

## **Canadian Lacrosse Association Appeals Committee**

**In the Matter of an Appeal by the Orangeville Northmen Jr. A Lacrosse Club from the fine of \$5,000.00 in relation to the purchase of Minto Cup Championship Rings (2008) from a supplier other than the CLA's Sponsor.**

### **Decision of the Appeals Committee on Costs**

#### **Panel Members:**

Mike Kanentakeron Mitchell, Chair  
Tom Engel  
Jim Burke

#### **Appearances:**

David Thwaites – for the Appellant, Orangeville (in writing)

#### **Part 1: Introduction**

1. In its decision of January 4, 2010 the Appeals Committee made its ruling on the substantive aspect of the appeal, reserved decision on the issue of costs and the return of the appeal fee and requested written submissions from the Appellant.
2. The written submissions were received on January 22, 2010.

#### **Part 2: Appellant's Argument**

3. Orangeville submits that no costs should be awarded against it and that the appeal fee should be returned.
4. A copy of the Appellant's submissions is attached to this decision.

#### **Part 3: Decision and Analysis**

5. The Appeals Committee agrees with Orangeville that the wording of CLA 7.2.7.3 does not support an award of costs here because, in this case, there is no 'respondent'. Were it otherwise, costs would have been awarded.

6. There is a gap in policy which the CLA should consider correcting by amending 7.2.7.3 by deleting the words “award costs to the appellant or respondent against the other” and replacing them with “order that costs be paid by the appellant or the respondent”.
7. If the Appeals Committee had jurisdiction and been able to deal with costs, it may have been determined by the complainants in relation to complaints made about the some of the conduct which is the subject of this decision that it would be unnecessary to proceed with those complaints.
8. However, the conduct can be addressed in a small way when considering whether to return the appeal fee. CLA 7.2.1 provides:
  - 7.2.1. Any individual who wishes to appeal a decision shall have fifteen (15) days from the date on which they received written notice of the decision with reasons, to submit a written notice of appeal along with a \$500 fee to the CLA Head Office. Should the original decision be upheld, **the \$500 fee will be forfeited unless otherwise determined by the Appeals Committee.** Each notice of appeal must include the following information:
    - 7.2.1.1. the person, committee or body whose decision is being appealed;
    - 7.2.1.2. the capacity in which that person was acting when he or she made the decision, or the title of the Committee or Body making the decision;
    - 7.2.1.3. the date the decision was made, and;
    - 7.2.1.4. the particulars of his/her grounds for appeal, including a summary of the submissions and arguments in support of the appeal. **[emphasis added]**
9. Had there been no misconduct by Orangeville, since there was substantial success, it is likely that the whole fee would have been returned.
10. In these circumstances, due to the conduct of the Appellant, which was detailed in the previous decision and is repeated here:

*64. As stated above, Orangeville made accusations of serious misconduct against Miriguay and Harris and others which were baseless. There has been other objectionable conduct by the Appellant in relation to this appeal. In such cases, the tribunal may awards costs against the party who made them: **CLA 7.2.7.3 with Smith v. Harrington [1996] O.J. No. 1006; Woolley v. Association of Ontario Land Surveyors, [2001] O.J. No2741.** We ask for written submissions from Orangeville, by January 31, 2010 on whether the Appeal fee should be returned (CLA 7.2.1) and on whether costs should be ordered to be paid by Orangeville and, if so, in what amount, in relation to the following:*

- a. The following in the Notice of Appeal:*

- i. *“Mr. Miriguay had a vested conflict of interest”;*
  - ii. *“the CLA convenor, Mr. Miriguay, failed to disclose his financial interest in the Memorandum namely an entitlement to receive a \$1,500.00 “commission” from Highwood Manufacturing”;*
  - iii. *“Mr. Miriguay was influenced by bias, as he had a financial vested interest, in the decision”;*
  - iv. *“Mr. Miriguay exercised his ‘discretion’ for an improper purpose”;*
- b. *The following allegation from the letter to the AC dated November 10, 2009:  
I object to the ability (sic) to conduct a proper cross examination of Mr. Miriguay which I note was conveniently ignored by the Appeals Committee in its ‘jurisdictional reasons’...”*

