File No. 39323

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

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

APPELLANTS

- AND –

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, ATTORNEY GENERAL OF CANADA

RESPONDENTS

- AND –

ATTORNEY GENERAL OF BRITISH COLUMBIA, ALBERTA PRISON JUSTICE SOCIETY, CHIEFS OF ONTARIO, ADVOCATES' SOCIETY, ASSEMBLY OF MANITOBA CHIEFS, INDIGENOUS BAR ASSOCIATION IN CANADA, TREATY 8 FIRST NATIONS OF ALBERTA, ECOJUSTICE CANADA SOCIETY, ANISHINABEK NATION

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FACTUM OF THE INTERVENER CHIEFS OF ONTARIO

(Pursuant to Rule 42 of the ***Rules of the Supreme Court of Canada***)

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TABLE OF CONTENTS

Tab **Page**

PART I – OVERVIEW AND FACTS

A. Overview

1. This appeal is about what happens when courts are called upon to settle "the many unresolved problems in the Crown-[A]boriginal relationship"[1]. In such cases the financial resources of the litigants are almost always unequal, as a result of the structure of Canada's Constitution.

2. Such litigation can mean decades-long court processes that entail hefty financial burdens for Indigenous communities. Advance cost orders are meant to relieve some of these burdens, and enable important pieces of litigation to be brought. This appeal affords this Court an opportunity to consider the *Okanagan* line of cases, which has always been concerned with the inequality of financial resources as between litigants acting as a barrier to the just resolution of disputes.[2]

3. Chiefs of Ontario submits that the framework in *British Columbia (Minister of Forests) v. Okanagan Indian Band* ("*Okanagan*")[3] must be updated to reflect the financial realities of working toward reconciliation through litigation, and the changing legal context brought about by Canada's recognition of the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP" or the "*Declaration*").

PART II – STATEMENT OF ISSUES

4. The issues raised by the Appellant are:

   (a) Issue 1: Did the Court of Appeal err in law in its interpretation of the financial means branch of the *Okanagan* test by considering only "whether funds are available" and excluding consideration of the unique social, political, and economic context of an impoverished First Nations, and consideration of its reasonable financial choices?

   (b) Issue 2: If the answer to Issue 1 is "no", did the Court of Appeal err in holding that Beaver Lake did not satisfy its test based on the findings made by the case

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[1] *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2003 SCC 71 at para. 46 [*Okanagan*].
[2] *Okanagan*, at para. 33.
[3] *Okanagan*.

management judge including that Beaver Lake could not both fund the litigation and meet its basic needs?

(c) Issue 3: Did the Court of Appeal err in law in holding that the case management judge's discretionary order was unreasonable by including a defined annual cap, and failing to require repayment of the award?

5. With respect to Issue 1, Chiefs of Ontario takes the position that the Alberta Court of Appeal's narrow interpretation of the *Okanagan* test is contrary to the principle of reconciliation and conflicts with the principles of the *Declaration*.

6. Chiefs of Ontario takes no position on Issues 2 and 3.

PART III –ARGUMENT

7. The principles of reconciliation and the principles of the *Declaration* require that Indigenous peoples in Canada be able to access the Canadian judicial system in order to protect their Aboriginal rights, title and Treaty rights.

8. Access means something more than no longer being effectively barred from accessing legal services, as First Nations citizens were for nearly a quarter century.[4] Access, as made clear in the *Declaration*, must involve financial assistance and access to effective mechanisms of redress for violations of Aboriginal rights.[5]

9. Section 35 litigation, and resolution of claims by the courts, is a necessary component of the reconciliation of prior Aboriginal occupation with the Crown's assertion of sovereignty.[6] As this Honourable Court has stated, "[t]he 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"[7].

10. The Court's test for advance funding articulated in *Okanagan* must be revisited to ensure First Nations have adequate access to the courts for section 35 litigation.

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[4] *Indian Act*, RSC 1927, c 98, s. 141, repealed by *Indian Act*, SC 1951, c 29, s. 123(2), Chiefs of Ontario Book of Authorities at Tab 1.
[5] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, Res 61/295 (13 September 2007 | 61st Sess, A/RES/61/295), art 39 [*Declaration*].
[6] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35.
[7] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.

A. The Constitution grants much greater fiscal capacity to the Crown than to Indigenous peoples

11. Although the *Okanagan* case charted new territory in establishing advance cost orders for litigants seeking to confirm their rights in public interest litigation, it was working off a long common law tradition that saw costs orders as a way of ensuring that inequality of financial means did not act as a barrier to bringing important disputes to the attention of the courts.[8] The Court in *Okanagan* referred to family law precedents, "where one party is at a severe financial disadvantage that may prevent his or her case from being put forward"[9]. Such family law cases have parallels to s. 35 litigation – expecting s. 35 claimants to fund their own litigation is like expecting a party dependent on spousal support payments to fund an action to enforce a spousal support order that has been breached.

