COURT FILE NO.: 05-CV281875 PD
DATE: 2006-05-23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WILLIE KEEWATIN, ANDREW KEEWATIN JR., and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION	)	ROBERT J. M. JANES and DOMINIQUE NOUVET for the Plaintiffs
Plaintiffs	)	
- and -	)	
MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC.	)	D. THOMAS H. BELL, MICHAEL STEPHENSON and PETER LEMMOND, for the Defendant Minister of Natural Resources CHRISTOPHER H. MATTHEWS and COLLEEN E. BUTLER for the Defendant Abitibi-Consolidated Inc.
Defendants	)	
	)	**HEARD:** March 29-31, 2006

SPIES J.

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiffs are Anishnaabe (also referred to as Ojibway) and members of the Grassy Narrows First Nation ("Grassy Narrows") and of the Grassy Narrows Trappers' Council.

Each is the holder of a registered trap line located near the Grassy Narrows' reserve, in northwestern Ontario, just north of Kenora, near the English River.

[2] In this proceeding, the plaintiffs seek to set aside the validity of the permits and licences issued by the defendant, Minister of Natural Resources (MNR), to the defendant, Abitibi-Consolidated Inc., which allows certain regulated logging activities within the trap line areas held by the Grassy Narrows trappers in the Whiskey Jack Forest. The position of the plaintiffs is that these activities invalidly infringe upon the harvesting rights that members of Grassy Narrows enjoy under Treaty 3, and in particular their right to trap and hunt on lands surrendered to the Crown under Treaty 3.

[3] The plaintiffs raised essentially the same claims regarding their Treaty 3 rights in an earlier judicial review application: Keewatin v. Ontario (M.N.R.).[1] The MNR and Abitibi succeeded in having the application quashed. In rendering his decision, Then J. held that some of the relief claimed was not available in a judicial review proceeding and on that ground quashed the application with leave to the applicants to commence an action (at para.19). He also concluded that in any event, the matter ought to be converted to a trial given the complexity of the issues raised and their general public importance (at paras. 59-61).

[4] The plaintiffs have now commenced this action and bring two motions, one for an order granting leave to continue this action as a representative proceeding on behalf of themselves and all members of Grassy Narrows pursuant to Rule 12.08 of the Rules of Civil Procedure (Motion for Representation Order) and secondly, for an order that the MNR pay the plaintiffs their costs in advance (Advance Costs Motion). I have been assigned to hear all motions in this action pursuant to Rule 37.15.

ISSUES

Motion for Representation Order

[5] This motion for an order granting leave to the plaintiffs to continue this action as a representative proceeding has been largely settled between the parties. The defendants do not oppose an order converting the action into a representative proceeding in the name of the plaintiffs on behalf of all members of Grassy Narrows and many terms to the order have been agreed to. The sole dispute is whether or not, as an additional term to the order sought, I should order that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs.

[6] For the reasons that follow, I grant leave to the plaintiffs to continue this action as a representative proceeding on the terms agreed to, but I decline to order, at least at this time,

[1] (2003), 66 O.R. (3d) 370 (Div. Ct.)

that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs. The terms of this order are set out in Schedule "A" attached.

Motion for Advance Costs

[7] This motion, for an order that the MNR pay the costs of the plaintiffs of this action, in advance, in any event of the cause, on a partial indemnity scale, is vigorously opposed by both defendants. The resolution of this motion must be determined by an application of the legal test that the plaintiffs must meet, as established by the Supreme Court of Canada in British Columbia (Minister of Forests) v. Okanagan Indian Band [2] to the evidence before me.

[8] For the reasons that follow, I order that the MNR pay the costs of the plaintiffs on a partial indemnity basis, in advance, and in any event of the cause, with respect to the plaintiffs' claim as set out in paragraph 1(b) of the Amended Statement of Claim. The order is limited to the cost of determining the issue of the interpretation of the "taking-up" provision of Treaty 3 including, if necessary, the plaintiffs' constitutional division of powers argument so that it can be decided whether or not the province of Ontario has the authority to take up the Keewatin Lands (as defined below) for forestry.

MOTION FOR REPRESENTATION ORDER

Terms of Representation Order

[9] At an early stage in this action, counsel for the MNR advised plaintiffs' counsel that whether or not the plaintiffs had been authorized by the Grassy Narrows First Nation to bring this action on its behalf would be a central issue in the determination of the MNR's response to the plaintiffs' motion for a representation order. The defendants decided not to oppose the order sought, subject to agreement on terms, when they were advised that the law firm of Cook Roberts has, from the outset of the action, been retained in a solicitor-client relationship by the plaintiffs as well as Grassy Narrows (through its Council) and that it takes its instructions from both.

[10] To their credit, counsel were then able to resolve all but one of the proposed terms to the order. It is agreed that an order be granted in the form out in Schedule A. Those terms are in my view reasonable. Paragraph 8 of the order will ensure that all decisions and findings made in this action will be binding upon Grassy Narrows, its Council and all of its members. The test as set out by Nordheimer J. in Ginter v. Gardon[3] for a representation order has been met and the order sought is appropriate.

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[2] (2003) 233 D.L.R. (4th) 577

[3] (2001), 53 O.R. (3d) 489 at 494 (Ont. Sup. Ct.)

Should the Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs?

[11] The sole remaining issue is whether or not, as an additional term to the order sought, I should order that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs.

The Facts

[12] The facts relevant to this motion are not in dispute and are as follows.

[13] The plaintiffs are each members of the Grassy Narrows Trappers Council, a special interest group within the community, which acts as a support group for Grassy Narrows' trappers. Andrew Keewatin and Joseph Fobister are two of the organization's five elected "leaders". The plaintiffs' witness, Gabriel Fobister, is the president.

[14] The Trappers Council is composed of approximately 60 members and includes all registered Grassy Narrows trappers. As such, it represents approximately 5% of the community's 1200 members.

[15] The Grassy Narrows Council is the elected leadership of the Grassy Narrows. It speaks for the community and makes decisions on behalf of the community as a whole. Grassy Narrows does not have an alternative Band leadership, such as a hereditary chief or band council.

[16] The Chief of Grassy Narrows filed an affidavit on these motions and deposed that the Band Council decided that the named plaintiffs in this action should be members who are or have been very active trappers, rather than the Band Council Chief and that they made this decision because it is the regular trappers whose way of life and livelihood is most directly affected by forestry activity.

[17] The Grassy Narrows Band Council Resolution No. 3050, dated January 24, 2006, resolved that the law firm of Cook Roberts is jointly retained by both the plaintiffs and the Grassy Narrows in this action to act as counsel and solicitors of record. It further resolves that Grassy Narrows has no objection to the plaintiffs acting as representative plaintiffs for the members of Grassy Narrows and that the law firm of Cook Roberts shall report to and take instructions on behalf of the First Nation through its Chief or Deputy Chief Councilor.

Position of the defendants

[18] The defendants do not take the position that Grassy Narrows must be formally added as a plaintiff to this action but do say that it is common practice in these types of actions that the Band, its Chief or a person of authority within the band be included as a party to the

representative action. They argue that I should order that Grassy Narrows be jointly and severally liable with the plaintiffs for any award of costs that may be made against the plaintiffs in favour of the defendants. Counsel for the MNR advised that the intention is to bind the assets of Grassy Narrows as an entity, not the assets of individual members. In this regard I note that the members of Grassy Narrows may include persons who are not Indians within the meaning of the Indian Act[4] and therefore not members of the Grassy Narrows Band. Abitibi proposes, in the alternative, that I order that Grassy Narrows shall be considered a party for the purposes of any request for costs made by the defendants in this proceeding.

[19] The defendants argue that such an order is necessary in that it is really the Band Council that is in control of this action and such an order will encourage both the plaintiffs and the Council to litigate the action in a disciplined and efficient manner and with a high level of accountability to Grassy Narrows' members. They submit that the defendants should know from the outset who might be responsible for costs.

Position of the plaintiffs

[20] Mr. Janes argues that it is premature and inappropriate to expose Grassy Narrows to a cost order. It is his position that the naming of the plaintiffs in this case was entirely appropriate and in keeping with the law. He relies on a decision of the British Columbia Supreme Court, Nemaiah Valley Band v. Riverside Forest Products Ltd., [5] where the court found that there was no requirement that the representative plaintiff be a chief and that he or she need only be a member of the class (at page 106).

[21] The plaintiffs also rely on the recent decision of our Court of Appeal, Moja Group (Canada) v. Pink[6] which set aside costs orders made against the appellant personally in a claim brought by the corporation. The appellant was not a party to the litigation and the court held that:

> to require the controlling mind of a company to pay costs personally in litigation brought by the company, the company must be sham or a "man of straw" put forward by the person who is the real litigant to shield himself from liability for costs (at para. 5).

[22] It is submitted that the named plaintiffs are not men of straw and that the term sought by the defendants should not be added to the order.

[23] It was also submitted that pursuant to section 89 of the Indian Act, real and personal property of an Indian or a band situated on a reserve is immune from execution. I accept the submissions of counsel for the MNR however, that the issue of exigibility is not relevant to the issue that I must decide.

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[4] R.S., 1985, c. 1-5
[5] (1999), 37 C.P.C. (4th) 101
[6] [2005] O.J. No. 5023

[24] Finally the plaintiffs argue that I will have an ongoing supervisory role in this litigation and impose, if necessary, the discipline with respect to the action suggested by the defendants.

Analysis

[25] As already stated, there is no suggestion that Grassy Narrows or the Band Council be formally added as a plaintiff. This issue therefore, must be considered from the perspective of the court's jurisdiction to order costs against a non-party.

[26] The Moja Group decision relied upon by the plaintiffs, applied the law as established by the Court of Appeal in Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.[7], where the court held that the court has inherent jurisdiction to award costs against a non-party where it is shown that the non-party had status to bring the action himself, that the plaintiff was not the true plaintiff and that the plaintiff was a "man of straw" put forward to protect the non-party from liability for costs.

