Court File No. C41105

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

ETHEL AHENAKEW, ALBERT BELLEMARE, 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

Applicants
(Appellants)

- and -

PETER MacKAY
on his own behalf and on behalf of all members of the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondents
(Respondents in Appeal)

FACTUM OF THE APPELLANTS
BY CROSS-APPEAL
(COSTS)

PART I - NATURE OF THE CROSS-APPEAL

1. The respondents, appellants by cross-appeal (hereinafter, for consistency, referred to as the "respondents"), seek leave to appeal from, and if granted seek to set aside, the costs order of Juriansz J., as he then was, dated March 23, 2004, wherein the learned Application Judge denied the costs of the application to the successful respondents. This cross-appeal is joined with the appeal of the application decision pursuant to Rule 61.03.1(18)(b) of the *Rules of Civil Procedure* which requires

the respondents to seek leave from the panel of the Court of Appeal hearing the appeal as of right.

2. It is respectfully submitted that leave to appeal should be granted, and the costs order be set aside, on the basis that the learned Application Judge erred in law in denying costs to the respondents.

3. The learned Application Judge erred in concluding that a cost award would be contrary to s.2(b) of the *Canadian Charter of Rights and Freedoms*. There is no recognized legal principle that the guarantee of free expression under s.2(b) of the *Charter* precludes costs awards against persons who bring suits against politicians or political parties. To the contrary, Ontario courts have repeatedly awarded costs in cases that arise in a political context. In fact, costs have been awarded on a substantial indemnity basis where the unsuccessful party attempted to litigate its case in the press and engaged in conduct similar to that of the appellants, respondents by cross-appeal, (hereinafter, for consistency, referred to as the "appellants"). Specifically, the appellants engaged in a concerted media campaign alleging, among other things, fraud, deceit, misappropriation of funds, and vote rigging as against the respondents, none of which they ultimately pursued at the hearing of their application.

4. The learned Application Judge further erred in denying costs to the respondents, where there was no wrongdoing on their part, or other special circumstances. At the least, partial indemnity costs should have followed the event of the dismissal of the application in its entirety.

PART II - THE FACTS

The Conduct of the Appellants

5. The application was served on short notice and a month after the events giving rise to the application took place. The initial return date was less than two weeks prior to the event the application sought to influence.

Notice of Application, dated November 20, 2003, Appeal Book and Compendium, Tab 4, pages 22 - 29

Respondents' Written Cost Submissions, January 23, 2004, Exhibit Book of the Appellants by Cross-Appeal, Tab 1, page 11, para. 20

6. In the application, the appellants sought numerous discretionary remedies, many of them extraordinary in nature. In total the appellants sought nine declarations, one reference, an order appointing a representative respondent and a permanent injunction enjoining and restraining anyone from dealing with the PC Party assets in a manner "inconsistent" with the declarations sought.

Notice of Application, dated November 20, 2003, Appeal Book and Compendium, Tab 4, pages 22 - 29

Respondents' Written Cost Submissions, January 23, 2004, Exhibit Book of the Appellants by Cross-Appeal, Tab 1, page 10, para. 17

7. Several of the remedies sought by the appellants were abandoned before or at the hearing of the application, as noted by the learned Application Judge in his reasons:

> I note that several items of the relief set out in the Notice of Application are not pursued before me. Paragraph 1(j) requested a declaration that Mr. MacKay is in breach of his written agreement, dated June 1, 2003, with Mr. Orchard and sought consequential relief. The request for this relief was withdrawn on the consent of counsel prior to the date set for the hearing. Paragraph 1(e) sought a declaration that the procedures set by the Management Committee of the PC Party for the special meeting scheduled for December 6, 2003 are contrary to the Party's Constitution and by-laws. Counsel for the applicants indicated they were not seeking such relief and informed the Court the applicants were making no attack on the specific procedures adopted by the Party respecting the special meeting. Counsel also informed the Court that the applicants were not requesting the Court to deal with the relief sought in paragraph 1(g) which sought a declaration that the Constitution of the PC Party prohibit its leader from agreeing with the leader of another political party that the PC Party will not nominate candidates in every federal constituency in Canada.
>
> **Reasons for Judgment, December 4, 2003, paragraphs 4-5, Appeal Book and Compendium, Tab 3, page 11**