*which has no foundation in relation to the allegation that there was a lack of ability to cross examine and the suggestion that there was dishonesty in the part of the AC;*

- c. *The failure to disclose relevant documents to the AC;*
- d. *The argument that the MUS was “knowingly inaccurate”;*
- e. *The argument that the CLA was not “up front” with Orangeville by bringing the MUS to its attention before the meeting at the Minto Cup;*
- f. *The argument that Orangeville is being asked to be held accountable because of the CLA’s “fear that it may have to pay \$3500.00” to Highwood and “I’m saying as gentle as I can – this was generated by persons who are misguided and trying to dump the load on Orangeville”;*
- g. *The treatment of Miriguay as a witness at the hearing.*

*65. We note that the allegations in 64 (a) were withdrawn but, thus far, there has never been an apology. For the rest, thus far, there has not been a retraction and/or an apology.*

it is “otherwise determined” that none of it will be returned.

11. Dealing with each of the issues raised above, we find as follows:

**a. *The following in the Notice of Appeal:***

- v. ***“Mr. Miriguay had a vested conflict of interest”;***
- vi. ***“the CLA convenor, Mr. Miriguay, failed to disclose his financial interest in the Memorandum namely an entitlement to receive a \$1,500.00 “commission” from Highwood Manufacturing”;***
- vii. ***“Mr. Miriguay was influenced by bias, as he had a financial vested interest, in the decision”;***
- viii. ***“Mr. Miriguay exercised his ‘discretion’ for an improper purpose”.***

The allegations against Mr. Miriguay were made without any reasonable foundation and were made recklessly. Orangeville claims that this was due to a “misunderstanding of information received” but has not explained what that was.

To make matters worse, Orangeville now claims that the CLA had a “vested interest in the process and failed to disclose it to Orangeville” when it was obvious that the CLA had a sponsorship agreement with Highwood and that there would be a penalty for breach of contract by the CLA. Orangeville continues its misconduct by suggesting bias on the part of the CLA and failure to disclose in this process.

- b. ***The following allegation from the letter to the AC dated November 10, 2009:  
I object to the ability (sic) to conduct a proper cross examination of Mr. Miriguay which I note was conveniently ignored by the Appeals Committee in its ‘jurisdictional reasons’...”***

***which has no foundation in relation to the allegation that there was a lack of ability to cross examine and the suggestion that there was dishonesty in the part of the AC.***

If there was, as claimed by Orangeville, no suggestion of dishonesty in the part of the Appeals Committee, then Orangeville, through its lawyer, should have been much more careful in the choice of words used. The ordinary meaning of the words “conveniently ignored” is acting dishonestly. Orangeville compounds the misconduct when, in its submissions it seeks to blame the victim, the Appeals Committee, by claiming that it was “making inferences which were not so stated or invited”.

- c. ***The failure to disclose relevant documents to the AC.***

Orangeville claims that it did not fail to disclose; we find that it did. The Appellant argues that it was not required by Policy to disclose the records but the Appellant was directed by the Appeals Committee to disclose records and it did not. The AC had the jurisdiction to control its own process and to direct parties to disclose information within their possession or control.

***d. The argument that the MUS was “knowingly inaccurate”.***

Orangeville persists in its claim that the MUS was “knowingly inaccurate” and submits that the reference by the Appeals Committee that the Appellant was alleging fraud is “astounding”.

It does not matter what was inaccurate, knowingly. Whatever was alleged to be inaccurate was alleged to be done ‘knowingly’, which suggests dishonesty on the part of the person responsible for the inaccuracy for which Orangeville is unrepentant.

***e. The argument that the CLA was not “up front” with Orangeville by bringing the MUS to its attention before the meeting at the Minto Cup.***

In its submissions, Orangeville now claims that the allegation that the CLA was not “up front” was not an allegation of dishonest conduct. A perusal of any dictionary shows that the ordinary meaning of those words is a failure to be frank, open, honest and truthful. Once again, Orangeville is unrepentant.