[27] In this case, there is no doubt that Grassy Narrows or the Band Council could have been named as the representative plaintiffs and that they have status to bring this action. The plaintiffs however have provided a reasonable explanation for why they have been named as the representative plaintiffs as opposed to Grassy Narrows or the Band Council. Furthermore, there is no suggestion that the plaintiffs are not proper representatives of the class.

[28] Furthermore, although the Band Council is instructing counsel for the plaintiffs, they are doing so in conjunction with the named plaintiffs and so it cannot be said that the named plaintiffs are not legitimate representatives of the class or that the Band Council, on its own, is the real litigant.

[29] Finally, there is no allegation that the named plaintiffs, who are exposed to costs orders, are "men of straw". Although on the record before me, there is no evidence that either Willie Keewatin or Andrew Keewatin Jr. have any significant assets or means to pay any cost order, Joseph Fobister has significant assets which the defendants rely on in defence of the Advance Costs Motion as a basis to say that the plaintiffs are not impecunious and ought to contribute to the litigation. Given Mr. Fobister's assets, I do not see how I could conclude that the selection of these plaintiffs is a sham put up to shield Grassy Narrows or the Council from liability for costs.

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[7] (1997), 34 O.R. (3d) 291 at p. 296. The defendants also rely on Ridgely (in trust) v. Ridgely Design Inc. (1991), 3 O.R. (3d) 695 (Gen. Div) but that decision does not set out the full test and was decided before Television Real Estate Ltd.

[30] For these reasons I accept the submissions of counsel for the plaintiffs that there is no basis at this time to order that as a non-party, Grassy Narrows should be jointly and severally liable with the plaintiffs for any award of costs that may be made in favour of the defendants. I also accept his submission that as the case management judge I will be able to perform a supervisory role and ensure that the action proceeds in an efficient manner. That role will be even more important given my disposition of the Advance Costs Motion.

[31] I have considered the alternative language proposed by Abitibi but reject that proposal as well. Such an order would automatically expose Grassy Narrows to a cost order every time the defendants seek a cost order against the plaintiffs and would require that submissions be made on behalf of Grassy Narrows. In light of my ruling, unless there is some new evidence upon which the defendants wish to rely, which suggests that the Band Council has abused the litigation process, run up costs and as such should be exposed to a cost order, it is unnecessary to have submissions on their exposure to costs made every time.

Disposition

[32] For these reasons I am not prepared to add a term to the Representation Order that Grassy Narrows be jointly and severally liable with the plaintiffs for any award of costs that may be made against the plaintiffs in favour of the defendants or that Grassy Narrows be considered a party for the purposes of any request for costs made by the defendants in this proceeding.

[33] This order does not preclude the defendants from moving at a later date for an order that Grassy Narrows should be responsible for costs, if there is new evidence suggesting a proper basis for making such a request that has not been considered on this motion. Should that occur, the defendants must of course formally put Grassy Narrows on notice so that the issue can be fully argued.

[34] Accordingly a Representation Order shall go in accordance with the form of order attached to this decision as Schedule A.

MOTION FOR ADVANCE COSTS

The Test

[35] In Okanagan, Mr. Justice Lebel, speaking for the majority, held that in those jurisdictions like Ontario, where the courts have retained a general discretion in awarding costs, an advance costs order may be granted, prior to the final disposition of a case and in any event of the cause, if the party seeking advance costs satisfies all of the following conditions:

(a) 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.

(b) 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.

(c) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases (at para. 40).

[36] The court went on to find that even where all of these specific conditions are present, this will not necessarily be sufficient to establish that such an award should be made;

> that determination remains 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…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" (at para. 41).

[37] Lebel J. emphasized that these orders should be granted sparingly and reserved for that narrow class of cases where there are special circumstances sufficient to satisfy the court that this extraordinary exercise of the court's powers is appropriate (at para. 36).

[38] The parties agree that this is a correct statement of the test and so the issues raised in the Advance Cost Motion revolve around the application of the evidence to these requirements and if I determine that the requirements are met, my decision as to whether or not, in my discretion, this is one of those rare cases where such an order should be made.

[39] While Abitibi is not a target of the requested advance costs order, it is a third party caught in the dispute. Accordingly, it has status to make submissions on the costs motion, as it could be subject to significant expense, which would be unrecoverable, if a costs order were granted[8]. In circumstances where public interest litigation involves private litigants, LeBel J. in Okanagan instructed courts to:

> 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 (at para 41).

[8] As explained below, the advance costs order granted in this case does not expose Abitibi to unrecoverable costs, as it will not need to intervene on the treaty interpretation issue.

Are the plaintiffs genuinely unable to prosecute this case in the absence of funding from the MNR?

The Law

[40] As set out above, in Okanagan, the Supreme Court of Canada framed the financial component of the advance costs test as follows:

> 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 (at para. 40).

[41] In an earlier passage, Lebel J. described this requirement as follows:

> The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case (at para. 36).

[42] One of the issues I must consider is whether or not individual members of Grassy Narrows should be required to contribute to the cost of the litigation. Although Okanagan is silent on the point, as submitted by Mr. Janes, there was no inquiry in that case as to the financial means of individual members, nor any indication that such an inquiry should be made. He argued that this line of inquiry was not pursued in the Okanagan case even though it is well known in British Columbia that two other first nations that are part of the Okanagan Nation are well off.

[43] I do not read the Okanagan decision however, as precluding an inquiry as to the financial means of members of the representative class. It appears that the issue was not raised in Okanagan as it has been argued before me. In fact there are several cases where the courts have made such an inquiry in order to consider the first requirement of the Okanagan test.

[44] After oral submissions concluded counsel provided brief written submissions on two additional cases, which they were not aware of at the time of the hearing. The first, Deans v. Thachuk,[9] is a case where the Alberta Court of Appeal reversed the decision of the chambers judge who had refused to order advance costs in a representative proceeding by beneficiaries of a pension trust fund who were alleging mismanagement of their fund. The chambers judge had found that there was no organized funding campaign to collect donations to fund the litigation. The evidence was that the members of the Plan had been informally canvassed but only a small percentage of the beneficiaries of the Plan responded and agreed to contribute financially towards the legal costs. The chambers judge found that before asserting that they could not afford the litigation the appellants should have formally canvassed all members of the Plan on whose behalf the action was brought or pursued a contingency fee arrangement.

[9] [2005] A.J. No. 1421 (C.A.) reversing [2004] A.J. No. 470 (Q.B.), leave refused, [2005] S.C.C.A. No. 555

[45] The court on appeal concluded that because only a small percentage of members responded to the informal canvassing for funds that it could be "inferred" that a majority of them were not dissatisfied with the administration of the fund and that "it seems patent" that any formal canvas for funds to support the litigation would have been futile. There was no evidence that a contingency arrangement was a viable alternative and the court, on this part of the test concluded that the chambers judge had erred in relying on the lack of evidence of a formal canvas or little prospect of a contingency arrangement, and disregarding undisputed evidence of the appellants' personal impecuniosity.

[46] The plaintiffs argue that the Deans case reinforces their position that it is not incumbent upon the plaintiffs to demonstrate that they canvassed every member of Grassy Narrows or other three First Nations bands when the evidence establishes that such efforts would not bear fruit.

[47] Counsel for the plaintiffs also drew my attention to the recent decision of the Manitoba Court of Appeal; Dominion Bridge Inc. (Trustees) v. Retirement Income Plan of Dominion Bridge[10] where the Court of Appeal set aside a decision of a chambers judge granting an advance costs order. The case also involved a dispute over the payment of a surplus in a retirement income pension plan. There were about 53 persons in the plan.

[48] The court on appeal stated that it was difficult to see how the plan members met any of the three conditions in Okanagan. On the issue of impecuniosity, the evidence was that about half of the plan members had been contacted and 20 plan members had contributed approximately $2,000 in total. There was no specific evidence that the plan members were unable to find the necessary funds to obtain a legal opinion after the examination of the relevant documents without the order for costs and on that basis this part of the test was not met.

[49] Counsel for the respondents submit that the decisions must be read in the context of the specific facts of the case. I agree. Both cases are examples of the application of this part of the Okanagan test to a specific set of facts, but they do illustrate that the court will consider evidence concerning the financial means of the members of the representative group.

[50] In Townsend v. Florentis, G.D.Lane J.[11] denied an advance costs order to an individual litigant (not a representative plaintiff) on a number of bases, including a finding that the applicant had chosen not to work and earn an income and to instead devote his time to harassing his ex-wife with litigation. In this case, there is no suggestion that the impecuniosity of most of the members of Grassy Narrows is self-inflicted.

[51] Counsel for the MNR relies on Gitxsan First Nation v. British Columbia (MNR of Forests),[12] where Halfyard J. of the British Columbia Supreme Court found that the evidence of impecuniosity was insufficient and that it was not unreasonable to expect at least 1,000 of an

[10] (2004) MBCA 180
[11] [2004] O.J. No. 5770 (S.C.J)
[12] [2005] B.C.J. No. 1531 at para. 70 (B.C.S.C.)

assumed number of 4,000 persons represented in that action to contribute a modest amount to a fund which could be used to retain counsel. He was not persuaded that reasonable efforts had been made to achieve this and he found that the evidence was as consistent with an unwillingness to contribute to legal expenses as with the inference that they were unable to contribute.

[52] The evidence in that case consisted of affidavits of the representative applicants and each of them had a very limited income. There was not a great deal of evidence about the financial circumstances of the Band itself, although there was a reference to high unemployment at 95% and that most Gitxsan people lived in poverty. The respondents however filed an affidavit of a Wing Chief of one of the Gitxsan houses, which comprise the Gitxsan Nation, attesting that a number of the people represented by the applicants were employed and earning reasonable incomes or had other sources of income.

