

**PROVINCE OF PRINCE EDWARD ISLAND  
IN THE SUPREME COURT - APPEAL DIVISION**

Citation: Griffin v. City of Summerside et al. 2010 PECA 15

Date: 20100728

Docket: S1-AD-1105

Registry: Charlottetown

**BETWEEN:**

**THE CITY OF SUMMERSIDE, TERRY MURPHY,  
THE ESTATE OF GEORGE ARSENAULT AND SGT. DAVID POIRIER  
APPELLANTS/RESPONDENTS BY CROSS-APPEAL**

**AND:**

**DAVID GRIFFIN  
RESPONDENT/APPELLANT BY CROSS-APPEAL**

Before: Chief Justice D.H. Jenkins  
Mr. Justice J.A. McQuaid  
Madam Justice M.M. Murphy

Decision on Cross-Appeal on Costs and Costs on Appeal

Appearances:

David W. Hooley, Q.C., and Karen A. Campbell, Q.C. , counsel for the  
Appellants/Respondents by Cross-appeal, The Estate of George Arsenault and Sgt.  
David Poirier

Edwin Ehrhardt, Q.C. and Ronald J. Savoy, counsel for the Appellant/Respondent by  
Cross-appeal City of Summerside

Charles Campbell, counsel for the Respondent/Appellant by cross-appeal

Place and Date of Hearing

Charlottetown, Prince Edward Island  
May 4, 2010

Place and Date of Judgment

Charlottetown, Prince Edward Island  
July 28, 2010

**Written Reasons by:**

Chief Justice D.H. Jenkins

**Concurred in by:**

Mr. Justice J.A. McQuaid

Madam Justice M.M. Murphy

***TORTS - Malicious prosecution - Cross-appeal on costs - Costs on appeal***

***PRACTICE and Procedure - Costs***

The Court of Appeal decided the issues of costs following the trial, which the trial judge had deferred pending completion of all appeals from the trial judgment. The Court awarded costs to the successful plaintiff against the unsuccessful defendants, and to the successful defendants against the plaintiff whose action against them was unsuccessful, determined that all the costs awards would be assessed on a partial indemnity basis, and fixed those costs. The Court made a Bullock order permitting the plaintiff to add to his bill of costs against the unsuccessful defendants the costs he is ordered to pay the successful defendants.

Having dismissed the appeal in the malicious prosecution action, the Court of Appeal awarded costs on the appeal to the respondent on a partial indemnity basis, and fixed those costs.

Authorities Cited:

**CASES CONSIDERED:** *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Rayner v. Knickle* (1992), 99 Nfld. & P.E.I.R. 35; *MacPherson v. Ellis* 2005 PESCAD 19; *Oliver v. Severance* 2007 PESCAD 21; *Jay v. DHL* 2009 PECA 11; *Moore (Litigation Guardian of) v. Wienecke*, 2008 ONCA 162; *100875 P.E.I. Inc. v. Curran & Briggs Limited* 2010 PECA 08; *Prince Edward Island Regional Administrative Unit No. 3 School Board v. Morin* 2008 PESCTD 2; *Wall v. Haney*, 2007 NSSC 153; *Seeton v. Commercial Union Assurance Co. of Canada*, [1999] N.W.T.J. No. 75 (NWJSC); *Allen v. Holman*, [1998] B.C.J. No. 46 (BCSC (Registrar))

**STATUTES CONSIDERED:** *Judicature Act*, S.P.E.I. 2009, Cap. J.2-1, ss.5(1), 11(2), 18, 21(1)(a), 21(6), 60(1)

**RULES CONSIDERED:** *Prince Edward Island Rules of Civil Procedure*, Rules 11.01, 11.02, 57.01(1), 57.01(1)(a), 57.01(3), 57.01(7)

**TEXTS CONSIDERED:** Orkin, Mark M.: *Law of Costs* (Canada Law Book Inc.)

Reasons for judgment:

**JENKINS C.J.P.E.I.:**

**INTRODUCTION**

[1] The court is now called upon to decide the questions regarding costs in this litigation, as follows:

- (a) The cross-appeal by the successful plaintiff Griffin against the trial judge's decision to defer deciding trial costs issues until all appeals are decided; Griffin seeks his costs and a Bullock or Sanderson order regarding any costs obligation imposed on him;
- (b) Costs on the appeal.

[2] For the reasons that follow, I would decide those questions in the following manner:

- a. Regarding the cross-appeal:
  - (1) leave to appeal should be granted, although leave may be unnecessary because no substantive decision on costs was made by the trial judge;
  - (2) this court should decide the trial costs issues in this case, as that process is most expeditious, and that is the procedure that the parties unanimously request;
  - (3) the successful plaintiff Griffin should have his costs against the unsuccessful defendants the City of Summerside and Arsenault;
  - (4) the successful defendants Murphy and Poirier should have their costs against the plaintiff Griffin, whose claim against them was unsuccessful;
  - (5) all trial costs awards should be assessed on a partial indemnity basis;
  - (6) a Bullock order should issue permitting Griffin to add to his bill of costs against the defendant City and Arsenault the costs he is ordered to pay the defendants Murphy and Poirier;
  - (7) costs should be fixed in the following amounts:
    - (i) to Griffin, payable by the City and Arsenault - \$125,000. plus disbursements of \$11,982., and applicable taxes;
    - (ii) to Murphy, payable by Griffin and claimable by him against the City and Arsenault under the Bullock order -

\$56,500., plus approved disbursements and applicable taxes;

- (iii) to Poirier, payable by Griffin and claimable by him against the City and Arsenault under the Bullock order - \$75,000., plus approved disbursements and applicable taxes;

b. Regarding costs on the appeal:

- (1) the respondent Griffin should have his costs against the appellants on a partial indemnity basis, to be fixed by the Court;
- (2) those costs should be fixed in the amount of \$25,000. plus \$3,313. for disbursements, and applicable taxes.

c. These costs awards following the trial and the appeal will result in the following overall obligations to pay and entitlement to receive costs:

- (i) the City and Arsenault are jointly and severally liable to pay to Griffin trial costs of \$125,000. plus disbursements of \$11,982., and applicable taxes;
- (ii) the City, Arsenault and Poirier are jointly and severally liable to pay to Griffin appeal costs of \$25,000. plus disbursements of \$3,313., and applicable taxes;
- (iii) Griffin is liable to pay:
  - to Murphy trial costs of \$56,500. plus approved disbursements in an amount to be determined, and applicable taxes;
  - to Poirier trial costs of \$75,000., plus approved disbursements in an amount to be determined, and applicable taxes.

However, with the benefit of the Bullock order, Griffin can add all of those costs, disbursements and applicable taxes payable by him to Murphy and Poirier to his bill of costs to the City and Arsenault, with the result that the City and Arsenault are jointly and severally liable and will

reimburse Griffin for his costs obligations.

## **CROSS-APPEAL ON COSTS**

### **Relief sought**

[3] David Griffin ("Griffin") cross-appeals on the issues of costs from the trial judgment of Cheverie J. in his action for malicious prosecution against the defendants (reasons dated March 27, 2006 (2006 PESCTD 15) and order dated August 8, 2006).