***f. The argument that Orangeville is being asked to be held accountable because of the CLA’s “fear that it may have to pay \$3500.00” to Highwood and “I’m saying as gentle as I can – this was generated by persons who are misguided and trying to dump the load on Orangeville”.***

In its submissions, Orangeville has failed to deal with what its lawyer alleged at the hearing. He alleged that the CLA was only pursuing discipline against Orangeville in order to set off the fine against the penalty that would be owed by the CLA to Highwood. Orangeville not only fails to apologize for this allegation but doesn’t even acknowledge it.

***g. The treatment of Miriguay as a witness at the hearing.***

The reference to the treatment of Mr. Miriguay is not vague at all, as alleged by Orangeville in its submissions. Orangeville was present at the hearing for the cross-examination of Mr. Miriguay by counsel for Orangeville and we repeat paragraph 59 (d) of our previous decision here:

***“Miriguay did not have the courtesy to follow up with Orangeville” before imposing the fine***

*While we agree that Orangeville should have been confronted with the allegation that it had breached the MUS before the fine was imposed, there is no evidence of any harm. Orangeville knew it was in breach and all that would have happened would be that the breach would have been confirmed and the automatic fine imposed.*

*It is of note that this accusation was directed personally at Miriguay which was consistent with the theme that began with the letter of appeal which accused Miriguay of serious misconduct which was later retracted. That was another allegation that Orangeville made with no foundation. **We noticed that this personal animosity towards Miriguay was also evidenced with the cross examination of Miriguay which was needlessly, at times, rude, sarcastic, mocking and bullying.***

*It must be emphasized that it was Harris, not Miriguay, who directed that the fine be imposed. To maintain that it was Miriguay’s decision to impose the fine, which was the initial position of Orangeville when it appealed, after it was disclosed to Orangeville that Harris directed it and after that was confirmed by the October 14<sup>th</sup> Decision, is astounding but consistent with the desire to attack Miriguay. **[emphasis added]***

12. We wish to make it very clear that we are very concerned with how easily some people in the lacrosse community use seriously slanderous language about others in the community. That is by no means confined to this case. A message must be sent that such behavior will not be tolerated. As stated above, the Appeals Committee is hamstrung by the Manual from doing more than we have here but, hopefully, the message will, nonetheless, be clear.

Dated this 1st day of April, 2010



Tom Engel  
(Authorized to sign for Mike Kanentakeron Mitchell, Chair of the Appeals Committee)

**MULLIN THWAITES WARD, LLP**  
Barristers & Solicitors

GEOFFREY T. MULLIN, Q.C. (Ret.)  
DAVID G. THWAITES, LL.B.  
PATRICIA L. SPROULE WARD, B.B.A., LL.B.

PHONE: (519) 941-4559  
P.O. Box 67  
25 First Street  
ORANGEVILLE, Ontario  
L9W 2Z5

E-MAIL - [dthwaites@mtwlawoffice.com](mailto:dthwaites@mtwlawoffice.com)  
WEB - [www.mtwlawoffice.com](http://www.mtwlawoffice.com)

FAX (519) 941-4806

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Our File-2009-0091-T

FAX NUMBER: (613) 260-2029  
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Re: Orangeville Jr. "A" Northmen Lacrosse - Appeal

**FROM:**

DATE: January 22, 2010  
NAME: DAVID THWAITES

**TO:**

NAME: Attention: Michael Mitchell  
FIRM: CHAIRMAN OF THE APPEAL COMMITTEE  
CITY: Canadian Lacrosse Association  
Ottawa, Ontario

**MESSAGE:**

**IN CASE OF TRANSMITTAL PROBLEMS, PLEASE CONTACT Nancy, ext. 231.**



**MULLIN THWAITES WARD LLP**  
**Barristers and Solicitors**

PHONE: (519) 941-4559  
FAX: (519) 941-4806

GEOFFREY T. MULLIN, Q.C. (Ret.)  
DAVID G. THWAITES, LL.B.  
PATRICIA L. SPROULE WARD, B.B.A., LL.B.

