Date: 20080502

Docket: T-363-85

Citation: 2008 FC 574

Ottawa, Ontario, May 2, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

ALFRED JOSEPH, CHIEF COUNCILLOR, WALTER JOSEPH and JACK SEBASTIAN, BAND COUNCILLORS ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE HAGWILGET INDIAN BAND, HAGWILGET BAND AND HAGWILGET BAND COUNCIL

Plaintiffs

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendant

REASONS FOR ORDER

Introduction

[1] This is a motion brought by the plaintiffs for an interim or advanced costs order. The power to make such an order has been sanctioned by two recent Supreme Court of Canada decisions[1] but those decisions themselves and the exercise of ordinary prudence and common sense both dictate the exercise of extreme caution. To require a defendant, before any finding of legal right on the plaintiffs' part, to fund, on a possibly unrecoverable basis, legal proceedings against itself is a drastic and unusual step to be taken only on the imperative dictates of the interests of justice.

Background

[2] The plaintiffs are the representatives of the Hagwilget Indian Band. The Band is made up of members of both the Gitxsan and Wet'suwet'en people. Those peoples, following protracted litigation, are now engaged in treaty negotiations with Canada and British Columbia but those negotiations do not deal directly with the matters alleged and damages claimed in the present action.

[3] Hagwilget is an Indian village located in northern British Columbia on the Bulkley River (the River) a tributary of the Skeena. It is upstream from the Village of Hazelton. Sometime in the past, apparently around 1820, a rockslide partially blocked the River canyon beside the present location of the village. As a result of the obstruction, the salmon (Sockeye and Cohoe are the principal species mentioned, but there may have been others) that run up the river to spawn every year could no longer move upstream as readily as before and a natural fishery was created along the banks adjacent to the places where the fish had to wait until they could get past the obstruction.

Many people and groups from both first nations (the Gitxsan and Wet'suwet'en) traveled to this fishery in the summer to fish. The fishery was an integral part of the identity of the Hagwilget people and their culture. This included in particular the smoking and preserving of fish in the traditional manner and the holding of feasts where the traditional songs would be sung, the regalia worn and the histories told.

[4] In 1938 the Hagwilget Indian Band Reserve (the Reserve) was formally set aside for the Band by the Federal Government although it seems clear that both the village and the Band had *de facto* existed for many years before that. The territory of the Reserve was transferred to Canada from British Columbia; however, although this is disputed, the river bed and River seem to have been excluded from the transfer and to have remained the territory of the Province. There is evidence that the exercise of the fishery from the banks was the very raison d'être for the existence of the village and, when it was created, the reserve.

[5] In the 1950s the defendant sent scientists and engineers to study and consider the impact of the rocks on the fishery in the River. They decided that removal of the rocks from the canyon was essential although the plaintiffs disputed and still dispute the validity of this conclusion. In the spring of 1959 the Department of Fisheries blasted the rocks out of the canyon. The plaintiffs objected to the blasting which seems to have done more than simply removed the obstruction but to have so deepened the River that there is no longer any resting place for salmon in the canyon. It

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[1] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.R. 371 (QL) [*Okanagan*] and *Little Sisters Books and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 S.C.R. 38 (QL) [*Little Sisters*]

appears to be undisputed that the result was the total destruction of the fishery and to this day there is no fishing in the canyon.

[6] In the following years a number of promises were made by officials that the loss of the plaintiffs' fishery would be remedied; there were suggestions that an alternative site on the River might be found even though there were no suitable places within the reserve and the exercise of a fishery on any other site would have brought the plaintiffs into conflict with others who already had or claimed such rights. There was a promise to supply boats, motors and nets so as to support a different fishing method but these came to nothing. There were spasmodic efforts to buy and supply fish from other sources but on at least one such occasion it is claimed that the fish were “spent” and thus of no use for either eating or smoking. At one point the government even seems to have supplied canned salmon to the village and although this may have met their food requirements it is difficult to see how it could be thought to be a substitute for their cultural heritage.

