

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Appellants/
Respondents on Cross-Appeal

-and-

**POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SÉGUIN**

Respondents/
Appellants on Cross-Appeal

-and-

**JULIAN FANTINO, COMMISSIONER OF THE PROVINCIAL POLICE,
IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS UNIT and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (MINISTRY OF COMMUNITY
SAFETY AND CORRECTIONAL SERVICES)**

Respondents

**FACTUM OF THE RESPONDENTS/APPELLANTS ON CROSS-APPEAL
ON COSTS, POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT
MARK PULLBROOK AND POLICE CONSTABLE GRAHAM SÉGUIN
(Appellants' Factum)**

August 4, 2011

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

Barristers

250 University Avenue, Suite 501

Toronto, ON M5H 3E5

Ian Roland (LSUC No. 14512K)

Michael Fenrick (LSUC No. 57675N)

Tel: 416-646-4300

Fax: 416-646-4301

Lawyers for the Respondents/Moving
Parties, Police Constable Kris Wood,
Acting Sergeant Mark Pullbrook and
Police Constable Graham Seguin

AND TO: FALCONER CHARNEY LLP
Barristers at Law
8 Prince Arthur Avenue
Toronto, ON M5R 1A9

Julian Falconer (LSUC No. 29465R)
Sunil S. Mathai (LSUC No. 49616O)
Tel: 416-964-3408
Fax: 416-929-8179

Lawyers for the Appellants

AND TO: SACK GOLDBLATT MITCHELL
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Marlys Edwardh
Jessica Orkin
Tel: 416-979-4381
Fax: 416-979-4430

Lawyers for the Director of the Special
Investigation Unit, Ian Scott

**AND TO: COMMUNITY SAFETY &
CORRECTIONAL SERVICE**
77 Grenville Street, 8th Floor
Toronto, ON M5S 1B3

Christopher Diana
Tel: 416-314-3513
Fax: 416-314-3518

Lawyers for the Commissioner of the
Ontario Provincial Police, Julian
Fantino

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(Appellants' Factum)**

PART I – OVERVIEW

1. Despite their complete success in the proceedings below, the application judge did not award the Respondent police officers any of their costs. In the present case, there was no reason to depart from the general rule that the successful party is entitled to costs. The application judge erred by not exercising her discretion judicially. Instead, she declined to award costs to the Respondent police officers on the basis of irrelevant considerations, not argued by either party. The application judge's costs order should be set aside, and costs of the proceedings below should be fixed at \$79,284.43 (inclusive of GST, and disbursements) payable by the Appellants to the Respondent police officers.

PART II – THE FACTS

The Parties

2. The Respondents, Police Constable Kris Wood, Acting Sergeant Mark Pullbrook and Acting Sergeant Graham Séguin (together, the Respondent police officers) are Ontario Provincial Police officers.¹

3. Evelyn Minty, Diane Pinder and Ruth Schaeffer (together, the “Appellants”) are family members of Douglas Minty and Levi Schaeffer, men who died in separate incidents involving the Respondent police officers in the lawful execution of their duties.²

The Application

4. The Appellants commenced a proceeding on November 4, 2009, in the Superior Court of Justice seeking declaratory relief, primarily a judicial interpretation of sections of the *Police Services Act*, R.S.O. 1990, c. P.15, Regulation 673/98 and certain of the Law Society of Upper Canada’s “Rules of Professional Conduct” (the “Application”). The Application was returnable May 13, 2010.³

The Examinations

5. The Appellants caused two summonses to be issued on November 12, 2009, to compel the testimony of two Special Investigation Unit (“SIU”) investigators, Daniel Marshall and Denis O’Neill (the “SIU Investigators”).⁴ Counsel for the Appellants examined Messrs. Marshall and O’Neill on December 7, 2009 (the “Examinations”).⁵

6. The Examinations produced a number of refusals made by counsel for Director

¹ *Schaeffer v Woods*, 2010 ONSC 3647 at para 3 [*Schaeffer v Woods*].

² *Ibid* at paras 4-23.

³ Respondent Police Officers’ Exhibit Book (“REB”), Notice of Application dated November 4, 2009, Tab 3C.

⁴ REB, Applicants’ Summons to Witness, Tab 1B.

⁵ REB, Falconer Charney LLP letter to Master Dash, dated December 10, 2009, Tab 1G, p 60.

Scott, both on the basis of relevance and on the basis of privilege.⁶ The privilege asserted belonged to the Respondent police officers. In the Appellants' view, the refusals made by Director Scott's counsel necessitated a refusals motion (the "Refusals Motion").⁷

The Appellants Wanted Case Management

7. At the Examinations, counsel for the Appellants indicated that they wanted the Application case managed. Counsel for the Respondent police officers did not object. The Appellants had the Application assigned to a Case Management Master.⁸

The Motion to Strike

8. In early December 2009, the Respondent police officers informed the Appellants that they intended to move to strike the Application (the "Motion to Strike").⁹

9. On January 13, 2010, the Respondent police officers served their Motion to Strike on the Appellants.¹⁰

The Respondent Police Officers Try to Bring Their Motion to Strike

10. On January 19, 2010, the Respondent police officers moved before the Case Management Master to have the Motion to Strike heard in advance of the Application. Director Scott supported the Respondent police officers. The Appellants opposed it. The Case Management Master agreed with the Appellants, and ordered that the Motion to Strike be heard together with the Application on May 13, 2010 - the same date that the Appellants had already scheduled with the Court for the hearing of the Application at the

⁶ REB, Falconer Charney LLP letter to Master Dash, dated December 10, 2009, Tab 1G, p 60.

⁷ REB, Correspondence between parties' counsel regarding the scope of the motion to be argued on March 10, 2010, Tab 3R, p. 253

⁸ REB, Mr. Mathai's letter of December 8, 2009, Tab 3L, p. 221.

⁹ REB, Mr. Mathai's letter of December 8, 2009, Tab 3L, p. 221.

¹⁰ REB, Respondents' Notice of Motion, Tab 1H.

outset of the proceedings.¹¹

11. On February 24, 2010, the Respondent police officers amended their Motion to Strike in an attempt to persuade the Appellants to consent to having the Motion to Strike heard prior to the Application.¹² The Appellants once again refused.

12. That same day, the Respondent police officers moved before the Case Management Master to have the amended Motion to Strike heard in advance of the Application. Director Scott once again supported this position. The Appellants insisted that both the Motion to Strike and the Application ought to be heard together. The Case Management Master agreed with the Appellants.¹³

The Refusals Motion

13. On February 26, 2010, the Respondent police officers agreed to waive any claim to privilege which Director Scott had previously asserted on their behalf, thus narrowing the issues for the Refusals Motion, scheduled for March 15, 2010. However, Director Scott did not agree to waive the refusals made based on relevance.¹⁴

14. The Refusals Motion was argued over a full day on March 15, 2010 before the Case Management Master. Counsel for the Respondent police officers attended at the Refusals Motion, at which motion the Appellants were largely successful as against Director Scott and the Respondent, then-Commissioner Julian Fantino.¹⁵

15. Director Scott agreed to pay the full costs of the Refusals Motion to the Appellants, as well as the costs thrown away as a result of the refusals Director Scott's

¹¹ Respondent Police Officers' Appeal Book ("RAB"), Affidavit of Jodi Martin, affirmed December 10, 2010 in support of the Motion for Leave to Appeal ("Martin affidavit"), para. 15, Tab 4.

¹² REB, Paliare Roland Letter to Master Abrams, dated February 24, 2010, Tab 1J, p. 76.

¹³ REB, Mr. Roland's letter of February 24, 2010; Mr. Falconer's responding letter of February 24, 2010, Tab 3S, p. 284.

¹⁴ REB, Master Abrams' endorsement dated February 26, 2010, Tab 3T, p. 291.

