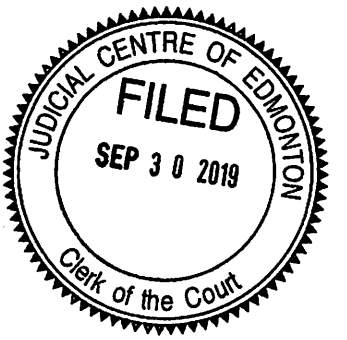


# Court of Queen's Bench of Alberta

**Citation: Anderson v Alberta (Attorney General), 2019 ABQB 746**

**Date:**
**Docket:** 0803 06718
**Registry:** Edmonton

Between:

**Germaine Anderson on her own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No 6 and Beaver Lake Cree Nation**

Plaintiff/Applicant

- and -

**Her Majesty the Queen in Right of the Province of Alberta and the Attorney General of Canada**

Defendants/Respondents

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**Reasons for Decision of the Honourable Madam Justice B.A. Browne**

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## Introduction

[1] This is an application by the Beaver Lake Cree Nation (Germaine Anderson on her own behalf and on behalf of the Beaver Lake Cree Nation beneficiaries of Treaty No. 6) ("Beaver Lake") for an order of advanced costs in the sum of $5 million to allow them to proceed with their Statement of Claim (filed in 2008) against Canada and Alberta. The litigation deals with the

cumulative effects of the "taking up" of land in the Beaver Lake traditional territory and the damage done thereby on the way of life of the members of the Beaver Lake Cree Nation.

[2] Canada and Alberta resist the claim for advanced costs on the basis that Beaver Lake has funds available that can be allocated for legal fees and that the circumstances do not justify this extraordinary remedy.

**The Litigation**

[3] It is 10 years since Beaver Lake filed its Statement of Claim. Since then there have been a number of applications and appeals regarding the extent of the claim, amendments of the Statement of Claim, eligibility of lawyers from outside the country to represent Beaver Lake, and production of documents. Statements of Defence have been filed.

[4] Beaver Lake has spent approximately $3 million on legal fees to date.

**Law on Advanced Costs – Okanagan and Little Sisters**

[5] An advanced costs decision is ultimately discretionary. Courts must be mindful of the democratic implications of using public funds to source private litigation. There is a high threshold of accountability for the authorization of spending of public funds through courts rather than through the legislature or the government bureaucracy.

[6] The criteria an applicant must fulfil to obtain an interim award of costs are set out in ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71, [2003] 3 SCR 371 [***Okanagan Indian Band***], ***Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 SCR 38 [***Little Sisters***].

[7] In ***Okanagan Indian Band***, the Court explained that a court may award interim costs when a party demonstrates impecuniosity, a meritorious case, and issues of public importance (at paras 40-1):

> With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — *in short, the litigation would be unable to proceed if the order were not made.*
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are

> established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order. (emphasis added)

[8] Even if all the criteria are met, there is no right to interim costs. The court has discretion whether to grant an order for interim costs, or consider other methods to facilitate the hearing of the case depending on its assessment of the individual circumstances of the case.

[9] The Court in ***Little Sisters*** elaborated on the approach to be followed (at paras 36, 38-42):

> *Okanagan* was a step forward in the jurisprudence on advance costs -- restricted until then to family, corporate and trust matters -- as it made it possible, in a public law case, to secure an advance costs order in special circumstances related to the public importance of the issues of the case (*Okanagan*, at para. 38). In other words, though now permissible, public interest advance costs orders are to remain special and, as a result, exceptional. These orders must be granted with caution, as a last resort, in circumstances where the need for them is clearly established. The foregoing principles could not yield any other result. If litigants raising public interest issues will not always avoid adverse costs awards at the conclusion of their trials, it can only be rarer still that they could benefit from advance costs awards. An application for advance costs may be entertained only if a litigant establishes that it is impossible to proceed with the trial and await its conclusion, and if the court is in a position to allocate the financial burden of the litigation fairly between the parties.
>
> ...
>
> It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray JA pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.
>
> First, the injustice that would arise if the application is not granted must relate both to the individual applicant and to the public at large. This means that a litigant whose case, however compelling it may be, is of interest only to the litigant will be denied an advance costs award. It does not mean, however, that every case of interest to the public will satisfy the test. The justice system must