[53] Clearly in this case the court considered the financial means of individual members of the represented class. The evidence filed on behalf of the respondents that a significant number of members of the class had means to contribute at least a modest amount to the cost of the litigation certainly appears to have conflicted with the very general evidence of the applicants.

[54] The case is distinguishable from the case before me in that the evidence before me of impecuniosity of the Grassy Narrows community is quit detailed and unchallenged. This is not a case where I could reasonably conclude that a significant proportion of the members of Grassy Narrows could contribute a modest amount to fund the litigation. On the evidence only a handful could.

[55] The defendants also rely on Re Charkaoui[13] where the Federal Court denied the cost award because the litigant, who qualified for Quebec legal aid, wanted to hire more expensive counsel instead. Noel J. found this unacceptable, particularly given his view that there were well-qualified counsel who likely could have taken Mr. Charkaoui's case at the legal aid rates. That issue does not arise here because Legal Aid is not available to the Plaintiffs.

The Issues

[56] The MNR concedes that the Band Council of the Grassy Narrows First Nation does not appear to have the necessary funds to prosecute this case, at least without jeopardizing other pressing priorities. The position of the MNR is that the plaintiffs have not met the onus on them to establish that they do not have other means to raise money for the costs of this litigation

[57] The defendants argue that notwithstanding the economic problems faced by the people of Grassy Narrows, that the plaintiffs have failed to make serious efforts to raise funds and support for this case. It is submitted by the defendants that if, as the plaintiffs claim, this is a

[13] (2004), 256 F.T.R. 93 (F.C.T.D.)

case of such importance to the members of Grassy Narrows and other Treaty 3 First Nations, that advance costs funding is appropriate, surely they should seek funding from those individuals and groups. They submit that if those individuals and groups, the potential beneficiaries of the case, do not consider the case of sufficient merit and importance to support it with any of their funds, the court should not conclude that it must be funded by the MNR. Most telling, it is submitted, is the refusal of the plaintiff, Mr. Fobister to contribute anything to the costs of this proceeding.

[58] The specific issues raised by the defendants are as follows:

(a) The plaintiffs and the Chief and Council of Grassy Narrows have made no effort to try to raise money to support this litigation from other members of their community, including accessing the income from the Grassy Narrows trust fund.
(b) The plaintiffs have made no effort to secure the support of other Treaty 3 signatory communities or their members, including the three Treaty 3 signatory communities that also have harvesting areas in the Keewatin Lands as defined below: the Lac Seul, Wabauskang and Wabaseemoong First Nations.
(c) The plaintiffs have not sought the support of any regional, provincial or national aboriginal organizations, outside of limited inquiries to Grand Council Treaty.
(d) The plaintiffs have failed to investigate whether other legal counsel could and would be willing to prosecute the case at lower cost than the Cook Roberts firm, which is located in Victoria, British Columbia.

The Facts

The financial resources of the Grassy Narrows community

[59] The defendants did not contest the evidence relied upon by counsel for the plaintiffs concerning the general economic conditions of the Grassy Narrows community, which includes the following:

(a) Grassy Narrows receives virtually all of its funding from the Canadian and provincial governments. That funding is earmarked for specific programs, such as health, education, social assistance, and capital infrastructure projects.
(b) Grassy Narrows has operated at a deficit in several of the previous fiscal years, including 2004-2005. It has substantial outstanding liabilities including a $1.6 million long term debt owing to CMHC.
(c) The unemployment rate in the Grassy Narrows community currently sits at about 80%, and most people rely on social assistance as their main source of income. Most of the local jobs are with the Band itself. Community members often need to seek emergency loans from the Band for matters such as travel for hospitalization, funerals, and hydro bills.
(d) Grassy Narrows lacks adequate housing for their members. Many are living in over-crowded homes or off reserve, waiting for new housing. Grassy Narrows cannot afford to build more than a couple of new houses per year. Furthermore,

much of the existing housing is substandard, and the Band lacks the funding to carry out all of the necessary repairs. In 2004, six homes on the reserve were condemned by Health Canada, but Grassy Narrows members generally continued to live in condemned houses as they have nowhere else to live.

(e) Grassy Narrows does not have an adequate water supply. The current water treatment plant does not meet provincial standards. In two sections of the reserve, residents must drink bottled water as the tap water is not safe. Grassy Narrows cannot afford to build a new water treatment plant until it receives a special grant from Indian and Northern Affairs (INAC).

(f) 60% of the population on the reserve is under the age of 20.

(g) Grassy Narrows does not have adequate recreational facilities for its youth. A skating arena is under construction, but work on that has been stalled for several years now for lack of the $400,000 needed to complete it. Aside from this, the only communal gathering place for youths on the reserve is a gymnasium. Given that Grassy Narrows is almost an hour's drive from Kenora, this lack of facilities to promote healthy activities for youths is a serious problem, and many youths resort to drugs and alcohol for entertainment. However, the problem is not one that the community can afford to address at this time.

[60] Apart from government funding, Grassy Narrows has access to two trust funds. The first is from Casino. Like other Ontario Indian bands, Grassy Narrows receives revenues from Casino Rama, which are distributed through the First Nations Limited Partnership Agreement, and, in the case of Grassy Narrows, placed in a trust. In recent years, the total revenues generated by the Trust have averaged about $350,000. The defendants have not disputed the fact that the Rama money is not available for this litigation given the terms of the limited partnership agreement, which limits the capital and/or operating expenditures of Casino Rama monies to specified purposes, namely: community development, health, education, economic development, and cultural development.

[61] There is also a Grassy Narrows trust fund, which results from a settlement with Ontario Hydro and Canada for the flooding of Grassy Narrows' original reserve. Under the terms of that trust agreement, only the interest can be spent which is in the range of $500-$600,000 per year. The members of Grassy Narrows vote on how those interest payments are to be spent and most of the time they vote in favour of individual payouts which usually range in the amount of $150-$200 to each member per year.

<u>The financial resources of certain members of Grassy Narrows</u>

[62] One of the plaintiffs, Joseph Fobister, is a successful businessman with personal assets exceeding $425,000, excluding the value of his general store. Approximately $370,000 of Fobister's assets are in his RRSP. The balance is in assets such as boats and trucks. He has 5 children and no pension.

[63] Mr. Fobister has stated he will not use any of his personal income or assets to finance the prosecution of this action, and that it would not be reasonable to expect other financially successful Band members to contribute anything either.

[64] There is no evidence that any of the other members of Grassy Narrows have significant assets save that two other members of Grassy Narrows have had some financial success.

Other sources of funding

[65] The Sierra Legal Defence Fund assisted with and helped fund the judicial review application and paid some of the plaintiffs' legal fees and provided some direct legal support. Sierra has advised however that it lacks the resources to become involved in a trial.

[66] The plaintiffs only pursued funding from Legal Aid for this action when prompted by a Rule 39.03 examination on this issue initiated by the MNR. As a result Grassy Narrows members made a group/test case application to Legal Aid Ontario. However, they have been denied funding on the basis that the case is too expensive. Although the defendants complain that the application was brought late, there is no suggestion that Legal Aid might fund this action.

[67] The plaintiffs applied for funding to the federal government's Indian and Northern Affairs Canada "Test Case Funding" and were denied on the basis that the funding is restricted to cases on appeal.

[68] Representatives of Grassy Narrows approached the Grand Council of Treaty 3 on a couple of occasions to seek funding for this litigation. They were advised that although the Council had a fund available for discretionary spending, accessing this required the agreement of all Chiefs, and it would not be possible to secure agreement for the Grassy Narrows' litigation. No further effort was made to secure the support of the Grand Council Treaty 3 or its chiefs.

[69] The plaintiffs have not attempted to make use of the Treaty and Aboriginal Rights Research group operated by Grand Council Treaty 3. Mr. Janes acknowledged that they do have a research arm, which he would try to access.

[70] Further affidavit evidence filed on behalf of the plaintiffs was admitted on consent, which disclosed a number of other attempts to contact various groups for funding, all without success.

The costs of this litigation

[71] The costs of litigating this case for the plaintiffs are estimated at just over $2.8 million. This figure is based on a detailed budget for an estimated 12-week trial on all issues and it provides for use of experts (scientific, historical, archival, and anthropological).

[72] Most of the work by counsel for Grassy Narrows has gone unpaid, and most of what has been collected has been paid not by Grassy Narrows, but Sierra Legal Defence Fund.

[73] Grassy Narrows paid Cook Roberts LLP a bill of $18,391.54 in December 2005. Grassy Narrows obtained this money by making a special request to INAC for the Band's Ottawa trust fund monies.

Analysis

Funding from individual members of Grassy Narrows

[74] The first issue is whether or not I should consider this motion on the basis that Mr. Fobister and a couple of other members of Grassy Narrows with financial means should be expected to contribute to the cost of this litigation.

[75] Given the evidence of the financial circumstances of the Grassy Narrows community, as the Alberta Court of Appeal found in the Deans v. Thachuk, I am able to infer that canvassing the members of the community would be futile as they are impoverished and could not reasonably be expected to make any financial contribution to this action. The only evidence of a Band member with any significant assets concerns Mr. Fobister. Given that most of the other members of Grassy Narrows are on social assistance, Mr. Fobister is in a relatively unique position in his community, financially speaking.

[76] I do not accept the arguments advanced by the defendants that Mr. Fobister and the couple of other members of Grassy Narrows who do have some financial means ought to be expected to contribute to or fund this litigation.

[77] The rights that are being pursued by the plaintiffs in this action are communal rights that belong to all of the members of Grassy Narrows. Mr. Fobister represents those communal interests, not his personal interests. As such Mr. Fobister does not have an individual or direct pecuniary interest in this litigation. He could not for example, exclude the other members of the Grassy Narrows community from benefiting from this action[14]. It is not reasonable to expect Mr. Fobister to sacrifice his retirement fund for this litigation. These are the only retirement savings of a man in his late 40s.