[4] Griffin asks that the judgment on costs be varied as follows:

- (a) the costs of the appellant Poirier, if any, be ordered to be paid by the either [sic] defendant City or the defendant Arsenault;
- (b) that the costs of the defendant Murphy be ordered to be paid either by the defendant City or the defendant Arsenault;
- (c) that costs of Murphy and Poirier, if any, payable by Griffin, be the lower of the costs by the two sets of counsel representing them, i.e. the lawyers for the city and the lawyers for the individual defendants;
- (d) that a net award of costs be fixed, by this Court reflecting the reasonable expectations of the results of the trial after appeal.

### **Proceedings to date**

[5] The reasons for judgment contain the following thoughts or musings of the trial judge on trial costs:

#### **Costs**

[264] Costs generally follow the cause and are always in the discretion of the court. The peculiar nature of this case causes me some difficulty in apportioning costs fairly.

[265] An action for malicious prosecution is extremely rare in this jurisdiction. In this case, in order for Griffin to obtain a judgment against the City of Summerside, he had to prove that at least one of the named defendants, Murphy, Arsenault, or Poirier, maliciously prosecuted him and did so while operating within the scope of their employment with the City of Summerside. It was, therefore, necessary for Griffin to name individual defendants if he entertained any hope of obtaining a judgment against the City.

- [266] Griffin sued the Chief Administrative Officer of the City, the Officer who conducted the investigation leading to the charges against him, and the Director of Police Services who prosecuted the case. Griffin did not get over the first hurdle on the road to a successful malicious prosecution suit with respect to the defendant, Murphy. One might argue that he ought to have dropped his suit against Murphy much earlier in the proceedings.
- [267] The same cannot be said with respect to Poirier and Arsenault. Although the tort was not made out against Poirier, it was only because Griffin failed to prove that Poirier acted with malice. Could Griffin run the risk of suing only Arsenault and the City, ignoring the fact that Poirier was the investigating officer? If he sued only Arsenault and the City, he ran the risk of a finding that Poirier was actually the prosecutor and that Arsenault would be absolved. In such a scenario, in all probability, Arsenault would call Poirier as a witness in his defence. However, that is not a certainty. Griffin might have found himself in a suit against Arsenault and the City where Griffin would have to call Poirier as his witness.
- [268] Griffin should certainly have his costs against Arsenault and the City of Summerside. As for Murphy, he should have costs against Griffin for the reasons I have already articulated. In the end, Poirier successfully defended Griffin's action, but by a much narrower margin than Murphy. Poirier should have some costs as well against Griffin, but because of the necessity of suing both Poirier and Arsenault, some accommodation must be found in order to adequately compensate Poirier, but not at the expense of Griffin's overall success. One might argue that the City of Summerside should bear the entire burden of these costs, not as a punitive measure, but to reflect the reality that Griffin had to go through the individual defendants in order to establish liability on the part of the City. Armed with these comments, counsel may be able to work out the matter of costs without further recourse to the court. I am hopeful they will be able to do so.
- [269] In the event costs cannot be agreed upon, I will require further submissions in order to sort out those costs so they reflect the considerations I have mentioned above. Of course, in offering these comments on costs, I am not privy to any offers which may have been exchanged under Rule 49 of the Rules of Civil Procedure.

**Obiter**

- [270] This case has engendered strong and deeply held feelings among many residents of the City of Summerside for over nine years. With the completion of this trial, and my decision, a chapter in the life of Summerside is closed. Perhaps now, all involved can get on with

their lives and leave this chapter for history to critique.

[6] The trial judge included these comments in the judgment to encourage counsel to work out the matter of costs without further recourse to the court. The trial judge contemplated that in the event the costs were not agreed upon, he would entertain further submissions.

[7] Griffin brought a post-trial motion, and further submissions were then made to settle the responsibility for costs and quantum of costs. The trial judge declined Griffin's request to decide the trial costs issues, and instead put the matter of costs over to the end of the appeal process.

[8] The order following trial and the motion on costs dated August 8<sup>th</sup>, 2006, states:

1. THIS COURT ORDERS that the plaintiff's claim as against the defendant, Terry Murphy, is dismissed.
2. THIS COURT FURTHER ORDERS that the plaintiff's claim as against the defendant, Sergeant David Poirier, is dismissed.
3. THIS COURT FURTHER ORDERS that the plaintiff shall have judgment jointly against the defendants Director George Arsenault and the City of Summerside as follows:
  - a. General damages in the amount of \$40,000.00;  
and
  - b. Special damages in the amount of \$33,640.49.

Pre-judgment interests shall be payable in the amount of \$21,496.97 for a total of \$95,137.46.
4. THIS COURT FURTHER ORDERS that costs may be spoken to at the request of any party:
  - i. After the expiration of thirty (30) days of the date of this Order in the event no appeals or cross appeals are filed;
  - ii. In the event appeal(s) or cross-appeal(s) are filed within thirty (30) days of this Order, upon the expiration of sixty (60) days of the date of any decision of the P.E.I. Supreme Court (Appeal Division) should the issue of costs not be finally disposed of by the Appeal Division, pursuant to the **Supreme Court Act**, R.S.P.E.I. 1988, Cap. S-10, s.56(1) and

should no appeal(s) or cross appeal(s) have been filed with the Supreme Court of Canada.

[9] Arsenault, Poirier, and the City (the “appellants”) appealed from the trial judgment. Murphy was a party at trial, but was not involved in the appeal. Arsenault and the City appealed from the order of the trial judge. Even though the trial judge did not find Poirier liable for malicious prosecution, he appealed from the trial judge’s finding that he did not have reasonable and probable cause to proceed with the charges against Griffin. Regarding Poirier’s appeal, this Court noted that an appeal is from an order and not from a trial judge’s reasons. Griffin filed a cross-appeal which was with respect to costs only.

[10] After hearing the appeal, this Court rendered judgment on December 11, 2008 (2008 PESCAD 14) dismissing the appeal of all the appellants. In the majority decision, McQuaid J.A. stated this regarding the costs issues:

**CROSS-APPEAL**

[80] Griffin has filed a cross-appeal from the order of the trial judge respecting costs. It is on various grounds which I will not address at the present time. At the conclusion of the hearing of the appeal, the court ordered, with the consent of all the parties, that the merits of the cross-appeal, as well as any preliminary issues affecting its status, would be addressed and adjudicated upon by the court after the decision was delivered on the appeal.

[81] The parties should immediately contact the deputy registrar to arrange a mutually convenient date to argue the cross-appeal and to make submissions with respect to costs on the appeal, the cross-appeal and at trial.

This was formalized in an order issued on March 19, 2009.

[11] Upon motion of Griffin, which was consented to by the appellants, hearing of the cross-appeal was further postponed by this Court on April 27, 2009, pending determination of the appellants’ appeal to the Supreme Court of Canada.

[12] The Supreme Court of Canada dismissed the appellants’ application for leave to appeal on December 3, 2009.