¹⁵ REB, Motion heard March 15, 2010 with attached Schedule "A" to Master Abrams' March 31, 2010 Endorsement, Tab 1M.

counsel made at the Examinations. Director Scott paid the Appellants \$14,500 in complete satisfaction of these costs.¹⁶

The Motion to Strike is Heard as Scheduled

16. As scheduled from the outset,¹⁷ the application judge, Low J., began hearing submissions from the parties on the Motion to Strike on May 13, 2010.¹⁸

17. By decision and reasons dated June 23, 2010, Low J. granted the Respondent police officers' Motion to Strike on all of the bases advanced by the Respondent police officers in their Notice of Motion. She ordered the Application struck. The Respondent police officers' Motion to Strike was a complete success.¹⁹

18. Low J. further held in her reasons that she may be spoken to if the parties could not agree as to costs of the Motion to Strike.²⁰

The Costs Order and Endorsement

19. The parties could not agree as to costs, and so on November 9, 2010, they made submissions to the Application judge. The Respondent police officers sought costs against both the Appellants and the Respondent Director Scott, whose position on the merits was aligned with the Appellants. The Respondent police officers sought costs from the Appellants primarily on the basis that they were the successful party. The Appellants submitted primarily that they should be relieved from the burden of an award of costs because they claimed that they had assumed the mantle of public interest litigants.

20. By order and endorsement dated November 25, 2010 (the "Costs Order"), Low J. ordered that the Respondent police officers were not entitled to their costs of the Motion

¹⁶ REB, Mr. Kendik's letter of May 5, 2010; copy of a cheque in the amount of \$14 500, Tab 3X.

¹⁷ REB, Notice of Application dated November 4, 2009, Tab 3C, p. 156.

¹⁸ RAB, Order of Low J., dated November 25, 2010, Tab 3.

¹⁹ *Ibid* at para 92.

²⁰ *Ibid* at para 93.

to Strike or of the application, despite their success.²¹

PART III – ISSUES AND THE LAW

21. This cross-appeal raises three issues:

- a. Should the Respondent police officers be granted leave to appeal Low J.'s Order as to the costs of the Motion to Strike?
- b. If so, did Low J. err when exercising her discretion not to award costs by taking into account irrelevant considerations and failing to take into account relevant one?
- c. If so, in what amount should this Court fix the costs of the proceedings below?

a. This Court Should Grant Leave to Appeal

22. Leave is necessary to appeal a costs order.²² Leave to appeal will be granted when there are “strong grounds upon which the appellate court could find that the judge erred in exercising [her] discretion.”²³

23. The record here provides strong grounds for finding that Low J. did not act judicially in exercising her discretion as to costs. A judge’s discretion in awarding costs must be exercised judicially on the facts of the case and be based on relevant considerations.²⁴ For the reasons below, Low J. exercised her discretion improperly in the present case.

b. Low J. Exercised Her Discretion Improperly

24. An appellate court should set aside a costs award if there has been an error in

²¹ RAB, Costs Endorsement of Justice Low dated November 25, 2010, Tab 2, para 4.

²² *Courts of Justice Act*, RSO 1990, c C 43, ss 131(1) and 133.

²³ *Brad-Jay Investments Limited v Village Developments Limited* [2006] OJ No 5078 at para 21 (CA).

²⁴ *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at para 22.

principle or if the costs award is plainly wrong.²⁵

25. The rule that a successful party is entitled to its costs is long standing and should not be departed from without very good reasons.²⁶ Low J. failed to properly consider this rule before departing from the normal costs consequences for the unsuccessful party. Instead, she held that the Respondent police officers were not entitled to their costs because of an alleged “failure to move promptly”, which she held delayed the proceedings and exacerbated the costs of the litigation.²⁷ However, Low J. based her conclusion on two critical errors. Specifically:

- a. first, she held that the Respondent police officers took a “detour into case management”,²⁸ when it was in fact the Appellants who requested that the Application be case-managed;²⁹ and
- b. second, she held that the Respondent police officers’ assertion of privilege created additional costs and delays,³⁰ which it did not as the refusals motion had to proceed in any event,³¹ Director Scott paid the Appellants the costs of the refusals motion and any costs thrown away,³² and the Application proceeded on the date it had been set down from the outset.³³

26. With respect to her first error, there is simply no support in the record for Low J.’s conclusion that the Respondent police officers were responsible for a “detour into case management” or that this “exacerbated the costs of litigation.”³⁴

27. As noted, it was the Appellants and not the Respondent police officers who

²⁵ *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 SCR 303 at para 27 [*Hamilton v Open Window Bakery*].

²⁶ See, e.g., *Watts v Benvenuti* (2006), 80 O.R. (3d) 721 at para. 8 (C.A.).

²⁷ RAB, Costs Endorsement of Justice Low dated November 25, 2010, Tab 2, para. 5.

²⁸ *Ibid* at para 6.

²⁹ REB, Mr. Mathai’s letter of December 8, 2009, Tab 3L, p. 221.

³⁰ RAB, Costs Endorsement of Justice Low dated November 25, 2010, Tab 2, para 7.

³¹ REB, Motion heard March 15, 2010 with attached Schedule “A” to Master Abrams’ March 31, 2010 Endorsement, Tab 1M.

³² REB, Mr. Kendik’s letter of May 5, 2010; copy of a cheque in the amount of \$14 500, Tab 3X.

³³ RAB, Order of Low J., dated November 25, 2010, Tab 3.

³⁴ *Ibid* at para. 6.

requested that the Application be case-managed. The Respondent police officers sought to use Case Management to bring the matter to an expeditious resolution. In fact, the Respondent police officers moved twice before the case management Master to have their Motion to Strike heard in advance of the Application.³⁵ The Respondent police officers even amended their Notice of Motion in an effort to have the matter heard at the earliest opportunity.³⁶ Had the Appellants consented to the hearing of a motion which was clearly preliminary, it would have spared all parties the costs of preparing the Application.

28. There was also no evidence before Low J. that case management caused any parties any additional delay or costs. In fact, the Appellants did not even submit to Low J. that they should be relieved from costs on this basis.

29. Finally, the Costs Order undermines the purpose of civil case management. The *Rules of Civil Procedure* provide for case management in order to move complex proceedings expeditiously to resolution, thus reducing unnecessary costs and obtaining the least expensive determination of a case on its merits.³⁷ If Low J.'s order stands, parties may resist case management given the risk that they will face punitive costs consequences should the judge at first instance make a *post hoc* finding that case management was "unnecessary."³⁸

30. Low J.'s second error is that she held that the Respondent police officers caused the Appellants "significant delay and additional costs" because the Respondent police officers allegedly "made an unmeritorious assertion of privilege."³⁹ Irrespective of the

³⁵ RAB, Martin affidavit, para 15, Tab 4; REB, Paliare Roland Letter to Master Abrams, dated February 24, 2010, Tab 1J, p. 76.

³⁶ REB, Paliare Roland Letter to Master Abrams, dated February 24, 2010, Tab 1J, p. 76.

³⁷ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s 77.01(2); *Business Depot Ltd v Genesis Media Inc* (2000) 48 OR (3d) 402 at para. 25 (S.C.).

³⁸ RAB, Costs Endorsement of Justice Low dated November 25, 2010, Tab 2.

³⁹ RAB, Costs Endorsement of Justice Low dated November 25, 2010, Tab 2, para. 7.

merits of the assertion, which no court has ever adjudicated, it caused neither delay, nor additional expense.

31. From the outset, the Motion to Strike and the Application were scheduled to be heard on May 13, 2010,⁴⁰ which was the date the hearing in fact proceeded.⁴¹ Moreover, the Refusals Motion did not result in any extra costs for the Appellants. The Respondent police officers waived any claims to privilege well in advance of the Refusals Motion,⁴² which narrowed the disputed issues, and thereby reducing the costs of preparation.