> not become a proxy for the public inquiry process, swamped with actions launched by test plaintiffs and public interest groups. As compelling as access to justice concerns may be, they cannot justify this Court unilaterally authorizing a revolution in how litigation is conceived and conducted.
>
> Second, the advance costs award must be an exceptional measure; it must be in the interests of justice that it be awarded. Therefore, the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation. Finally, different kinds of costs mechanisms, like adverse costs immunity, should also be considered. In doing so, courts must be careful not to assume that a creative costs award is merited in every case; such an award is an exceptional one, to be granted in special circumstances. Courts should remain mindful of all options when they are called upon to craft appropriate orders in such circumstances. ...
>
> Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.
>
> Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse - - or another private party -- takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.

[10] An award for interim costs is not designed to address all of the access to justice problems that challenge the modern legal system. In ***Little Sisters***, the Court stated (at para 5):

> ... This Court's ratio in *Okanagan* applies only to those few situations where a court would be participating in an injustice — against the litigant personally and against the public generally — if it did not order advance costs to allow the litigant to proceed.

[11] Each of the requirements of impecuniosity, meritorious case, and issues of public importance are "absolute requirements": ***Little Sisters*** at para. 37. A party must convince the court of each requirement separately.

[12] These principles were reiterated in ***R v Caron***, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-39 [***Caron***].

## ANALYSIS

### A. Prima Facie Merit

[13] For the purposes of this application only, both Defendants concede that Beaver Lake has a *prima facie* meritorious claim.

### B. Uniqueness of the Claim – Public Importance

[14] The SCC has stated that almost all constitutional litigation concerns "matters of public importance": ***Carter v Canada (Attorney General)***, 2015 SCC 5, [2015] 1 SCR 331 at para 137. The SCC has acknowledged that novel issues regarding the interpretation of Aboriginal and Treaty rights and the infringement of rights are clearly issues of significant public importance: ***Okanagan Indian Band*** at para 45. Further, in ***Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 SCR 388, the SCC stressed (at para 1):

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.

[15] In accord, see ***Beckman v Little Salmon/Carmacks First Nation***, 2010 SCC 53, [2010] 3 SCR 103 at para 10 and ***Manitoba Metis Federation Inc v Canada (Attorney General)***, 2013 SCC 14, [2013] 1 SCR 623 at para 66.

[16] Canada disputes the importance of Beaver Lake's claim, submitting that the cumulative effects of development on Treaty rights are already being addressed and that many of the issues respecting development could be more expeditiously resolved through other means such as judicial review of regulatory decisions. While Canada's submissions may have some validity, they cannot address the heart of Beaver Lake's claim, relating to the interpretation of Treaty No. 6, its alleged infringement, and the consequences of such infringement. I am satisfied that Beaver Lake's claim meets the aspect of public importance.

[17] Beyond this, both Defendants dispute the uniqueness of the claim. There are presently two outstanding cases that will deal with roughly similar issues to those raised in the Beaver Lake litigation. The Blueberry River First Nation (BC - Treaty No. 8), Yahey v British Columbia (S151727), case may go to trial in 2019. The status of the Carry the Kettle First Nation (SK – Treaty No. 4) (QBG 3225), case is unclear. Both of those cases may address the issue of cumulative effect in the context of the interpretation of the numbered Treaties entered into in Western Canada.

[18] The fact that other cases raise similar issues does not mean that Beaver Lake's case should not continue. It may mean that there will be some guidance or some proposed settlement regarding the issues once those matters are determined, or they may take guidance from the Beaver Lake case if it concludes first. Besides, the same wording was not used in all the

numbered Treaties and different Indigenous peoples may have different oral traditions respecting the meaning of the Treaties, so that the Blueberry River First Nation and Carry the Kettle First Nation cases may be distinguishable from Beaver Lake's. In any case, the fact there is parallel litigation does not mean the issues raised in the Beaver Lake claim have been resolved in *previous cases*. I am satisfied that Beaver Lake's claim meets the aspect of uniqueness.

### C. Impecuniosity

[19] Impecuniosity means that it would be impossible to proceed with the litigation absent the order of costs.