[13] Griffin applied for leave to appeal regarding the trial judge’s order on costs *nunc pro tunc* on April 21, 2010. His counsel explained to the Court that Griffin had formed the intention to appeal the costs order within the appeal period, and as the trial judge had not heard submissions on costs, the motion for leave did not get served

within the proscribed time limit.

### **Leave to appeal**

[14] An appeal to the Court of Appeal is from an order. The only order of the Supreme Court was to give effect to the trial judge's procedural decision to defer determination of all the costs issues. No substantive decisions were made regarding costs. The statements in the judgment at paras.264-268 are only observations by the trial judge, which neither purport to be nor comprise a decision or order.

[15] In these circumstances, I think that the better view is that there is nothing from which to appeal. To the extent that there may be a decision to appeal, I would grant leave to appeal. Griffin's counsel provided an explanation for late filing of his motion for leave to appeal that is sufficient in all the unusual circumstances of this case. The other parties do not object to leave to appeal being granted. Furthermore, as the trial judge stated, the peculiar nature of the case causes some difficulty in apportioning costs fairly. In particular, there is a question of whether the City as an unsuccessful defendant should bear the entire burden of the costs of either or both of the successful defendants Murphy and Poirier. Other cost principles are engaged too.

### **Court of Appeal will decide trial costs**

[16] The Court of Appeal can entertain and decide the issues raised by the cross-appeal regardless of whether or not there is an order of substance on costs from which to appeal. Under the **Judicature Act**, R.S.P.E.I. 1988, Cap. J-2.1, s.5(1), an appeal lies to this court from any order of the Supreme Court. Under s.60(1), the trial costs are in the discretion of the trial judge. In this case, the trial judge deferred any substantive decision on trial costs. For any decision on costs, leave having been granted, there is a right of appeal. In the absence of a substantive decision on costs from which to appeal, the **Act** makes provision for this Court to act. Section 11(2) directs that the trial judge should decide all questions coming properly before him or her (subject to a discretion to reserve a particular proceeding or question for consideration of the Court of Appeal). Under ss.18, 21(1)(a) and 21(6), the scheme of the **Act** is that the jurisdiction of the respective courts is to be respected, with provision for the Court of Appeal to make any order that ought to or could have been made by the court whose decision is under appeal.

[17] In this case, the Court of Appeal is considering trial costs afresh. As would usually be the case, the trial judge is in the best position to make cost determinations because as the presiding judge he would be aware of the many nuances of this long and complex trial. However, all of the parties ask that the Court of Appeal make the determination. Counsel for the defendants Murphy and Poirier plead expedition; counsel for Griffin is concerned that the trial judge has a predisposition having

expressed his comments without hearing the parties; and counsel for the defendant City would like to see the matter finalized.

[18] In the end, my view is that this Court should decide the trial cost issues in the circumstances of this particular case. I consider that this court has sufficient information in order to make the determination on costs, and in the interests of expedition and finalizing all matters should proceed to determine the trial costs. I view this approach as somewhat exceptional, as adherence to s.11(2) of the **Judicature Act**, which requires Supreme Court judges to decide all questions, should be encouraged. This election to decide the costs is not an invitation for parties to ask the appellate court to decide trial matters. However, this particular case has gone on for over a decade, this Court has heard and decided an appeal that involved the issues at the heart of the case and heard the cross-appeal including detailed submissions on trial costs matters, and all parties want this Court to bring matters to a close by determining the costs, notwithstanding that it is impossible for us to be familiar with all of the nuances at the trial. This election is consistent with Rule 57.01(7), which directs the court to devise and adopt the simplest, least expensive and most expeditious process for fixing costs.

[19] In making that election, I am not influenced by the suggestion that the trial judge might be predisposed on the matter of costs. It is quite usual and expected for a trial judge to include an epilogue in his written judgment expressing his preliminary thoughts regarding costs matters and inviting counsel to make submissions on costs should the court be called upon to decide the matter. The purpose of the trial judge's commentary is to assist the parties in their negotiation of costs, and to bring focus to the submissions should matters remain for the trial judge's determination.

### **Continuation of proceeding against Estate of Arsenault**

[20] The unsuccessful defendant Arsenault has passed away. Under Rule 11.01 a proceeding is stayed until an order to continue the proceeding by or against the other person has been obtained. Under Rule 11.02, Griffin sought an order to continue *nunc pro tunc* and upon consent of the other parties, the Court of Appeal has granted that order.

### **Costs to the successful parties**

[21] General costs principles should be applied in this case. The general rule is that while costs are in the discretion of the judge deciding the case, they generally follow the result. That is the expressed contemplation of Rule 57.01(1). That was the view expressed by the trial judge re costs at para. 264 of the judgment. In my view, the general rule should apply throughout in this case. At trial Griffin obtained

judgment against the City and Arsenault, and Griffin's claim against Murphy and Poirier was dismissed. The trial judge made comment about Griffin not getting over the first hurdle regarding Murphy, and getting over the first three but not the fourth hurdle regarding Poirier. In my opinion, those circumstances should not affect the application of the general rule. The tort of malicious prosecution involves four elements. Having found as a fact that it was not shown that the defendant Poirier did not act with malice, Griffin's claim against Poirier in tort failed, and costs should follow the result.

[22] Rule 57.01(1) contains a list of other factors for consideration in exercising discretion whether to award costs and the extent of costs.

[23] Rule 57.01(1)(a) states that one of the enumerated factors to be considered in the court exercising its discretion to award costs, in addition to the result of the action, is the amount claimed and the amount recovered in the action. It is notable that Griffin recovered general and special damages totaling approximately \$74,000., compared to his claims against the defendants of \$1.6 million, comprised of \$800,000. for general damages, \$100,000. for special damages, \$200,000. for aggravated damages, and \$200,000. for punitive damages, and that Griffin's claims for aggravated damages and punitive damages were denied. In that regard, some consideration will be given to the level of success compared to the claims made in terms of the time and expense of the trial process, the denial of aggravated and punitive damages, and any reasonably inferable loss of opportunity to settle the claims.

[24] It is noteworthy as well that some portion of Griffin's costs are applicable to his prosecuting and defending claims involving Grimes, which were settled mid-trial without payment of costs to any party. The other parties urge that some apportionment should be made for Griffin's costs applicable to the Grimes counter-claim. Griffin submits there should be no apportionment, as that litigation was not separable from the rest of the case.

[25] Obviously the action was complex, and the issues were important for each of the parties, not only in financial terms but in consideration of the seriousness and associated stigma and notoriety of the allegations of malicious prosecution and sexual harassment by senior officers within a municipal police service and municipal corporation.

### **Costs assessable on partial indemnity basis**

[26] The general rule is that costs are awarded on a partial indemnity basis. Substantial indemnity costs may be ordered when there is some form of reprehensible

conduct or conduct worthy of sanction by the losing party that should be rebuked by the Court.