32. In any event, the Refusals Motion was still necessary to resolve Director Scott's objections based on relevance. As the refusals chart demonstrates, Director Scott refused on the basis of relevance to allow the SIU Investigators to answer substantially all of the same questions he refused to have answered on the basis of privilege.⁴³ Not only that, Director Scott also paid the Appellants' costs of the Refusals Motion to their satisfaction. The Respondent police officers' assertion of privilege thus resulted in no additional costs for the Appellants.⁴⁴

c. The Respondent Police Officers are Entitled to Partial Indemnity Costs

33. There is no reason in the present case to depart from the general rule that the successful party is entitled to its costs. The circumstances in which a court will depart from this general rule are well-catalogued in the jurisprudence. None of these exceptions apply to the present case. For example, in a rare case, a court may not award costs to a

⁴⁰ Appellants' Exhibit Book ("REB"), Notice of Application dated November 4, 2009, Tab 3C.

⁴¹ RAB, Order of Low J., dated November 25, 2010, Tab 3.

⁴² REB, Master Abrams' endorsement dated February 26, 2010, Tab 3T, p. 291.

⁴³ REB, Motion heard March 15, 2010 with attached Schedule "A" to Master Abrams' March 31, 2010 Endorsement, p. 89, Tab 1M.

⁴⁴ REB, Mr. Kendik's letter of May 5, 2010; copy of a cheque in the amount of \$14 500, Tab 3X.

successful party where the successful party misconducted itself in the litigation,⁴⁵ or the successful party misconducted the proceedings,⁴⁶ or the successful party acted in a manner that was oppressive or vexatious (e.g. by alleging fraud against an adverse party, without foundation),⁴⁷ or the proceedings raised a novel issue.⁴⁸

34. Public interest litigants may also be relieved from costs where unsuccessful.⁴⁹ However, the Appellants are not public interest litigants. In order to qualify as such, the Appellants should have no (or, at most, a very limited) personal interest in the outcome of the proceeding.⁵⁰ In short, the Appellants are in this sense alone in exactly the same position as the plaintiffs in *Odhavji Estate v. Woodhouse* to whom they so often compare themselves. They have a personal interest in the outcome of the Application, and should not be insulated from a costs award.⁵¹ The Appellants brought the Application with the expressed expectation that it would lay a legal foundation for a cause of action in tort.⁵² In fact, they have recently commenced civil proceedings against, *inter alia*, the Respondent police officers addressing substantially the same factual and legal issues and claiming more than \$14,000,000 in damages.

35. In the present case, this Court ought to fix the costs of the proceedings below at \$79,284.43 (inclusive of GST and disbursements) for the reasons set out in the Respondent police officers' costs submissions below.⁵³

⁴⁵ See, e.g., *HG Winton Ltd v One Medical Place Ltd* (1968), 69 DLR (2d) 383, [1968] OJ No. 1163 at para. 10 (CA).

⁴⁶ See, eg, *Brown v Pepall* (1911), 23 OLR 630, [1911] OJ No. 166 at para 23 (Div Ct).

⁴⁷ See, eg, *McLaughlin v Colvin*, [1941] 4 DLR 568, [1941] OJ No. 241 at paras 30-33 (CA).

⁴⁸ *Hamilton v Open Window Bakery*, *supra* note 4.

⁴⁹ *Hastings Park Conservancy v Vancouver (City)*, 2007 BCSC 147 at para 10.

⁵⁰ *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 76.

⁵¹ *Schaeffer v Woods*, *supra* note 1 at paras 30-31, 36.

⁵² *Schaeffer v Woods*, *supra* note 1 at para 69.

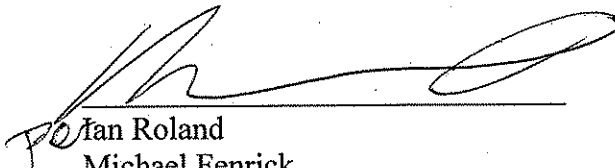
⁵³ Attached as Schedule "C".

PART IV – ORDER REQUESTED

36. The Respondent police officers request an order:
- a. granting leave to appeal the Costs Order;
 - b. setting aside the Costs Order;
 - c. fixing costs of the proceedings below at \$79,284.43 (inclusive of GST and disbursements); and
 - d. costs of the cross-appeal on a partial indemnity basis.

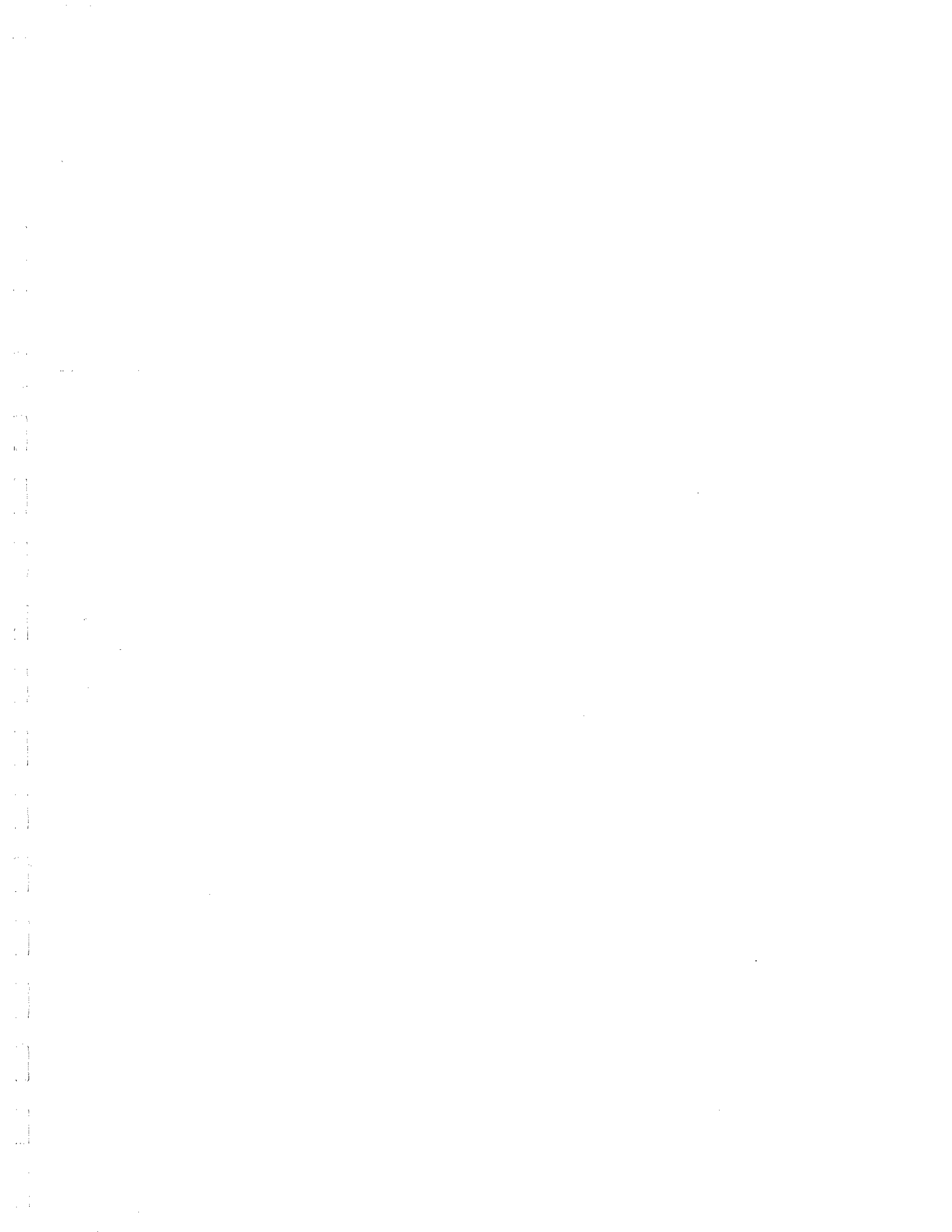
ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 4, 2011



