Cassels

“Pressing Needs”: SCC Clarifies Advance Costs for Indigenous Governments in Public Interest Litigation

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On March 18, 2022, the Supreme Court of Canada (SCC) released its unanimous decision in *Anderson v. Alberta*, which considers and expands Indigenous governments’ ability to obtain interim funding from the other party (in this case, the Crown) during public interest litigation (advance costs).[1]

The SCC’s decision improves Indigenous governments’ access to justice and signals the SCC’s willingness to adapt and evolve Canadian law, and the exercise of the Court’s discretionary powers, in a manner that furthers reconciliation. The decision is relevant for Crown and Indigenous governments who are, or who may be, involved in public interest litigation.

Background

Beaver Lake Cree Nation (Beaver Lake) is a Treaty 6 First Nation. It is an “impoverished community” whose living conditions are marred by issues of food insecurity, inadequate housing, inadequate infrastructure, insufficient resources for education and health programs, poor water access and quality, and unemployment.[2]

In 2008, Beaver Lake sued the Crown for improperly allowing its traditional lands to be taken up for industrial and resource development, and for compromising its ability to pursue its traditional practices.[3]

In 2018, Beaver Lake brought an application for advance costs — i.e., an award where the Crown funds a portion of the First Nation’s litigation expenses. Beaver Lake submitted that the anticipated litigation expenses of $5 million are “well beyond its reach,” as it needed to direct its existing financial resources towards the community’s other priorities. Leading up to the application, Beaver Lake had already spent approximately $3 million on legal fees, paid from its own funds and from third-party fundraising. A costly 120-day trial for the underlying claim is scheduled to begin in two years.[4]

At the original hearing, the case management judge awarded Beaver Lake advance costs, with each of Beaver Lake, Canada, and Alberta being required to contribute $300,000 annually to the credit of the First Nation’s legal fees until the litigation’s resolution. She found that, although Beaver Lake had more than $3 million in unrestricted funds, the First Nation was “impecunious” (having little or no money) on the basis that it required its existing funds to address the community’s other priorities.[5]

On appeal, the Alberta Court of Appeal set aside the case management judge's award of advance costs. It found that it was an error to conclude that Beaver Lake was "impecunious" when the First Nation had existing financial resources that it chose to spend on the community's other priorities.[6]

The SCC set aside the Alberta Court of Appeal's decision and remitted Beaver Lake's application for a new hearing.[7]

Issue

The SCC considered whether the existing test for obtaining advance costs could be satisfied where an Indigenous government has access to existing financial resources that could be used to fund public interest litigation, but that it claims are needed for the community's other priorities instead.[8]

Test for Advance Costs

The SCC confirmed that an award of advance costs is a "last resort" that is meant to provide the applicant with a basic level of assistance to proceed with public interest litigation. It is reserved for the "rare and exceptional" case where a court's refusal to make such an award would amount to an injustice, against the applicant personally and against the public generally.[9]

In seeking an award of advance costs, an applicant must (1) demonstrate impecuniosity, (2) present a *prima facie* meritorious case, and (3) raise issues of public importance. Even where these "absolute requirements" are satisfied, a court retains residual discretion to decide whether to award advance costs or to consider other methods of facilitating the litigation.[10]

The "Impecuniosity" Requirement

The SCC's decision concerns the first part of the test for obtaining advance costs — i.e., whether Beaver Lake has demonstrated that it is impecunious and that it cannot afford to pay for the litigation.

At the original hearing, and on appeal, the Crown argued that Beaver Lake failed to satisfy the "impecuniosity" requirement on the basis that the First Nation had access to more than $3 million in unrestricted funds that could be used to fund the litigation, but that it chose to devote to the community's other priorities instead.[11]

The SCC rejected the Crown's argument. It observed that, although the "impecuniosity" requirement imposes a high threshold on Beaver Lake to demonstrate that it "cannot afford to pay for the litigation" and

that it is “impossible to proceed” with the litigation without an award of advance costs, the “impecuniosity” requirement contains enough flexibility to account for the First Nation’s realities, including competing spending commitments, resource restrictions, and fiduciary and good governance obligations.[12]

The SCC concluded that an applicant, such as Beaver Lake, can be considered “impecunious” where it cannot meet its ***“pressing needs”*** while also funding the litigation.[13] It set out a new four-part test for assessing whether an ***Indigenous government*** is impecunious after prioritizing its pressing needs:

1. **Identify the applicant’s pressing needs:** A court’s determination of an Indigenous government’s “pressing needs” is a fact-specific exercise that must be undertaken from the Indigenous government’s perspective to account for its governance structure and funding priorities. Generally, “pressing needs” include basic necessities, such as adequate housing, a safe water supply, and basic education and health services, and they may include spending for improved standards of living and other priorities.[14]
2. **Determine what resources are required to meet those needs:** An Indigenous government must provide evidence of the costs of meeting its pressing needs and the extent to which it cannot cover those costs. If the Indigenous government has access to existing financial resources that could be used to fund litigation, but that it claims are needed for its pressing needs instead, then it must provide evidence that those resources are, in fact, being devoted to those pressing needs.[15]
3. **Assess the applicant’s resources:** If an Indigenous government has extensive assets and ongoing revenue, it must provide evidence of its existing financial resources in detail. Further, since an award of advance costs is a “last resort,” the Indigenous government must demonstrate that it made sufficient efforts to obtain funding from alternate sources.[16]
4. **Identify the estimated cost of funding the litigation:** An Indigenous government must submit a litigation plan to supports its estimation of the litigation cost. After assessing the Indigenous government’s existing financial resources, the extent to which it must commit those resources to its pressing needs, and the estimated litigation cost, a court can determine whether the Indigenous government has any surplus resources to fund the litigation, in whole or in part.[17]

Notwithstanding the introduction of the “pressing needs” principle and the four-part “pressing needs” test, the SCC confirmed that the “impecuniosity” requirement remains a high threshold, and that an award of advance costs remains a “last resort.”

Implications: Improved Access to Justice

As articulated above, the “impecuniosity” requirement of the test for obtaining advance costs had previously been difficult for Indigenous governments to satisfy. Many Indigenous governments have access to some existing financial resources that could be used to fund public interest litigation, but that are needed for their communities’ pressing needs instead.

By developing the “pressing needs” principle and the four-part “pressing needs” test, the SCC’s decision improves Indigenous governments’ ability to access the courts, and to advance their Aboriginal and treaty rights and interests and other public interest matters.

Implications: A Step Towards Reconciliation

The SCC confirmed that a court holds discretionary powers, including residual discretion, to decide whether to award advance costs to Indigenous governments. It articulated that a court should exercise its discretionary powers in a manner that accounts for the context in which the Indigenous government makes financial decisions, as well as other aspects of the Crown-Indigenous relationship (e.g., the honour of the Crown), with a view to fostering a “positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities.”[18]

The SCC’s comments on a court’s exercise of its discretionary powers around advance costs signal the SCC’s willingness to adapt and evolve Canadian law in a manner that furthers reconciliation. These comments could also have implications for the SCC’s approach in future cases concerning a court’s exercise of its discretionary powers in respect of other matters or procedures, namely that the exercise of discretionary powers should be informed by reconciliation.

Implications: Application Beyond Indigenous Governments

Although the SCC’s decision is focused on Indigenous governments, the SCC enunciated the “pressing needs” principle in the context of applicants generally. Specifically, it noted 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.”[19]

The SCC’s enunciation of the “pressing needs” principle in the context of applicants generally suggests that the door is open for future courts to apply the “pressing needs” principle to applicants beyond Indigenous governments, which application could result in more public interest litigants obtaining greater access to funding to pursue their claims.

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[1] *Anderson v Alberta*, 2022 SCC 6.

[2] *Ibid* at paras 7 & 55.

[3] *Ibid* at para 9.

[4] *Ibid* at para 10.

[5] *Ibid* at paras 12 & 13.

[6] *Ibid* at para 14.

[7] *Ibid* at para 72.

[8] *Ibid* at para 31.

[9] *Ibid* at paras 19, 21 & 23.

[10] *Ibid* at para 24.

[11] *Ibid* at para 18.

[12] *Ibid* at paras 30 & 32.

[13] *Ibid* at paras 38 & 40.

[14] *Ibid* at paras 42-44.

[15] *Ibid* at paras 45 & 46.

[16] *Ibid* at paras 47-50.

[17] *Ibid* at paras 51 & 52.

[18] *Ibid* at paras 26 & 27.

[19] *Ibid* at para 40.

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