[27] Murphy and Poirier ask for costs to be assessed against Griffin on a substantial indemnity basis. They assert that Griffin made allegations against them about very serious matters involving excessive damages which were determined at trial to have been unfounded. They point out regarding Murphy that the trial judge found that *“Griffin did not get over the first hurdle on the road to a successful malicious prosecution suit ...,”* as he failed to establish that the proceedings against him were initiated or continued by Murphy. Regarding Poirier, they point out that Griffin acknowledged at trial that he had no direct evidence of the key and essential element of malice. Regarding both defendants, they also point out that the trial judge found there was no basis for Griffin’s claims for aggravated and punitive damages against any defendant.

[28] Griffin responded by elevating his claim for costs. He asserts that the defendants Arsenault and Poirier “upped the ante” during the appeal by arguing for the first time actual guilt on the part of Griffin, and for making unfounded allegations against him about equally serious matters.

[29] In my assessment, there should not be an assessment of costs on a substantial indemnity basis against any party.

[30] Regarding Griffin, it is clear that he believed in his cause of action, and ultimately he proved malicious prosecution by the City’s agents. His testimony that he had no direct evidence of malice against a particular defendant is immaterial to the assessment of costs.

[31] The City, which will be ultimately responsible for the costs awards, committed no reprehensible conduct or other unacceptable conduct that would warrant substantial indemnity costs.

[32] In considering the behaviour or motivation of the City’s officers in defending against Griffin’s action, the trial judge found that Poirier and Arsenault formed an honest, subjective belief that they had reasonable and probable grounds. He stated (at para.170):

... On the whole of the evidence, I find the subjective element of the test has been met. Arsenault and Poirier did form the actual belief in the guilt of Griffin.

[33] As well, the trial judge’s various conclusions on damages suggest this is not a

case for elevated costs. He found there was no basis upon which to grant an award of aggravated damages, and that the case was not exceptional such that it should attract punitive damages. He also greatly tempered Griffin's claim for general damages. Regarding this assessment, he stated (at paras.249-258) that this case paled by comparison with *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, which Griffin had submitted for comparison, and he concluded this case was at the lower end of cases involving general damages awards:

I believe this award (\$40,000.) serves to adequately compensate Griffin for hurt, embarrassment, and damages to his reputation while at the same time it takes into account Griffin's participation in the press frenzy.

[34] This case was fraught with factual complexities, and fuelled by allegations and aspersions. In the end, I do not see conduct of the parties or counsel within the litigation, or of any party in events leading to the litigation, as being cause to elevate costs from partial indemnity to substantial indemnity basis.

#### **Summary of costs awards**

[35] Upon application of the general costs principles to this case, my threshold determinations would be:

- a. Griffin should have his costs against the City and Arsenault;
- b. Murphy should have his costs against Griffin;
- c. Poirier should have his costs against Griffin;
- d. All costs awards should be on a partial indemnity basis.

#### **Court of Appeal should fix the costs awards**

[36] It is also my view that this court should fix those costs awards. The procedure contemplated by Rule 57.01(3) is that except in exceptional cases when a court awards costs, it will also fix the costs. Consistent with Rule 57.01(7), this is also the most expeditious process for this case.

#### **Bullock order should issue**

[37] Griffin asks that any costs ordered against him in favour of the successful defendants Murphy and Poirier be ordered to be paid by the unsuccessful defendants

City and Arsenault. Griffin submits that his action against each of the four individual defendants and their employer the defendant City was reasonable; that he had no way of knowing which of the defendants was responsible in fact or law for the failed prosecution against him; that the defences at trial were not conflicting, and the City had pleaded it was not responsible for the acts of its employees (although at trial the City did not deny such responsibility).

[38] The City objects to a Bullock or Sanderson order being made. The City submits that costs should follow the result in the normal course, and the successful defendants Murphy and Poirier should have their costs against Griffin directly. The City submits that Griffin chose the defendants, including the City, and once the City was involved there was no need to keep the individual defendants involved and incur the unnecessary attendant costs. The City also submits that on Griffin's own admission, he had no evidence that Murphy initiated the proceedings against him or that Poirier acted with malice against him. Also, at no point did the City seek to avoid liability by suggesting blame on the part of Murphy, Poirier, or Arsenault.

[39] Bullock and Sanderson orders and their purpose were described by Carruthers C.J.P.E.I. in **Rayner v. Knickle** (1992), 99 Nfld. & P.E.I.R. 35 (PEISCAD):

[13] The Bullock Order finds its origins in the Courts of Chancery and the modern formulation of the rule is found in two decisions of the English Court of Appeal: **Sanderson v. Blyth Theater Company**, [1903] 2 K.B. 533 (C.A.) and **Bullock v. London General Omnibus Company and others**, [1907] 1 K.B. 264 (C.A.). The Sanderson case allows a successful defendant to recover costs directly from an unsuccessful co-defendant. And this is known as a Sanderson Order. A Bullock Order allows a plaintiff to add to the costs recoverable from an unsuccessful defendant the amount of costs which he is obliged to pay to the successful defendant.

[14] The test for the granting of a Bullock Order stems from the comments of Collins M.R. in the Bullock case where he states at p. 269:

The common sense underlying this order is clear, because the learned judge when he made it has before him evidence that, owing to the attitude taken up by the General Omnibus Company, it was reasonable for the plaintiff to join the other defendants.

[15] This test or threshold question was stated in the following manner by L.J. Vaughan Williams in **Besterman v. British Motor Cab Company, Limited**, [1914] 3 K.B. 181 (C.A.) at pp. 186-187:

Under these circumstances, was it a reasonable thing for the plaintiff in his action against a man who ultimately turns out to be in fact the wrong-doer to join the other defendant in order that the matter might be thoroughly threshed out? If, in the circumstances of the case, it was a reasonable thing to do, then he was entitled to add as part of the costs in bringing this reasonable action in which he reasonably joined this other person the costs of that other person who is found not to be at fault.

[16] Orkin, *The Law of Costs* (2nd ed.) states at para. 209.2:

Such an order, known as a 'Bullock' order, is appropriate where a plaintiff is in doubt as to which of two persons is responsible for the act that caused the injury. It is not, however, appropriate where a plaintiff alleges independent causes of action against two defendants and where the breaches of duty are in no way connected with each other. ... The reasonableness of the plaintiff's action may be found in the fact that there were two people either or both of whom have been at fault; or because each of the defendants tried to put the blame on the other, either in his pleadings or at trial, although the fact that the unsuccessful defendant did not attempt to throw the responsibility on his co-defendant is not sufficient reason to deprive the plaintiff of part of the benefit of his verdict if it was reasonable to sue both defendants.

[17] Chief Justice Culliton of the Saskatchewan Court of Appeal used the same test in *Badger v. Surkan et al* (1973), 32 D.L.R. (3d) 216 when he states at pp. 228-229:

The discretion to order an unsuccessful defendant to pay the costs of a successful defendant must be exercised judicially, and must be just in the circumstances: *Waite v. Edwards* (1911), 17 W.L.R. 566; *Haibloom and Haibloom et al. v. Rocky Mountain Tours Transport Ltd. et al.* (1951), 3 W.W.R. (N.S.) 201. The test is whether the plaintiff acted reasonably in suing both defendants: *Smith v. Kennedy et al.*, [1936] 4 D.L.R. 71, [1936] 3 W.W.R. 255, 51 B.C.R. 52.

