

COURT OF APPEAL FOR ONTARIO

BETWEEN :

**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 MCCRACKEN, 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 the
PROGRESSIVE CONSERVATIVE PARTY OF CANADA
other than the applicants

Respondent
(Respondent in Appeal)

**FACTUM OF THE APPELLANTS,
RESPONDENTS BY CROSS-APPEAL
(COSTS)**

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PART I - OVERVIEW

1. The respondent/appellant by cross-appeal (hereinafter called the “respondent”) has appealed the costs order made by the Court below. Section 133(b) of the *Courts of Justice Act* requires that the respondent obtain leave to appeal where the appeal relates solely to costs.

Courts of Justice Act, section 133(b), Cross-Appeal Factum of the appellants/respondents by cross-appeal, Schedule “B”

2. The appellants/respondents by cross-appeal (hereinafter called the “appellants”) seek no order as to costs, regardless of the outcome of the appeal. The effect of the cross-appeal is to put costs in issue in the event that the appellants are unsuccessful on the merits of the appeal.

3. The position of the appellants is simply that the Court below had a complete discretion with respect to costs, and that it did not make any error in principle in the exercise of its discretion.

PART II - THE FACTS

Facts which the respondents by cross-appeal accept as correct

4. The appellant’s application was dismissed by the Court below. Reasons for Judgment were given. The Court below invited submissions with respect to costs. After reviewing those submissions, the Court ordered that each party bear its own costs.

Costs Endorsement dated March 23, 2004, Cross-appeal Book, Tab 3
Costs Order, Cross-appeal Book, Tab 2
Reasons for Judgment, Appellants Appeal Book and Compendium, Tab 3

Facts with which the respondents by cross-appeal disagree

5. The balance of the “Facts” in the Cross-appeal Factum of the respondent are set out in a patently argumentative manner.

6. After the conclusion of argument at the Court below, counsel for the appellants advised the Court below that he was not seeking the specific declarations contained at paragraphs 1(j) and (e) of the Notice of Application. Paragraph 1(j) sought a declaration that the respondent, Peter McKay, had breached his agreement with the appellant, David Orchard. This particular declaration had been withdrawn with the prior consent of the respondent’s counsel. Paragraph 1(e) of the Notice of Application had sought a declaration that the specific procedures for the December 6, 2003 PC Party meeting were unconstitutional. The decision not to seek the paragraph 1(e) declaration did not, however, change the

factual scope of either the application or this appeal, since the facts underlying that particular declaration were also relevant to other declarations sought by the appellants.

7. As noted at paragraph 35 of the Factum of the respondent, the declaration sought at paragraph 1(e) of the Notice of Application was withdrawn only after the end of argument at the Court below. The evidence tendered by both parties on the application and the argument, both written and oral, made by both parties addressed the facts relating to the specific procedures for the December 6, 2003 meeting of the PC Party. This was necessary because those facts pertained not only to the declaration sought at paragraph 1(e), but also to the other declarations sought by the appellants from the Court below.

8. At paragraph 8 of his Cross-appeal Factum, the respondent, places an unfounded spin on the testimony of the appellant, David Orchard. He describes Mr. Orchard's testimony as unfounded and biased. Examples are given to purportedly support this characterization of Mr. Orchard's evidence. They are addressed below:

(a) It is alleged that Mr. Orchard contradicted himself on the issue of the clarity of the agreement-in-principle and his understanding of it. A reading of Mr. Orchard's affidavit evidence and the transcript of his cross-examination discloses that there is no such contradiction in his testimony.

