated costs because of their misconduct. The third purpose is to encourage settlement (*Incredible Electronics Inc v Canada (Attorney General)* (2006), 80 OR (3d) 723 (SC) ("*Incredible Electronics Inc*") at para. 63, and cases cited therein).

[19] Generally, the policy behind costs rules is the administration of justice and the control of access to justice. The tool of costs awards can encourage the efficient and appropriate conduct of litigation, as well as the ability of less affluent litigants with meritorious cases to access the justice system.

c) Public interest litigation and costs

[20] It has been generally observed that the jurisprudence on costs in public interest litigation has historically been incoherent and unpredictable (*Incredible Electronics Inc* at para. 74 and Professor Chris Tollefson, "Costs in Public Interest Litigation Revisited" (2011), 39 Advocates Q. 197 at 205). Part of the difficulty stems from the various ways courts have attempted to define public interest litigation or litigants.

[21] Professor Tollefson in his article "Costs in Public Interest Litigation Revisited" noted that:

> … Canadian courts have become increasingly comfortable with the notion that litigation involving the public interest raises unique policy considerations that may justify a departure from ordinary costs rules. … (p 204)

[22] For example, the Supreme Court of Canada wrote in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 ("*Okanagan Indian Band*") at para. 38:

> … [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]

[23] In other words, the compensatory purpose of the costs rules may be modified in public interest litigation because of the benefit to the public of the resolution of the issues raised in the litigation, or the access to justice considerations.

[24] Before discussing the potential impact of public interest litigation on costs awards, it is necessary to consider the meaning of public interest litigant and public interest litigation and how they overlap. The Court in *Incredible Electronics Inc* grappled with this issue as the same litigation involved numerous parties, some of whom were determined to be public interest litigants and some who were not. This determination affected the costs awards.

[25] There appears to be little to no authority that clearly defines public interest litigant. The determination of public interest litigant must be done in the context of the litigation and requires the exercise of judicial discretion after considering the individual circumstances of the case (*Sierra Club of Western Canada v British Columbia (Chief Forester*), [1994] 10 WWR 279 (BCSC) ("*Sierra Club*") at para. 57). Certain relevant factors emerging from the case law help to determine public interest litigants or public interest litigation. As noted by the Court in *Incredible Electronics Inc*, a factor could be necessary but not sufficient, or sufficient but not necessary in determining public interest. Those factors are:

a) is the litigant a partisan in a matter of significance not only to the parties but to the broader community (*Incredible Electronics Inc* at para. 92);

b) does the litigant have a direct pecuniary or other material interest in the proceedings (e.g. a non-profit organization) (*Odhavji Estate v Woodhouse*, 2003 SCC 69 ("*Odhavji Estate*") at para. 76);

c) does the litigant have a pecuniary interest which is modest in comparison to the costs of the proceedings (*Odhavji Estate* at para. 76);

d) what is the motive for bringing the action – are there diminished private or selfish interests or altruistic motives because of little to gain financially (*Incredible Electronics Inc* at para. 95);

e) does the litigant have other characteristics such as courage, loyalty, patriotism, dedication to a worthy cause, and the pursuit of justice (*Incredible Electronics Inc* at para. 98);

f) is the litigant a marginalized, powerless or underprivileged member of society (*Incredible Electronics Inc* at para. 99);

g) is there a novel point of law to be litigated (*Sierra Club* at para. 26); and

h) will the public benefit from a decision on the issues (*Okanagan Indian Band* at para. 38).

[26] A contextual analysis is required. Private interests can be implicated in a public interest challenge (*Sierra Club* and Chris Tollefson, Darlene Gilliland and Jerry DeMarco, "Towards a Costs Jurisprudence in Public Interest Litigation" (2004), 83:2 Can. Bar Rev. 473). The Supreme Court of Canada in *Okanagan Indian Band* did not incorporate into the definition of public interest litigant a requirement that the litigant has no personal, proprietary or pecuniary interests.

d) This case is public interest litigation involving public interest litigants

[27] Here, counsel for Annie Blake argues that Pauline Frost is not a public interest litigant, primarily on the basis that her motives were selfish. Counsel notes she is a private citizen who had a pecuniary and personal interest in the outcome. Her potential for financial gain was more than minor, as if she were successful in obtaining a by-election after a declaration of invalidity, and then successful in the election, she would

have regained her salaried position as a member of the legislative assembly. Counsel for Annie Blake differentiates this case from what she says is true public interest litigation, where marginalized or underprivileged groups challenge government legislation or actions, often on the basis of constitutionally protected rights. Counsel says this case, although possessing some aspects of public interest litigation, does not meet the threshold.