[20] The threshold for proof of impecuniosity is high. The party must demonstrate it is "impossible" to proceed with the litigation without an order for interim costs. An order for interim costs is a last resort to prevent an injustice for the party and the public in general. It is not to be used as a "smart litigation strategy": see ***Little Sisters)*** at para 71.

[21] A party seeking such an extraordinary remedy is required to make full and transparent disclosure of its assets, expenses, ability to raise or borrow monies, and ability to obtain counsel, and the likelihood of a contingency fee agreement and an estimate of the costs it requires to fund the litigation: see ***LC v Alberta***, 2017 ABQB 93 at paras 37, 75 [***LC***], leave to appeal denied, 2017 ABCA 133, leave to appeal denied, 2017 CanLII 75046 (SCC) and ***Chief John Fletcher v Canada (Attorney General)***, 2011 ONSC 5196 at paras 41-7 [***Chief John Fletcher***], leave to appeal denied, 2012 ONSC 2701 (Div Ct).

[22] One final factor to consider. In ***Okanagan Indian Band***, the evidence revealed that the Bands were all in extremely difficult financial situations; they had no way to raise the money needed for the litigation and even if they did, they faced many more pressing needs which would take priority over funding the litigation (at paras 4-5). Likewise, in ***Keewatin v Ontario (Minister of Natural Resources)*** (2006), 32 CPC (6th) 258, 2006 CanLII 35625 at para 84, (Ont SCJ) [***Keewatin***], the Court was reluctant to force the First Nation to choose between attempting to provide for the basic necessities of life that most citizens take for granted, and pursuing its litigation. Alberta submits that ***Keewatin*** should be viewed with caution since it was rejected in ***Pasqua First Nation v Canada***, 2017 FC 655 [***Pasqua First Nation***]. This is not quite accurate. ***Pasqua First Nation*** considered the approach adopted in ***Keewatin*** and found the applicant First Nation did not meet it: the Court was not satisfied that the applicant had exhausted all alternative sources of funding for the litigation, including its trust funds and the possibility of a contingency fee in the context of a claim for damages in the amount of $200 million (at paras 21, 29, 31). Further, ***Keewatin*** was cited with approval by this Court in ***LC*** at paras 20 and 74, albeit on a different, but related point (not appropriate for few wealthy members to exhaust all of their assets to fund the claim for the benefit of the entire group).

## Findings of Fact

[23] Much of the attention in this hearing was devoted to Beaver Lake's financial circumstances and its ability to fund this litigation. Canada and Alberta both argue that Beaver Lake has substantial assets which can be used to fund this litigation, and that advanced costs should not be granted until those funds are exhausted.

[24] The Defendants raised concerns about the completeness and transparency of Beaver Lake's disclosure of its financial information. I am satisfied that Beaver Lake has now provided

detailed and complete financial information that allows me to deal with this issue without hesitation.

[25] I am satisfied that Beaver Lake is not under any imminent threat of third party or co-management or insolvency.

[26] I am satisfied that a contingency fee arrangement is not a practical method of paying legal fees in cases like this where the disbursements are high and the primary claim under the Statement of Claim is for a declaration and the claim for monetary relief is secondary: see in accord, ***LC*** at paras 77, 81 and ***Chief John Fletcher*** at para 45.

[27] Beaver Lake has been paying $25,000 per month towards legal fees for this litigation ($300,000 per annum).

[28] Beaver Lake has asked for $5 million to take the case to the end of trial, and subsequent to the filing of material, they filed a detailed litigation budget which I am satisfied is appropriate. But, I also recognize that it is almost impossible to predict with certainty what the legal fees for a particular action might be.

[29] Beaver Lake's financial resources come primarily from 3 streams: i) Government funding for a variety of programs such as health, education, social assistance, housing and infrastructure, and economic development; ii) Impact Benefit Agreements (IBAs) negotiated with industry; and iii) various other revenue streams (i.e., commercial enterprises and fund-raising).

[30] It is undeniable that Beaver Lake is an impoverished community with substantial deficits in housing and infrastructure and with high levels of unemployment and social assistance; these are all pressing needs which demand solutions.