P.O. Box 67  
25 First Street  
ORANGEVILLE, Ontario  
L9W 2Z5

WEB - [www.mtwlawoffice.com](http://www.mtwlawoffice.com)  
E-MAIL - [dthwaites@mtwlawoffice.com](mailto:dthwaites@mtwlawoffice.com)

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David G. Thwaites - Lawyer - Ext.: 240  
Nancy Quail - Legal Assistant - Ext.: 231

January 21, 2010

Via Fax Only

**Canadian Lacrosse Association**  
B-4 - 2211 Riverside Drive  
Ottawa, Ontario  
K1H 7X5

Attention: Mike Mitchell  
Chair of the Appeals Committee

Dear Sir:

**Re: Orangeville Jr. "A" Northmen Lacrosse - Appeal**  
**Our File No. 2009-0091-SW**

As a follow-up to the decision recently released in this matter and in response to the invitation to make submissions on the issue of costs I enclose the Submissions on behalf of the Orangeville Lacrosse Association.

Yours truly,

**MULLIN THWAITES WARD LLP**

Per:

  
David G. Thwaites

DGT/nq  
Encl.

cc: Orangeville Jr. "A" Northmen Lacrosse

**In the matter of an appeal by the Orangeville Northmen Jr. A Lacrosse Club from the fine of \$5,000.00 in relation to the purchase of Minto Cup Championship Rings (2008) from a supplier other than the CLA's Sponsor.**

### APPELLANT'S SUBMISSIONS

The Orangeville Lacrosse Association in response to the invitation of the Appeal Committee makes the following submissions in reference to paragraph 64 of the decision of the Appeals Committee:

- (a) its appeal fee should be returned; and
- (b) there should be no cost ordered against Orangeville.

It is noted that the decision refers to S.7.2.7.3 of the CLA Operations Manual. In fact the Appeal Committee has previously advised that there was no Respondent in this matter (see email of Mr. Engel August 14, 2009 10:20 a.m. "So, as stated previously, there is no Respondent") and as such the Appeal Committee has no jurisdiction to make a cost Order pursuant to this provision, one way or the other. The cases cited in the decision likewise involved a "respondent" in the process. As to the cases cited the facts in those cases are in no way similar to this matter.

With respect to the preamble provisions referenced by Mr. Engel in paragraph 64, Orangeville takes serious exception to any suggestion of "obstructive conduct". As to the "points" referenced by Mr. Engel in paragraph 64:

- (a) the reference to Mr. Miriguay in the Notice of Appeal was withdrawn by Orangeville as it had been a misunderstanding of information received. It is noted that it was the CLA, not Mr. Miriguay, who had a vested interest in the process and failed to disclose such to Orangeville until Orangeville became aware of the Highwood agreement. Orangeville apologizes to Mr. Miriguay for any "personal offence" referenced in its original Notice of Appeal:

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- (b) there was no suggestion of dishonesty on the part of the AC. Mr. Engel has persisted, with respect, in making inferences which were not so stated or invited. In fact this was addressed in fax correspondence dated November 11, 2009 directed to Mr. Mitchell (11:00 a.m.). As to the matter of the cross-examination the fact is, it was affected/constrained by virtue of the "telephone process";
- (c) there was no failure to disclose by Orangeville. The Manual (7.2.5.5) requires production of documents on which the Appellant intended to rely. Such documents were produced in advance of the hearing. The Appeal Committee refers in paragraph 42 of the Decision to evidence that was not in fact evidence at the hearing. If the reference is to an email from McGregor to Miriguay on January 26, 2009 (3:02 p.m.), then the Decision inaccurately states the message or the reference to there being such an email from Orangeville. The Appeal Committee did not question Mr. Clevely on this "email". Mr. Clevely in fact proffered the emails in his possession (October and December) and referred to another email that he did not have. There was no evidence to support the paragraph 42 statement (first sentence) and no evidence at all from Highwood;
- (d) the MUS was "knowingly inaccurate" as the CLA (Mr. Miriguay being the rep at the August meeting) knew that Mr. Clevely had not prior to signing informed "my team and all representatives" of points 1, 2 and 3. The team was not present. All representatives were not present. The document had not been previously produced by the CLA. Paragraph 25 of the decision is not, with respect, a proper