[28] Counsel for Pauline Frost argues that this is unquestionably a public interest case. He notes the chaotic nature of the jurisprudence and that individual facts of the case should govern. He argues that *Incredible Electronics Inc* sets out factors for consideration of public interest litigation or litigants and that no one factor is sufficient or necessary on its own. In this case, while there was some private interest motivation in that Pauline Frost, if successful, would get another “kick at the can” though participating in a by-election, victory in the litigation would not guarantee victory at the poll. Another significant motivation was her desire to ensure the integrity of the election process was preserved. The concerns raised by Pauline Frost about the policies, actions and conduct of elections officials in determining residency of voters like Christopher Schafer constituted important legal issues of broader interest to the community at large.

[29] A review of other cases in which there were elections legislation challenges shows a lack of consistency in the approach to determine public interest. This supports the observations of the courts in *Sierra Club* and *Odhavji Estate* that this determination is an exercise of judicial discretion, guided by the relevant factors.

[30] In this case, I find on balance that Pauline Frost is a public interest litigant in public interest litigation. While there are elements of private self-interest in her

application, the questions it raised and their resolution were of benefit to Yukoners in general. For example, the *Act* is silent on how residency is determined for incarcerated voters. Elections Yukon has developed a policy to address this question, which was scrutinized during this litigation. The logistics, the mechanics, and the challenges of implementing this policy were also scrutinized during this litigation. The Court's examination of these matters, some of which involved concerns affecting voters other than those who are incarcerated, such as voter identification for those who do not have government issued identification, was useful for the public to know and understand. The examination of the relevant elections jurisprudence and processes in such a detailed manner, thanks to the issues raised by the petitioner and the material provided by the chief electoral officer and Annie Blake in response, was a matter of public interest and public benefit. As noted by counsel for Annie Blake, there has been no decision involving elections in the territory since 1996.

[31] This case required a balancing of two main objectives of elections legislation: the encouragement of enfranchisement among qualified voters and the upholding of procedural safeguards that help protect the integrity of the electoral process. The consideration of these interests and especially an examination of how the courts have favoured the value of the *Charter* protected right to vote over the other values including certainty, accuracy, fairness, accessibility, voter anonymity, promptness, finality, legitimacy, efficiency, and cost, was an instructive and important public interest exercise.

[32] I note as well that Annie Blake is a respondent by virtue of her candidacy for public office as a member of the New Democratic Party and of her election to the

legislative assembly. Like Pauline Frost, there are elements of both private and public interest in her status.

[33] Other courts have considered the public interest nature of elections litigation. In *Forsyth v Fraser*, 2013 ABQB 557, an unsuccessful candidate brought an application for a judicial recount, which confirmed the original result. The court acknowledged there was a personal element to the application, but found the overriding factor was one of public interest in ensuring public confidence in a fair and transparent electoral system. Costs were ordered to be paid by the government, permitted by statute in that case.

[34] In *Friesen v Hammell*, 2002 BCSC 1103, the petition was brought unsuccessfully to invalidate an election because three voters alleged they were fraudulently induced to vote for NDP candidates by the premier's remarks about balanced budgets. The court noted no allegations were made against the respondents personally and the petition was not brought frivolously or for improper purposes. It was characterized as public interest litigation. Each party was ordered to bear their own costs.

[35] In *Cusimano v Toronto (City)*, 2012 ONCA 907, an unsuccessful candidate for City Councillor lost an appeal of a declaration of election validity. The issue was whether the absence of an election official's signature on a voters list change request form as required by statute was sufficient to invalidate the vote. The court held it was a procedural irregularity that did not compromise the voters' entitlement to vote. In deciding that each party would be responsible for their own costs, the court noted that "[p]roceedings challenging the validity of elections … are unique because there will often be no "successful" or "unsuccessful" party ..." (para. 130). No misconduct was alleged except as against the chief electoral officer. Neither candidate was the cause of

or implicated in the ballot to be set aside. If anyone was successful it was the chief electoral officer and he did not seek any costs.

[36] Similarly, in this case, no misconduct was alleged by Pauline Frost against Annie Blake. Concerns expressed were directed to the policies and processes of the chief electoral officer. The petition in this case raised legitimate and not frivolous concerns going to the integrity of the electoral process. If anyone could be considered to be "successful" in this petition, it is Maxwell Harvey and his officials, not Annie Blake. I agree with counsel for Maxwell Harvey that he is a public interest litigant and thus his position on not seeking costs is appropriate.

