Federal Court  Cour fédérale

Date: 20190416

Docket: T-1542-12

Citation: 2019 FC 462

Ottawa, Ontario, April 16, 2019

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

CHIEF SHANE GOTTFRIEDSON, ON HIS OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND AND THE TK'EMLÚPS TE SECWÉPEMC INDIAN BAND, CHIEF GARRY FESCHUK, ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF THE SECHELT INDIAN BAND AND THE SECHELT INDIAN BAND, VIOLET CATHERINE GOTTFRIEDSON, DOREEN LOUISE SEYMOUR, CHARLOTTE ANNE VICTORINE GILBERT, VICTOR FRASER, DIENA MARIE JULES, AMANDA DEANNE BIG SORREL HORSE, DARLENE MATILDA BULPIT, FREDERICK JOHNSON, ABIGAIL MARGARET AUGUST, SHELLY NADINE HOEHNE, DAPHNE PAUL, AARON JOE AND RITA POULSEN

Plaintiffs

And

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

[1] If the Crown sticks to all of the defences it asserts, this matter will not get to trial for years. When it finally does, that trial will last months and will literally cost the Plaintiffs millions. The Plaintiffs have moved for an advance or interim costs order. In other words, they ask that this Court order the Crown to fund the litigation directed against itself.

[2] Orders for advance costs are not unheard of, but they are rare. The Supreme Court of Canada has set out criteria that a plaintiff must fulfill before a trial court may exercise its judicial discretion to order advance costs in its favour. To contextualize the principles relating to this Court's power to order advance costs, a summary of the Plaintiffs' case is in order.

I. Nature of the Case

[3] This case has both legal and emotional components. The Indian Residential Schools Settlement Agreement of 2006 (IRSSA), later approved by nine provincial and territorial courts, is the touchstone. The IRSSA settled a number of class actions with respect to students who resided at Indian Residential Schools and provided them with a common experience payment. Among other things, the IRSSA established the Truth and Reconciliation Commission and provided for an endowment to the Aboriginal Healing Foundation to address harm suffered, including inter-generational effects.

[4] The Plaintiffs in this case are students who attended the residential schools by day, but went home at night. In August 2012, they filed a Statement of Claim in which they proposed that the matter proceed as a class action. After some wrangling, including a visit to the Federal Court of Appeal on an unsuccessful motion by the Crown to stay proceedings under section 50.1 of the *Federal Court Act* (*Gottfriedson v Canada*, 2013 FC 546; *Canada (Attorney General) v Gottfriedson*, 2014 FCA 55), I certified this as a Class Action in June 2015. My Reasons and the Certification Order are reported at *Gottfriedson v Canada*, 2015 FC 706 and 2015 FC 766.

[5] The emotional component of this case is that the day students submit they suffered the same hurt as those who resided at the schools. Nevertheless, only the resident students were included in the IRSSA, with one notable exception, day students who attended the Mohawk Institute Residential School in Ontario. The only difference that I can see between those day students and the day students in the present action is that their matter was certified as a class proceeding prior to the IRSSA (*Cloud v Attorney General of Canada et al*, [2004] O.J. No. 4924, 73 OR (3d) 401 (ONCA)).

[6] The IRSSA sought a "fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools". However, this action and others illustrate that this purpose has not been fully achieved. These Plaintiffs have been left behind.

[7] In these proceedings, there are three classes of Plaintiffs. The first is the "Survivor" class, being all aboriginal persons who attended an identified residential school from 1920 to 1997 as a day student. The second class is the "Descendent" class, being all persons who are

descendent in the first degree from Survivor class members. The third class is the "Band" class, meaning bands which had members of the Survivor class or in whose community a residential school was located, and who have opted into the action. There are now 105 Bands involved all told.

[8] The Plaintiffs allege that the Crown had an Indian Residential School Policy to assimilate the aboriginal peoples of Canada into Euro-Canadian society. Day students were forbidden from using their mother tongues at school, even on the playgrounds, and were punished if they did. As a result, a lengthy list of alleged damages were inflicted, including loss of language, culture, spirituality, identity, emotional and psychological harm, isolation, loss of self-worth, humiliation, embarrassment, and a propensity to addiction.

[9] Among many other allegations, the Plaintiffs assert that the Crown had a statutory duty to protect their language and culture, and breached that duty, in addition to deliberately breaching the Plaintiffs' cultural and linguistic aboriginal rights.

II. The Law of Costs

[10] When costs are awarded they usually arise from pleadings, motions, and trials that have already taken place, not those yet to be heard.