[78] Furthermore, I agree with the submission by Mr. Janes that given most of the members of Grassy Narrows could not contribute to the cost of this action, that it is not appropriate to consider whether a few individual members should do so. Where, as in this case, there are only a very small number of individuals who could reasonably be expected to make any kind of financial contribution, and where the evidence establishes that the remaining members of the representative group could not reasonably be expected to make any financial contribution

[14] See for example R v. Sundown (1999), 170 DLR (4th) 385 (S.C.C.)

whatsoever, in my opinion it is not appropriate for the court to expect that the few members who might be able to make a contribution exhaust all of their assets for the benefit of the entire group before a finding will be made that the first requirement of the Okanagan test has been met.

[79] I also agree with the submission by the plaintiffs that there is a danger in placing too much emphasis on the income or assets of a few members of the Band, in that it puts the interests of the collective at the mercy of a few individuals. The situation might be different if a large proportion or a substantial number of Band members could collectively, and without hardship, make a significant contribution or bear the burden of the litigation. In that case, it might be reasonable to expect some contribution by individual members. However, it would be quite different to make the litigation conditional on one Band member contributing all or a significant part of his retirement savings.

Funding from the Grassy Narrows trust funds

[80] The Band membership collectively has access to approximately $5-600,000 per year in trust fund income that could be devoted to this case. Although no budget was prepared on this basis, it seems likely that if the litigation were phased, that sum would cover the first phase dealing with the interpretation of the treaty.

[81] This issue then is should I find that the impecuniosity requirement in the Okanagan test has not been met because this fund is available? If the test was solely that of unqualified “impecuniosity”, I would have to accept the submission of the defendants and effectively compel the members of Grassy Narrows to decide whether or not this case is important enough to warrant the use of these funds.

[82] Lebel J. however did not limit this part of the test to a consideration solely of financial means. He stated the party seeking the order must be impecunious “to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case” (at para. 36). In Okanagan the evidence filed, like the evidence here, was that the Bands were all in extremely difficult financial situations. The Bands had no way to raise the money needed for the action and even if they did there were many more pressing need which would have to take priority over funding the litigation (at paras. 4-5).

[83] I am satisfied on the evidence before me that Grassy Narrows is an impoverished community. The settlement funds in question generate in the range of $150-$200 per person per year which is a very modest sum, but given that most members of Grassy Narrows are unemployed and on social assistance they are obviously dependent on that funding to meet basic needs. For the most part, the members of Grassy Narrows have such immediate pressing social problems it would not be reasonable to expect them to divert any of the income that they receive from the settlement to fund this litigation Even if individual members could reasonably be expected to leave this income in the trust, which I do not accept, like the Bands of Okanagan, the

Council of Grassy Narrows would clearly have more pressing needs that would take priority over funding this litigation.

[84] I recognize that the payment of the order for advanced costs will come from the public purse. The British Court of Appeal said in Little Sisters[15] that while the gay and lesbian communities had other priorities for their funds than the lawsuit in question, "so does the public purse." It is therefore not enough for an applicant to argue that they have other priorities for funds at hand and should be relieved of an obligation to utilize those funds. In this case however, one could hardly question the priorities of the Council given that the Grassy Narrows community lacks adequate infrastructure. If I were to accept the submissions of the defendants on this point I would be compelling the members of Grassy Narrows to choose between attempting to provide for the basic necessities of life, such as adequate housing and securing a safe water supply, that most citizens of Ontario take for granted, and pursuing this litigation. In the circumstances, the reasonable choice would not be to divert those funds to this litigation. Accordingly I reject the submission that I consider the availability of these settlement funds in considering this requirement of the test.

Funding from other sources

[85] The MNR argues that at the very least the plaintiffs have an obligation to inquire to seek support from the other three Treaty 3 First Nations with harvesting areas in the Keewatin Lands. They argue that their failure to do so is fatal, as they have not established that the other First Nations could not and would not provide financial support.

[86] In the Federal Court decision of Re Charkaoui the court stated that if there is no possibility of recourse to other means or of access to other financial sources, it is important for the applicant to say so, as the burden of proof in such a motion is on the applicant (at para. 24).

[87] There is no evidence before me as to whether or not the other three First Nations with harvesting areas within the Keewatin Lands could or would assist with funding this litigation. The plaintiffs did not ask them for support, even though those First Nations are potential beneficiaries of the litigation and of the treaty negotiations. I was advised that counsel for the MNR suggested for the first time, during the cross-examinations, that the plaintiffs seek funding from other First Nations in the area.

[88] The defendants argue that the onus is on the plaintiffs to establish that the other First Nations are unable to fund this litigation. The plaintiffs argue that Okanagan does not require them to prove that there is absolutely no one else who can bear the costs of the litigation. Mr. Janes' position is that going to an Indian band is not an obvious source of funding and that

[15] [2005] B.C.J. No. 291 (leave to appeal granted, [2005] S.C.C.A. No. 190)

there is no evidence that these other First Nations have any funds that could be used on this litigation.

[89] Although the onus of satisfying me that the plaintiffs meet the test in Okanagan is on the plaintiffs, I accept the submission of Mr. Janes that the plaintiffs only have to act reasonably in following up with possible sources of funding and that without more, other First Nation communities in Ontario would not be an obvious source of funding.

[90] If the MNR intended to seriously suggest that these other First Nations should be canvassed, notwithstanding that the onus is on the plaintiffs, in my opinion counsel ought to have alerted Mr. Janes to this in sufficient time that he could pursue the matter, as was done with the issue of Legal Aid or alternatively, put forward some evidence that these other First Nations have some financial resources that could be used to fund the litigation. Had he done so and the plaintiffs had decided not to pursue the matter, this argument might have had some force. As it is, I have no evidence that these other First Nations are unable or unwilling to assist and I am not prepared to find that they were an obvious source. That presumes that they are not faced with the same type of financial problems that the members of Grassy Narrows face as only then could this be considered a reasonable suggestion.

[91] Mr. Janes argues that making aboriginal group coalitions a prerequisite to an advance cost award is problematic in that different First Nations may have different social, political and economic goals. For example, counsel for the MNR admitted that one of the other First Nations is logging to a significant extent. It may be that that First Nation would not support the position of Grassy Narrows on this issue. That however could be dealt with on a motion like this because if there was evidence that other bands were not in favour of the litigation, as the court did in Deans, it could then be "inferred" that a request for funds to support the litigation would be futile. The Okanagan test does not require that everyone who stands to benefit from the litigation be in support of the action.

[92] However, what the argument of the defendants does not consider is that if other First Nations agree to contribute to the cost of the litigation they would in no doubt demand some say in how the litigation proceeds. That would require a high level of cooperation and could lead to internal disputes. I do not read the first requirement in Okanagan as going so far as to, in circumstances like these, seek to join in other First Nation bands to this litigation.

[93] As Mr. Janes submitted, the Okanagan case illustrates the reality that different groups may make different decisions on how to advocate and advance their rights. In that case there were originally three sets of proceedings: two claims involving Okanagan First Nations (the Okanagan Indian Band and the Westbank First Nation) and a claim involving a number of Secwepemc First Nations. Westbank, settled with the Crown quite quickly by entering into a

forestry agreement with the Crown. The Okanagan band did not; it proceeded with the litigation and ultimately obtained an advance costs order[16].

[94] The defendants also suggest that the plaintiffs should pursue the Grand Council of Treaty 3, but on the evidence two requests were made and denied. No reasons were given. There is no evidence to suggest that further attempts would result in funding. As for the research group I accept Mr. Janes' advice that he will try to access this research program for this case. I expect this to be done immediately so their position can be taken into account in the budget.

[95] Finally, as for the suggestion that there are other unspecified aboriginal organizations that the plaintiffs should contact, I accept the submission of Mr. Janes that the plaintiffs do no have to provide negative evidence on funding availability for all aboriginal groups and organizations to which they have any connection, when the defendants have provided no evidence that funding might reasonably be available from any specific group.

[96] For these reasons therefore, I am satisfied that the plaintiffs do not have any other sources of funds that could reasonably be diverted or obtained to fund this action.

Cost of counsel

[97] Although not pursued in oral argument, counsel for the MNR suggests in its factum that Grassy Narrows will increase the costs of the litigation by virtue of its decision to retain Cook Roberts LLP, which is located in Victoria. The Crown does not suggest that the plaintiffs' budget for this trial is misguided. For example, there is no allegation that the length of trial is overestimated or that the experts identified are inappropriate.

[98] As counsel for the plaintiffs submits, Okanagan and the cases that have applied it consider the complexity of the proposed litigation. It may be possible to prosecute a simple case with the assistance of counsel acting on a pro-bono basis, at significantly reduced rates, or even possibly without counsel. However, a complex case will require the assistance of counsel, who will likely need specialized knowledge and who will likely require payment at normal or close to normal rates.

[99] In this case, the defendants moved to convert the application for judicial review to a trial on a number of bases, including the complexity of the issues raised and the fact that they could not be resolved justly on a summary basis. They successfully argued that the case would require the detailed examination of historical, anthropological and scientific evidence, and the making of difficult legal arguments, and this was one of the reasons that Justice Then converted this matter to an action.[17] In fact many courts have noted the inherent complexity of

[16]British Columbia (MNR of Forests) v. Okanagan Indian Band (2000) BCSC 1135; (rev'd) [2002] 1 C.N.L.R. 57 (B.C.C.A.); British Columbia (MNR of Forests) v. Westbank First Nation [1999] B.C.J 2161 (B.C.S.C.).

[17] Keewatin, supra, at paras.44-52

aboriginal rights litigation which often involves complex factual records and difficult legal questions

[100] Mr. Janes has extensive experience in aboriginal law. This is a specialized area and in my view, a lawyer with special expertise in this area is required to properly advance the plaintiffs' claim. Furthermore, presumably someone like Mr. Janes, who has this kind of expertise, will be able to prepare the case more efficiently. In my view the plaintiffs' choice of Mr. Janes as counsel is reasonable give the nature of this action.