12. In s. 35 litigation, the two parties are generally an Indigenous people and the Crown. The inequality of financial resources between the parties is prescribed by the Constitution of Canada. On the one hand, Crown governments have arrogated to themselves exclusive jurisdiction to raise funds through taxes and royalties,[10] often derived from resources extracted from the very same lands that are the subject of disputes with Indigenous peoples.

13. By contrast, Indigenous peoples usually have no means to raise their own revenues; and where they do, those powers are narrow. The only taxation power that all First Nations enjoy is the limited power under the *Indian Act* of taxation over reserve lands.[11] First Nations are therefore left to rely on transfers from other governments to provide services to their members, and these funding sources have been recognized as being inadequate to the task.[12] What revenue First Nations are able to generate has to stretch across various competing priorities for First Nations, with litigation competing against the urgent need for

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[8] *Okanagan*, at paras. 22-41.
[9] *Okanagan*, at para. 33; see e.g. *McDonald v. McDonald*, 1998 ABCA 241 at paras. 20-23; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.) at paras. 12-22, Chiefs of Ontario Book of Authorities at Tab 2; *BDM v. MMM*, 2020 ABQB 288 at paras. 121-128.
[10] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss. 91(3), 92(3), 92A(4), 109.
[11] *Indian Act*, RSC 1985, c I-5, s. 83.
[12] See e.g. *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

basic housing and infrastructure, reliable access to health care, basic education, access to policing and other urgent priorities.

14. The Crown's capacity to fund litigation vastly outstrips that of First Nations. Crown-Indigenous Relations and Northern Affairs Canada's legal fee payments to the Department of Justice in the 2019/2020 fiscal year, for example, were $57,033,074.[13] This averages to nearly $100,000 per year against each of the 630 First Nations in Canada, and excludes expenditures by provincial Crowns.

15. It is uncontroversial that reconciliation between Indigenous rights and the Crown's assertion of sovereignty requires meaningful access by Indigenous communities to the courts. Without access, the court processes held out as tools for moving towards reconciliation are out of reach.[14] Meaningful access includes access to funding to engage with the costly Canadian legal system.

16. It remains for the common law to begin to equalize access for Indigenous peoples, through advance costs orders.

B. UNDRIP requires states to provide mechanisms for redress, and for financial assistance

17. Parliament has recently enacted the *UNDRIP Act*, which has "affirmed the Declaration as a universal international human rights instrument with application in Canadian law"[15].

18. Parliament has expressed its intention that UNDRIP should guide the development of the common law of Canada, of which the *Okanagan* line of cases form a part. Inasmuch as it is within "the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values", which has included ensuring that the common law is consistent with Charter values,[16] it is also within the inherent jurisdiction of the courts to ensure that the common law is consistent with UNDRIP.

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[13] See e.g. Public Accounts of Canada, tabled in the House of Commons on November 30, 2020, online: https://www.tpsgc-pwgsc.gc.ca/recgen/cpc-pac/2020/vol3/ds3/index-eng.html#wds3en_tbl_r384. Retrieved July 16, 2021.

[14] See e.g. Right Honourable Richard Wagner, Chief Justice of Canada, "Access to Justice: A Societal Imperative"; *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 24-25.

[15] United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14, s. 4(a) [*UNDRIP Act*].

[16] *Hill v. Church of Scientology*, [1995] 2 SCR 1130 at 1169.

19. Articles 8(2) and 39 of the *Declaration* work together to require that (a) Indigenous peoples have access to effective means of redress for rights infringements, and (b) that funding be provided to ensure that the rights outlined in UNDRIP are able to be enjoyed by Indigenous peoples.[17]

20. Article 8 provides:

> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>
> (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
>
> (d) Any form of forced assimilation or integration;
>
> (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

21. Article 39 provides:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

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[17] *Declaration*, arts 8(2), 39.

22. International law informs the development of Canadian law,[18] and should inform the Court's interpretation and application of the advance funding test. UNDRIP, especially Articles 8(2) and 39, guarantees a right of Indigenous peoples to mechanisms of redress when their Indigenous rights have been breached, and also obliges States such as Canada to provide financial assistance to enable Indigenous peoples to access these mechanisms, which include the courts.

C. Reinterpretation of Test

23. The current advance litigation funding test does not distinguish between the application of the test in s. 35 rights litigation and in other public interest litigation.

24. It ought to do so, in recognition of the fundamental importance to the rule of law in Canada of reconciling Indigenous rights with the Crown's assertion of sovereignty.