[11] This Court is a court of equity (*Federal Courts Act* sections 3 and 4). When it comes to awarding costs, this Court enjoys a wide discretion. *Federal Courts Rule* 400 and following illustrate this point. However, in class proceedings, that discretion is limited. In such

proceedings, the default provision is that no costs shall be awarded except for cause (Rule 334.39 (1)).

[12] The Supreme Court summarized and expanded upon many of the general principles relating to costs in *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 SCR 371.

[13] All things being equal, the default principle is that an order for costs is intended to compensate, to some degree, the successful plaintiff or defendant.

[14] However, indemnity is not the sole purpose. Courts may also use costs awards to encourage settlement, to deter frivolous actions and defences, to sanction unnecessary steps in litigation that increase its duration, or to penalize a party who has refused a reasonable settlement offer (see *Okanagan*, at paras 22-25).

III. The Law of Advance Costs

[15] *Okanagan* was closely followed by the Supreme Court in two subsequent cases: *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, and *R. v Caron*, [2011] 1 SCR 78.

[16] The fundamental principles are set out in *Okanagan* at paragraphs 36-39. At paragraph 36, Mr. Justice LeBel, speaking for the majority, stated:

> There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. [my emphasis]

He went on to say at paragraph 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. [my emphasis]

IV. *Prima facie* Merit and Public Importance

[17] I am satisfied that the claims to be adjudicated are *prima facie* meritorious, that they transcend the Plaintiffs' individual interests, are of public importance and have not been resolved in previous cases. Indeed, the Crown does not dispute these two points, and focuses only on the impecuniosity requirement.

[18] In 2008, following the IRSSA, Prime Minister Harper apologized for the Crown's policy of assimilation. This was followed by the Truth and Reconciliation Commission.

[19] In Canadian law, it has not been decided whether steps taken to deprive a collectivity of its identity, language or culture constitute a tort. In *Joseph v Canada (Minister of Northern Affairs and Northern Development)*, 2008 FC 574, Mr. Justice Hugessen dealt with a motion by the plaintiff band for an advance costs order. After carefully analyzing the dicta in *Okanagan* and *Little Sisters*, he granted the motion. With respect to public importance, he noted that the issues included whether the plaintiff band was the proper collectivity to assert the claim, and whether a claim for cultural losses is cognizable at law and, if so, how it should be valued (at paras 18-19).

[20] As was the case in *Joseph*, the issue of compensation for collective losses of culture, language, and heritage are present in this case. However, I should note that *Joseph* did not concern a class proceeding and Mr. Justice Hugessen was satisfied that the plaintiffs were impecunious (at paras 12-15).

[21] Australia, which has had its own colonial history, has recognized that claims for both individual and collective cultural losses are compensable.

[22] In *Cubillo v Commonwealth*, [2000] FCC 1084 at para 1499, O'Loughlin J. of the Australian Federal Court of Appeal stated "I do not think that it could be argued that the cultural loss that a part aboriginal person has suffered does not sound in damages". In one of the "stolen generation" cases involving aboriginal children who were placed into non-aboriginal homes, judgment included compensation for cultural losses brought about through the loss of aboriginal identity and culture (*Trevorrow v State of South Australia*, [2007] SASC 285).

[23] Moreover, just recently, in March 2019, the High Court of Australia held that an aboriginal group's loss of cultural and spiritual relationships with a plot of land due to the state's infringement of aboriginal title was a compensable collective loss (*Northern Territory v Griffiths (dec'd) and Lorraine Jones (on behalf of the Ngaliwurru and Nungali Peoples & Anor),* [2019] HCA 7 at para 154).

[24] From the foregoing, I repeat that I am more than satisfied that the Plaintiff's claims have *prima facie* merit, and that they have raised issues that transcend their individual interests, are of public importance, and have not been resolved in previous Canadian cases.

V. Impecuniosity

[25] While I am satisfied that the other two mandatory *Okanagan* requirements are met, the Plaintiffs have not established that they are impecunious – I must therefore dismiss this application.

[26] The Plaintiffs ask that, going forward, 45% of their legal fees and all reasonable disbursements be covered by an advance costs order. However, they have led no evidence whatsoever demonstrating that they are impecunious. They have retained counsel on a retainer basis, with no contingency fee component, and have funded this case for nearly seven years so far. There were unfortunate delays in the litigation but they may well have been overcome, as a consent Order was issued this February whereby the Crown has paid some $1,468,073.71 towards their costs.

[27] The Plaintiffs have attempted to distinguish *Okanagan*, *Little Sisters* and *Caron* on the basis that those cases did not concern class actions. They rely on certain passages in those cases which, in their view, provide that, if in light of all the circumstances, the case is sufficiently special, the impecuniosity requirement may be overcome in whole, or in this case, in part as they would continue to pay 55% of their solicitors' fees.