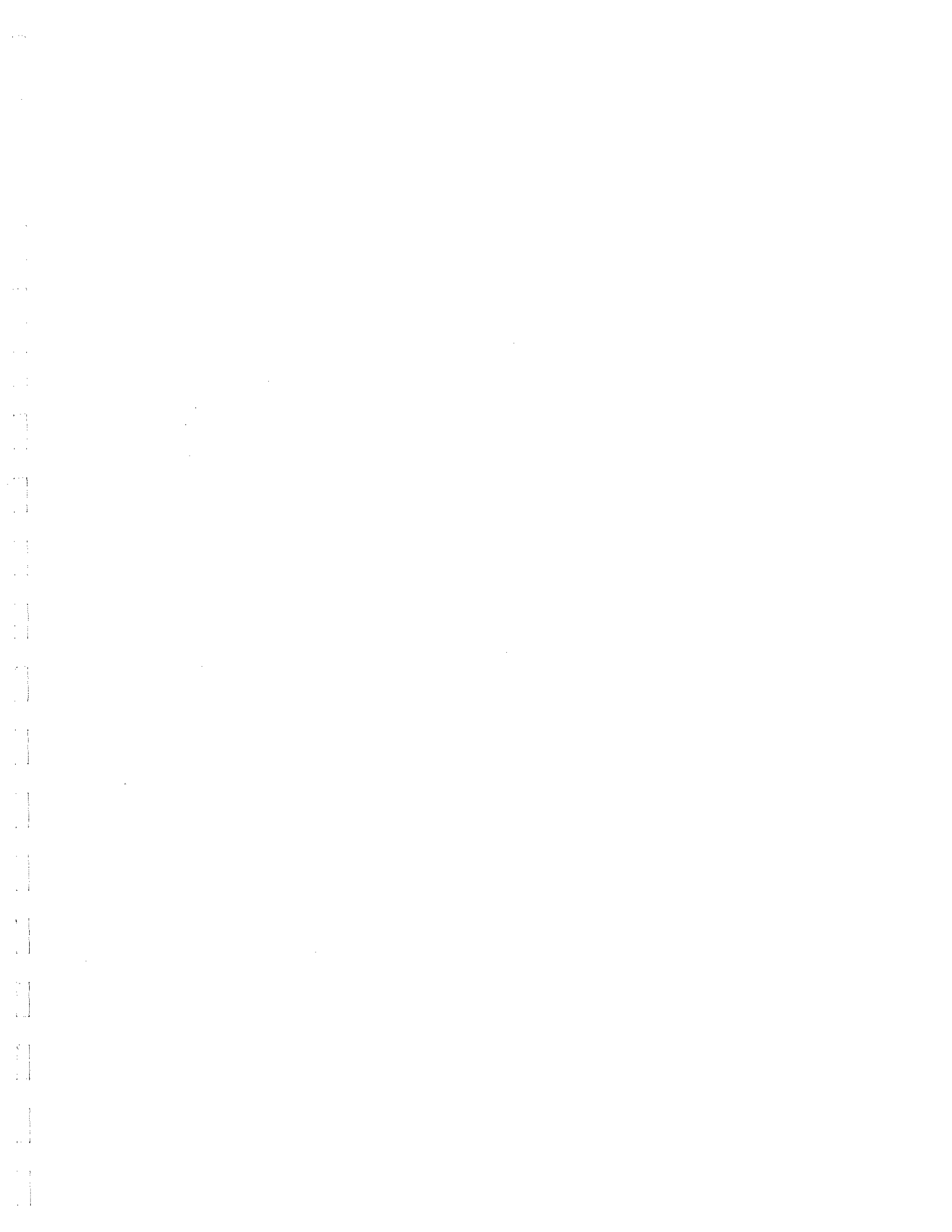
Ian Roland
Michael Fenrick

Lawyers for the Appellants on Cross-Appeal,
Police Constable Kris Wood, Acting Sergeant Mark
Pullbrook and Police Constable Graham Séguin



SCHEDULE "A" – SOURCES CITED

1. *Brad-Jay Investments Limited v Village Developments Limited* [2006] OJ No 5078 (CA).
2. *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.
3. *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 SCR 303.
4. *Watts v Benvenuti* (2006), 80 O.R. (3d) 721 (CA).
5. *Schaeffer v Woods*, 2010 ONSC 6500.
6. *Business Depot Ltd v Genesis Media Inc* (2000) 48 OR (3d) 402 (On SC).
7. *HG Winton Ltd v One Medical Place Ltd* (1968), 69 DLR (2d) 383, [1968] OJ No. 1163.
8. *Brown v Pepall* (1911), 23 OLR 630, [1911] OJ No. 166.
9. *McLaughlin v Colvin*, [1941] 4 DLR 568, [1941] OJ No. 241.
10. *Hastings Park Conservancy v Vancouver (City)*, 2007 BCSC 147.
11. *Odhavji Estate v Woodhouse*, 2003 SCC 69.



SCHEDULE "B" – STATUTORY REFERENCES

Courts of Justice Act, RSO 1990, c C 43, ss 131 and 133

Costs

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.

Leave to appeal required

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

- (a) from an order made with the consent of the parties; or
- (b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

Rules of Civil Procedure, RRO 1990, Reg 194

General Principles

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
 - (a) the amount claimed and the amount recovered in the proceeding;
 - (b) the apportionment of liability;
 - (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the

duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

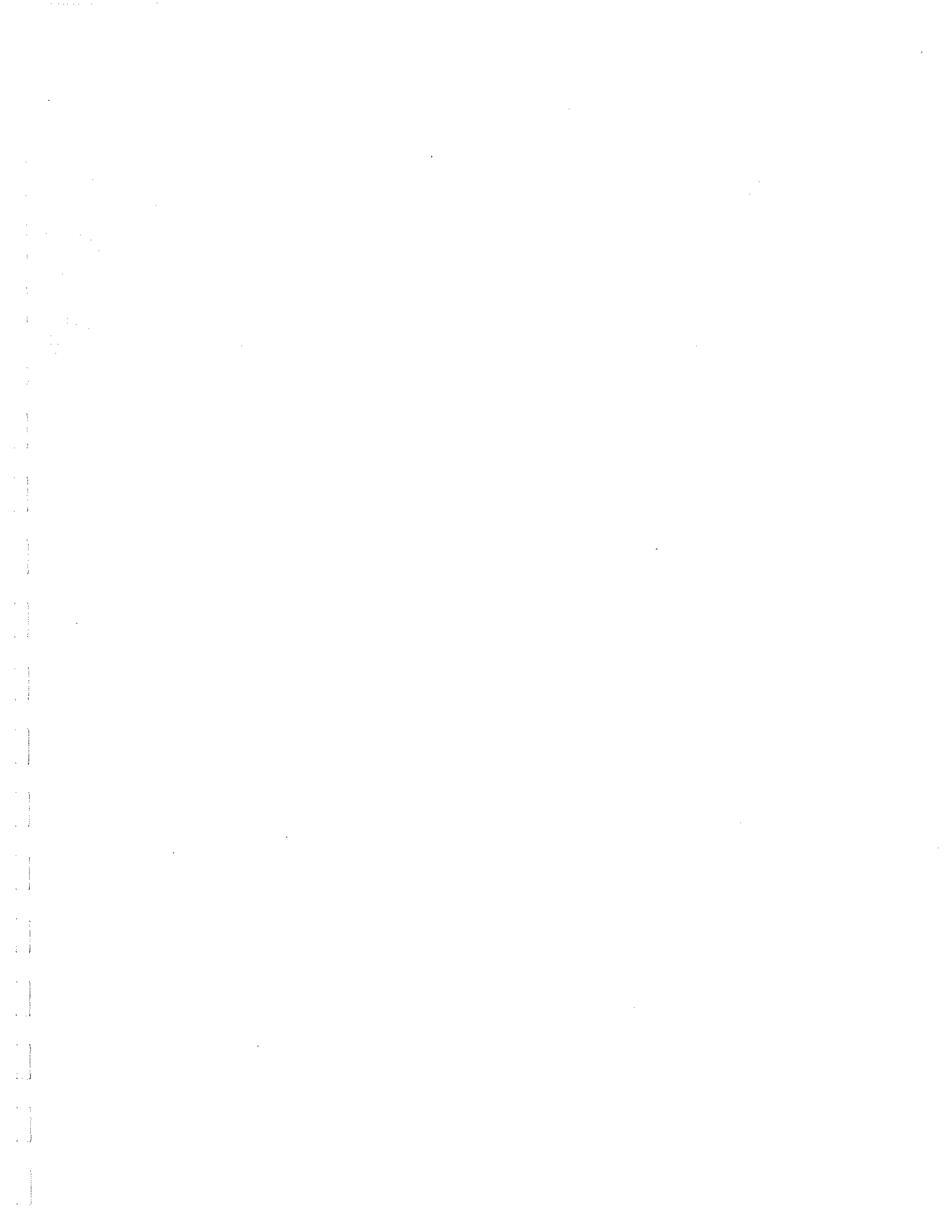
(i) any other matter relevant to the question of costs.