Affidavit of David Orchard, sworn November 20, 2003, Exhibit Book, Volume 1, Tab 1, pages 4 to 5
Transcript of the cross-examination of David Orchard, Exhibit Book, Volume 2, Tab 36, pages 354 to 355, 359 to 363 and 455

(b) Mr. Orchard's affidavit evidence included a list of Rules and Procedures established specifically for the December 6, 2003 meeting of the PC Party. The affidavit evidence relied upon by the respondent at the Court below included a final version of

those Rules and Procedures that was somewhat different than the version included in Mr. Orchard's affidavit. According to the respondent, the Rules and Procedures were drawn up by the PC Party's National Meeting Organizing Committee, and approved by the PC Party's Management Committee. Since none of the appellants were members of either of those committees, it is understandable that they might not have had access to the most recent version of the Rules and Procedures at the time their application materials were being prepared. It is important to note that the responding affidavit suggested that this discrepancy regarding the Rules and Procedures was the result of some kind of impropriety on the part of Mr. Orchard. The affidavit of Dominique Bellemare implies that Mr. Orchard may have had something to do with the removal of an electronic draft stamp on each page of the Rules and Procedures. This is tantamount to an allegation of fraud for which the respondent had utterly no evidence.

Exhibit Book, Volume 1, Tab 10, Exhibit "I" to the affidavit of David Orchard, sworn November 20, 2003

Exhibit Book, Volume 1, Tab 18, Exhibit "6" to the affidavit of Dominique Bellemare Affidavit of Dominique Bellemare, para. 103, Exhibit Book, Volume 1, Tab 12

(c) The respondent, states that Mr. Orchard was mistaken about the basis for denial of a certain motion to the PC Party Management Committee at its October 25, 2003 meeting. This particular matter does not appear to be relevant to the issue of costs.

9. The respondent, alleges that the appellants attempted to litigate this matter in the news media. Examples of public statements made by or on behalf of the appellants were cited to the Court below in the respondent's costs submissions. They are repeated in the respondent's Cross-appeal Factum. They are not all found within the evidentiary record in this proceeding.

PART III - THE ISSUES AND THE LAW

10. Section 131 of the *Courts of Justice Act* states as follows:

131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

11. Rule 57 of the Rules of Civil Procedure sets out certain factors which the Court may take into account in exercising its discretion regarding an award of costs. There is nothing in Rule 57 which limits the Court's discretion under Section 131 of the *Courts of Justice Act*.

Factum of the appellants, Schedule "B"

12. Leave to appeal on the question of costs alone ought to be sparingly granted and only in very obvious cases. An award of costs by a judge will not lightly be interfered with. The Court must be convinced that there are strong grounds upon which it could be found that the judge erred in exercising his discretion.

Hill v. Ross Memorial Hospital, [1995] O.J. No. 3287 (Div. Ct.) at paras. 14 and 15

13. The respondent has argued that the Court below made an error in principle by relying upon section 2(b) of the *Charter of Rights and Freedoms*. It is submitted that there was no such error. The Court below did not decide that an order of costs would actually violate the guarantee of free expression contained in section 2(b) of the *Charter*. The Court below merely allowed the spirit of section 2(b) of the *Charter* to inform the exercise of its discretion regarding costs. It is submitted that this was entirely reasonable given that the result of this legal dispute is clearly a matter of broad political interest.

14. Specifically, the Court below did not proceed on the basis of the idea that section 2(b) of the *Charter* precludes costs awards against persons who bring applications against politicians or political parties. Accordingly, the Court below made no error in principle.

15. It is agreed that statements made to the media by a litigant may be taken into account on a costs

determination. It is clear, however, from the costs endorsement that the Court below did consider and take into account certain statements made to the media by or on behalf of the appellants. The Court then proceeded to exercise its discretion in a manner displeasing to the respondent. That is no error in principle.

16. The respondent argues that there are no special circumstances in this case which would be relevant to costs. It is respectfully submitted that that is wrong. This is no ordinary commercial dispute between private parties. This is a dispute involving the operation and existence of a significant federal political party. The legal issues raised by this case are of interest both legally and politically.

17. The respondent contends that the appellants ought to have been punished in costs for having abandoned the relief originally sought by them at paragraph 1(j) and 1(e) of the Notice of Application. Because the declaration sought at paragraph 1(j) of the Notice of Application was abandoned on consent, it is submitted that it should be of no consequence regarding costs. Further, as explained at paragraphs 6 and 7 above, while the specific declaration at paragraph 1(e) was ultimately not sought, all the facts relevant to it were fully argued because they applied to other items of relief which were pursued by the appellants.