In my opinion, the plaintiff, in instituting the action against both Dr. Surkan and Holy Family Hospital, did only what was reasonable in the circumstances. At the time the action was commenced, the plaintiff could not know, if there was negligence, whether that negligence was attributable to the doctor or to the hospital. Under these circumstances, his action in suing both defendants was

reasonable. The learned trial Judge, in my opinion, in making the order as to costs which he did, properly exercised his discretion, one with which this Court will not interfere. The discretion to order an unsuccessful defendant to pay the costs of a successful defendant must be exercised judicially, and must be just in the circumstances: **Waite v. Edwards** (1911), 17 W.L.R. 566; **Haibloom and Haibloom et al. v. Rocky Mountain Tours Transport Ltd. et al.** (1951), 3 W.W.R. (N.S.) 201. The test is whether the plaintiff acted reasonably in suing both defendants: **Smith v. Kennedy et al.**, [1936] 4 D.L.R. 71, [1936] 3 W.W.R. 255, 51 B.C.R. 52.

In my opinion, the plaintiff, in instituting the action against both Dr. Surkan and Holy Family Hospital, did only what was reasonable in the circumstances. At the time the action was commenced, the plaintiff could not know, if there was negligence, whether that negligence was attributable to the doctor or to the hospital. Under these circumstances, his action in suing both defendants was reasonable. The learned trial Judge, in my opinion, in making the order as to costs which he did, properly exercised his discretion, one with which this Court will not interfere.

- 18] Mr. Justice Lambert of the British Columbia Court of Appeal states in **Robertson v. North Island College Tribunal and Vocational Institute et al** (1981), 119 D.L.R. (3d) 17 that the statement of the threshold question as expressed by L.J. Vaughan Williams in the Besterman case has been widely followed. He then states on p. 24:

Once the threshold question is answered affirmatively then the discretion of the trial Judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock Order or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

[40] In **Moore (Litigation Guardian of) v. Wienecke**, 2008 ONCA 162, at ¶37-50, the Ontario Court of Appeal discussed the difference between Bullock and Sanderson orders and the test for determining which order should be made. The difference between the two types of order is that under a Bullock order the unsuccessful defendant reimburses the plaintiff for the successful defendant's costs while under a

Sanderson order the unsuccessful defendant pays the successful defendant's costs directly. The usual test for determining whether a Sanderson order is appropriate has two steps: (1) the threshold question of whether it was reasonable to join the several defendants in one action; and if the threshold question is answered in the affirmative, then (2) whether a Sanderson order would be just and fair in the circumstances. The second step involves an exercise in discretion in which a number of factors may be relevant. These factors, which need not be applied mechanically in every case, include:

- (1) whether the defendants at trial tried to shift responsibility onto each other, as opposed to concentrating on meeting the plaintiff's case;
- (2) whether the unsuccessful defendant caused the successful defendant to be added as a party;
- (3) whether, where there are multiple causes of action, they were independent of each other;
- (4) in some cases, there is reference to ability to pay.

[41] In my view, the circumstances of this case call for an exercise of discretion resulting in an order requiring the City and Arsenault to reimburse Griffin for costs payable by him to Murphy and Poirier. However, those circumstances do not call for an order for the City and Arsenault to pay those costs directly. In summary, it was reasonable for Griffin to include the City, Murphy, Arsenault and Poirier as defendants in his action, and for him to be reimbursed for costs he became obliged to pay to Murphy and Poirier who successfully defended the claims against them. However, the City and Arsenault only concentrated on meeting Griffin's case. Although they were unsuccessful in defending against Griffin's claim, they did not add any party or try to shift responsibility on to each other or the other defendants. As a result, a Bullock order should issue in this case; however, a Sanderson order should not. A number of factors contribute to this conclusion:

- (a) It was reasonable for Griffin to join the several defendants in his action. When he commenced his action, he knew there was a prosecution being brought against him, but he didn't know, and couldn't have known, who within the City corporation and/or police services, was the driving force. It was reasonable for him to include as defendants, in addition to the City, the City's Chief Operating Officer, the Chief of Police, and the police investigator in the prosecution.
- (b) The trial judge (at para.268) made a comment that is applicable to

Poirier's costs and may or may not be applicable to Murphy's costs:

One might argue that the City of Summerside should bear the entire burden of these costs, not as a punitive measure, but to reflect the reality that Griffin had to go through the individual defendants in order to establish liability on the part of the City.

- (c) It was not unreasonable for Griffin to continue his action against all defendants. The defendants submit that the trial judge alluded that "*One might argue that [Griffin] ought to have dropped his suit against Murphy much earlier in the proceedings.*" However, this statement was made only after the case was over. During the appeal hearing, counsel informed the court that during the trial, the defendants brought a motion for non-suit, and the trial judge dismissed the motion and decided to keep both defendants Murphy and Poirier in the proceeding. This decision advises that it was not unreasonable for Griffin to have then continued this action against the defendants Murphy and Poirier, even though later on they were shown to be successful with their defences.
- (d) Neither the unsuccessful defendants the City or Arsenault ever tried to shift responsibility onto the other defendants Murphy and Poirier, who were ultimately successful.
- (e) In its pleadings, the City denied vicarious liability. However, during the appeal hearing, City's counsel advised that this was due to the fact of the sparring contest that had been going on between Griffin and Grimes. Except for the denial in its statement of defence, and once the City was able to ascertain the situation, the City stood behind its employees throughout the proceeding. Never did the City take a position different than its employees; it only supported them in concentrating on meeting the plaintiff's case. Counsel advised the Court that the City always looked after the employees including their legal bills.
- (f) Once Griffin had sued the individual defendants, it was reasonable for them to choose to be represented by separate counsel. As individual office holders within the City administration, each had much at stake. Initially, the City denied vicarious liability. Afterwards, while Griffin asserts he was confronted by two sets of counsel, and the City asserts that counsel for the individual defendants was really no longer necessary, they do not assert that there was unnecessary duplication of effort in the trial process.

[42] Upon applying the test to the circumstances of this case, I view this as a situation where Griffin should be allowed to add to his costs recoverable from the City and Arsenault the amount of costs he is obliged to pay to Murphy and Poirier. It was reasonable for Griffin to join all of the defendants in his action. His cause of action was the same against all defendants, the claim of vicarious liability against the City as employer being incidental to the main claim of malicious prosecution by the City and its officers. It was reasonable for Griffin to retain the view that any, some, or all of the defendants could have been liable.

[43] A Bullock order is appropriate, and a Sanderson order is not because: the City only responded to Griffin's claim; it did not add any party; it did not expand the litigation; it took the same position as the defendants who were City officers; and all the City officers took the same position, which was to act in concert in fully defending their actions taken, without any attempt to blame each other.

[44] In the circumstances, with the benefit of a Bullock order, Griffin is not denied the fruits of his judgment.