8. The only evidence tendered in support of the application were affidavits sworn by David Orchard. Those affidavits contained hearsay, misrepresentations, speculation, unfounded allegations of bias and irrelevant political rhetoric. It was necessary for the respondents to file a lengthy responding affidavit and to cross-examine Mr. Orchard in order to identify the speculation, hearsay and opinions that were set out as facts in his affidavits and to correct the errors contained therein. For example:

- at paragraphs 9 and 10 of his first affidavit, Mr. Orchard asserts that he is confused about the meaning of the Agreement-in-Principle and that it is unclear. Yet, when cross-examined, he states that easily understood the Agreement-in-Principle the first time he read it and that he never sought clarification of its meaning because he did not need to.

  Affidavit of D. Orchard, sworn November 20, 2003, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 4, page 9 – 10, paragraphs 9 and 10, Exhibit Book Volume 1, Tab 1 pages 4 - 5

  Transcript from the Cross-examination of Mr. Orchard, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 5, page 11 - 18, Questions 32-39, 62-78 and 469, Exhibit Book Volume 2, Tab 36, pages 354 – 355, 359 – 363, 455

- at paragraphs 66-75 of his first affidavit Mr. Orchard criticizes the rules and procedures contained in a document he attaches as Exhibit I. On cross-examination Mr. Orchard disclosed that he obtained the document from Ms. Repo and he made no inquiries to satisfy himself that the document Ms. Repo sent him was, in fact, the final set of rules and procedures. The respondents' unchallenged evidence was that Mr. Orchard was in error and his Exhibit I was a draft document that was not accepted.

  Affidavit of D. Orchard, sworn November 20, 2003, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 6, page 19 - 23, paragraphs 66-75, Exhibit Book Volume 1, Tab 1, pages 21 - 25

  Transcript From the Cross-examination of Mr. Orchard, Appeal Book and Compendium of Appellants by Cross-Appeal, Tab 7, page 24 - 25, Questions 180-184, Exhibit Book Volume 2, Tab 36, pages 387 - 388

  Affidavit of D. Bellemare, sworn November 26, 2003, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 8, page 26, paragraph 103, Exhibit Book Volume 1, Tab 12, page 138

- At paragraph 60 of his first affidavit Mr. Orchard alleged that John Scott ruled a motion by Ms. Repo challenging the Agreement-in-Principle out of order at the October 25, 2003 meeting of Management Committee. The respondents' unchallenged evidence was that Mr. Orchard was in error; Ms. Repo's motion was voted upon and defeated 31-1.

  Affidavit of D. Bellemare, sworn November 26, 2003, Appeal Book and Compendium of the Appellants by Cross-Appeal, paragraphs 35 and 102, Exhibit Book Volume 1, Tab 12, 117 and 137 - 138

9. Further, the appellants engaged in attempts to litigate this matter in the news media before they commenced their application, then before, during and after the oral hearing. In doing so the appellants released information to the media before disclosing it to the court and the respondents, and made many allegations against the respondents which they did not even assert in their application material. These allegations included bias, fraud, deceit, misappropriation of funds, vote rigging and unconstitutional actions. These allegations were made against elected public officials, members in good standing of various provincial bar associations, duly elected Party

officials and others. Examples of instances where the appellants sought to litigate this matter in the media, and instructed their counsel to do so, include:

(i) Prior to the application being served on the respondents, the appellants publicly commented on the application, released copies to the news media and announced a press conference at the office of their solicitors to discuss it. The respondents in fact learned of the application and the identity of the appellants' counsel from the media and contacted them requesting service.