General Principles

77.01 (2) This Rule shall be construed in accordance with the following principles:

1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.

2. The nature and extent of the case management provided by a judge or case management master under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred.



SCHEDULE "C" – COST SUBMISSIONS

Court File No. CV-09-390573

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

- and -

**POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF
THE PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL
INVESTIGATIONS UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

Respondents

**COSTS SUBMISSIONS AND CASES OF THE RESPONDENTS,
POLICE CONSTABLE KRIS WOOD, ACTING SERGEANT MARK
PULLBROOK AND POLICE CONSTABLE JEFFREY SÉGUIN
(Costs Against the Applicants)**

PART I – OVERVIEW

1. Police Constable Kris Wood (incorrectly identified in the style of cause as "Chris Woods"), Acting Sergeant Mark Pullbrook and Police Constable Graham Séguin (collectively, the "Respondent police officers") seek their costs of the motion they brought (and upon which they were entirely successful) to strike the Application (the "Motion to Strike") commenced by Ruth Schaeffer, Diane Pinder and Evelyn Minty (collectively, the "Applicants") and supported by the Respondent, Ian Scott, Director of the Special Investigations Unit ("S.I.U."). The Motion to Strike finally disposed of the issues as between the parties. The

Respondent police officers seek \$74,616.16 (inclusive of G.S.T., plus disbursements) in costs, payable by the Applicants.

2. There is no reason in the present case to depart from the general rule that the successful parties (in this case, the Respondent police officers) are entitled to their costs. The primary purpose of an award of costs is to indemnify the successful party. This rule will only be departed from in rare cases, and in circumstances not here present. The Motion to Strike, though complex, raised fundamental legal issues that are already well-settled. Moreover, the financial circumstances of the parties should not displace this general rule, as this would only encourage more ill-advised litigation. This is especially true in the present case where the Applicants did not stand to have any right or interest of theirs determined by the Application. If this Court were to insulate the Applicants from a costs award, the Applicants (and others like them) would face no risk whatsoever when bringing claims, however flawed, and whatever the expense incurred by the successful party. This would be contrary to the basic principles which underlie our adversarial system.

3. The Applicants are not public interest litigants. The Applicants sought a judicial opinion on a legal issue relevant to a personal cause of action in tort against, *inter alia*, the Respondent police officers. The Applicants have a personal interest in the Application, which was made to assist the Applicants in deciding whether or not to bring an action in tort. This, among other issues, disqualifies them from avoiding costs on this basis.

4. Further, the principles this Court is to consider when determining the appropriate quantum of costs favour an award of \$74,616.16 (inclusive of G.S.T, plus disbursements). Such an award would go some way towards indemnifying the Respondent police officers for their actual costs of litigation. As fundamentally, the Applicants' litigation strategy was itself to blame for the largest proportion of the costs of this litigation. By repeatedly insisting that the Motion to Strike be heard with the Application on its merits, the Applicants ensured that the Respondent police officers were put to the expense of preparing fully to address the merits of the Application, notwithstanding that the Motion to Strike could (and should) have been heard at a threshold stage in the proceedings. By doing so, the Applicants ensured that the proceedings did not follow the most efficient, orderly and cost effective procedure. Given that the Respondent police officers put the Applicants on notice that they intended to bring the Motion to Strike before any major steps had been taken in the litigation, the Applicants must have expected that their misguided strategy could result in higher costs being incurred by the Respondent police officers.

PART II – THE FACTS

The Application

5. On November 4, 2009, by way of Notice of Application, the Applicants commenced proceedings (the "Application") against, *inter alia*, the Respondent police officers.

6. The Application would not determine any right or interest of the Applicants. However, if the Applicants were successful (which they were not), the Application would have had a significant impact on the rights and interests of the Respondent police officers and, indeed, all police officers in Ontario. Specifically, a successful Application may have imposed substantial barriers on the ability of many police officers to exercise their statutory right to consult counsel in the face of S.I.U. investigations; investigations which could lead to penal or other serious consequences for the officers involved. The expressed purpose of the Application was to lay the legal foundation for a cause of action in tort against, *inter alia*, the Respondent police officers.

The Course of Litigation

7. Following the commencement of proceedings, the Applicants caused two summonses to be issued on November 12, 2009, to compel the testimony of two S.I.U. investigators, Daniel Marshall and Denis O'Neill. Counsel for the Applicants examined Messrs. Marshall and O'Neill on December 7, 2009. The purpose of these examinations was to lay the evidentiary record necessary for the hearing of the Application on its merits, which this Court declined to hear.

8. In early December 2009, prior to the examinations, counsel for the Respondent police officers informed the Applicants that they intended to move to strike the Application. Counsel for the Respondent police officers attended and participated in the examinations on the basis that that participation was without prejudice to their right to seek other relief; namely, the striking of the Application.

9. The December 7, 2009, examinations produced a number of refusals, which, in the view of the Applicants, necessitated a refusals motion (the "Refusals Motion"). In light of the potential Refusals Motion and their own looming Motion to Strike, the Respondent police officers agreed with the Applicants that the Application should be case managed. As such, the parties convened a conference call with a case management Master on January 19, 2010.

10. In the meantime, on January 13, 2010, the Respondent police officers served their Motion to Strike on the Applicants. The Respondent police officers moved to strike the Application on a number of bases, including that:

- a. the Application disclosed no legal cause of action and was therefore not justiciable. There was no *lis* between the parties;
- b. the Applicants had not disclosed in the Notice of Application any legal right that would be determined by the declaratory relief that they sought, as required by Rule 14.05(3)(d); and
- c. the Applicants lacked standing to bring the Application because they were not directly affected by the outcome of the Application and there was another reasonable and effective means of adjudicating their dispute.

11. Notwithstanding that hearing the Application would be unnecessary if the relief the Respondent police officers sought was granted by this Court (which it was), the Applicants took the position at the January 19, 2010 conference call that the merits of the Application should be heard together with the Motion to

Strike. This was opposed by the Respondent police officers, who submitted the Motion to Strike should be heard first. In response to the Applicants' position, the case management Master scheduled the Motion to Strike to be heard with the Application on its merits on May 13, 2010.

12. On February 24, 2010, the Respondent police officers amended their Motion to Strike in an attempt to persuade the Applicants to consent to having it heard prior to the Application. The Applicants once again refused and again they insisted before the case management Master that both the Motion to Strike and the Application ought to be heard together.