[37] These elections cases and their application to the facts of this case support the characterization of this matter as predominantly a public interest one.

e) Implications of public interest litigation and litigants on costs

[38] Once again, no coherent or consistent effect of a finding that a matter is public interest litigation or brought by a public interest litigant emerges from the jurisprudence. In some instances, courts have found the public interest litigant to be immune from costs; in others the normal costs rules have applied; and in still others there have been some modifications to costs awards because of the public interest element. A finding of public interest is usually a justification for lower costs (see *Bow Valley Naturalists Society v Canada (Minister of Canadian Heritage)*, 2002 FCA 515). This is consistent with the nature of public interest, as noted above, where there is often no clear winner or loser and the issues litigated were of public benefit, so that even the loser should not be required to pay full costs.

[39] Here I agree with counsel for Annie Blake that there should be no immunity from costs in this circumstance. Although I have found that on balance this is a public interest matter, it is not free from private interest and Pauline Frost is not impecunious. Her financial circumstances are also a relevant factor.

[40] I note that the public interest aspect of this litigation pervades the entire case and unlike other factors, such as last minute amendments to pleadings, cannot be attributed to specific aspects of the litigation.

f) Assessment or alternative

[41] I have reviewed the assessment forms provided by counsel and appreciate the comparator document prepared by counsel for Annie Blake. I did not receive detailed arguments from either counsel on the units for each activity, rather, submissions of a more general nature were made. Instead of proceeding with an assessment and assigning units, I will exercise my discretion under Rule 60(14) to fix lump sum costs. In doing so, I am guided by the principles underlying the *Rules of Court*, as well as the purpose of costs awards and the factors applicable to public interest litigation set out in the jurisprudence. As noted by the Ontario Court of Appeal in *Zesta Engineering Ltd v Cloutier* (2002), 118 ACWS (3d) 341 (ONCA) at para. 4:

> … [T]he costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. …

[42] The overriding principle is reasonableness. Courts have repeatedly stressed that in fixing lump sum costs they are not following a mathematical approach of multiplying the number of hours spent by an hourly rate. My view of this case is that the public

interest nature of the litigants and litigation should substantially modify the compensatory purpose of a costs award.

g) Quantum of costs - Scale, interlocutory applications and conclusion

Scale

[43] Although I am fixing a lump sum as costs of the proceeding I will address the appropriate Scale of costs because the analysis provides additional guidance towards a determination of reasonableness in this case.

[44] Counsel for Annie Blake argues that Scale C should apply throughout because this matter involved a difficult issue of law and fact that has not been dealt with in this jurisdiction since 1996; it was a public interest issue and one of great importance to the people in the Vuntut Gwitchin electoral district and to the outcome of the April 2021 territorial election; and the outcome of the proceeding confirmed the results of the election in Vuntut Gwitchin and the make-up of the legislative assembly, results beyond the results for Annie Blake and Pauline Frost.

[45] In addition, counsel for Annie Blake says she was required to develop an expertise in the *Act*; learn about intervenor jurisprudence; educate herself on issues of residency in elections statutes in other jurisdictions; and research and obtain jurisprudence on voting rights of incarcerated persons, aboriginality-residence, *Charter* and United Nations Declaration of Rights for Indigenous Peoples.

[46] Finally counsel notes she was required to submit a new affidavit after counsel for Pauline Frost amended the petition just before the hearing, and all costs spent on preparing to address the argument directed at the other voter were thrown away because of the abandonment of this ground just before the hearing.

[47] Counsel for Pauline Frost says that Scale B is more appropriate. While he does not deny that there were complexities to the issues raised, he notes that much of that burden was assumed by the chief electoral officer. He includes in this the response to the amendment of the petition done close to the hearing – that is, it was addressed primarily by the chief electoral officer as it related to the technicalities and logistics of the procedures undertaken by the elections officials. He concedes that the abandonment of the grounds related to the second voter was done at the last possible moment, that is, at the outset of the substantive hearing. He further notes that counsel for Annie Blake's submissions were for the most part restricted to arguments on the residency of Christopher Schafer and, appropriately, the response to the procedural and policy issues was left for the chief electoral officer to address.