The Litigation

[7] The present action was started in 1985. Some documentary discovery and other preliminaries were conducted but the action was formally placed in abeyance in 1997 while the plaintiffs had recourse to the “specific claims” process. In 2001 the legal analysis required by that process was completed but some two years later the plaintiffs were advised that they could not expect their claim to be resolved in any less than a further 20 years. They were also told that this process could not be expedited. Since it was then a virtual certainty that by the time the claim could be resolved any witnesses to the events giving rise to the claim would no longer be available to testify the plaintiffs brought the litigation out of abeyance and moved to have it specially managed. I

was appointed as case management judge and my first active involvement with the case was to hear and dismiss a motion to strike the action brought by the Crown some 20 years after the case had been started. An appeal of that decision by the Crown was brought but was discontinued some two years later. In 2006 at the request of the parties a Court supervised settlement process was commenced and has continued spasmodically since that time. There have, however, been no substantive negotiations because the Crown's representatives have yet to obtain a negotiating mandate. Concurrently with the exploratory settlement talks, the pre-trial stages of the action have continued including discovery and the taking of the evidence by videography of a number of elderly witnesses. As matters now stand, I estimate that the trial should take place in the early summer of next year (2009). Provisional arrangements are being made to name a trial judge and provide courtroom facilities at that time. Pending the disposition of this motion, I have put those arrangements on hold.

The Law

[8] In *Okanagan* (above) an Indian band had conducted logging operations on land in which they claimed aboriginal rights. When they disobeyed a Stop Work order they were summoned into court. The Supreme Court, after noting that the Band were not the ones who had started court proceedings said, in a majority decision:

> **38** The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are

of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 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.
>
> **41** 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.

[9] *Little Sisters* (above) represents the other end of the rather narrow spectrum of cases where advance or interim costs orders may be justified. There the appellant, having won a previous Supreme Court challenge to a specific seizure of certain books, sought a more general review of Customs practices with regard to works with an homosexual orientation. The Court explained the limitations (inherent in my view in any event) in its decision in *Okanagan*. The majority said:

> **5** The fact that the appellant's claim would not be summarily dismissed does not suffice to establish that interim costs should be granted to allow it to proceed. That is not the proper test. Quite unfortunately, financial constraints put potentially meritorious claims at risk every day. Faced with this dilemma, legislatures have offered some responses, although these may not address every situation.

Legal aid programs remain underfunded and overwhelmed. Self-representation in courts is a growing phenomenon. *Okanagan* was not intended to resolve all these difficulties. The Court did not seek to create a parallel system of legal aid or a court-managed comprehensive program to supplement any of the other programs designed to assist various groups in taking legal action, and its decision should not be used to do so. The decision did not introduce a new financing method for self-appointed representatives of the public interest. 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.

…

36 *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.

37 The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

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.

In analyzing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.

38 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 J.A. 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.

39 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.

40 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. Also, they should not assume that the litigants who qualify for these awards must benefit from them absolutely. In the United Kingdom, where costs immunity (or "protective orders") can be ordered in specified circumstances, the order may be given with the caveat that the successful applicant cannot collect anything more than modest costs from the other party at the end of the trial: see *R. (Corner House Research) v. Secretary of State for Trade and Industry*, [2005] 1 W.L.R. 2600, [2005] EWCA Civ 192, at para. 76. We agree with this nuanced approach.

41 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.

42 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.

> **43** For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.
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> **44** A court awarding advance costs must be guided by the condition of necessity. For parties with unequal financial resources to face each other in court is a regular occurrence. People with limited means all too often find themselves discouraged from pursuing litigation because of the cost involved. Problems like this are troubling, but they do not normally trigger advance costs awards. We do not mean to minimize their unfairness. On the contrary, we believe they are sufficiently serious that this Court cannot purport to solve them all through the mechanism of advance costs awards. Courts should not seek on their own to bring an alternative and extensive legal aid system into being. That would amount to imprudent and inappropriate judicial overreach.

[10] In a separate concurring opinion Chief Justice McLaughlin cast some further light on the precise limits of the rule laid down in *Okanagan*:

> **85** Again, in applying the test, the Court, *per* LeBel J., stated:
>
> > 1. Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial

> without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. [Emphasis added; para. 46.]

86 However, in setting out the test in the context of public interest litigation at para. 40 of *Okanagan*, the third condition of special circumstances was expressed in terms of public interest without express reference to special circumstances. The third branch is described there as follows: "3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases."

87 Notwithstanding the restricted formulation of the third requirement of the test at para. 40 of *Okanagan*, it is clear from the overall tenor of the reasons in *Okanagan* that the Court did not intend to depart from the common law requirement that special circumstances be established as a pre-condition of interim costs. The test for interim costs in public interest litigation should not be less exacting than the test for interim costs generally. Indeed, there is no reason why they should not be the same. In applying the test, as discussed, the Court confirmed that the search is not merely for a matter of public interest, but for the very special circumstances required to justify this extraordinary order.