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conclusion as Mr. Miriguay knew he had not given Mr. Clevely the opportunity prior to signing. Mr. Miriguay acknowledged this at the hearing on his cross-examination (in fact paragraph 59(b) is incorrect). Thus the document was "knowingly inaccurate". Paragraph 57 of the decision is also inaccurate, as the "create of the MUS" was not the issue, it was the circumstance giving rise to the signing. There was no suggestion of "fraud" whatsoever. To suggest otherwise is "astounding";

- (e) the CLA did not advise Orangeville prior to the Minto Cup meeting of any requirement to sign the MUS. It could have and should have. In fact if it had this matter may not have resulted as there would have been time for Orangeville to review and consider in advance and the message conveyed by Mr. Miriguay (paragraphs 22 and 23) would not have been so conveyed putting Mr. Clevely in the situation he then faced. To the extent this subparagraph refers back to paragraph 39(c) of the Decision, there was no suggestion of "dishonest conduct" at all made by Orangeville. Further to suggest that Mr. McLeod's failure to fulfill some "argued" "responsibility" to Orangeville took away the obligation of the CLA to ensure, prior to the Minto Cup, that certain matters needed to be addressed is unfortunate. In fact the recommendation at paragraph 69 of the Decision incorporates and addresses the very concern of Orangeville as it would have and will hopefully clearly identify process and communication responsibilities;

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- (f) the reference by the AC is not complete. In fact the evidence pointed to the conclusion that Orangeville as the only "person" being held to any account. Highwood had not been and was not pursued. The CLA had not taken ownership for its lack of attention to the matter including its lack of communication with Orangeville both prior to and after the Minto Cup. Better communication by all involved would no doubt have assisted;
- (g) the reference is vague. Mr. Miriguay was produced as a witness. He was cross-examined. His answers were at times evasive and argumentative. His evidence was affected in part by the lack of a paper trail on his part. His evidence in November was different from his evidence in September, 2009. As to the criticism of the manner of cross-examination of Mr. Miriguay there in fact was nothing improper at all recognizing as well that none of the AC representatives took issue with the same during the November hearing. It is indeed unfortunate that the cross-examination was necessary at all as Mr. Miriguay could have acknowledged all points prior to the hearing (but this was not done) or the CLA could have engaged in discussions with Orangeville, as sought by Orangeville on a number of occasions post-March 13, 2009, at anytime.

To the extent the references in the Decision otherwise must be addressed as they "impact" cost, Orangeville submits:

paragraph 56: This is not accurate, in fact it was recognized that all (except perhaps Mr.

Miriguay) are "volunteers" and that the purpose of the Minto Cup should be

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focussed on serving the young men (players) and not to be creating opportunity for "legal debate". Mr. Clevely, Mr. McLeod, Mr. Harris and others have the privilege of impacting young men and it is most unfortunate that resources (time and dollars) have been consumed in this process.

paragraph 57: previously addressed.

paragraph 58: the suggestion is denied. In fact there was no submission of "improper motive or deceit" referencing Mr. Harris. Mr. Miriguay's evidence and the original Notice of Appeal have been dealt with herein. As to the "unfairness" it related to the decision of Mr. Miriguay in his email of March 13, 2009 by his failure to consult or discuss the matter with Orangeville. On Orangeville learning, after-the-fact, that it was Mr. Harris who made the decision, the fact remains Mr. Harris had not consulted with Orangeville, for whatever reason. The failure to consult prior to making a "decision", arguably, was a denial of the principles recognized by the CLA Manual for natural justice and certainly a respect for one another, even if the CLA deemed it "contractual" not "discipline".

- paragraph 59: (a) no comment;
- (b) addressed herein;
- (c) addressed herein;
- (d) addressed herein recognizing that if in fact there had been discussions at the outset then there is every hope that this matter would have been resolved prior to "lines" being drawn.

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With respect to paragraph 59 (subparagraph 2) this matter had nothing to do with "personal animosity" toward Mr. Miriguay. There was nothing in the evidence of Mr. Clevely, or for that matter Mr. McLeod, to support such a conclusion. As to the comments with respect to the cross-examination of Mr. Miriguay this has been addressed already.