[31] Beaver Lake has frequently been in a deficit position, but recently it seems to have started turning the corner financially. Beaver Lake's net operating surplus last year was almost $1 million, which was substantially depleted by the purchase of capital assets and the repayment of loans. In 3 of the last 4 years, Beaver Lake's financial statements have shown a surplus. In addition, Beaver Lake's current net financial assets are $971,000.

[32] At this stage, I will review some of the important aspects of Beaver Lake's financial situation as it relates to the issue of impecuniosity.

### *A. Government of Canada Program Funding*

[33] Beaver Lake receives a significant amount of program funding - approximately $7-8 million annually - from the Federal government, primarily from Indigenous Services Canada, Health Canada and Human Resources Development Canada. These funds are restricted to the specific programs that are funded and therefore are not available to be used for financing litigation. In 2018, there was a surplus in a number of areas and that funding will be deferred to the next year. In the context of Beaver Lake being an impoverished community, it is surprising that funds are not spent completely in each fiscal year. Nonetheless, those deferred funds cannot go into general revenue or be used to fund this litigation.

### *B. Alberta Government Program Funding*

[34] Beaver Lake has received program grants from the Provincial Government, such as the Alberta Economic Partnership Program, Alberta Business Investment Fund, Alberta Indigenous

Community Energy Program and the Alberta Indigenous Solar Program. These funds are restricted to the specific programs that are identified.

[35] In 2017, Beaver Lake received a contribution of $135,000 to assist in their consultation efforts respecting development projects. They received further consultation-related contributions in regard to specific projects: development of the North Saskatchewan Regional Plan ($100,000 and a further $24,000); and Lower Athabasca Regional Plan ($24,000). As will be discussed below, IBAs supplement the cost of these consultation efforts. For the most part, none of those funds can be used to fund this litigation.

### *C. FNDF (First Nation's Development Fund) (Casino monies)*

[36] This is funding received from Alberta to be used for various community needs. The source of the Fund is revenues generated from slot machines operated in First Nations casinos. The amount of funding varies every year. Approximately $600,000 was received in 2018, slightly higher than in previous years. This money can be used for housing, community development, cultural programs and employment programs. It cannot be used for legal fees directly, but it can serve to free up resources allocated to priority projects and those funds can then be used to pay legal fees.

### *D. Beaver Lake Cree Nation Heritage Trust*

[37] The Heritage Trust was created by Beaver Lake in 2014 with Peace Hills Trust. The purpose of the Trust is to receive moneys from entities carrying on projects on Beaver Lake's traditional lands, usually by way of IBAs. IBAs provide three types of funding: (1) Consultation capacity, (2) Community investment, and (3) Negotiation funding. The Trust has a balance of $2.2 million. Beaver Lake expects to receive $1.5 million over the next three years from these IBAs, perhaps with some adjustment for the fluctuation in the economy. No funds have been withdrawn from this Trust.

[38] There are strict restrictions on this Trust, which were negotiated between Peace Hills Trust and Beaver Lake. The funds can only be used for community development programs and services listed in the Trust Agreement; the annual withdrawal is also capped. Beaver Lake has made no efforts to renegotiate the restrictions to allow the money to be used for litigation.

[39] Beaver Lake identified 17 active IBAs, and one other significant IBA is under negotiation. Monies received from these entities are generally deposited into the Heritage Trust. Consultation-related funds are sometimes paid directly to the Beaver Lake Intergovernmental Affairs department.

[40] Individual IBAs generally specify the purposes to which monies can be put. Beaver Lake has made no efforts to renegotiate the terms of any IBA to allow the money to be used for litigation.

[41] I am satisfied both that the Heritage Trust is subject to strict conditions on the purposes for which funds can be used and that IBA monies are subject to similar conditions. In particular, I am satisfied that IBA money that is paid for community development should not be used for litigation. Incidentally, it is also conceivable that if IBA money was used to fund this or other litigation, then it could put a chill on the willingness of entities to enter into further IBAs with Beaver Lake in the future.