[101] The budgeted rates set out in Mr. Janes' budget are approximately in line with the partial indemnity hourly rates established by the old Costs Grid by the Subcommittee of the Rules Committee. The hourly rate will be argued at a later date but it is not suggested by the defendants at this stage that the rates are too high.

[102] The only issue remaining then, is the fact that Mr. Janes is from British Columbia. There is no suggestion that the plaintiffs could not retain experience Ontario counsel, but they have chosen Mr. Janes to represent them.

[103] As Mr. Janes points out, Ontario counsel would need to fly to Winnipeg to reach Grassy Narrows, which is where extensive work needs to be carried out, and their travel costs would likely not be much less than lawyers coming from Victoria. Furthermore, extra disbursement costs will be small relative to the costs of this action.

[104] These issues are really more appropriately dealt with when terms of the order are argued. If at that stage I am persuaded that it is inappropriate for British Columbia counsel to represent the plaintiffs or that the rates proposed are too high, that can be dealt with when the terms of the order for advanced costs are established. It would not be appropriate reject the application for advance costs on this basis.

Scope of the action

[105] As already stated, I have come to the conclusion that only a determination of the treaty interpretation/division of powers issue meets the Okanagan test. If the case proceeds with a trial on this issue alone, then only a portion of the costs estimated by Mr. Janes will be incurred. There was no specific evidence before me as to what the estimate for those costs would be and in fairness to counsel, that issue was to be dealt with in the next stage, but I have considered the fact that the threshold treaty interpretation/division of powers portion of the plaintiffs' case would be much less costly to litigate than the action as a whole in considering whether or not the plaintiffs meet the first requirement of Okanagan.

[106] Counsel for the MNR referred me to the decision of the British Columbia Court of Appeal in Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)[18] and the criticism by the appeal court of the trial judge who concluded that the

[18] 2004 B.C.S.C. 823; (2005) D.L.R. (4th) (B.C.C.A.) 695

applicants met the first requirement of the Okanagan test regardless of the scope of the litigation, given her failure to consider whether a ruling on the narrow issue could be pursued by the applicant.

[107] The trial of the treaty interpretation/division of powers issue would be expensive and the funding required would still be significant. Based on the evidence before me I can certainly conclude that a trial limited to the treaty interpretation/division of powers issue would still be a trial involving the expected complexity of aboriginal rights litigation with a complex factual record including expert evidence and novel legal questions. It is to be noted that on the motion before me the plaintiffs, presumably because of a lack of funds, led no expert evidence. Obviously they would wish to retain experts to respond to the experts called by the defendants. Even with the reduced cost of a trial dealing only with the treaty interpretation/division of powers issue, the cost of that proceeding would not be within a range I could reasonably expect the Grassy Narrows community to fund from the Grassy Narrows trust funds. Furthermore, for the reasons already given, I would not require financial contributions from Mr. Fobister or the other couple of band members with some financial resources.

Conclusion on the "impecuniosity" part of the Okanagan test

[108] For these reasons, I conclude that the plaintiffs meet the "impecuniosity" part of the Okanagan test.

[109] I should add that even if I had concluded that certain members of the Grassy Narrows community such as Mr. Fobister, could reasonably be expected to financially contribute to this litigation or that some portion of the income from the Grassy Narrows trust funds should be applied to the litigation in the future, I would not have dismissed the motion on this basis. By way of example only, in a case where the court determines that the plaintiffs and the members of the representative group can or should be expected to contribute 25% of the costs of the litigation, but could not afford to proceed with the litigation if an advance cost order was not made to cover 75% of the costs, if the other requirements of Okanagan were met, in my view the appropriate decision would be to award reduced advance costs. The plaintiffs in those circumstances would still meet the test of impecuniosity because without the order the action could not proceed.

[110] As Mr. Janes points out, the plaintiffs do not seek a costs order covering 100% of their litigation costs, nor are advance cost orders generally meant to achieve this. In Okanagan, the British Columbia Supreme Court made an advance costs order of 50% of special costs (the British Columbia equivalent of substantial indemnity costs).

Is the claim to be adjudicated prima facie meritorious?

The Law

[111] In Okanagan, the second requirement of the test is stated as follows:

> 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 (at para. 40).

[112] In an earlier passage, Justice Lebel describes this condition as follows: "The claimant must establish a **prima facie case of sufficient merit to warrant pursuit**…Although a litigant who requests interim costs must establish a case that is strong enough to get over the **preliminary threshold of being worthy of pursuit**, the order will not be refused merely because key issues remain live and contested between the parties (at paras. 36 and 37, emphasis added).

[113] The consideration of whether or not the case is of sufficient merit to warrant pursuit is consistent with comments of Lebel J. characterizing the findings of the trial judge in that case, and in particular the view of the trial judge that "although the claim [of the Band] was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit" (at para. 45).

[114] The standard for determining whether a claim is sufficiently meritorious to potentially warrant an award of advance costs has been considered by a number of Ontario cases.

[115] In Townsend v. Florentis, G.D.Lane J. considered a request for interim costs in the context of an action against solicitors for negligence in the conduct of his action for support, access and custody. The defendants brought a cross-motion to have the plaintiff declared a vexatious litigant. Lane J. considered the test from Okanagan, and although he concluded that the plaintiff's case against the defendants was not a "powerful one", he concluded that "this type of motion is not the forum in which to decide these issues, and the action is at a pre-discovery stage. If the credibility issues are resolved in favour of the plaintiff, there could be some damages awarded. It is not possible for me to say that the case is not worthy of pursuit" (at para. 55). This language is consistent with the language of Justice Lebel in Okanagan although I note it may be different than saying as Lebel J. did,that the case is worthy of pursuit.

[116] In Kelly v. Palazzo[19], Horkins J. considered the issue of advance costs claimed by the plaintiff, made during the course of a trial seeking damages for alleged racial profiling. She referred to the British Columbia Court of Appeal decision of Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue). In that case the court opined

[19] [2005] O.J. No. 5364 at paras. 24-25 (S.C.J)

that the requirement of a prima facie meritorious case "has a low standard of proof" and requires only that a case attain a status "above that of being merely frivolous" (at para. 28). It seems that Horkins J. approved of this statement, although that is not clear, as she made no further comment about it. She went on to find that the plaintiff's claim was not *prima facie* meritorious.

[117] Counsel for MNR relies on the Ontario Divisional Court decision in Broomer (Litigation Guardian of) v. Ontario (Attorney General)[20]. In that case, the applicants were impecunious and had been represented on a pro bono basis in a Charter application. Before the matter was heard a settlement was reached. In considering the submission on costs, Ferrier and O'Connor JJ., speaking for the majority of the panel of the Divisional Court, found that the applicants were successful in that they received the outcome they desired. They noted that costs can be used as an instrument of policy and that making Charter litigation accessible to ordinary citizens is recognized as a legitimate and important public policy objective, citing with approval the decision of Epstein J. in Rogers v. Greater Sudbury (City) Administrator of Ontario Works[21]. The court went on to state that:

> This is not to say the government should be treated as a bottomless pit of funding for every Charter challenge thought up by inventive legal minds. The applicants must be able to show significant merit to their cause, that is, a real possibility of ultimate success, or, as in this case, the actuality of success (at para. 18).

[118] The court also considered the Okanagan test, which it found applicable to all cases of public interest litigation, and without commenting further on that test, found that the three conditions of the Okanagan had clearly been met in the case before them. Counsel for the MNR submits that I should adopt the language of the Divisional Court, set out above, as the proper formulation of the second condition in the Okanagan test. I do not do so as the court did not expressly link that statement of what applicants must show in Charter cases to the principles set out in the second condition of the Okanagan test.

[119] Having said this, I do not believe there is much, if any distinction between determining whether or not a case has "a real **possibility** of ultimate success" or considering whether or not the case is of sufficient merit to warrant pursuit, in the way that phrase is used by Lebel J.. In either case, the court is not determining ultimate liability. In fact counsel for the plaintiffs characterized the test as whether or not the plaintiffs have a "real prospect of success".

[120] I agree, however, with the submissions of counsel for the MNR, that the restatement of this part of the Okanangan test by the British Columbia Court of Appeal in Little Sisters is not consistent with the test as expressed by Lebel J. in Okanagan and in particular with his comments that advance costs should only be reserved for a narrow class of cases that warrant this extraordinary exercise of the court's powers. It is not sufficient to find that a case is not frivolous. There must be some consideration of the merits in order to determine that the case is of sufficient merit to warrant pursuit. In addition to the merits of the plaintiffs' claim, this will also

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20(2003), 3 C.P.C. (6th) 194 at 200 (¶ 18) (Div. Ct.)
[21] (2001), 57 O.R. (3d) 467 (S.C.J.)

require a consideration of the nature of the case and whether it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the plaintiffs lack financial means. This brings into focus the third part of the test, namely whether or not the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[121] Typically, at the time when such motions are heard, key issues will remain live and contested between the parties. As Lebel J. stated, this is not a reason to refuse such a request (at para. 45). Applications for advance costs are typically considered in cases where the facts are complex and there is a need to test the claim in a trial process. Justice Then has already held that this is the case for this claim, and as he noted, aboriginal law claims, and in particular claims involving treaty issues can only be properly dealt with in an action.[22]

[122] It is important, as submitted by counsel for the plaintiffs, that the court not put the plaintiffs in an impossible situation and require the plaintiffs to marshal all of the evidence, particularly the expert evidence that they would hope to call at trial. Where there is impecuniosity, the plaintiffs will naturally lack the resources to do this. The threshold enunciated by Lebel J., for this portion of the test, recognizes that this is not the time to embark on a mini trial involving heavy and time-consuming litigation.[23]

[123] In Deans v. Thachuk the Alberta Court of Appeal described this part of the Okanagan test as requiring:

> that the case be strong enough to get over the preliminary threshold of being worth of pursuit. It does not require a close examination of the merits of the dispute, nor the prospects of success, including the likelihood of recovery. The action here is of sufficient merit to warrant pursuit …(at para. 39).