> **Respondents' Compendium re: Cost Submissions, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 10, page 30 - 31**

(ii) At a press conference on November 21, 2003, counsel for the appellants stated, among other things, that the respondent Mr. MacKay, an elected member of the House of Commons and a member in good standing of the Nova Scotia Barristers' Society, was engaged in a "coup". This accusation was reproduced in both print media and on television nationally. He also cited case law to the media that had yet to be provided to the respondents.

> **Respondents' Compendium re: Cost Submissions, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tabs 11 and 12, page 32 - 35**

(iii) On November 30, 2003, one of the appellants appeared on the CTV television program "Question Period". On that program he discussed the appellant's legal arguments and case law and accused the respondents of fraud regarding the voting procedures for the national meeting of members. These allegations of fraud were reproduced in print media the following day.

> **Respondents' Compendium re: Cost Submissions, Appeal Book and Compendium of Appellants by Cross-Appeal, Tab 13, page 36 - 37**

(iv) On December 1, 2003, the appellants published an article in the Globe and Mail newspaper entitled "Why We Are Going to Court". In that article they accused the respondents of "subverting democracy", "rigging the voters' list", "improper use of party funds", "hijacking" and "gerrymandering".

> **Respondents' Compendium re: Cost Submissions, Appeal Book and Compendium of Appellants by Cross-Appeal, Tab 14, page 38**

(v) Following the release of the reasons for decision on December 5, 2003, and in spite of the fact that the appellants had withdrawn their request for a declaration regarding the voting procedure, one of the appellants appeared on the CBC radio program "As It Happens" to discuss the decision and alleged that the respondents had "fraudulently rigged" the vote. He also clearly misstated the relief sought in the application by denying the fact that the appellants had sought a permanent injunction.

Respondents' Compendium re: Cost Submissions, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 15, page 39

10. On December 4, 2003, the learned Application Judge dismissed the application, in its entirety, and invited counsel to make an appointment to address costs.

Reasons for Judgment, December 4, 2003, paragraph 42, Appeal Book and Compendium, Tab 3, pages 10 - 21

11. The respondents sought costs on a substantial indemnity basis, or in the alternative on a partial indemnity basis, given the conduct of the appellants and the respondents' complete success in defending the application.

Respondents Written Costs Submissions, January 23, 2004, Exhibit Book of the Appellants by Cross-Appeal, Tab 1, pages 1 - 14

12. On March 23, 2004, the learned Application Judge denied costs to the successful respondents and held that each side should bear its own costs.

Costs Endorsement, March 23, 2004, paragraph 8, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 3, pages 7 – 8, para. 8

PART III - ISSUES AND THE LAW

13. This Honourable Court must determine the following issue:

> Did the learned Application Judge err in denying costs to the successful respondents on the basis that an award would be contrary to s.2(b) of the *Charter*, and where there was no finding of wrongdoing on the part of the respondents or other special circumstances?

14. Where costs are in the discretion of the court, leave will be granted and the decision set aside if the trial judge exercised his/her discretion arbitrarily or on an erroneous principle of law.

> ***Bell Canada v. Olympia & York Developments Ltd.*** **[1994], 111 D.L.R. (4th) 589 (Ont. C.A.) at page 590, 596-597, 600-601, Respondents' Book of Authorities, Tab 1**
>
> ***Ventin v. Ferguson*** **[1995] O.J. No. 2789 (Div.Ct.) at page 3, Respondents' Book of Authorities, Tab 2**

15. It is respectfully submitted that leave should be granted and the cost decision set aside, as the learned Application Judge exercised his discretion on an erroneous principle of law and failed to properly consider the relevant factors favouring an award of costs to the respondents.

16. The learned Application Judge denied costs on the basis that to award costs "would sanction or inhibit free discussion of political issues" and would therefore be contrary to the guarantee of free expression under s.2(b) of the *Charter*. The learned Application Judge expressly held at paragraphs 4 and 8:

> 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 Statues*, [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."
>
> I am not persuaded that I should make a cost award that would sanction or inhibit free discussion of political issues.
>
> **Costs Endorsement, dated March 23, 2004, Appeal Book and Compendium of the Appellant by Cross-Appeal, Tab 3, pages 7 - 8**

17. There is no recognized legal principle that s.2(b) of the *Charter* precludes costs awards against persons who bring applications against politicians or political parties. Both cases cited by the learned Application Judge pre-date the *Charter*, and neither stand for the proposition that costs awards in such circumstances were precluded.