### **The costs awards**

[45] The parties have made submissions on quantum, and at the request of the Court counsel for each party has submitted a bill of costs in accordance with Rule 57.01(5). Their claims for fees are supported by copies of their dockets and categories of disbursements.

[46] The Practice Note 21 costs guide should be applied. The rates shown are the maximum rates the court will normally consider when fixing partial indemnity costs. Maximum rates are intended to apply only to the more complicated matters, and to the more experienced counsel within each category. The applicable hourly rates for lawyers, based on years at the Bar, are: twenty plus, \$160.; ten to twenty, \$140.; five to ten, \$120.; less than five, \$90.; and articulated clerks, \$50.

[47] In fixing costs, consideration needs to be given to the factors listed in Rule 57.01(1). In addition to the aforementioned factors of the relationship between the amount claimed and recovered, complexity of the proceedings, and importance of the issues, there are other listed factors that are relevant in this case. They include:

- (j) 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 by and the hours spent by the lawyer;

- (k) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the steps in the proceeding to which the costs are being fixed.

[48] There has been considerable direction regarding the application of these factors. The reasonable expectation of the parties has emerged as the lead discretionary factor. I have considered and applied the applicable factors enumerated in Rule 57.01(1), as advised by the principles applicable to fixing costs stated by this court in *MacPherson v. Ellis* 2005 PESCAD 19 at ¶10-14 and ¶31-35, *Oliver v. Severance* 2007 PESCAD 21 at ¶12-16, and *Jay v. DHL* 2009 PECA 11 at ¶7-10.

[49] When Griffin initiated his claim for malicious prosecution, he would have been advised that he would be pursuing a complex claim that would be quite difficult to prove, and he would have expected that he would be met by a forceful defence, as he was suing in addition to the municipal corporation, four individuals who held high office in the City corporation – Police Chief; a police sergeant, and a police officer. He would have known that the case would be heavily documented and that he would be facing very substantial document discovery, oral discovery, and a lengthy trial. He could have contemplated that, since the case involved individual reputations, that named defendants might obtain separate counsel.

[50] As the litigation progressed, Griffin's reasonable expectations would have been influenced by various developments. These would have included especially the progress billings from his own counsel, and the fact that the individual defendants Murphy, Poirier, and Arsenault had then retained separate counsel and filed their statements of defence.

[51] Counsel for the defendants Murphy, Poirier, and Arsenault have pointed out that the nature of the case made it defendant-oriented, as they had the documents for production and most of the witnesses for presentation that would refute Griffin's claim. They also point out that they had to take instructions from three individual parties and that involved separate meetings. They advised the court that they internally apportioned their fees and disbursements among their three clients equally, i.e. one-third each.

[52] In this case, there is a vast variation between the bills of costs of counsel for Griffin and for the defendant City on the one hand and the bill of costs of counsel for the individual defendants Arsenault, Murphy, and Poirier on the other hand. In summary, both plaintiff's counsel and City's counsel attribute to this action partial indemnity fees in the range of \$170,000.-\$180,000. based on 1300-1400 total hours, while the individual defendants' counsel attributes partial indemnity fees of \$395,000. based on approximately 2940 hours.

[53] In assessing the amount of costs that an unsuccessful party might anticipate becoming obliged to indemnify the successful party, it is informative to reflect on the amounts and attendances in the bill of costs of the unsuccessful party. Griffin's counsel stated the applicable proposition well: *It was not within the reasonable expectations of Griffin that any one defendant would spend more defending the claim than Griffin spent carrying the case against all five defendants.* (This statement is subject to some modification for the claim being document-heavy and defence-oriented, and for their being three individual defendants.)

[54] In regard to reasonable expectations of the parties, McQuaid J.A. stated in ***100875 P.E.I. Inc. v. Curran & Briggs Limited*** 2010 PECA 08 at ¶43:

[43] Considering the time expended in preparation by counsel for the respondent, there would be a reasonable expectation on the respondent's part that should the motion fail, the respondent would be liable for the appellant's costs calculated somewhat on the same expenditure of time. It is also be reasonable to infer this expectation would be modified by the further expectation that the time expended might be somewhat less having regard to the fact that the appellant was responding to the motion as opposed to moving it. ...

[55] I have perused the dockets of counsel, and considered their submissions regarding adjustments that should be made. I would make some observations and qualifications.

[56] First of all, it is significant that other parties accept the time claimed as reasonable. Upon reviewing the dockets, I think it is fair to say that Griffin's counsel conducted the case with admirable economy, and I too find his bill of costs to be reasonable.

[57] Second, I observe that the time expended by City's counsel, which also appears reasonable, serves as a fairly reliable reference point for the City's reasonable expectations of the time that would be spent by Griffin's counsel on the case, and vice versa. Griffin's counsel's time docket is an important reference point too. The time spent by counsel for those opposing parties is similar to each other.

[58] Fixing the costs of the successful defendants Murphy and Poirier involves mostly the same considerations. The time spent by opposing counsel is in this case a fairly reliable and important reference point. On the other hand, I would not give much credence to the bill of costs of counsel for Arsenault, Murphy, and Poirier. This bill of costs is greatly disproportionate to the accounts of counsel for the other parties.

Counsel for both the City and Griffin urged the court to view the time claimed for partial indemnity by the individual defendants' counsel on the various components of the proceeding as inordinate. I accept their submission.

[59] The aggregate hours spent by Griffin's counsel was approximately 1100. Adding for in-court assistance at trial, it is equivalent to approximately 1300 hours. The City's counsel expended just under 1350 hours of lawyers' time.

[60] The City's counsel noted that the City was defending two separate claims, by Griffin and Grimes, each claiming over \$1.6 million in damages against the City. He advised the time spent on the Grimes case, which was discontinued mid-trial, could be somewhat arbitrarily apportioned at 10-15% of the total bill, and he submitted that the portion applicable to the Grimes claims should be deducted. With that deduction, the City's aggregate time on the Griffin litigation would be reduced to approximately 1200 hours.

[61] By comparison, counsel shared by the three individual defendants expended 2740 hours of lawyers time (plus approximately 200 hours of articulated clerks time). This is comprised of 2346 hours distributed between two senior counsel at 1109 and 1236 hours respectively, plus almost 400 hours for various functions performed by ten junior lawyers. Allowance needs to be made for taking instructions from and the presence of three individual defendants, with separate though overlapping involvement and interests, and also for the increased attendances associated with this malicious prosecution action being document-heavy, defence witness-oriented, and counsel having taken the lead on document production. However, after taking those factors into account, the bill of costs for the individual defendants' counsel remains outside the range of reasonable expectation of the parties for partial indemnity.