[124] This is an accurate summary of this part of the Okanagan test in my view. It does not change it.

[125] In my opinion, there is no need to attempt to restate the "merits" component of the test for making an order for advance costs as set out in Okanagan. Any question as to what the court meant by requiring that the claim be "*prima facie* meritorious" is adequately explained in the language that follows, as set out above: "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" and the comments of Lebel J. that a prima facie case is one of "sufficient merit to warrant pursuit".

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[22] Keewatin, supra at para 48

[23] The English Court of Appeal applies a similar approach for applications for protective costs orders, see for example R (on the application of Corner House Research) v. Secretary of State for Trade and Industry [2005] EWCA Civ 192 at para. 73

The Issues

[126] A determination of whether or not the plaintiffs have a *prima facie* case of sufficient merits to warrant pursuit involves a consideration of the constitutional division of powers between the federal and provincial governments and an interpretation of Treaty 3, which was signed in 1873.

[127] The key part of Treaty 3, for the purposes of this motion, is the following:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and **saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada**, or by any of the subjects thereof duly authorized therefore by the said Government (emphasis mine).

[128] There is no dispute among the parties that the reference to hunting includes trapping. What is in dispute is whether or not the bolded portion of this passage of the Treaty, which is referred to as the "taking up" provision, should be interpreted to restrict the right to "take up" land for such purposes as lumbering, to the federal government, given the reference in the treaty to "Her Government of the Dominion of Canada.

[129] The plaintiffs' central argument is that the "taking up" clause reserves the right to "take up" land for forestry to the federal government and that at least on the Keewatin Lands, as defined below, Ontario lacks the jurisdiction to unilaterally, without the involvement of the federal government, authorize forestry and "take up" land for that purpose. The plaintiffs argue that to the extent that Ontario authorizes forestry activities that significantly infringe the hunting and trapping rights guaranteed by Treaty 3, it intrudes impermissibly into federal jurisdiction.

[130] A determination of the plaintiffs' claim will require a consideration of the distinction created over time between the Northwest Angle and the Keewatin Lands. . Both are within the area covered by Treaty 3. The Northwest Angle lands are located south of the English River, while the Keewatin Lands lie north of the English River and east of Ontario's present boundary with Manitoba. The ownership of the Northwest Angle lands had not been settled when Treaty 3 was signed, as both Canada and Ontario claimed them. This claim was ultimately resolved in Ontario's favour. The Ontario Boundaries Extension Act added the Keewatin Lands to the province of Ontario in 1912.[24]

[131] The specific issues that I must consider to determine whether or not the plaintiffs have a *prima facie case* of sufficient merit to warrant pursuit, were narrowed a great deal during

[24] S.C. 1912, 2 Geo. V. c.40

the course of argument, for which I thank counsel. Certain concessions for the purpose of this motion only, were made by both counsel for the plaintiffs and counsel for the MNR and they are as follows:

(a) Counsel for the plaintiffs conceded that he could only meet the "merits" test in Okanagan with respect to that portion of the lands covered by Treaty 3, that for the purpose of this motion were identified as the Keewatin Lands. Part of Grassy Narrows traditional territory lies within the Northwest Angle Lands, and part of it lies within what were called the Keewatin Lands. A large part of the Whiskey Jack forest is in the Keewatin Lands. Most of the planned logging is to take place in the Keewatin Lands.

(b) Counsel for the MNR conceded that if I find that the plaintiffs have met the "merits" test on their position that Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that Ontario's right to authorize forestry is limited by the parameters set out in R. v. Sparrow[25] (Sparrow). Because of the complexity of the issues that arise in considering those parameters, it is not argued, for the purpose of this motion, that there is no meaningful interference or "*prima facie* infringement" with hunting and trapping rights as a result of the forestry activities in question, within the meaning of Sparrow. Accordingly it is not necessary for me to analyze in detail the evidence led by all parties on the issue of the extent to which the forestry activities infringe on the plaintiffs' treaty rights to trap and hunt.

(c) Counsel for the plaintiffs also conceded that if he cannot meet the "merits" test on his position that Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that he could not meet the test in so far as the issues of *prima facie* infringement/justification of that infringement/ lack of consultation arguments are concerned, in that that the law concerning those issues has been decided in Misikew Cree First Nation v. Canada (Minister of Canadian Heritage)[26] (Misikew) and as a result these issues would no longer qualify as a test case.

[132] Accordingly, as a result of the concessions made by counsel for the plaintiffs and the MNR, for the purpose of considering whether or not the plaintiffs' claim meet the "merits" test in Okanagan, I have limited my deliberations to the plaintiffs' claim as set out in paragraph 1(b) of the Amended Statement of Claim which seeks a declaration that the MNR had no authority to approve any forest licences, forest management plans, work schedules or make or give any other approvals or authorizations for forest operation, within the Keewatin Lands so as to infringe, violate, impair, abrogate, or derogate from, the right to hunt and fish guaranteed to the plaintiffs by Treaty 3.

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[25] (1990), 70 D.L.R. (4th) 385
[26] (2005) 259 D.L.R. (4th) 610

[133] The central issue in dispute is whether or not Ontario has the right to "take up" the Keewatin Lands for forestry. That involves an interpretation of the taking up provision of Treaty 3 and a consideration of the constitutional division of powers.

The Facts and relevant legislative and history

Events following the signing of Treaty 3

[134] In 1884 the Privy Council decided that Ontario owned the North-West Angle Lands and this was enacted in 1889 in the Canada (Ontario Boundary) Act, 1989[27].

[135] Ontario's ownership of the Northwest Angle Lands created problems for Treaty 3, as Canada had obligations to create reserves under the treaty but lacked the title required to create them. In 1891 the federal and provincial governments passed two statutes, which have been referred to as reciprocal legislation, which resolved the issue of the selection of the reserves.[28]

[136] In 1912, Ontario's boundaries were extended to include the Keewatin Lands through the Ontario Boundaries Extension Act. Once this was done, all Treaty 3 lands were under Ontario's jurisdiction, except for a small segment that fell within Manitoba.

Forestry activities in the Treaty 3 territory

[137] Ontario began to authorize forestry in the Treaty 3 territory in 1923. Since that time, there has been extensive logging, including logging in the Grassy Narrows traditional territory. The Ontario government manages forestry activity on Crown lands, including the Whiskey Jack Forest, pursuant to the Crown Forest Sustainability Act, 1994[29].

[138] In recent years, forestry activity in the Whiskey Jack Forest has been governed by Forest Management Plans ("FMP"). These are 20 year logging plans that are required under s. 8(2) of the Crown Forestry Sustainability Act and prepared according to the Forest Management Planning Manual, as well as numerous other policies and guidelines that are renewed every five years. The current plan is the 2004-2024 FMP and authorizes logging on the Grassy Narrows Traditional Territory, including logging on the trap lines held by Grassy Narrows' members.

[139] The logging carried out under the FMP is clear-cutting. Clear-cutting is accompanied by road building, the establishment of culverts, the removal of beaver dams to

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[27] 52 and 53 Vict., Chap. 28

[28] An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, 54-55 Victoria, c. 5 and An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, 54 Victoria, c.3

[29] S.O. 1994 c. 25

prevent road flooding, brush burning, the establishment of work camps, tree planting, herbicide spraying, and other related activities on the land.

[140] There was a great deal of evidence filed on this motion as to the impact of past and proposed logging on the trap lines of the Grassy Narrows people. The respondents say that only 0.7% of the forest is harvested annually, but the plaintiffs argue that, given the size of the forest, the issue is where that logging is taking place. The impact of that logging is also subject to fierce debate. In addition to impact on the trap lines themselves, the plaintiffs argue that the effects of clear-cutting extend to other areas of the forest. Given the concessions made by counsel, it is not necessary for me to consider this evidence except to say that the parties are far apart on these issues.

Analysis

Division of powers argument

[141] It is the plaintiffs' position that if Ontario does not have the power to "take up" the Keewatin Lands pursuant to the terms of Treaty 3, that it cannot unilaterally authorize forestry because of the constitutional division of powers between the federal and provincial governments, which imposes a substantive limit upon a province's authority to interfere with aboriginal treaty rights.

[142] I do not need to deal with this submission because for the purpose of this motion the MNR conceded that if Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that Ontario's right to authorize forestry is limited by the parameters set out in Sparrow. The MNR's position is that Ontario has been issuing permits for logging in the Treaty 3 lands, relying on the Crown's treaty right to take up the lands. I will however summarize the legislative and common law background briefly as it assists in understanding the significance of the issues in dispute.

[143] The Constitution provides two important substantive protections for aboriginal people. First, section 91(24) of the Constitution Act, 1867[30] assigns exclusive jurisdiction over aboriginal matters (including the protection of their treaty and other rights) to the federal government. According to Professor Peter Hogg, the main reason for section 91(24) of the Constitution Act, 1867 seems to have been the idea that the federal government would be more likely to protect aboriginal people against the interest of local majorities.[31]

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[30] formerly the British North America Act, 1867, (U.K.), 30 & 31 Victoria, c. 3

[31] P. Hogg, Constitutional Law of Canada (Looseleaf 4th Ed) (Toronto: Carswell, 1997) at p. 27-2

[144] Second, section 35 of the Constitution Act, 1982 protects aboriginal and treaty rights from both levels of government by imposing substantive constraints on the ability of either level of government to interfere with these rights.[32]

[145] The common law and s. 35 of the Constitution Act, 1982 also provide procedural protection, as they require the government to engage in meaningful consultation with aboriginal people before making decisions that have the potential to impact their aboriginal or treaty rights.