PART IV - ADDITIONAL ISSUES

18. In addition to the submissions contained in this Factum, the appellants also rely upon the submissions regarding costs made by their prior counsel to the Court below (the "original costs submissions"). The original costs submissions have been reproduced in the Cross-appeal Exhibit Book at Tabs 4 and 4A. The Cross-Appeal Brief of Authorities filed by the appellants contains the cases referred to in the original costs submissions. The original costs submissions address the specific costs claims made by the respondent.

19. The costs sought by the respondent were so grossly excessive that it is reasonable to consider they may have been demanded as a bargaining tool or as a means of economically terrorizing the appellants. It is respectfully submitted that such an unreasonable demand for costs should not be rewarded, especially in the context of a proceeding in which there is significant public interest.

20. The respondent was required by Rule 61.07(1) to serve his notice of cross-appeal within 15 days of service of the notice of appeal. This was impossible in this case because the costs endorsement was released only after the expiry of that 15 day period. The respondent was, however, required by Rule 61.07(1.2) to obtain leave to appeal in the manner provided by Rule 61.03.1(18) before serving the Notice of Cross-appeal. The respondent has served the Notice of Cross-appeal without first obtaining such leave.

Rules 61.03.1(18), 61.07(1) and 61.07(1.2), Factum of the appellants, Schedule "B"

PART V - ORDER SOUGHT

21. It is the appellants' position that there should be no order as to the costs of this appeal, regardless of its outcome. The appellants seek an Order that leave not be granted to the respondent to proceed with his cross-appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

PAUL BIGIONI

SCHEDULE "A"
LIST OF AUTHORITIES

Buchanan v. Geotel Communications Corp., [2002] O.J. No. 3063 (S.C.J.)

Hill v. Ross Memorial Hospital, [1995] O.J. No. 3287 (Div. Ct.)

Re Lavigne and Ontario Public Service Employees Union et al. (1987), 60 O.R. (2d) 486 (H.C.J.)

Lawyer's Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921 (S.J.C.)

Re Mahar and Rogers Cablesystems Limited, [1995] O.J. Nos. 3035 and 3711 (supp.) (Ont. Ct. Gen. Div).

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 (S.C.C.)

Pagnotta v. Brown, [2002] O.J. No. 3033 (S.J.C.)

Tri-S Investments Ltd. V. Vong, [1991] O.J. No. 2292 (Ont. Ct. Gen. Div.)

**SCHEDULE “B”
RELEVANT STATUTORY PROVISIONS**

Courts of Justice Act, section 131(1):

131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Court of Justice Act, section 133(b):

133. No appeal lies without leave of the court to which the appeal is to be taken,

(b) Where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

Rule 61.03(18) of the Rules of Civil Procedure:

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under clause 133(b) of the *Courts of Justice Act* or under another statute that requires leave for an appeal with an appeal or cross-appeal as of right,

- (a) the request for leave to appeal shall be included in the notice to appeal or cross-appeal as part of the relief sought;
- (b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;
- (c) where leave is granted, the panel may then hear the appeal.

Rule 61.07(1) of the Rules of Civil Procedure:

- (1) A respondent who,
 - (a) seeks to set aside or vary the order appealed from; or
 - (b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,

shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross-appeal.

Rule 61.07(1.2) of the Rules of Civil Procedure:

(1.2) The respondent shall obtain leave to appeal in the manner provided by subrule 61.03(8) or 61.03(18), as the case may be, before serving the notice of cross-appeal if the cross-appeal is taken under,

- (a) Clause 133(b) of the *Courts of Justice Act*; or
- (b) another statute that requires leave for an appeal.

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(Appellants)

- and -

PETER MacKAY et al

Respondent

Court File No. C41105

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Proceedings commenced at Toronto

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