> ***Re Alberta Statues*, [1938] S.C.R. 100, page 22 (S.C.C.), Respondents' Book of Authorities, Tab 3**
>
> ***Switzman v. Elbling* (1957), S.C.R. 285, page 14 (S.C.C.), Respondents' Book of Authorities, Tab 4**

18. In *Switzman,* the issue before the Supreme Court was whether "*The Act Respecting Communistic Propaganda*" was *ultra vires* the Province of Quebec. The majority of the Court found that the subject matter of the statute was not within any of the powers specifically assigned to the Province by s. 92 of the *British North America Act* and that the statute constituted an unjustifiable interference with freedom of speech and expression. It was in this context that Rand J. made the observations upon which the learned Application Judge relies. Similarly, in *Re: Alberta,* the issue before the Court was whether "*The Alberta Social Credit Act*", among others, was *ultra*

vires the Province of Alberta. Again, it was in this context and with respect to this statute that Duff C.J. made the comments upon which the learned Application Judge relies.

19. To the contrary, Ontario courts have repeatedly awarded costs against unsuccessful applicants in cases that arose in a "political context".

> ***Munro v. Canada (Attorney General),*** **1994 Carswell Ont. 3254 (Gen. Div.) at para. 5, Respondents' Book of Authorities, Tab 5**
>
> ***Manago v. Muscoe*** **(1991) 4 O.R. (3d) 469 (Gen Div.) at page 473-474, Respondents' Book of Authorities, Tab 6**
>
> ***R. v. Santa,*** **[2002] O.J. No. 3002 (S.C.J.) at paragraph 20-21, Respondents' Book of Authorities, Tab 7**

20. It is respectfully submitted that the learned Application Judge, in denying costs on the basis that a cost award would be contrary to s.2(b) of the *Charter,* exercised his discretion on an erroneous principle of law and as such leave to appeal should be granted and the decision set aside.

21. In fact, costs have been awarded on a higher scale where the unsuccessful party attempted to litigate its case in the press and engaged in conduct similar to that of the appellants.

> ***Munro v. Canada (Attorney General),*** **1994 Carswell Ont. 3254 (Gen. Div.) at para. 5, Respondents' Book of Authorities, Tab 5**
>
> ***Manago v. Muscoe*** **(1991) 4 O.R. (3d) 469 (Gen Div.) at page 473-474, Respondents' Book of Authorities, Tab 6**
>
> ***R. v. Santa,*** **[2002] O.J. No. 3002 (S.C.J.) at paragraph 20-21, Respondents' Book of Authorities, Tab 7**

22. In *Munro v. Canada (Attorney General),* the applicants sought a declaration that the Liberal Party of Canada and others were in violation of section 3 and 15 of the *Canadian Charter of Rights and Freedoms*. The application was dismissed, as against the Liberal Party on procedural grounds, and in awarding costs Borins J., as he then was, held:

> There is another factor, to which I did not refer in my reasons for judgment, which is appropriate to take into consideration in the exercise of my discretion in regard to costs….There was evidence before the court on the motion that the applicants and their counsel held a press conference on July 27, 1993, which was the date on which the notice of application was issued and prior to the time it was served on the respondents. Where a party to a proceeding attempts to litigate his or her case in the news media, this is a relevant factor to be taken into consideration in awarding costs.
>
> ***Munro v. Canada (Attorney General),*** **1994 Carswell Ont. 3254 (Gen. Div.) at para. 5, Respondents' Book of Authorities, Tab 5**

23. In *Santa*, an application was brought for an order for prerogative relief to quash a summons against a city councillor, Mr. Santa, who was alleged to have committed election campaign infractions. The summons was issued following an ex parte hearing in Provincial Offences Court where the informant Mr. Audziss alleged certain election campaign infractions. In awarding substantial indemnity costs to the successful applicant the court held:

> I cannot accept that Mr. Audziss made an innocent error in issuing a press release. It was his intention to litigate in the press, rather than the courts. Mr. Audziss was well aware that such a press release would be deemed newsworthy. That was its very purpose. Mr. Santa's position as city councillor made it news. There are many litigants before the courts who wish a determination on the merits who do not issue press releases. The timing of the news release, before the applicant was even served with process, and the reference to criminal charges is particularly aggravating… Mr. Santa is entitled to substantial indemnity with respect to his cost of this application…

> ***R. v. Santa*, [2002] O.J. No. 3002 (S.C.J.) at paragraph 20-21, Respondents' Book of Authorities, Tab 7**

24. In *Mangano*, the applicant was seeking, *inter alia*, a judicial determination that the respondent, a member of the city council of the Municipality of Metropolitan Toronto, had contravened s.5(1) of the *Municipal Conflict of Interest Act*, 1983, S.O. 1983, c. 8, as amended. In awarding costs on a solicitor client scale the court held:

> Costs are awarded on the higher scale in light of the unwarranted press release issued by the applicant. If the applicant had wished to avoid the media, he should have merely referred any inquires to his counsel; a press release merely enlarged the arena of conflict to two theatres.
>
> ***Manago v. Muscoe* (1991) 4 O.R. (3d) 469 (Gen Div.) at pages 473-474, Respondents' Book of Authorities, Tab 6**

25. With respect to the appellants' conduct, the learned Application Judge expressly held at paragraph 2 of his reasons:

> 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. (emphasis added)
>
> **Costs Endorsement, dated March 23, 2004, paragraph 2, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 3, page 7, para. 2**

26. After finding that the appellants embarked on "a concerted media campaign", the learned Application Judge erred in requiring the respondents to show how that conduct specifically impacted on the application process or reflected negatively on the court. Specifically, the learned Application Judge held:

> While the respondents filed material detailing 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.

Costs Endorsement, dated March 23, 2004, paragraph 6, Appeal Book and Compendium of the Appellants by Cross-Appeal, Tab 3, page 8, para. 6

27. The case law is clear that it is not just the conduct of the parties before the court which is to be taken into consideration. Attempts to litigate in the news media are, in and of themselves, a relevant consideration and justify costs on a substantial indemnity basis.

Munro v. Canada (Attorney General), **1994 Carswell Ont. 3254 (Gen. Div.) at para. 5, Respondents' Book of Authorities, Tab 5**

Manago v. Muscoe **(1991) 4 O.R. (3d) 469 (Gen Div.) at page 473-474, Respondents' Book of Authorities, Tab 6**

R. v. Santa**, [2002] O.J. No. 3002 (S.C.J.) at paragraph 20-21, Respondents' Book of Authorities, Tab 7**

28. It is respectfully submitted that there were no proper legal principles or considerations favouring a denial of costs in this case. The learned Application Judge made no finding of wrongdoing on the part of the respondents.

29. Although a successful party has no entitlement to costs, that party is entitled to a reasonable expectation of costs in the absence of special circumstances.

Bell Canada v. Olympia & York Developments Ltd. **(1994), 111 D.L.R. (4th) 589 (Ont. C.A.) at page 596, Respondents' Book of Authorities, Tab 1**

30. There were no special circumstances in this case; to the contrary there were significant factors in favour of an award of costs to the respondents, as described hereinafter.

31. The court's discretion to award costs arises from section 131 of the *Court of Justice Act*. Guidance with respect to the legal principles upon which this discretion should be exercised is found in R. 57.01(1) of the *Rules of Civil Procedure*.

***Courts of Justice Act*, R.S.O. 1990, c.C.43, s.131**

32. Rule 57.01(1) provides that in exercising its discretion to award costs, the court may consider, in addition to the result in the proceeding, the complexity of the proceeding, the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding, and whether any step in the proceeding was improper or vexatious or unnecessary.