[146] In the Ontario forestry regime context, all of these protections are reinforced by the statutory protections contained in s. 6 of the Crown Forest Sustainability Act, 1994 which states:

> This Act does not abrogate, derogate from or add to any aboriginal or treaty right that is recognized and affirmed by section 35 of the Constitution Act, 1982.

[147] In Sparrow, the Supreme Court of Canada held that section 35(1) of the Constitution Act, 1982 "affords aboriginal peoples constitutional protection against provincial legislative power" (at p. 406).

[148] This is reinforced by section 88 of the Indian Act[33], which provides that "[s]ubject to the terms of any treaty and any other Act of Parliament" general provincial laws that are not inconsistent with that Act, are applicable to Indians as defined in the Indian Act.

[149] It is the position of the plaintiffs that the provinces are excluded from regulating aboriginal affairs or adversely affecting aboriginal treaty rights unless expressly empowered to do so by federal statute or a treaty instrument. For example with respect to treaty rights, the Supreme Court of Canada in R. v. White and Bob[34] held that British Columbia could not prohibit hunting by aboriginal people that was occurring pursuant to the Douglas Treaties.

[150] In Sparrow, the Supreme Court of Canada held that even where a government has the jurisdiction to interfere with aboriginal or treaty rights, it can only do so if it can justify this interference on a strict test. The justification test requires demonstrating that the Crown had a pressing legislative objective, that it gave priority to the aboriginal right, and that it consulted and generally acted honourably towards the aboriginal group.

[151] The Supreme Court of Canada in recent decisions culminating with Mikisew held that a taking up clause, such as the clause in Treaty 3, expands the range of activities that the Crown can authorize without having to meet the Sparrow justification test. The court rejected the proposition that any interference with the right to hunt is a *prima facie* infringement, which must be justified under the Sparrow test in the case of exercising a taking up provision. In those circumstances, interference with treaty harvesting rights is only an infringement requiring

[32] Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c. 11
[33] R.S.C. 1985, c. I-5
[34] (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (per Davey J.A.); aff'd (1965), 52 D.L.R. (2d) 281 (S.C.C.)

justification, where no meaningful right remains, assessed in relation to the traditional harvesting areas of a particular signatory community.

[152] There were some submissions as to what rights Ontario will have if any, to authorize logging, if it does not have the right to "take up" the land for forestry pursuant to the terms of Treaty 3. Counsel for the MNR set out in his factum that the plaintiffs' argument creates a constitutional vacuum where no one can authorize logging on Treaty 3 lands. Plaintiffs' counsel responded that that is not the case and that if the court ultimately accepts their position, Ontario has two options: one to ask the federal government to exercise its power under the "taking up" clause for the benefit of Ontario or Ontario can negotiate with Grassy Narrows to permit logging to continue on terms acceptable to all parties. He referred by example to the Nisga'a Final Agreement and the Nisga'a Final Agreement Act[35], which resulted from a negotiated settlement following the commencement of litigation.

[153] It is not necessary for me to consider what Ontario's position will be if the plaintiffs succeed in their treaty interpretation argument. For the purpose of this motion, it is sufficient to observe that there is no doubt that the issue of whether or not Ontario has the authority to "take up" the Keewatin Lands pursuant to Treaty 3 is an important issue with significant consequences for the parties. The threshold that the plaintiffs must establish for infringement of their hunting and trapping rights is much lower if Ontario cannot rely upon the taking up clause, and if that threshold is established, on the plaintiffs' argument, Ontario will need coordinated action or legislation by the federal government in order to authorize this type of logging.

The decision of Mr. Justice Then

[154] The defendants have already successfully argued that this matter is of such complexity that it cannot be disposed of on a summary basis and instead requires a trial. The plaintiffs submit that this position weighs heavily in favour of a finding that there is a prima facie meritorious case. They argue that if their case was devoid of merit or very weak, the defendants presumably would have favoured a summary disposition via a judicial review or would have moved to strike the claim as disclosing no triable issue. In fact they argue that it is inconsistent to say that the case is so difficult that it requires a trial and cannot be decided summarily but so easy that I can determine that it is not a *prima facie* case.

[155] Although I find that the position taken by the defendants before Then J. as to the public importance of this litigation to be relevant to the third condition of the Okanagan test, I do not accept the plaintiffs' position that I should consider the fact that the defendants have not sought to dispose of the claim in a summary fashion and draw an inference that the plaintiffs have a *prima facie* meritorious claim. There is no motion before me to strike the claim as disclosing no reasonable cause of action and the test on such a motion is quite different than the test as expressed by Lebel J. I therefore reject this submission.

[35] S.C. 2000, c.7

[156] The plaintiffs also submitted that Mr. Justice Then acknowledged the meritorious nature of this case. I disagree. He considered the matter in the context of a procedural motion and the issue he decided was whether or not, given the nature of the plaintiffs' claims, the matter should proceed by way of application for judicial review or by way of action.

[157] Furthermore, the issue of whether Ontario has the authority to take up the land for forestry was not seriously argued or developed in the limited evidence before Then J., except to explain the nature of the case in relation to whether it should proceed by way of application or action. This issue is of material importance on this motion and is the subject of considerable evidence that was not before Justice Then.

[158] For these reasons, I have not considered the decision of Then J. in determining whether or not the plaintiffs meet the "merits" requirement of the Okanagan test.

The plaintiffs' interpretation of the "taking up" provision in Treaty 3

[159] The wording of the clause in Treaty 3 that contains the "taking up" provision is as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, …saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada...

[160] The plaintiffs rely upon the clause in issue as it is worded and argue that, on its plain meaning, it is the federal government that has the power to take up the lands governed by the treaty, for the purpose of forestry. Specifically Mr. Janes argues that the reference to the "Dominion of Canada" is a reference to the federal government, the party that negotiated the treaty.

[161] If a trial court were to find that there is some ambiguity in the meaning of "Dominion Government", the plaintiffs will be able to rely on the general rule that doubtful or ambiguous phrases in treaties are to be interpreted against the drafters of the treaty and in favour of the aboriginal people or at least not be interpreted to the prejudice of the aboriginal people if another construction is reasonably possible[36]. Thus, in this case, if there is any ambiguity in the meaning of "Dominion Government", the plaintiffs can argue that the term should be interpreted narrowly to mean only the federal government in that aboriginal people could generally assume

[36] R. v. Nowegijick, (1983) 144 D.L.R. (3d) 193 (S.C.C.) at p. 198; aff'd in numerous cases, including R. v. Marshall, (1999), 177 D.L.R. (4th) 513 (S.C.C.) at para. 51 (per McLachlin J. (as she then was))

that term refers to the federal government which has the constitutional duty to protect their rights and privileges.

[162] The meaning of the "taking up" clause has not been explicitly considered in any previous case. Counsel for the plaintiffs however relies on other cases where the courts have interpreted similar terms. For example in R. v. Horseman,[37] the phrase the "Government of the Country" in Treaty 8 was specifically interpreted in an obiter comment to mean the "Government of Canada". There are other cases interpreting the regulatory limitations contained in the hunting/trapping rights clauses of various treaties suggesting that the meaning of "Government of the Country" or "Government of the Dominion" is restricted to the federal government and its laws.[38] In fact, as set out below, it seems clear that at least at the time the treaty was signed, that the reference to the "Dominion Government" was a reference to the federal government.

The defendants' interpretation of the "taking up" provision

[163] Counsel for the MNR submits that on its face, Treaty 3 was an agreement entered into between the Queen and the Ojibway First Nations and that in interpreting the "taking up" provision of Treaty 3 a number of principles will be applied that will lead to the conclusion that Ontario can exercise the taking up power, namely:

(a) Treaties with significant constitutional implications must be interpreted in light of the constitution; and
(b) Specific terms in a treaty will not be given a meaning that diverges from the constitutional framework.

[164] On the application of these principles to this case, counsel for the MNR relies on the unitary concept of the Crown; the treaty was between the First Nations and the Crown, not with one level of government or the other and submits that the references to the Dominion Government were references to which level of government as agent could exercise the rights of the Crown. At the time Treaty 3 was negotiated, the position of the federal government was that the lands being addressed were entirely outside of Ontario, which were held and administered by the federal Crown. In that context, the Treaty 3 references to the Dominion government can and should be seen as references to the emanation of the Crown they believed to be relevant. The federal government's understanding that it was the relevant emanation of the Crown was subsequently proven to be incorrect for much of the Treaty 3 lands. It is submitted that accordingly the relevant emanation of the Crown for the lands in question is Her Majesty the Queen in right of Ontario, and the treaty has and should be read in that manner.

[165] It is also submitted that the plaintiffs' interpretation of the treaty is contrary to Ontario's authority under s. 109 of the Constitution Act, 1867 to administer surrendered Crown

[37] [1990] 1 S.C.R. 901 at p. 935 (per Cory J.)
[38] See for example R. v. Batisse, (1978) 19, O.R. (2d) 145 (Ont. Dist. Ct.) at p. 153 cited by the Supreme Court of Canada in R. v. White and Bob, supra

lands situated in Ontario, including the licensing of lumbering on such lands. This is dealt with below in connection with the St. Catherine's Milling case.

[166] In addition to s.109, the defendants also rely on s. 92.5 of the Constitution Act, 1867 which confers on the original provinces the power to make laws in relation to "the [m]anagement and sale of the Public lands belonging to the Province and of the Timber and Wood thereon". With the Privy Council having authoritatively resolved that surrendered Treaty 3 lands were provincial public lands, it is submitted that s. 92.5 confirms provincial legislative authority over the timber and wood on those lands.

[167] The defendants also argue that the way in which the Crown would "take up" the land for forestry would be to issue logging permits and since the federal government cannot do so, the provincial government must be able to exercise the "taking up" rights as the beneficial owner of the lands. Counsel for Abitibi argued that the taking up right must run with the land and the Crown administering it. None of the parties to the treaty intended that there would be two levels of government involved in taking up lands, or that there might be a bifurcation of the ability to take up lands from the ability to license activities on such lands. The treaty did not contemplate the two-step process that would be required if the plaintiffs' submissions were correct. If Ontario does not have the right to take up the lands for these purposes, they argue, there is nothing left for the province to do.