[62] A lot of the additional lawyer time in the bill of costs of the individual defendants appears to be attributable to the involvement of more than one senior or experienced counsel on the file. Over the course of the trial process, often more than one counsel was present, and over the course of the litigation various services were provided by different senior counsel and by various junior counsel. This practice appears to have contributed to both duplication and overlap, and to the involvement of some administration in the bill of costs. I wish to be clear in recognizing that parties and their counsel are well entitled to conduct their case in the manner they consider most advantageous. In fixing costs as between parties, the court is not questioning the appropriateness of whatever arrangement is made between a solicitor and his or her own client. However, as McQuaid J.A. stated in ***Oliver v. Severance***, there is not necessarily a direct connection between what counsel for a successful party has billed his client and what is recoverable from the unsuccessful party. I wish also to note that delegation of functions to junior counsel in an effort to utilize the

lowest cost service provider is also a practice to be encouraged. However, the cost of those services that can be appropriately charged to the unsuccessful party still has to be limited to what appears as reasonable in the circumstances. As Griffin's counsel stated, appropriate partial indemnity assumes the services are performed by a competent litigator who can conduct the court case.

[63] Returning to Griffin's partial indemnity costs, I would accept Griffin's bill of costs as a valid starting point or base, and then make adjustments: (1) to conform with the stated rates in Practice Note 21 costs guide; and (2) to take into account the proportionality between the amount claimed and the amount recovered in the proceeding, and denial of the claims for aggravated and punitive damages.

[64] I would decline to make a further adjustment as suggested by counsel for the City, of deducting a portion of Griffin bill of costs as being applicable to the Grimes' claims and not being the responsibility of the indemnifying party in the Griffin claim against the City and its officers. I accept Griffin's submission that the Grimes' litigation was part of the main malicious prosecution case. The Grimes' claim against Griffin was the impetus for the dispute between Griffin and Arsenault, and Griffin's litigation unfolded from there. The costs incurred were interrelated, and resulted from the same saga. Also, the Grimes' case was settled late in the trial, so that any adjustment would really be arbitrary.

[65] Adjusted to the prescribed maximum rates for this jurisdiction, Griffin's partial indemnity bill of costs would be 869 hours for senior counsel at \$160., 228 hours for junior counsel @ \$90., plus the actual outlay by Griffin's counsel of \$7569. for clerk and in-court assistance, for a total of \$167,129. I would use that as the base for Griffin's costs, before making the second adjustment.

[66] I would then make an adjustment in view of the disproportion between the amount and kind of claims made and the result obtained. As previously discussed, costs normally follow the result. Griffin achieved overall success in proving liability – he proved malicious prosecution against two defendants, and he obtained judgment. I think it can be safely inferred that proving malicious prosecution was Griffin's primary goal, and he succeeded in proving his claim. However, in assessing the damages the trial judge made various statements regarding the nature of the action and then awarded general damages in a very low amount and determined this was not a case for either aggravated or punitive damages. In my assessment, it would be reasonable for Griffin to receive about three-quarters of the partial indemnity costs he would otherwise receive. This adjustment would produce \$125,346. With this information, I would fix Griffin's partial indemnity costs at \$125,000. plus disbursements.

[67] Regarding the costs of the successful defendants Murphy and Poirier, I would refer for comparison to Griffin's hours and costs. I would then add to that an increment to take into account that the defence involved three defendants as discussed, and that the litigation involved a lot of documents and a lot of defence witnesses. On the other hand, the individual defendants did not have to defend the Grimes' claim. Viewed by time, and referring to Griffin's hours at approximately 1300, I would start from there and then add an increment of 300 hours, for a total of 1600 hours. It would be within reasonable expectations that these defendants would expend an additional 300 hours more or less. To calculate a bill of costs, I would allocate between senior and junior counsel based on one lawyer performing a service using the hours indicated in their counsel's docket. I would allow 1100 hours at \$160. per hour, 400 hours at \$90. per hour, and the balance of 100 hours at \$140. per hour. This produces a sum of \$226,000.

[68] I would then apportion those costs among the three individual defendants. In my assessment, counsel for the individual defendants would have spent substantially less time with the defendant Murphy, proportionally more time with the defendant Arsenault, and an average amount of time with the defendant Poirier. This is due to their particular personal circumstances, involvement in the case, and individual level of preparedness for the litigation. On that basis I would adjust the apportionment proposed by the individual defendants' counsel and apportion Murphy at 25%, Arsenault at 42%, and leave Poirier at 33 $\frac{1}{3}$ , or one-third as suggested by counsel. This produces an apportionment of the bill of approximately \$56,500. to Murphy, and \$75,000. to Poirier. I would award Murphy and Poirier their partial indemnity costs accordingly.

### **Disbursements**

[69] Each counsel included a schedule of disbursements with their bills of costs. A few items were the subject of submissions in the hearing. I would determine the various items of disbursements in the following manner.

[70] Griffin's total disbursements amount to \$32,155. The travel portion of his disbursements applicable to bringing outside counsel to this jurisdiction is \$18,922., and disbursements excluding counsel's travel and accommodation are \$13,233.

[71] The other parties question whether the travel and accommodation portion of Griffin's disbursements should be included in a bill of costs on a partial indemnity basis, but they do not question the amount.

[72] Griffin employed Toronto counsel, and as a result necessarily incurred expenses for lawyer's travel and accommodation. This involved nine trips and 60

days of attendances. The argument against inclusion is that while a party is entitled to have counsel of his choice, the incremental cost of outside counsel is not a cost that reasonably should be visited on the opposite parties. The argument for inclusion is that Griffin had found that local counsel could not act due to conflicts, and so it was reasonable for him to reach afield for experienced counsel capable of taking instructions on a complex malicious prosecution suit.

[73] In my view, whether such a disbursement is assessable depends on the circumstances of the case and whether the reasonableness of the expense is substantiated. The general principle is that to be assessable, disbursements must be reasonably necessary to advance a party's position, and the amount of a disbursement must be reasonable (**Orkin**, §219.6(1)). The caselaw advises that courts vary in their approach.

[74] However, there is a consistent theme in the approach, which should be applied in this case. The general rule is that a party is responsible for putting its counsel at the place of trial at its own expense. The unsuccessful party should be called upon to reimburse the successful party for the proper travelling and living expenses of counsel who does not practise in this jurisdiction only where in the opinion of the court either (a) the expertise required to perform the particular case was not available from solicitors practising in this province, or (b) conflicts of interest prevented solicitors practising here from acting in the matter. The question to be asked is whether the attendance of outside counsel was in the circumstances necessary and proper and reasonably incurred. The onus is on the party claiming the disbursements to demonstrate its reasonableness. See: **Orkin**, supra at §222.3; **Prince Edward Island Regional Administrative Unit No. 3 School Board v. Morin** 2008 PESCTD 2, at ¶56-61; **Wall v. Haney**, 2007 NSSC 153; **Seeton v. Commercial Union Assurance Co. of Canada**, [1999] N.W.T.J. No. 75 (NWJSC); **Allen v. Holman**, [1998] B.C.J. No. 46 (BCSC (Registrar)), particularly ¶31-37.

[75] Griffin bases his claim for counsel out-of-province travel expense on conflicts of interest in local counsel, and not on the complexity of the litigation. However, Griffin did not present to the Court any evidence or other explanation to substantiate the unavailability of counsel practising in this province. Such substantiation is a prerequisite to visiting that expense on the unsuccessful party. I would not allow the counsel out-of-province travel as a disbursement.