[28] The relevant sections of *Federal Courts Rule* 334.39 (1) provide that costs are not to be awarded against a party unless: a) the conduct of the party unnecessarily lengthened the duration of the proceeding, or c) exceptional circumstances make it unjust to deprive the successful party of costs. The Rule was discussed at great length by the Federal Court of Appeal in *Campbell v Canada*, 2012 FCA 45.

[29] The Plaintiffs concede that they are not seeking costs arising from the Crown's past conduct, but rather with respect to its future conduct, assuming that it sticks to every point set out in its Amended Statement of Defence.

[30] There may well be exceptional circumstances but the Plaintiffs have yet to be successful. The points that the Crown has raised in its Amended Statement of Defence are by no means frivolous.

VI. The Crown's Position

[31] The Crown submits that it is an absolute requirement that all three criteria set forth in *Okanagan* be met, failing which, no order of advance costs can issue. Even then, the Court, in

its discretion, is not bound to order advance costs. The case must raise something special for it to rise above the three *Okanagan* criteria (*Little Sisters* at paras 36-40).

[32] For the purposes of this motion, Canada only challenges the impecuniosity requirement. The Plaintiffs did not advance evidence that they are impecunious. Indeed, they do not even submit that they are impecunious at all.

[33] Even if impecunious, as advance funding is a last resort, the party seeking such an order must set out what efforts it made to raise funds elsewhere. The Crown sets out a great many examples from decisions of this and other Courts to this effect (See for example: *Pictou Landing First Nation v Nova Scotia (Attorney General)*, 2014 NSSC 61 at paras 35-36, 40; *Traverse et al. v Government of Manitoba and A.G. of Canada*, 2013 MBQB 150 at paras 53, 81-82; *Hwlitsum First Nation v Canada (Attorney General)*, 2015 BCSC 2100 at paras 19-25; *David v Loblaw*, 2018 ONSC 6469).

[34] Since advance funding is not a blank cheque, and must be carefully and continually scrutinized, the Plaintiffs must present a budget. That was not done.

[35] Finally, and in any event, the Crown asserts that since this is a Federal Court Class Proceeding the Plaintiffs are “estopped” from arguing that an order for advance costs is necessary.

VII. Decision

[36] Canada is correct in submitting that, as a condition precedent to any order for advance costs, all three criteria set out in *Okanagan* must be met.

[37] I have already referred to paragraph 40 of Okanagan in which the Court stated that the three criteria "must be present to justify an award of interim costs". Furthermore, as stated at paragraph 38:

> 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.

[38] As the Plaintiffs do not submit that they are impecunious, the motion must be dismissed on that ground alone. Although I am inclined to the view that the case, over and above the three criteria, is "special" enough to justify an order for advance costs, this cannot overcome the impecuniosity requirement.

[39] I also do not believe it is necessary to comment on the various steps that many Courts have suggested that a party must first take to seek outside funding before seeking an advance cost order. Suffice it to say that when the action was certified there were two Band Class members. Now there are 105. One would think that the Plaintiffs would have to establish that all 105 Bands are impecunious or that they at least attempted to secure funding from some, if not all of them.

[40] Although not necessary to dispose of this motion, I believe that some remarks are in order with respect to the Crown's submissions on budgets and that no order for advance costs can *ever* issue in a Federal Court Class Proceeding.

[41] The Plaintiffs provided a budget as part of their certification motion. At their request, I kept that budget under seal. They were concerned that since the Crown has considerable powers with respect to Indian Bands, especially when it comes to possible dissipation of assets and the spending of discretionary funds, an advantage might be given to opposing counsel if made aware of the Plaintiffs' financial arrangements. My order that the budget be kept under seal has not been challenged until now.

[42] This case was certified before the Crown filed a Statement of Defence, which is fairly common. The Crown has been informed that counsel are proceeding on a retainer basis, at hourly rates which I consider more than fair and reasonable, and that the budget projected that trial would commence by this year (2019). That is not going to happen.

[43] This past January, the then Minister of Justice and Attorney General of Canada, The Honourable Jody Wilson-Raybould, issued a Directive on Civil Litigation Involving Indigenous Peoples. As a result, the Crown sought and was given leave to consider amending the Statement of Defence that it filed in 2015. It served and filed an Amended Statement of Defence after this advance costs motion was set down for hearing.

[44] In the Amended Statement of Defence, it acknowledges, on the one hand, that the operation of Residential Schools was a dark and painful chapter in our country's history and resulted in harm to many Indigenous persons. It is admitted that Residential Schools were used as a means to assimilate Indigenous Peoples into the dominant culture. It further admits that reconciliation will be furthered by resolving the legacy of such schools and says it is committed to achieving such reconciliation, including with any day students who may have suffered harm as a result of their attendance at these schools, their descendants and with any Indigenous communities that suffered loss.

