

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ETHEL AHENAKEW, ALBERT BELLEWARE, C. HANSON DOWELL, MARIE GATLEY, JEAN GLOVER, HEWARD GRAFFTEY, AIRACA HAVER, LELANND HAVER, ROBERT HESS, ALBERT HORNER, OSCAR JOHVICAS, ARTHUR LANGFORD, NEALL LENARD, PATRICIA McCRAKEN, BLAIR MITCHELL, TOM MITCHELL, DAVID ORCHARD, ARLEIGH ROLIND, DONALD RYAN, LOUIS R. (BUD) SHERMAN, GERALD WALTERS, CADY WILLIAMS and JOHN PERRIN v. PETER MacKAY on his own behalf and on behalf of all members of the PROGRESSIVE CONSERVATIVE PARTY OF CANADA other than the applicants

BEFORE: Justice Juriansz

COUNSEL: *Sean Dewart and Steven Barrett*, for the applicants

Paul Bates and Arthur Hamilton, for the respondents

ENDORSEMENT

[1] The respondents, Peter Mackay and the Progressive Conservative Party of Canada, seek an order that the applicants pay their costs on a substantial indemnity basis because they submit the applicants attempted to litigate the matter in the news media, filed affidavits containing hearsay, misrepresentations, speculation, and irrelevant political rhetoric, and alleged personal bias against the members of the Progressive Conservative Party Arbitration Panel under the Party's internal dispute resolution process.

[2] In this case the material filed by the respondents leaves no doubt that Mr. David Orchard embarked on a concerted media campaign to portray his position in this litigation as the right and just one, and the position of the respondents as wrong.

[3] The cases cited by the respondents do in deed indicate that "substantial indemnity" costs may be awarded against a party for attempting to litigate his or her case in the news media. Nevertheless, the awarding of costs remains largely a matter of discretion for the court.

[4] The manner in which I exercise my discretion must be mindful of the guarantee of free expression by s. 2(b) of the *Charter*, and the historic recognition that completely open and free discussion of issues of politics and public affairs is essential to democracy. Duff C.J. in the 1938 case *Re Alberta Statutes*, [1938] S.C.R. 100 described free discussion of political affairs as the "the breath of life for parliamentary institutions." In *Switzman v. Elbling* (1957), S.C.R. 285,

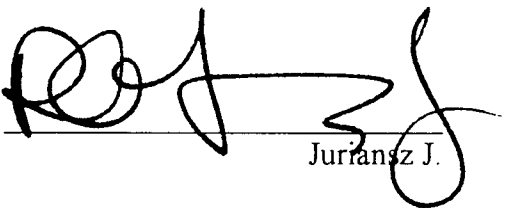
Rand J. observed that Canadian government by "the will of the majority expressed directly or indirectly through popular assemblies" ultimately means "government by the free public opinion of an open society". Public opinion, in order to meet such a responsibility, he said "demands the condition of a virtually unobstructed access to and diffusion of ideas".

[5] This case raised fundamental questions about the nature of political parties and the interpretation of the new provisions of the *Canada Elections Act* relating to merger of political parties. These questions were of national significance to the politics of the nation.

[6] While the respondents filed material detailing the what Mr. Orchard said about the issues of the case in media interviews, the respondents did not identify how his seeking publicity and speaking to the media had any effect on how the application proceeded and was heard, or how it reflected negatively on the integrity of the court or its process. This was a case in which the public had a great interest, and it was the duty of the media to report on the issues.

[7] I would not give effect to the other submissions of the respondents. In this case, it is my view that the considerations raised by the respondents are outweighed by the highly charged political context of this proceeding. The dominant factor in assessing costs in this case is that the parties were on opposite sides of a political question of national import. The individuals involved on both sides had no personal interest in the proceedings, other than a determination of the nature of the institutions through which they would participate in the political affairs of the country.

[8] I was not persuaded that I should make a costs award that would sanction or inhibit free discussion of political issues. I conclude that this is an appropriate case for each side to bear its own costs.



Juriansz J.

DATE: March 23, 2004