[76] Griffin's disbursements include a claim of \$1,251. for "transcripts." There is no explanation as to why this expenditure was reasonably necessary to advance his position. I would disallow this item.

[77] The rest of Griffin's disbursements appear to be reasonable, and the other

parties made no objection to any of the other items. Those disbursements are for: process servers, long distance calls, courier service, photocopies, printing affidavit of documents and argument, Quicklaw searches, transportation of documents, and in-province meals and transportation. I would allow the rest of Griffin's disbursements as claimed, in the sum of \$11,982.

[78] The individual defendants' bill of costs lists disbursements in the sum of \$84,610.

[79] The largest single disbursement is \$50,148. for "Document Production." (This is separate from "Binding Costs" of \$3,773.) The individual defendants' counsel attribute this sizable expenditure to the preparation of the agreed book of documents, which they prepared on behalf of all participants in the trial, and which is comprised of 5,823 pages in 28 volumes. (Counsel for Griffin referred to there being 40 volumes of documents.) The unsuccessful parties consent to the portion of this expense that is reasonably attributable to copying and binding, but they presume the disbursement includes document management software and data entry for the document production project, and they assert that portion is not assessable. I agree with their submission. The actual outlay or reasonable cost of copying and binding is assessable. However, the expectation would be that the cost of software would be treated as law firm overhead; and data input appears to be clerical or secretarial in nature, and also overhead. It may be that a case could be made for such a disbursement being reasonably necessary to advance a party's position and thereby assessable, but to so qualify some support would need to be provided upon which the other parties and the court could evaluate whether the expenditure meets the test. Therefore, I would allow only the portion of "Document Production" that is reasonably attributable to copying and binding. Counsel should try to agree on the assessable portion, and if they cannot agree, then they can make written submissions to the Court for decision in accordance with this direction.

[80] I would allow the disbursements as claimed for telephone charges, courier, delivery, filing fees, Prothonotary transcript, medical report, telecopy charges, binding costs, and PST paid on client's behalf.

[81] I would disallow the claimed disbursements for "Other (non-taxable) \$962.07" and "Other (taxable) \$1,263.98," as these claims are not explained or substantiated.

[82] There is a claim for "Transcript costs of \$12,902.82" for transcripts used at trial which is otherwise unexplained. The cost of real-time reporting of daily transcripts ordered for the convenience of counsel during the trial will be allowed only in exceptional circumstances: **Orkin**, supra, at §219.6(2a). No support has been provided to substantiate exceptional circumstances in this case. I would disallow this

item.

[83] There is a claim for in-province travel of \$1,448. and meals of \$391. The general rule and practice is that such expenses are not assessable, on the basis that it is the client's responsibility to put its counsel at the place of trial. However, where, as here, it is shown that it was necessary for a party to retain counsel from Charlottetown due to unavailability due to conflicts of interest in local Summerside counsel, then the reasonable cost of counsel transportation and meals can be justified. In this case, the legal proceeding involved the City corporation, five office holders, and the City solicitor, and was preceded by an inquiry and numerous judicial proceedings that involved various legal counsel. It seems reasonable to infer that it was necessary for all the parties to go outside of the Summerside bar for their legal representation in this case. I would allow that item.

[84] There is a claim for "Quicklaw Research" of \$9,783. This claim is disproportionate to the amounts claimed by the opposing parties for electronic research – the City \$760., and Griffin \$906. – and no explanation is provided. This claim is subject to some adjustment. Electronic research could be either law firm overhead as part of library expense or an assessable disbursement. All or part of a claim may be shown to be reasonably necessary to advance a party's position, as opposed to overhead, on the basis that it saves lawyer's time and is thereby cost-effective for the particular litigation file. However, to qualify a claim like the one in this case there would need to be some support through provision of some information upon which the reasonableness of the expenditure could be scrutinized. In any event, it can be inferred that in this case respondents' counsel reasonably incurred some electronic research. Upon referring to the expenditures of the other parties, and in the absence of further supporting information, I would allow a disbursement for electronic research of \$906.

[85] In summary, I would approve the disbursements of the individual defendants' as follows:

- document production – printing and binding portion only; amount to be determined
- telephone charges, courier, delivery, filing fees, Prothonotary transcript, medical report, telecopy, binding costs, and PST paid on client's behalf, as claimed \$7,616.
- Charlottetown-Summerside travel and meals, as claimed \$1,879.
- electronic research \$ 906.

[86] The approved disbursements would be apportioned among the individual defendants on the same basis, i.e. Poirier: one-third; and Murphy: one-quarter, of the total disbursements.

**No costs on the cross-appeal**

[87] In the circumstances, I would consider it unnecessary to make any order for costs on the cross-appeal itself.

**COSTS ON APPEAL**

[88] Griffin was successful on the appeal, and costs should follow the result. Griffin should have his costs of the appeal on a partial indemnity basis. The Court can fix the costs, and I would do so.

[89] On the appeal, the submissions of Griffin's counsel were very well organized and this was helpful to the court. The expenditure of time indicated by the bill of costs filed on the appeal by Griffin's counsel appears reasonable. This is upon review of his docket which shows 156 hours by senior counsel Charles Campbell.

[90] On review of the comparative information provided by counsel for the appellants, the City's counsel expended 135 hours. This was apportioned approximately 35 hours to senior counsel and approximately 100 hours to junior counsel. Counsel for the appellant Arsenault (and the appellant Poirier who had no order to appeal against) reported counsel time expended of just over 500 hours, comprised of 365 hours for two senior counsel, and a further 148 hours for junior lawyers and article clerks.

[91] As mentioned in the previous assessment of costs, the time and attendances expended by counsel for the unsuccessful party is informative of that party's reasonable expectations toward determining what amount of costs that party might become obliged to indemnify the successful party. The bill of costs of City's counsel provides a reliable reference point in this appeal. I would not give very much credence as a reference point to the bill of costs of the respondents' Arsenault and Poirier's counsel because it involved two senior counsel and is globally beyond the reasonable expectations of the parties for partial indemnity on this appeal.

[92] The other parties do not dispute the fees portion of the bill of costs submitted by Griffin's counsel.

[93] Based on counsel's time expended of 156 hours calculated at the maximum

rate on the fee guide of \$160. per hour, the fees portion of costs on appeal would be \$25,000.

[94] Regarding disbursements, except for the travel portion, which was questioned in principle but not as to amount on the same basis as travel within the trial costs, disbursements as claimed are not questioned. I would deduct the claimed disbursements applicable to travel and accommodation, and otherwise allow the disbursements as claimed. On that basis, disbursements would be allowed in the amount of \$3,133. plus applicable taxes.

[95] I would award the respondent Griffin his costs on the appeal of \$25,000. plus disbursements in the amount of \$3,313., and applicable taxes. The obligation for payment is upon the appellants on a joint and several basis.

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Chief Justice David H. Jenkins

I AGREE: \_\_\_\_\_  
Justice John A. McQuaid

I AGREE: \_\_\_\_\_  
Justice Michele M. Murphy