88 I therefore proceed on the basis that the three criteria for an order for advance costs are: (1) impecuniosity; (2) a meritorious case; and (3) special circumstances making this extraordinary exercise of the court's power appropriate. This formulation differs from that used by my colleagues Bastarache and LeBel JJ. in that the third condition is not merely that the matter be one of public interest, but that it constitute special circumstances in the sense indicated. The third requirement of special circumstances has been found in cases involving trusts, family maintenance, corporate and bankruptcy matters, and, in *Okanagan*, in cases involving issues of public importance. However, public importance is not enough in itself to meet the third requirement. The ultimate question is whether the

> matter of public interest rises to the level of constituting special circumstances. As with all equitable orders, the order is in the court's discretion, provided the conditions are made out. However, absent these conditions, it cannot be made.

[11] Without in any way minimizing the subtle differences between the various criteria set out in the opinions delivered in both *Okanagan* and *Little Sisters*, it is my view that they are not irreconcilable in their application to the facts of this case. For simplicity I shall refer to them hereafter as “the Okanagan requirements”.

The Okanagan Requirements

1. Impecuniosity

[12] The plaintiffs have unaided supported this litigation for well over 20 years. They are a small band with virtually no resources and dependant upon funds provided, and closely controlled, by the government. They have unsuccessfully sought funding from a number of sources, including some suggested by the Crown itself in its response to the present motion.

[13] From the end of 2003, when steps to reactivate the present action were started, down to the bringing of this motion the plaintiffs have paid almost $83,000 in legal fees and owe their counsel a further sum of over $140,000. They are deeply in debt and have no sources of credit.

[14] Their current budget is in deficit. Late last year the Band Council offices had to be closed for over three weeks because of a lack of funds. In my view there is simply no doubt that unless they receive help of some sort they will be unable either to prosecute this action through to trial or even to pursue settlement negotiations even assuming that the government finally makes up its mind

to give its representatives a mandate to make some kind of an offer and to enter into settlement discussions.

[15] The first of the Okanagan requirements is clearly met.

2. Merit

[16] This requirement of Okanagan is more problematical. Clearly it is not enough that the defendant was unsuccessful in attempting to have the action struck out on a preliminary motion for that threshold is very low. Even placing the bar somewhat higher, I am nonetheless satisfied that the claim is serious and that there is, at the very least, a reasonable possibility of success notwithstanding that there are substantial difficulties in the plaintiffs' way. Not the least of these are questions relating to whether or not the plaintiffs are truly the beneficiaries of the aboriginal right which they claim and whether the alleged ownership of the river bed by the provincial Crown is an insuperable obstacle to them. I think that it would be wrong for the Court at this preliminary stage to get into a detailed assessment of the plaintiffs' likelihood of success since that could only be a source of difficulty both to the parties and to the Court itself at subsequent stages. In my view it is enough for me to find, as I do, that they have a reasonable chance of obtaining at least some of what they seek.

[17] Ironically, it is in large measure the questions raised by the Crown itself in its defence and to which I have just referred which give much substance to the plaintiffs' argument that the case is of great public interest and importance, whose outcome whichever way it goes, will be significant in the development of Canada's relations with its aboriginal peoples.

3. Public Interest

[18] The issues raised by the plaintiffs claim are, in my opinion, of great importance not only, and obviously, to the plaintiffs themselves but also to the Crown and to other aboriginal peoples. Starting with those which I have already mentioned those issues include:

a) Whether a reserve based aboriginal right to fish can be asserted in waters which do not belong to Canada and do not form part of the reserve itself.

b) Whether such a right enjoys constitutional protection.

c) Whether British Columbia, as the alleged owner of the river bed, is a necessary party.

d) Whether, as a consequence of the foregoing, this Court is without jurisdiction.

e) Whether the plaintiffs are the proper collectivity to assert the claimed aboriginal right to a fishery.

f) Whether a claim for cultural loss is cognizable at law and, if so, how it should be valued.

[19] This list is by no means intended to be exhaustive. Obviously the case raises many other questions of considerable public interest. The issues I have listed above are, however, in my view, both in combination and to a lesser extent individually, unique to this case and, as far as I have been made aware, have not as yet been resolved in other cases, nor are likely to be so at an early date. Collectively they meet the third Okanagan requirement.

Other Relevant Factors and "Special Circumstances"

[20] As *Little Sisters* makes clear, the fulfillment of the three listed conditions is necessary but not sufficient to justify an advance costs order. The Court must examine all the circumstances of the case and determine not only if its importance is sufficiently "special" to support an extraordinary order of this sort, but also if there are any other factors which might militate for or against the granting of relief.