13. The Refusals Motion was scheduled for March 15, 2010. Counsel for the Respondent police officers attended at the Refusals Motion, at which motion the Applicants were largely successful as against the Director Scott. Following the Refusals Motion, but prior to the hearing before this Court on the Motion to Strike, Director Scott agreed to pay the costs of the Refusals Motion to the Applicants, notwithstanding there was no order as to costs of the Refusals Motion by the Master and notwithstanding that the main issue between the parties had yet to be determined by this Court.

14. On April 15, 2010, the Applicants reconvened the examination of the two S.I.U. investigators,¹ which examination counsel for the Respondent police officers attended.

¹ As Mr. Marshall was unavailable for personal reasons, the Applicants' counsel examined another S.I.U. investigator, Angela Mercer, instead.

The Materials Filed

15. The Applicants filed a lengthy factum on the Application's merits, a lengthy factum on the Motion to Strike and a voluminous record to address the Application's merits.

16. The Respondent police officers filed a lengthy factum on the Application's merits and a lengthy factum on the Motion to Strike.

The Hearing

17. This Court heard the Motion to Strike on May 13, May 14 and May 18, 2010, and specifically declined to hear the Application on its merits by decision and reasons dated May 18, 2010.²

18. Notwithstanding that the Application had been set down for one day on May 13, 2010, this Court heard submissions over three days. The Applicants' counsel occupied by far the greatest proportion of the time used for oral submissions on the three days. Notwithstanding that this Court was only hearing the Motion to Strike, counsel for the Applicants addressed the merits of the Application, repeatedly and at length.

The June 23, 2010 Decision

19. By this Court's decision and reasons dated June 23, 2010,³ this Court granted the Respondent police officers' Motion to Strike and ordered the Application struck, ruling that:

² 2010 ONSC 2916.

³ 2010 ONSC 3647.

- a. the Application was not justiciable;
- b. the Applicants were not entitled to declaratory relief as no legal right of the Applicants stood to be determined by the Application;
- c. the Applicants lacked private interest standing to maintain the Application; and
- d. the Applicants lacked public interest standing to maintain the Application.

20. This Court's decision represented a complete success for the Respondent police officers' position, which position the Respondent police officers had first put the Applicants on notice in December 2009.

21. This Court further held that the parties may return to make submissions as to costs, if they were unable to agree.

The Applicants' Litigation Strategy Resulted in Increased Costs

22. Because of the manner in which the Applicants litigated the Application (namely, the Applicants' position that the Motion to Strike and the Application ought to be heard together), the Respondent police officers were required:

- a. to attend at the Refusals Motion, which was unnecessary and ought to have been conducted after this Court heard the Motion to Strike (if at all);
- b. to attend at two days of examination, which were unnecessary and ought to have been conducted after this Court heard the Motion to Strike (if at all);
- c. to incur the cost of reviewing a voluminous evidentiary record on

the Application, which would have been unnecessary had the Applicants agreed to follow the logical course to these proceedings and consent to this Court hearing the Motion to Strike in advance of the Application;

- d. to produce two lengthy factums and books of authorities (one each on the Motion to Strike and on the Application), the latter of which would have been unnecessary had the Applicants agreed to follow the logical course to these proceedings and consent to this Court hearing the Motion to Strike in advance of the Application; and
- e. to attend before this Court on May 13, May 14 and May 18, 2010, notwithstanding that the matter had been set down for one day, because counsel for the Applicants went on at length, and repeatedly, to address the merits of the Application, notwithstanding that this Court was hearing submissions only on the Motion to Strike.

23. Given the early notice the Respondent police officers provided to the Applicants of their intention to move to strike the Application (less than one month after the Applicants had commenced the proceedings and before any of the major steps of the litigation had been taken), the Applicants must have expected from an early stage that the Respondent police officers would incur unnecessarily the full costs of preparing for the Application on its merits, if the Respondent police officers' position was upheld by this Court (which it was). In light of this, it would have been more orderly and cost effective if the Motion to Strike were heard by this Court in advance of (instead of together with) the Application on its merits, which this Court (again) ultimately did. The costs of

perfecting the Application and the attendant factums could have been avoided had the Applicants agreed to the orderly proceeding of the Application.

24. On July 5, 2010, the Respondent police officers served their costs outline on the Applicants, pursuant to the *Rules of Civil Procedure*. The Applicants have not served their own costs outline.

PART III – ISSUES AND THE LAW

25. The Respondent police officers raise the following three issues respecting costs of the Motion to Strike:

- a. Is there any reason in the present case to depart from the general rule that the successful party is entitled to its costs of the proceeding?
- b. Having regard to the relevant factors, what is the appropriate quantum of costs in the present case? and
- c. Who should be liable for costs of the Motion to Strike?

There is No Reason to Depart from the General Rule

26. The rule that a successful party is entitled to his or her costs is of long standing and should not be departed from, except where there are very good reasons.⁴ Only in a rare case should successful parties (in this case, the Respondent police officers) be deprived of their costs.⁵

⁴ See, e.g., *Macfie v. Cater*, [1920] O.J. No. 71 at para. 28 (S.C.).

⁵ See, e.g., *Titcher (Litigation Guardian of) v. Toronto District School Board*, [2003] O.J. No. 137 at para. 3 (S.C.J.).

27. The circumstances in which a court will depart from the general rule are well-catalogued in the jurisprudence, and none of these apply to the present case. For example, in a rare case, a court may not award costs to a successful party where:

- a. the successful party misconducted itself in the litigation;⁶
- b. the successful party misconducted the proceedings;⁷
- c. the successful party acted in a manner that was oppressive or vexatious (e.g. by alleging fraud against an adverse party, without foundation);⁸
- d. the proceedings raised a novel issue.⁹

28. In the present case, the Respondent police officers are entitled to their costs, as the successful party in the litigation. The Motion to Strike finally resolved all of the matters as between the parties. There is no reason to depart from the general rule. Specifically:

- a. the Respondent police officers conducted themselves in the litigation in a manner that was free from fault or misconduct;
- b. the Respondent police officers conducted the litigation in the correct manner and attempted to follow a logical procedure in the conduct of the litigation, notwithstanding the Applicants' position that the Application should be heard with the Motion to Strike;
- c. the Respondent police officers did not conduct the proceedings in a

⁶ See, e.g., *H.G. Winton Ltd. v. One Medical Place Ltd.* (1968), 69 D.L.R. (2d) 383, [1968] O.J. No. 1163 at para. 10 (C.A.).

⁷ See, e.g., *Brown v. Pepall* (1911), 23 O.L.R. 630, [1911] O.J. No. 166 at para. 23 (Div. Ct.).

⁸ See, e.g., *McLaughlin v. Colvin*, [1941] 4 D.L.R. 568, [1941] O.J. No. 241 at para. 30-33 (C.A.).

⁹ *Supra* note 4.

manner that was oppressive or vexatious; and

- d. the Motion to Strike raised issues that are already well-settled in the law; namely, justiciability, a litigant's entitlement to declaratory relief, and both public interest and private interest standing. While legally complex, these issues are not in any way novel to this proceeding. There is a difference between an application that raises a novel legal issue, and the Application, which was fundamentally flawed in law.

29. The fact that the imposition of costs may cause a financial hardship on the unsuccessful party is an insufficient basis upon which to justify displacing the general rule.¹⁰ Even where the unsuccessful party is impecunious, there is no reason not to award costs to the successful party.¹¹ This Court ought not to award costs based on the respective financial positions of the parties.¹² This is for three reasons.

30. First, such an award undermines the primary purposes behind an award of costs, which are to discourage unmeritorious claims¹³ and to indemnify the successful party.¹⁴

¹⁰ See, e.g., *Wawrzyniak v. Jagiellicz* (1988), 9 A.C.W.S. (3d) 175, [1988] O.J. No. 328 (H.C.J.).