25. Currently, the test requires that a party seeking interim costs:

    (a) Be impecunious;

    (b) Have a *prima facie* meritorious claim; and

    (c) Raise issues that transcend the individual interests of that particular litigant.[19]

26. This Court has stated that, "[i]t is only a 'rare and exceptional' case that is special enough to warrant an advance costs award."[20] Lower courts have heeded this guidance and advance funding requests have been denied to s. 35 rights litigants.[21]

27. It does not take abject poverty for a First Nation to be entirely outmatched by the overwhelming financial capacity of the Crown, backed by their constitutionally entrenched fiscal powers. First Nations must always plan for exceedingly costly litigation, as well as possible litigation by attrition with their Crown opponents, and often this will mean that litigation that could meaningfully advance reconciliation is never brought to court. Not only is this unjust, but it runs counter to the clear guidance from UNDRIP that not only

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[18] See e.g. *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 at paras. 30-36.
[19] *Okanagan*, at para. 40.
[20] *Ibid*., at para. 1; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para. 38.
[21] See e.g. *Pasqua First Nation v Canada (Attorney General)*, 2017 FC 655 at paras. 30-31; *Ochapowace Indian Band v Saskatchewan (Minister of Justice*), 2004 SKQB 486.

must Indigenous peoples have the mechanisms to seek redress for breaches of Indigenous rights, but they must also be provided with financial assistance in order to do so.

28. This Court has held that where a new legal issue is raised, or where there is a change in circumstances or evidence that fundamentally shift the parameters of the debate, lower courts may reconsider previous rulings from higher courts.[22] This Court may revisit and refine its previous findings without such changes. However, it bears noting that the passage of the *UNDRIP Act*, together with this Court's evolving understanding of the Canadians courts' role in reconciliation, amount to a change in circumstance warranting the revisiting of the advance litigation funding test for s. 35 litigation.

29. In this context, Chiefs of Ontario proposes a shift in the Court's application of the test for advance litigation funding test for Indigenous peoples in section 35 cases:

(a) It should be presumed that the party seeking the interim costs order cannot afford to pay for the litigation:

(i) For the reasons outlined above, the burden of funding s. 35 litigation ought not be borne by Indigenous peoples. The principles of reconciliation and the *Declaration* preclude this. Indigenous peoples should not be required to direct limited resources away from other pressing priorities in order to litigate s. 35 rights that ought ideally to be recognized through negotiation, especially given that it is the exploitation of Indigenous resources that are filling Crown coffers.[23]

(b) Claims demonstrating a reasonable cause of action should be considered meritorious:

(i) So long as a claim demonstrates a reasonable cause of action, it should be considered to be meritorious for the purposes of the advance litigation funding test. As in any litigation, if a s. 35 claim is commenced that has no

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[22] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44.
[23] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 14.

reasonable prospect of success, the Crown may bring a motion to strike the pleading.[24]

(c) It should be presumed that the claim is of public importance and transcends the interests of the particular litigants:

(i) Section 35 litigation is a necessary component of reconciliation, which in turn is the crucial project of reconciling prior Aboriginal occupation with *de facto* Crown sovereignty.[25] Every person living on the lands now called Canada has an interest and a stake in reconciliation and in the s. 35 litigation brought to further reconciliation and resolve claims.

30. Chiefs of Ontario submits that this reinterpretation of the *Okanagan* test would bring the advance funding test for s. 35 litigation in line with the principles of reconciliation and the principles contained in the *Declaration*.

PART IV – COSTS SUBMISSION

31. The Chiefs of Ontario do not seek costs and ask that no costs be ordered against them.

PART V – NATURE OF ORDER SOUGHT

32. The Chiefs of Ontario make no submissions in respect of the order on the merits of the appeal itself.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26th DAY OF JULY, 2021.

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[24] See e.g. *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 9-5(1); *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D, Rule 14.24; *Alberta Rules of Court*, Alta Reg 124/2010, Rule 3.68; *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01.

[25] See e.g. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 42.

PART VI – TABLE OF AUTHORITIES

CASES	PARAGRAPH REFERENCE
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71	1, 2, 3, 6, 7, 11, 25, 26
BDM v. MMM, 2020 ABQB 288	11
Carter v. Canada (Attorney General), 2015 SCC 5	28
Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73	29
Hill v Church of Scientology, [1995] 2 SCR 1130	18
Hryniak v. Mauldin, 2014 SCC 7	15
First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2.	13
Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2	26
McDonald v. McDonald, 1998 ABCA 241	11
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69	9
Ochapowace Indian Band v Saskatchewan (Minister of Justice), 2004 SKQB 486.	26
Pasqua First Nation v Canada (Attorney General), 2017 FC 655	26
Quebec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32	22
Roberts v. Aasen, [1999] O.J. No. 1969 (QL) (S.C.J.)	11