Supreme Court applies principles of reconciliation to advanced costs awards

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What you need to know

On March 18, 2022, the Supreme Court of Canada released its decision in *Anderson v Alberta (Attorney General)*, 2022 SCC 6, which considered the availability of advance costs awards to First Nations governments. In a rare unanimous decision, Justices Karakatsanis and Brown, writing jointly for the Court, held that Beaver Lake Cree Nation (Beaver Lake) could qualify for advance costs if it did not have sufficient resources to cover its legal fees, taking into account the First Nation's other "pressing needs."

The Court's decision represents a major shift towards improved access to justice for First Nations, who are often involved in lengthy, complex, and costly litigation. The decision highlights the Court's commitment to applying the law in a manner that furthers the principles of reconciliation.

Background

In 2008, Chief Germaine Anderson commenced litigation under s. 35 of the *Constitution Act, 1982* against the federal government and the Government of Alberta on her own behalf and as a representative of all Beaver Lake beneficiaries of Treaty 6 and of Beaver Lake.

The First Nation claimed that Canada and Alberta had violated their Treaty 6 promises and compromised Beaver Lake's ability to pursue its traditional way of life, including the First Nation's right to hunt and fish on their treaty lands, by improperly allowing Beaver Lake's traditional lands to be taken up for industrial and resource development.

The litigation is currently scheduled for a 120-day trial starting in January 2024. Given the protracted nature of land rights litigation, and having already spent approximately $3 million on legal fees and estimating that another $5 million would be needed to get through trial, Beaver Lake concluded it had insufficient financial resources and asked the Albert Court of Queen's Bench to order an advancement of costs from the defendants.

Despite finding that Beaver Lake had access to more than $3 million in unrestricted funds that could potentially finance the litigation, the case management judge nevertheless determined that Beaver Lake met the test for impecuniosity because it is an impoverished community with other needs to meet with those funds. The case management judge ordered the provincial and federal governments to contribute $300,000 each annually to the cost of the litigation. The Court of Appeal set aside this decision, concluding that the case management judge erred in finding Beaver Lake to be impecunious when it had resources, but was choosing to spend them on other priorities.

The unanimous decision

The issue considered by the Court, at its core, was how a First Nation government applicant can demonstrate impecuniosity when it has access to resources that could be used to fund the litigation, but claims it must devote those resources to other competing priorities.

The Court confirmed the test it had established in *Okanagan* that in order to qualify for an advance costs award, the applicant must satisfy three absolute requirements:

1. The applicant must be **genuinely unable to pay** for the litigation and have **no other realistic option** for bringing the issues to trial (the "impecuniosity test");
2. The claim to be adjudicated must be ***prima facie*** **meritorious** ; and
3. The issues raised must transcend the individual interests of the particular litigant and **be of public importance** .[1]

The Court's decision focused on the first element of the advance costs test: whether Beaver Lake genuinely could not afford to pay for the litigation.

While the threshold for impecuniosity is high, the Court was satisfied the test is sufficiently flexible to account for the realities facing First Nation governments and the goal of reconciliation. However, the Court expanded on how the courts should assess impecuniosity when dealing with a First Nation government. The Court considered the formulations of impecuniosity set out in *Okanagan* and *Little Sisters*, and then considered how to formulate the test where a First Nation says it "genuinely cannot afford to pay" or that it would be "impossible to proceed" because its financial resources must be allocated elsewhere.

Rejecting the approaches presented by the various interveners, including the proposal that a First Nation government should be presumed to be impecunious, the Court held that courts should take notice of the systemic and background factors affecting Indigenous peoples in Canadian society. This means that a First Nation's impecuniosity should be considered from the perspective of a government that sets its own priorities and is best situated to identify its most pressing needs.

The Court affirmed that a First Nation government is impecunious when its prioritization of "pressing needs" leaves it unable to fund public interest litigation. The Court made clear that in applying the test for impecuniosity in this context, a judge must be able to:

- identify the applicant's pressing needs;

- determine what resources are required to meet those needs;
- assess the applicant's financial resources; and
- identify the estimated costs of funding the litigation.

Application of the test

The Court considered the four parts of the test for impecuniosity on the basis that available resources must be allocated to other pressing needs.

1. Identify applicant 's pressing needs

The Court found that applicants with access to financial resources must prove that they genuinely cannot afford to pay for litigation because those resources are devoted to meeting other pressing needs.