[45] On the other hand it has repeated all of the defences set out in the original Statement of Defence, with the exception of time-bar. The same defences did not stop it from settling with students who resided at the schools.

[46] The Crown continues to deny that there was a uniform Indian Residential School Policy although there was a common experience payment for residents. Furthermore, in accordance with the Amended Statement of Claim, it will only be liable to the extent that it cannot flow that liability through to the various religious orders which ran the schools on a day to day basis.

[47] Brought to its logical extreme, the Crown might wish to examine each of the 105 Bands on discovery and seek leave to examine the religious orders who taught at Residential Schools. As the IRSSA shows, there were literally hundreds of different religious entities involved in administering the schools.

[48] All of this would take years. The Plaintiffs are dying. Motions for commission evidence will undoubtedly soon follow.

[49] During argument, I suggested that if the Crown needed a budget, one could start at $50 million, perhaps even double that. Is it its intention to grind these 105 Bands into poverty and bankruptcy before this matter ever proceeds to trial?

[50] Our Rules of Court are flexible when it comes to class proceedings. A budget, in the context of a class proceeding, could be considered and modified as circumstances change. Certainly, no one who benefits from an advance costs order is given carte blanche.

[51] Moreover, in accordance with *Federal Courts Rules* 334.24(1) and 334.26, a judge may give separate judgments in respect of any questions that arise in a class proceeding that are not common questions and the judge may address questions that are individual to certain classes or class members. Preliminary questions on a point of law can also be adjudicated under *Federal Court Rule* 220 in a class proceeding before the entire matter is heard on the merits. Put simply, it may be appropriate to separate a class proceeding out in stages in some cases and the rules recognize this possibility. It follows that it may not be necessary to provide a budget covering the entire duration of the proceeding to merit an advance cost order, so long as the three *Okanagan* requirements are met and special circumstances require that the order be made to dispose of that stage of the proceeding.

[52] Finally, the Crown submits that, in any event, there can never be an advance costs order in a Federal Court class proceeding, because the Court had to be satisfied at the outset that the Plaintiffs had the financial ability to carry through to the end under *Federal Court Rule* 334.16(1)(e)(i)and (iv). In other words, it submits, [h]aving relied on its ability to pursue the action as a basis to obtain certification, the Plaintiffs are estopped from arguing that any advance costs order is required in this case [My emphasis]. I disagree. The circumstances of representative plaintiffs may well change after certification. So long as they can prove that they are impecunious at the time they ask for an order of advance costs, and satisfy the other *Okanagan* requirements, I see no reason why they should be foreclosed from ever moving for advance costs. After all, advance cost orders were developed to address "special circumstances". A circumstance so special as to require an order for advance costs likely would not have been foreseen at the certification stage.

[53] It is not necessary to plumb the depths of Rule 334.39, as it does provide that costs may be awarded if the conduct of a party unnecessarily lengthened the duration of the proceeding or exceptional circumstances make it unjust to deprive the successful party of costs. Certainly, if those conditions are met the Plaintiffs will be entitled to costs, after the fact. The past may give a glimpse into the future. I would not say that it is impossible to obtain an advance costs order in this action.

[54] On the eve of my retirement, I leave with paragraph 4 of the Crown's Amended Statement of Defence ringing in my head:

> Canada also acknowledges that reconciliation will be furthered by resolving the legacy of such schools. Canada is committed to

> achieving such reconciliation, including any Day Scholars who may have suffered harm as a result of their attendance at Residential Schools, their descendants, and with any Indigenous communities that suffered losses as a further result of the impacts on Day Scholars…

[55] I hope that Canada will not simply continue to talk the talk, but will now walk the walk.

[56] I would also leave with one last passing thought: "I shall tell you a great secret, my friend. Do not wait for the last judgment, it takes place every day" (Albert Camus, *La Chute*, Éditions Gamillard, 1956).

[57] There shall be no order as to costs.

ORDER IN T-1542-12

THIS COURT ORDERS that for reasons given, this motion is dismissed without costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Peter Grant John Kingman Phillips Diane Soroka	FOR THE PLAINTIFFS
Lorne Lachance Elizabeth McDonald	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Peter Grant & Associates Barristers & Solicitors Vancouver, British Columbia Phillips Gill LLP Barristers Toronto, Ontario Diane Soroka Avocat, Barrister & Solicitor, Inc. Westmount, Québec	FOR THE PLAINTIFFS
Attorney General of Canada Vancouver, British Columbia	FOR THE DEFENDANT