¹¹ See, e.g., *Bahan v. William Bartlett & Son Ltd.* (1990), 23 A.C.W.S. (3d) 1030, [1990] O.J. No. 2168 (Gen. Div.).

¹² See, e.g., *Kang v. Kang Estate* (2002), 43 C.C.L.I. (3d) 155, 2002 BCSC 1318 at para. 21; *Gravesende v. Toronto (City)* (2006), 147 A.C.W.S. (3d) 42, [2006] O.J. No. 1370 at para. 7 (Div. Ct.).

¹³ *Garand v. Mutual of Omaha Insurance Co.* (2001), 297 A.R. 286, [2001] A.J. No. 1431 at para. 49 (Q.B.).

¹⁴ See, e.g., *Bell Canada v. Consumers' Assn. of Canada*, [1986] 1 S.C.R. 190, [1986] S.C.J. No. 8 at para. 22.

31. Second, to award costs based on the financial circumstances of the parties would be a troubling message for this Court to send where (as here) the Applicants were attempting to bring an Application that had the potential to have a significant impact on the rights and interests of the Respondent police officers, but which would have had no impact on the rights or interests of the Applicants. A fundamental aspect of our adversarial process is that both parties should have an interest in the outcome of litigation, whatever that outcome may be. If litigants, such as the Applicants, who have no practical interest in the outcome of litigation, are also insulated from the risk of paying costs because of their financial circumstances, this would have a negative impact on the administration of justice, as it would encourage litigants to bring ill-conceived claims, such as the Application, without considering the consequences.¹⁵

32. Third, all parties, regardless of their means, should not take improvident steps, which increase the costs of all parties. This includes accepting early disposition of threshold issues that could determine (and render nugatory) the balance of a claim, which in this case the Motion to Strike did, as it finally disposed of all of the issues between the parties. Had the Applicants accepted the Respondent police officers' position that the Motion to Strike should be heard in advance of the Application, a large portion of the costs of all parties would have been avoided. Having chosen the strategy they did, and having had a perfectly reasonable, more efficient and more proportional alternative presented to them by the Respondent police officers, the Applicants should not now be able

¹⁵ *Dykens v. Van Horn* (2009), 176 A.C.W.S. (3d) 961, 2009 BCSC 418 at para. 22.

to avoid costs on the basis that they have limited resources, despite choosing the most aggressive and expensive means available to them to litigate the Application.

33. Finally, the Applicants are not public interest litigants, and there is no reason on this basis to displace the general rule that the successful parties (in this case, the Respondent police officers) are entitled to their costs. This is also for three reasons.

34. First, there is no general rule that a public interest litigant should be immune from costs, and where (as here) the public interest of a claim is questionable, this Court should not depart from the general rule that costs are payable to the successful party.¹⁶ To the extent the Application attracted media and other attention, an Applicant-created high public profile is not equivalent to public interest.

35. Second, in order to qualify as public interest litigants, the Applicants should have no (or, at most, a very limited) personal interest in the outcome of the proceeding.¹⁷ In this respect only, the Applicants are correct that their claim is on all fours with *Odhavji Estate v. Woodhouse*. The Applicants in the present case (like the plaintiffs in *Odhavji Estate*) have a personal interest in the outcome of the claim and should not be insulated from a costs award. The Applicants brought the Application with the expressed expectation that it would lay a legal

¹⁶ *Hastings Park Conservancy v. Vancouver (City)*, 2007 BCSC 147 at para. 10.

¹⁷ *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 76.

foundation for a cause of action in tort to be brought by them against, *inter alia*, the Respondent police officers. Having, in this Court's words, attempted to "fly a trial balloon",¹⁸ the Applicants cannot now shield themselves from an award of costs behind the veil of the public interest.

36. Third, even if the public interest would be at issue if the Application itself were litigated (which is denied), there is still no public interest that has been raised by the Applicants' position on the Motion to Strike. In other words, even if the Application itself had a public interest dimension, the Motion to Strike (which is the proceeding at issue before this Court) has none, nor is any public interest served by encouraging parties to litigate ill-conceived claims of the kind here brought by the Applicants. In fact, if any public interest was engaged by the Motion to Strike, then it was the public interest in the proper administration of justice, which is furthered by discouraging proceedings that are as fundamentally flawed as the Application, through costs.

The Appropriate Quantum of Costs

37. The costs of the proceeding are in the discretion of this Court.¹⁹ This discretion must be exercised judicially.²⁰ The principles that should be observed when exercising discretion as to costs have been defined as follows:

First, the principle of indemnity is a paramount consideration. Secondly, the courts must approach the matter on the basis that encourages settlement of all actions from the outset. Thirdly, the court must discourage actions and defences

¹⁸ 2010 ONSC 3647 at para. 70.

¹⁹ *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131(1).

²⁰ *Gibson v. Snaith* (1915), 21 D.L.R. 716, [1915] M.J. No. 20 at para. 6 (C.A.).

which are frivolous. Fourthly, the court must discourage unnecessary steps in the litigation.²¹

38. In the present case, each of these principles favours an award of costs of \$74,616.16 (inclusive of G.S.T., plus disbursements), as requested by the Respondent police officers. Specifically:

- a. this amount will go some way towards indemnifying the Respondent police officers for their legal costs;
- b. while settlement was not an option in the present case (given the nature of the Application and the relief sought), the Application would have been disposed of without a significant portion of the Respondent police officers' costs being incurred had the Applicants consented to proceeding with the Motion to Strike in advance of this Court hearing the Application on its merits. This would have been the logical and orderly way of proceeding, which this Court should encourage;
- c. this Court ought to discourage proceedings that are as ill-conceived as the Application, and which failed on four separate bases, each of which is a building block of our legal system with which experienced counsel ought to be familiar; and
- d. finally, this Court must discourage the unnecessary steps occasioned by the Applicants' litigation strategy to delay the hearing of the Motion to Strike to be heard with the Application; namely, all of the steps taken to produce an evidentiary record for the Application on its merits, which was ultimately unnecessary, as well as the work the Respondent police officers put into reviewing that record and producing an entirely unnecessary factum and book

²¹ *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464, [1997] O.J. No. 5130 at para. 10 (Gen. Div.).

of authorities addressing the merits of the Application.

39. In addition to these general principles (which support the Respondent police officers' position), this Court should also consider the factors provided in Rule 57.01(1). These include:

- a. "the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer";
- b. "the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed";
- c. "the amount claimed and the amount recovered in the proceeding";
- d. "the complexity of the proceeding";
- e. "the importance of the issues";
- f. "the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding";
- g. "whether any step in the proceeding was, (i) improper, vexatious or unnecessary, or (ii) taken through negligence, mistake or excessive caution";
- h. "any other matter relevant to the question of costs".²²

²² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 57.01(1)(0.a), (0.b), (a), (c), (d), (e), (f) and (i).

40. In the present case, these factors also support an award of costs in the amount of \$74,616.16 (inclusive of G.S.T., plus disbursements) in favour of the Respondent police officers. Specifically:

- a. as noted, the principle of indemnity favours the quantum of costs sought by the Respondent police officers. The experience of the Respondent police officers' counsel, the hours billed and the rates charged by them are set out in the Respondent police officers' costs outline, previously filed with this Court and attached hereto as Tab 2;
- b. the Applicants had every reason to expect that the Respondent police officers would incur substantially more costs as a result of the Applicants' litigation strategy. The Respondent police officers put the Applicants on notice that they intended to move to strike the Application prior to any major steps having been taken in the litigation. Moreover, the Applicants have not provided their own costs outline, so this Court ought to draw the inference that the Applicants' litigation expenses were similar or greater to those of the Respondent police officers and therefore within the Applicants' reasonable expectation;²³
- c. the Motion to Strike was a complete success;
- d. the Motion to Strike raised issues of legal complexity, including justiciability, statutory interpretation, standing and this Court's jurisdiction to award declaratory relief;
- e. the Motion to Strike raised many issues of legal importance. The Motion to Strike raised the standing of persons who are indirectly affected to seek a determination of a question of law and ancillary declaratory relief without bringing an action or otherwise

²³ See, e.g., *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557 at para. 27 (Div. Ct.)

demonstrating their practical interest in the Application's outcome. Moreover, had this Court agreed with the Applicants' deeply flawed approach, the decision may have had a significant impact on public litigation in Ontario; and

- f. while the Applicants' counsel suggested in oral submissions that the *Rules of Civil Procedure* provided the Applicants with a "shortcut" to have their Application heard, far from a shortcut, the manner in which the Applicants conducted this litigation ensured that the dispute would not be resolved efficiently, expeditiously or cost effectively. Throughout, the Applicants took the position that the Motion to Strike, which is a threshold motion, had to be heard with the Application.