Determining what amounts to a "pressing need" is a fact-driven exercise, recognizing that First Nations vary in governance structure and funding priorities and arrangements. When an applicant is a First Nation, courts should consider what amounts to a pressing need through the lens of reconciliation by looking at what the First Nation has prioritized in the past.

In the case at hand, the Supreme Court held that the case management judge had appropriately identified Beaver Lake's pressing needs. Beaver Lake provided evidence demonstrating, among other things, food insecurity, inadequate infrastructure, health needs, and overall poverty.

2. Determine what resources are required to meet those needs

To obtain an advance costs award, applicants must also provide courts with evidence that establishes the cost of pressing needs and the extent to which they cannot cover these costs. If an applicant has access to resources that could assist with covering litigation costs, they must demonstrate that the funds are being allocated specifically to other pressing needs (for example, by providing a financial resource use plan).

The Supreme Court found that the case management judge did not make findings with respect to the estimated costs of Beaver Lake's pressing needs or the extent to which Beaver Lake is unable to cover those costs. There was no evidence put before the case management judge quantifying the financial resources required to meet Beaver Lake's pressing needs or describing how these resources fell short of meeting those needs. For instance, financial statements, without more, did not provide evidence of Beaver Lake's current or future needs, or why federal funding was inadequate.

3. Assess the applicant 's financial resources

When an applicant does have access to resources that could potentially be used to fund the litigation (for example, private funding or a loan), they must show why the resources cannot fund the litigation. If the responding party challenges the applicant's position that certain funds are committed to meeting pressing needs, the applicant may be required to justify specific expenditures. Since advance costs are a "measure of last resort," an

applicant must also demonstrate that it has made an effort to secure alternative sources of funding.

In the case at hand, the Supreme Court held that the case management judge was entitled to find that Beaver Lake had several million dollars available to fund the litigation. However, additional evidence would have helped more accurately determine which of these resources Beaver Lake could access. In particular, the Court pointed to the First Nation's access to resources in two particular trusts, and flagged that Beaver Lake did not provide evidence demonstrating that it sought a loan to pursue litigation.

4. Identify the estimated costs of funding the litigation

After assessing the applicant's financial resources, the extent to which those resources are committed to addressing pressing need and the estimated cost of litigation, the court can then determine whether surplus resources are available to fund the applicant's litigation in whole or part. An applicant seeking an advance costs award must submit a litigation plan to the court so that it can determine the approximate cost of pursuing the litigation.

Key takeaways

The Court affirmed that the test for advance costs awards remains stringent and that these awards should remain a last resort. The Court overturned the Alberta Court of Appeal's decision and remitted the matter to the case management judge for reconsideration in light of the Court's reasons.

The following are key takeaways from the Supreme Court decision:

- The test for advance costs awards remains stringent. They are to be awarded only as a last resort;
- Reconciliation requires courts to consider the "pressing needs" of a First Nation government applicant in light of the fact that a First Nation is a government that sets its own priorities and is best suited to identify its needs;
- The impecuniosity requirement of the advance costs test can be satisfied by a First Nation government despite having financial resources that could otherwise be used to fund the litigation when those resources have been prioritized for other "pressing needs";
- Applicants must provide extensive evidence to establish they have insufficient resources to fund the litigation. If the First Nation has resources, but is unavailable to fund the litigation, it will need to detail the costs of their pressing needs as well as why existing resources cannot both meet those needs and fund the litigation;
- Allocating resources to improving deficits in housing, infrastructure, and basic social programming constitute "pressing needs" from the perspective of a First Nations government. The Court rejected the Court of Appeal's characterization of such needs as "discretionary spending on desirable improvements" as opposed to "basic necessities";
- It remains to be seen in future litigation how courts might apply the "pressing needs" requirement to other applicants. Although the decision is focused on First Nations governments, the Court frames the principle more broadly, stating that

"an applicant genuinely cannot afford to pay for the litigation where, and only where, it cannot meet its pressing needs while also funding the litigation."

- Any expansion of the "pressing needs" requirement in obtaining an advance costs order beyond the context of First Nation government applicants could have an impact more generally on access to justice, and could expand opportunities for public interest litigants to access funding to pursue their claims. Litigants will still need to satisfy the stringent requirements of the test, however. Even then, the court's decision is ultimately discretionary.

[1] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 40 [*Okanagan*]; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 49 [*Little Sisters*]

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