### *E. IOGC (Indian Oil and Gas Canada) Trust*

[42] The present balance in this Trust fund is $2.1 million, which is ongoing revenue from oil and gas on the Beaver Lake Reserve; the Reserve has 19 active and 55 inactive oil wells. There are no restrictions on the purposes to which this money can be put, though accessing funds from this Trust requires Ministerial permission. In the past, Beaver Lake requested permission to access $600,000 to cover salaries ($400,000) and urgent infrastructure projects ($200,000). In fact, approximately $1.6 million was withdrawn from this Trust in the past five years. Beaver Lake could ask the Minister to release funds from this Trust for this litigation, but they have chosen not to ask.

### *F. Pimee Well Servicing LP and Seven Lakes Oilfield Services LP- Joint Ventures*

[43] These two enterprises were created to encourage employment for First Nation members. Multiple First Nations are involved in these joint ventures. The financial documents indicate that Beaver Lake's equity in them may be worth $4.8 million. Beaver Lake has received small dividends from time to time of up to $20,000. There are strict restrictions requiring the consent of all shareholders to change structure, sell shares or provide advances. Beaver Lake has not sought an advance from these enterprises. I am satisfied that these investments have no liquidity at this time.

### *G. IAIR (Intergovernmental Affairs & Industrial Relations) Funding*

[44] At present, there is a balance of $1.4 million in this account. This money is received from the oil and gas industry and various contracts for road clearing, well inspection, and water supply contracts. SevGen negotiates these contracts on behalf of Beaver Lake. They were paid $250,000 for their services in 2018. The money received has no restrictions. Previous legal and consultant fees have been paid out of this account. Legal fees in this litigation of $600,000 plus have been paid out of this account. This money can be used to continue to fund this litigation.

### *H. RAVEN (Respecting Aboriginal Values & Environmental Needs) Trust*

[45] In recent years, RAVEN, a non-profit charitable organization that provides financial resources to assist Indigenous peoples across Canada, has raised $1.3 million towards Beaver Lake's legal fees in this matter. RAVEN has indicated that they are experiencing donor fatigue and do not expect to raise that kind of money over the near or far future. In 2018, they raised almost $150,000. They may be a funding source for future litigation, but I am satisfied that they will not raise funds at the same level as in the past.

### *I. Miscellaneous other revenue*

[46] Beaver Lake has various other unrestricted income sources: property tax assessments ($52,698), ATCO Pipeline contract ($301,000), Busy Beaver Convenience Store & Gas ($145,292) and Spruce Point Resort (nil).

### *J. Summary re: revenue*

[47] To recap, Government of Canada and Government of Alberta program funding is not available to finance this litigation. Neither are the funds in the Heritage Trust & Peace Hills Trust. Beaver Lake's investments in Pimee Well Servicing LP and Seven Lakes Oilfield Services LP have no liquidity and are not available to finance this litigation.

[48] FNDF funds received from Alberta can only be used for specified community needs. Approximately $600,000 was received in 2018. This money can free up other moneys to pay legal fees.

[49] RAVEN has raised $1.3 million towards Beaver Lake's legal fees in this litigation, but they are experiencing donor fatigue and are unlikely to be able to continue to contribute at the same level over the near or far future.

[50] IOGC Trust is $2.1 million. Beaver Lake can ask for permission to use these funds for this litigation, but they have chosen not to do that.

[51] Beaver Lake's IAIR funds total $1.4 million. These funds have no restrictions and can be used to pay for this litigation.

***K. Beaver Lake Debts and Future Claims***

[52] Beaver Lake carries some significant debt. The CMHC long-term debt is $1.3 to $1.5 million.

[53] Beaver Lake has five law firms under retainer to negotiate various claims and law suits. The cost of legal fees to Beaver Lake in 2018 was $206,000, including only $58,000 to counsel in this matter (substantially less than the $300,000 in previous years).

[54] A lawsuit by Waipiwin Corporation Inc. resulted in a settlement in the sum of $2.5 million dollars, which requires annual payments from Beaver Lake to Waipiwin of $416,667. That entire settlement will be paid in full as of 2021. Thereafter, those funds would be available.

[55] Beaver Lake has lawyers under retainer to negotiate an Agricultural Benefit claim (Treaty No. 6) with Canada. It is estimated that Beaver Lake may receive $35 to $65 million if that claim is settled. No timeline or assurance of victory is given for that settlement.