41. In all of the circumstances, this Court ought to award the Respondent police officers \$74,616.16 (inclusive of G.S.T., plus disbursements) in costs.

PART IV - ORDER SOUGHT

42. The Respondent police officers ask this Court for the following relief:
 - a. An order for \$74,616.16 in costs (inclusive of G.S.T., plus disbursements) payable by the Applicants, forthwith, plus interest at a rate determined by and as calculated under the *Courts of Justice Act*, R.S.O. 1990, C. c.43.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 27, 2010



Ian Roland

Michael Fenrick

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the Respondents, Police

Constable Kris Wood, Acting Sergeant Mark

Pullbrook and Police Constable Jeffrey

Séguin

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**RUTH SCHAEFFER, EVELYN MINTY
and DIANE PINDER**

Applicants

-and-

**POLICE CONSTABLE CHRIS WOODS, ACTING SERGEANT MARK PULLBROOK,
POLICE CONSTABLE GRAHAM SEGUIN, JULIAN FANTINO, COMMISSIONER OF THE
PROVINCIAL POLICE, IAN SCOTT, DIRECTOR OF THE SPECIAL INVESTIGATIONS
UNIT and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (MINISTRY OF
COMMUNITY SAFETY AND CORRECTIONAL SERVICES)**

Respondents

**COSTS OUTLINE OF THE RESPONDENTS
WOODS, PULLBROOK AND SEGUIN**

The Respondents Woods, Pullbrook and Seguin provide the following outline of their submissions on costs to be awarded in their favour as the successful Respondents on the Motion to Strike the Application:

	Partial Indemnity
Fees in preparation of the motion to strike and their response to the main Application: (detailed below)	\$63,625.50
G.S.T. on Fees:	\$3,181.28
Lawyers Fees in respect of the appearance before Low, J.:	
Ian Roland 12.5 hours (2.5 days re appearances before Low, J.) @ \$350.00 per hour (1974 call) (actual hourly rate \$680)	\$4,375.00
Michael Fenrick 12.5 hours (2.5 days re appearances before Low, J.) @ \$175.00 per hour (2009 call) (actual hourly rate \$350)	\$2,187.50
Michael Fenrick 5.0 hours (Refusals Motion before Master Abrams) @ \$175.00 per hour (2009 call) (actual hourly rate \$350)	\$875.00

GST on Lawyers Fees @ 5%:	\$371.88
Sub-Total Fees:	\$74,616.16
Disbursements (inclusive of G.S.T.) (see attached)	\$4,668.27
Total:	\$79,284.43

The following submissions are made in support of the costs sought with reference to the factors set out in sub-rule 57.01(1):

The complexity of the proceedings and the importance of the issues:

The motion raised issues of complexity, including justiciability, statutory interpretation, standing and this Court's jurisdiction to award declaratory relief. The Applicants took the position throughout that the Respondents' preliminary motion should be heard with the Application. This meant that the Respondent had to prepare motion materials in a manner that was responsive to the complete evidentiary record, which added complexity that was unnecessary to a just determination by this Court of the motion to strike.

The importance of these issues:

The motion raised many issues of great importance. For instance, the motion raised the jurisdiction of this Court to hear an Application where no material facts were in dispute and the Applicants were asking for a determination of a question of law. The Respondents' motion also raised the standing of persons who are indirectly affected to seek a determination of a question of law and ancillary declaratory relief without bringing an action or otherwise demonstrating their practical interest in the Application's outcome. Had this Court agreed with the Applicants, the decision would have had a significant impact on how public litigation operates in Ontario.

The hours spent, the rates sought for costs, the experience of the party's lawyers and the rate actually charged by the party's lawyer:

Fee Items – Motion	Persons	Hours	Partial Indemnity Rate	Actual Hourly Rate	Total
This item includes docketed time for:	Ian Roland (1974 Call)	62.1	\$350.00	\$650.00 (2009) \$680.00 (2010)	\$21,735.00
Preparation of motion materials (motion to strike), including drafting of notice of motion, and	Richard Stephenson (1988 Call)	3.6	\$300.00	\$525.00	\$1,080.00

factum; compilation and service of motion record; preparation and delivery of book of authorities; receipt and review of application materials; drafting of responding materials (application) and factum; preparation and attendance on cross-examinations; listing of undertakings and refusals; preparation of motion materials and attendance on refusals motion; communications; and receipt of instructions; review and preparation of correspondence; telephone calls; preparation of Costs Submissions; and for any other procedures authorized by the <i>Rules of Civil Procedure</i> and not provided for elsewhere.	Rob Centa (2001 Call)	15.2	\$225.00	\$475.00	\$3,420.00
	Michael Fenrick (2009 Call)	197.9	\$175.00	\$325.00 (2009) \$350.00 (2010)	\$34,632.50
	Law Student	17.7	\$60.00	\$150.00	\$1,062.00
	Law Clerks	21.20	\$80.00	\$185.00- \$195.00	\$1,696.00
Total		317.70			\$63,625.50

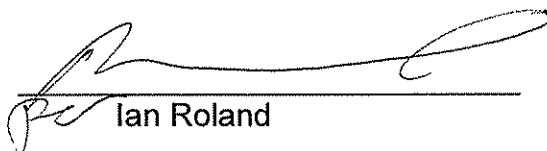
Any other matter relevant to the question of costs:

Throughout, the Applicants took the position that this preliminary motion had to be heard with the Application. This meant that the Respondents had to prepare extensive materials responding to the Application; prepare for and attend at examinations; and prepare for and attend at a refusals motion. Notwithstanding the importance of the Respondents' motion, the Application itself was of even greater importance to the Respondents as it would serve to define their right to counsel in the face of criminal or serious disciplinary investigations. In oral submissions, the Applicants' counsel suggested that the *Rules of Civil Procedure* provided his clients with a "shortcut" to have their Application heard. Far from a shortcut, the manner in which the Applicants conducted this litigation ensured that the dispute would not be resolved efficiently, expeditiously or cost effectively.

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: July 5, 2010


Ian Roland

SCHAEFFER et al. and **WOOD et al.**
Appellant(s) Respondent(s)

Court File No. C52414

**COURT OF APPEAL
FOR ONTARIO**

Proceedings commenced at
TORONTO

**FACTUM OF THE
RESPONDENTS/APPELLANTS
ON CROSS-APPEAL ON
COSTS, POLICE CONSTABLE
KRIS WOOD, ACTING
SERGEANT MARK
PULLBROOK AND POLICE
CONSTABLE GRAHAM
SEGUIN**

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

Barristers

250 University Avenue, Suite 501
Toronto, ON M5H 3E5

Ian Roland (LSUC No. 14512K)

Michael Fenrick(LUSC No. 57675N)

Tel: 416-646-4300

Fax: 416-646-4301

Lawyers for the Respondents/Moving
Parties, Police Constable Kris Wood,
Acting Sergeant Mark Pullbrook and
Police Constable Graham Seguin