***Rules of Civil Procedure*, R.R.O. 1990, Reg.194, as amended, 57.01(1)(c)(e)(f)**

33. As discussed above, the appellants waited a month after the events giving rise to the application took place and then proceeded to serve the notice of application on short notice. Although the court found that the delay in bringing the application was not so inordinate as to refuse it being heard, the respondents submit that the compressed timeframe imposed by the appellants' delay should be considered in the award of costs.

34. The breadth of the application and the extraordinary remedies sought required significant work to be completed and a large amount of resources to be expended in order to effectively respond. Further, the seriousness of the allegations being made against the respondents, and the implications for them in the event the appellants were successful, put the respondents in a position where, in the words of Malloy J., "they could not afford to cut corners".

Stojanov v. Holland, [2001] O.J. No. 4905 (S.C.J.) at paragraph 6, Respondents' Book of Authorities, Tab 8

35. Further, the appellants sought declarations for which they had no evidence in support and which they later abandoned. Specifically, in paragraph 1(e) of the application the appellants sought a declaration that the process for voting on the Agreement-in-Principle was unconstitutional and would be of no force and effect. A substantial part of the respondents' record was dedicated to responding to that particular allegation and claim for relief. It was not until the end of reply submissions that counsel for the appellants withdrew paragraph 1(e) from the application. Such an unsupportable allegation and late abandonment ought to attract substantial indemnity costs. As was stated by Dambrot J.:

> To completely absolve the plaintiff of responsibility for unfounded allegations because of this withdrawal at the courtroom door would fail to deter reckless allegations from being pleaded in the first instance, or maintained after they are known to be without foundation.

Mele v. Thorne Riddell (1997) 32 O.R. (3d) 674 (Gen. Div.), at p. 677, Respondents' Book of Authorities, Tab 9

36. It is respectfully submitted that the learned Application Judge's failure to adequately consider these factors constitutes grounds for leave, and a reversal of the order, and that the normal expectation of the successful litigant to obtain his/her own costs should prevail.

PART IV - ORDER REQUESTED

37. The respondents' request that leave to appeal be granted, that the costs order of the learned Application Judge be set aside and that this Honourable Court fix and award costs to the respondents for the application, and the costs of the cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 16, 2004

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

Arthur L. Hamilton
LSUC#: 39474W
Tel: (416) 860-6574
Fax: (416) 640-3009

Solicitors for the Respondents

TO: **Bigioni LLP**
Barristers & Solicitors
Suite 201
6060 Hwy 7 east
Markham, Ontario
L3P 3A9

Paul Bigioni
(905) 294-5222
(905) 294-1607 (fax)

Solicitors for the Appellants

SCHEDULE "A"
LIST OF AUTHORITIES

Bell Canada v. Olympia & York Developments Ltd., [1994] 111 D.L.R. (4th) 589 (Ont. C.A.)

Ventin v. Ferguson [1995] O.J. No. 2789 (Gen.Div.)

Re Alberta Statues, [1938] S.C.R. 100 (S.C.C.)

Switzman v. Elbling (1957), S.C.R. 285, page 14 (S.C.C.)

Munro v. Canada (Attorney General), 1994 Carswell Ont. 3254 (Gen. Div.)

Manago v. Muscoe (1991) 4 O.R. (3d) 469 (Gen Div.)

R. v. Santa, [2002] O.J. No. 3002 (S.C.J.)

Stojanov v. Holland, [2001] O.J. No. 4905 (S.C.J.)

Mele v. *Thorne Riddell* (1997) 32 O.R. (3d) 674 (Gen. Div.)

AHENAKEW et al.
Appellants

and

PETER MacKAY et al.
Respondents

Court File No: C41105

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

FACTUM OF THE APPELLANTS
BY CROSS-APPEAL
(COSTS)

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

Arthur L. Hamilton
LSUC#: 39474W
Tel: (416) 860-6574
Fax: (416) 640-3009

Solicitors for the Respondents,
Appellants by cross-appeal