Subparagraph three is wrong. Harris may have made the decision but it was not his email. It was not disclosed to Orangeville until later. The "last line" is also unfortunate recognizing that it was Mr. Miriguay that Mr. Harris apparently relied upon in making any decision and Mr. Harris was not called by the Appeal Committee to give evidence. Mr. Miriguay was the CLA person handling this matter. There was no "desire" to attack Mr. Miriguay and no evidence to support such a conclusion.

- (e) already addressed;
- (f) Orangeville disagrees. In fact the very conclusion allows a person, such as the CLA, to avoid a process designed for discipline by providing a "fine" which is in itself part of a discipline process. This is not a matter of seeking "favoured status" at all for Orangeville as the concern applies to all teams and persons involved with lacrosse in Canada;
- (g) addressed herein and Orangeville disagrees with the AC's "conclusion" and "analysis";
- (h) addressed herein;

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(i) addressed herein;

paragraph 60 addressed herein.

paragraph 61 agreed.

paragraph 63 acknowledged.

It is indeed unfortunate that this entire process was necessary. Separate and apart from the decision to allow the appeal by reducing the fine to \$500.00, counsel for the Orangeville Lacrosse Association agrees with paragraph 69 of the Decision (Collateral) and further would suggest that the CLA consider implementing an early mediation process, be it formal or informal, to address matters. Orangeville had sought this in this matter, but it was not available.

As to paragraph 67 counsel takes serious exception to the characterizations made by Mr. Engel:

First, it took the "CLA" until late July, 2009, some four months, to provide disclosure (in fact, further disclosure was provided late August, 2009) after having taken some weeks to form the Appeal Committee. This is not being critical of the time necessary to complete this process but it would be unfair to be likewise critical of Orangeville.

Second, Mr. Engel on behalf of the AC then attempted to impose a schedule for the hearing in contravention of paragraph 7.2.5.2 Manual (see Thwaites email August 18 11:03 a.m.).

Third, the initial scheduling in August, 2009 was done during the lead up to the Minto Cup 2009 in which Mr. McLeod and Mr. Clevely were much involved. Mr. Engel queries into Orangeville's counsel's "personal" schedule were, with respect, inappropriate

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and unnecessary as Mr. Engel sought to schedule hearing during weekends. This was addressed in emails at length (see email, for example, August 18 5:24 p.m. and August 19 8:44 a.m. from Thwaites). The matter of Mr. Clevely and Mr. McLeod's schedules were also addressed in a timely and proper manner both in August/September and again in November, 2009. If necessary Orangeville's counsel will specifically review each "email" to establish the timeliness of communication and efforts to "cooperate".

Fourth, it was Mr. Engel's time driven emails that created in part the issue of use of email together with email technical problems for Orangeville's counsel. It is noted that fax communication is much more reliable.

Fifth, Orangeville's counsel suggested in early August, 2009 that a telephone conference call (as early as the afternoon of August 10, 2009) be held to address procedural, including scheduling, issues but the suggestion was not accepted.

It would be the suggestion of the Orangeville Lacrosse Association that the Appeals Committee adopt an "early" telephone conference to address any procedural issue(s) that must be addressed as it will facilitate process and timing.

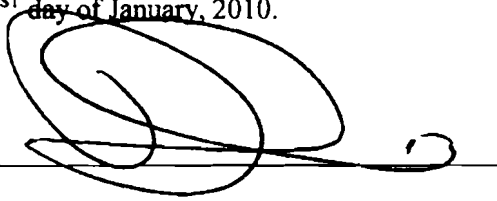
Finally it is noted that while the decision of the Appeal Committee is posted to the CLA website forthwith on rendering, it might be better postponed pending completion of the process including the opportunity of parties to address the decision, especially when "collaterals" are addressed. The characterizations in the Decision, in this case, were, with respect, inappropriate and in error.

*Appellant's Submissions**Page 9*Conclusion:

It is submitted that:

- (a) the filing fee be returned to Orangeville. Orangeville was substantially successful in its appeal and the matter could and should have been addressed through communication prior to a March 13, 2009 "decision" or immediately thereafter if the appropriate form allowed for same (ie. "informal mediation") or time for "reconsideration" by "decision maker";
- (b) no cost order is necessary or warranted and in fact there is no jurisdiction for same in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

this 21<sup>ST</sup> day of January, 2010.A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

David G. Thwaites