[21] Most important among these circumstances, I would above all note the quite extraordinary delays to which the plaintiffs have been put by the tactics of the Crown both before and after the launching of this litigation. Almost 50 years have passed since the blasting of the rocks and only a few members of the Band remain who can remember the fishery that once was theirs. For over 25 years the plaintiffs were continuously put off by a series of unkept and broken promises that the situation would somehow be remedied. The commission evidence of a former Indian Agent, and Crown witness A.E. Fry is particularly eloquent in this regard. Then, once the action was launched, the plaintiffs were "sidetracked" into the Special Claims process only to find out years later that that process was, if not a total dead end, an almost endless detour. The Crown now argues that it is proposing legislative changes to that process but that legislation, if and when it ever passes, may still include provisions which would exclude important parts of the plaintiffs' claim, notably those relating to cultural loss. In my view, the proposed legislation is too uncertain and hypothetical for me to give it serious consideration at this time. Even if it were adopted the new special claims procedure would be most unlikely to produce a result before this case does so.

[22] Even though the plaintiffs, unlike the Okanagan Band, were not forced into court proceedings, they cannot be said to have rushed into them with unseemly haste. In fact, in the

circumstances, if the plaintiffs were to assert their rights at all, they effectively had no choice but to resort to litigation and to do so timely so as to avoid possible defences of laches or limitation.

[23] Even once the action was re-activated and placed under special management the Crown brought a long-delayed motion to strike and, when that was dismissed, launched an appeal which it ultimately abandoned. And while I do not fault the Crown for engaging in tentative settlement discussions, I find it quite extraordinary that it is nowhere near to giving proper instructions and a mandate to counsel to enter into meaningful negotiations.

[24] In virtually all aboriginal rights cases the honour of the Crown is at stake, and that is certainly the case in this action as well. In the usual case, however, such honour is only raised in connection with the substance of the original right itself and its subsequent loss or diminution. Here, however, it seems to me that there are serious questions to be asked and answered concerning the actions of the Crown and its agents since the events complained of in the statement of claim.

[25] Another factor which I consider important is the fact that this claim does not concern the simple diminution or restriction of an alleged aboriginal right but its total destruction. Whether or not the fishery could ever be re-established is, I suppose, a matter for expert evidence but it seems to me significant that it has not been in the almost 50 years that have gone by in the interim.

[26] Also of importance in my view is the fact that the case is getting very close to trial. While things may still go wrong and the trial itself may go off the tracks, this litigation presents the best and speediest opportunity for an early resolution of this long-standing source of grievance.

[27] Finally, as noted above in the section on impecuniosity, the plaintiffs have since 2004 already spent or committed to spend on this action very significant sums of money which they can ill afford. The materials do not reveal how much they may have put out before that time but I think that I can safely assume that it was not negligible. Although the motion seeks total or partial reimbursement of moneys already paid or committed, it is my view that an advance costs order should only be prospective in nature. This means that, apart from the costs engaged on the present motion which I shall deal with separately, plaintiffs' counsel are *de facto*, and unwillingly, acting on a contingent fee basis with regard to the large amounts they are owed to date.

Conclusion

[28] I conclude from all the foregoing that this is one of those rare and exceptional cases where justice requires that the plaintiffs benefit from some sort of interim costs order. As both *Okanagan* and *Little Sisters* make clear, however, the precise nature of that order needs to be carefully crafted. I think that should in the first instance, be done by counsel for both parties working together and trying to make either a joint submission or, if that proves impossible, opposing proposals. As I have not heard detailed submissions on the matter I wish to make it clear that what follows is in no way a final determination on my part but simply an initial indication of the areas that the final order should cover:

1. Fees should be based on Tariff B.

2. Disbursements for more than routine expenses such as travel, etc. should be subject to prior approval. In particular no experts should be engaged without such approval.

3. The number of counsel should be limited and specified.

4. Accounts should be submitted on a periodic basis for approval by the Court (which might be done by a prothonotary or an assessment officer).

5. While I am doubtful that this is an appropriate case to order costs indemnity for the Crown, any amount paid as advance costs must of course be credited against any ultimate award of costs or damages made to plaintiffs.

6. Plaintiffs should continue to contribute to the costs of the litigation and the annual amount of such contribution must be specified.

[29] Finally, I propose to make an award of the costs of the present motion in a lump sum in favour of plaintiffs. While the amount should be set bearing in mind the provisions of Tariff B, I invite submissions from counsel as to the amount and manner of payment thereof.

[30] Pursuant to Rule 394, counsel for plaintiffs is directed to consult with counsel for the Crown and prepare a draft form of order for advance costs to be submitted to and discussed at a case management teleconference to be held as herein directed. The registrar shall communicate with counsel to fix a mutually convenient time for such teleconference at which time a schedule will also be established for submissions on the amount of the costs of this motion and any other outstanding matters.

"James K. Hugessen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-363-85
STYLE OF CAUSE:	ALFRED JOSEPH et al v. HER MAJESTY THE QUEEN as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
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