[56] Beaver Lake has brought a claim before the Specific Claims Tribunal regarding TopGas (take or pay gas financing charges) and OMAC (operating, marketing and administrative charges) with respect to the calculation of royalties on-reserve oil and gas production. This claim may be worth $1.2 million.

[57] Beaver Lake is defending a defamation suit brought against some of its council members.

[58] Beaver Lake has not applied to any banks for loans to support this litigation using some of the resources noted that might be available as collateral. I understand that low-interest loans may be available through First Nations Finance Authority. Beaver Lake is eligible to apply, but the funds must be used for community development and infrastructure. However, that might free up other monies.

***Conclusion re: Impecuniosity***

[59] Beaver Lake argues that the monies in various Trust accounts are for the future generations of the nation, but at the same time they argue that the litigation is for the future generations of their nation.

[60] As mentioned, Beaver Lake is an impoverished community with a number of pressing infrastructural and social needs.. It has only recently started to turn the corner financially as they accumulate some funds from various sources. As summarized above, the vast majority of Beaver Lake's financial assets are not available to fund this litigation. The remainder, which totals more

than $3 million, is available, but funding this litigation must be weighed against the community's other pressing needs.

[61] There may have been delays in the provision of Beaver Lake's financial information, but it has now been provided and I am satisfied that it is as complete as it can be. And in any event, I must decide the application based on the financial information provided.

[62] I am satisfied with the litigation budget that Beaver Lake has submitted. It is detailed and complete, but is of course based on some level of cooperation from the other litigants.

[63] Beaver Lake has funded this litigation for 10 years through its own sources. It cannot fund the litigation at the rate required to bring it to trial. I am satisfied that it would be impossible for this to proceed if the requested order were not made. Accordingly, I am satisfied that the final part of test is met. A resolution of this matter is important and compelling within a reasonable period of time as the cumulative effects continue to worsen over time.

**Conclusion**

[64] I am satisfied that all three elements of the ***Okanagan/Little Sisters*** test have been met. However, that does not resolve the issue since my discretion comes into play once all the criteria have been met.

[65] I acknowledge that an order of advanced costs is an extraordinary remedy, not "a general funding mechanism for important cases" (***Little Sisters*** at para 94). Further, this remedy should be granted only if "it would be contrary to the interests of justice to deny the advanced cost application" (***Caron*** at para 37; see also ***Deans v Thachuk***, 2005 ABCA 368 at para 41). The case before me is sufficiently extraordinary that I should exercise my discretion to grant the application. In my view, it would be manifestly unjust to either compel Beaver Lake to abandon its claim or to force it into destitution in order to bring the claim forward.

[66] Beaver Lake leadership has until now had the challenge of managing poverty. Recently, this First Nation is beginning to have some financial reserves. The philosophy of the leadership and of the people of Beaver Lake must adopt to the new reality. They can now begin to address some of the deficits that characterize their community. Meanwhile, they should be planning how to best devote the Trust funds for the benefit of future generations. Regardless, I am unwilling to force Beaver Lake leadership to choose between pursuing this litigation and attempting to provide for the basic necessities of life that most citizens take for granted.

[67] As mentioned, Beaver Lake has been devoting $300,000 per year to this lawsuit and that contribution shall continue. Canada and Alberta will each provide an equal amount per year to Beaver Lake ($300,000 to the credit of Beaver Lake's legal fees), until the trial is concluded or the litigation resolved. Clearly, if Beaver Lake receives compensation from its outstanding claims or otherwise receives a windfall, then this order shall be revisited. I am hopeful that the parties can sort out the details of the accounts for legal services and proportionate payments. Transparency is required from the parties.

[68] Since my appointment as case management judge, I have encouraged the parties to explore the possibility of resolving all or some of the issues raised in this lawsuit through some form of alternative dispute resolution. A well negotiated settlement can save the parties time and money and may provide some important steps along the road to reconciliation.

[69] If the parties cannot agree on the costs, then they may be spoken to within 30 days after the release of this decision.

Heard on the 21st day of February, 2019.
**Dated** at the City of Edmonton, Alberta this 30th day of September, 2019.

DA Sulyma for

**B.A. Browne**
**J.C.Q.B.A.**

**Appearances:**

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Cynthia Dickens and Courtney Davidson, Department of Justice Canada
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