[48] While this case was factually and logistically challenging for counsel for Annie Blake, particularly because the petition was heard relatively quickly, I do not think it was a case beyond ordinary difficulty. I agree with counsel for Pauline Frost that the work done by counsel for Annie Blake was focussed on the interpretation of residency of Christopher Schafer under ss. 3 and 6 of the *Act*, rather than responding to the alleged flaws in the policy and processes of the elections officials. The affidavit evidence provided by counsel for Annie Blake on this issue was helpful and indeed essential to make a proper ruling. The affidavits from Christopher Schafer setting out his history of residence, incarceration and release supplied the necessary context and factual basis to understand the application of the statutory provisions. The affidavits from his parents and other Vuntut Gwitchin elders, explaining among other things the connections with

Old Crow from the Vuntut Gwitchin First Nation perspective, were also helpful. Although this issue was factually challenging it was not legally complex.

[49] The challenges by Pauline Frost to the policies of and the actions and procedures undertaken by the elections officials, including the chief electoral officer, were more legally and technically complex. They required scrutiny of the policy and processes as well as interpretation of various sections in the statute. The response to these issues was appropriately provided by counsel for the chief electoral officer, and indeed on several occasions counsel for Annie Blake adopted his submissions or deferred to him on those points. I also note that well over half of the decision in this matter addressed the technical, procedural, and legal issues that were responded to by the chief electoral officer.

[50] I note that two of the factors which counsel for Annie Blake says support an award of Scale C costs are also factors relevant to the public interest: that is, the litigation raises issues of general importance, and the outcome determined rights and obligations of the parties beyond the relief denied.

[51] The research of the law in the various areas done by counsel for Annie Blake did not go beyond the level of ordinary difficulty.

[52] The new affidavit filed after the amendment to the petition and the costs thrown away because of the late abandonment of the challenge to the second voter are facts that I have taken into account in the award of lump sum costs.

[53] Scale B is appropriate and reasonable in this case.

Costs of applications

[54] Counsel for Annie Blake also seeks costs related to the interlocutory applications. She initiated two of the four applications: the application to seal material related to one voter – withdrawn after brief argument; and the application to file expert evidence – refused with one permitted exception which became unnecessary to pursue because it was not a contested point. Another interlocutory application was the application to intervene, brought by counsel for the two proposed intervenors, and supported by counsel for Annie Blake. The final interlocutory application was the contested application by counsel for Pauline Frost to amend the petition to add a new ground – granted with costs to the respondents for the inconvenience of providing new affidavits in a compressed time frame.

[55] Guidance about how to consider costs of these applications is provided by Rule 60(12), which provides:

> …
>
> (a) the party making an application that is granted, is entitled to costs as costs in the cause, but the party opposing it is not entitled to costs as costs in the cause,
>
> (b) the party making an application that is refused, is not entitled to costs as costs in the cause, but the party opposing it is entitled to costs as costs in the cause, and
>
> (c) where an application made by one party and not opposed by the other is granted, the costs of the application are costs in the cause.

[56] Costs in the cause is a way of saying that costs will be decided in the same way as the costs at the end of the hearing are decided. In this case, Annie Blake is entitled to some costs based on the final outcome and the conduct of the litigation by Pauline

Frost. However, applying the principles set out in Rule 60(12), the only one of the applications that entitles costs to be provided to Annie Blake is the late amendment to the petition, which I granted with costs to the respondents.

Conclusion on quantum

[57] Several aspects of this case stand out as they relate to costs: the last minute withdrawal by counsel for Pauline Frost of the argument related to the other voter, and the late amendment to the petition. These aspects, combined with the essential information and jurisprudence provided by counsel for Annie Blake related to the interpretation of residence under the *Act*, entitle her to some costs, instead of both parties assuming responsibility for their own costs.

[58] I have considered the following material prepared by counsel for Annie Blake: four affidavits and six-page argument submitted on behalf of the voter whose situation was not pursued by the petitioner; the three-page affidavit filed in response to the late amendment to the petition; and the useful factual and jurisprudential material filed on the Christopher Schafer residency issue. I will fix lump sum costs in the amount of $7,500 plus GST. I will also award the disbursement cost of $395 plus GST for the flight to Old Crow. I accept counsel's submission that most of her time was spent there obtaining affidavits and information to oppose the challenge to the other voter, which ultimately was not pursued.

[59] This amount not only takes into account the public interest aspect of the case, but it also considers the financial circumstances of Pauline Frost. While there was some dispute as to whether her husband's sources of income are attributable to her in part as household income, there was insufficient reliable evidence provided for me to make a

finding on this point. It is undisputed that at this point Pauline Frost does not have a regular income of her own. Her counsel advised that the Yukon Liberal Party did not fund the litigation, so any costs will be her responsibility.

[60] Finally, as permitted by s. 363(4) of the *Act*, I order that Pauline Frost's deposit may be applied to the payment of the costs ordered to be paid by her in this case.

____

DUNCAN C.J.