[168] In response to the arguments of the defendants, that the need for concurrent federal authorization is incongruous with the fact that Ontario beneficially owns the land, the plaintiffs argue that the constitutional division of powers will sometime require coordinated action on the part of the Crowns and that even when the province has clear title to the land it can still be burdened by valid federal legislation. He refers by way of example to the federal government's jurisdiction over fisheries and the fact that in the case of forestry, margins must be left around rivers so that the forestry activities do not interfere with fish habitat. He argues that by analogy the situation here is the same. If logging by Abitibi will interfere in a meaningful way (i.e. engage the test in Sparrow) with the rights of Grassy Narrows members to hunt, then Abitibi needs approval from the federal government.

The extrinsic evidence

[169] An interpretation of Treaty 3 at trial will no doubt involve a consideration of extrinsic evidence in addition to a consideration of the language of the treaty itself and how it should be interpreted. There was no dispute amongst counsel that the court could consider this evidence in interpreting the treaty and that seems clear from the judgment of Binnie J. in R. v. Marshall[39]

[39] supra at pp. 523-526

[170] The plaintiffs argue that the extrinsic evidence supports their interpretation of the taking up provision and that the Ojibway were consciously negotiating with the Ottawa government. Counsel for the defendants disagree.

[171] The plaintiffs rely on extrinsic evidence concerning the negotiations, which they allege support their interpretation of the treaty. The plaintiffs argue that the Ojibway were very concerned to establish who they were dealing with and and that they understood that while the treaty would be with "the Queen", a real person residing across the Great Waters, they were in fact dealing with a centralized government situated in Ottawa, i.e. the Government of the Dominion. On several occasions the Commissioners explained that they did not act alone but took their instructions from the Queen, who in turn was guided by her Council [that governs a great Dominion]. Furthermore at several points in the negotiations there was specific mention of the "Government in Ottawa"and "Parliament in Ottawa" and its role in honouring and enforcing any treaty concluded. In particular they argue that their interpretation of the treaty is consistent with the evidence of Dr. Chartrand, who gave evidence on behalf of the MNR, that the aboriginal signatories to Treaty 3 conceived of themselves as dealing with an organized government situated in Ottawa and had no reason to even conceptualize of themselves as dealing with Ontario.

[172] Counsel for the MNR argues however, that the uncontradicted evidence of Dr. Chartrand contradicts the plaintiffs' position. He submits that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian constitutional distinction between federal and provincial authorities, and any such distinction was not, to them, a meaningful aspect of the treaty. The defendants rely on his evidence from his affidavit and his statement:

> that "[i]t is implausible that the Ojibway who negotiated Treaty 3 held any detailed knowledge of a Canadian constitutional distinction between Dominion and Provincial authorities, or that any such distinction was to them a meaningful aspect of the Treaty". In their eyes, and in the eyes of the Commissioners, the Treaty was with the Queen.[40].

[173] Dr. Chartrand was examined and in re-examination stated in part, as follows:

> 1201. Q. In taking you through the extracts from
> 10 the Manitoban, Mr. Janes put to you a number of specific
> 11 sentences where references were made to "council for the
> 12 Dominion of Canada" or "council in Ottawa." Is it your
> 13 opinion based on your research that the Ojibway would have
> 14 understood a distinction or as between a council, a
> 15 government in Ottawa, as opposed to a provincial
> 16 government?
> 17 A. In a strict sense, that's impossible to

[40] Affidavit of Jean-Philippe Chartrand sworn July 28, 2005, pp. 11-13 at ¶ 27-30 (MNR's Motion Record, Vol. 1, Tab 6)

answer given the **lack of any reference to a provincial government by either the Ojibway or the treaty representatives. It's a non-entity. So that the answer is a qualified no qualified by the fact that the absence of any reference to Ontario precludes indicating whether a distinction was even possible at the time.** But...

1202. Q. All right. Does it remain your view that in the conception of the aboriginals negotiating for

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and ultimately signing Treaty 3 they were dealing with the Crown -- I believe that's how you expressed it in your affidavit -- that the Queen as a person and has what's gone on or has anything you've seen in the last day altered that view?

A. No. And I would base that answer on the preponderance of references to the Queen and to the treaty being made between the Queen and the Ojibway that are found in records detailing verbatim or near-verbatim statements by the participants as well as in, for example, the 1969 list of demands.

MR. JANES: 1869.

THE DEPONENT: 1869. I tend to do that from time to time. The title of that document, I'm sure I don't have it perfectly exact, but it's something like, "List of Demands for Agreeing to a Treaty with the Queen's Commissioners." I may not have it perfectly correct but the reference to the "Queen's commissioners" I can positively recall.

I do not dispute any contention, in fact, there is very good evidence in the documentary record to the effect that the Ojibway understood that they were dealing with individuals who belonged to a central government that was established at a place called Ottawa.

On the other hand, again, the totality of

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explanations given to the Ojibway indicate that that government had at its ultimate head and source of authority the Queen.

[174] This evidence clearly qualifies the evidence in Dr. Chartrand's affidavit. Obviously if Ontario was not privy to the negotiations, nor referred to in the negotiations, it is too simplistic to say that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian constitutional distinction between Dominion and Provincial authorities. As Dr. Chartrand acknowledges however, that does not mean that the Ojibway did

not appreciate the distinction between the Queen and that there was a central government referred to in the treaty as the Dominion of Canada.

[175] In my view, considering the totality of the evidence of Dr. Chartrand, there is certainly support for the plaintiffs' position that the phrase "Dominion Government" at the time was the federal government and that that is how the parties to the Treaty understood it.

The St. Catherine's Milling case

[176] Counsel for the MNR takes the position that the plaintiffs' case will fail in that this issue has already been decided against the plaintiffs, in the Privy Council decision of St. Catherine's Milling and Lumber Co. v. Ontario (A.G.)[41]. He argues that St. Catherine's Milling held that the surrender of the land was to the Queen and even if it was meant to be the Dominion Government this decision determined that the federal government could not take up the lands and that by "necessary implication" Ontario can in its emanation of the Crown that can do so. He argues that this is not offensive to the Indian signatories because they would have had no expectation that there would be two levels of government involved, one having a veto and that the Ojibway who negotiated the treaty did not appreciate the constitutional distinction.

[177] In St. Catherine's Milling, the federal government had issued a logging licence to St. Catherine's Milling. The Ontario government sought an injunction against St. Catherine's Milling on the basis that the province owned the trees. The federal government was allowed to intervene. The court declared the permit issued by the federal government for logging invalid.

[178] In my view an accurate summary of what the St. Catherine's case stands for can be found in a statement by the Privy Council in Ontario Mining Company v. Seybold[42]:

> It was decided by this Board in the St. Catherine's Milling Co.'s Case that prior to that surrender [referring to the North-West Angle Lands] the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty.

[179] The issue in the St. Catherines Milling case was which level of government had the beneficial interest in the land and the timber on the North West Angle Lands. Although the court concluded that section 109 of the British North America Act gave the entire beneficial interest of the Crown in the lands in question to Ontario, the court expressly declined to consider other questions such as "the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing is to be

[41] (1888), 14 App.Cas. 46.
[42] [1903] A.C. 73

taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit."

[180] In my view this statement by the court disposes of the argument advanced by counsel for the MNR that the issues in the case before me have already been decided. The court did not consider the issue of whether the federal government or the provincial government has the power to take up the land. Furthermore, the First Nations peoples were not before the court.

[181] The defendants are really suggesting that because this decision confirmed that Ontario, not the federal government, owns the beneficial interest in the land including the trees and that the federal government cannot authorize logging, that it must follow that the federal government does not have the power to take up the lands for forestry and Ontario must have that right.

[182] The defendants rely on Ontario v. Canada[43], which concerned a Dominion claim for compensation from Ontario for the surrender of Treaty 3 lands. Idington J. stated for the majority:

> It is alleged Ontario entered into possession and therefore must pay.
> It always had been in possession. Its civil laws and administration of justice reigned over it all. The administration of criminal justice so far as needed devolved upon that province. Its inhabitants hunted and fished there as well as the Indians, and **when the cloud [of Indian title] was removed the duty devolved, as of course, on its government to facilitate the land's development**. It is alleged the land had turned out rich in minerals and timber. Is the obligation one turning upon the nature of the soil? or would it not exist if timber and gold had not been found there, but only a vast barren waste?
>
> Nor did the province come to the court seeking aid as against the Dominion or any one else to recover possession of the lands in question. **The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents**. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things when given a chance. (emphasis added)

[183] As Mr. Janes submits however, the taking up power is a power in the treaty to limit treaty rights of the First Nations people, not a power to grant property, or issue licenses for logging. He submits that although the Privy Council held that Ontario owned the land in the province pursuant to s. 109 of the Constitution Act, 1867 and that as a result Ontario has the exclusive power to deal with the ownership and disposition of the lands in the province, including the trees on the lands, to the extent that Ontario proposes to interfere with the burden

[43] (1909), 42 S.C.R. 1 (S.C.C.)

on its title imposed by the combined operation of the Treaty 3 hunting and trapping rights and s. 91(24) of the Constitution Act, 1867, Ontario requires coordinated action or legislation on the part of the federal government. As the courts noted both in St. Catherine's Milling and Ontario Mining Company v. Seybold, Ontario's title to those lands continued to be burdened by the Treaty 3 hunting, fishing and trapping rights

[184] The court in St. Catherine's Milling described the position of the Dominion and Ontario with respect to the lands in question, as each "maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty." Although the court went on to state that the case related exclusively to the right of the federal government to dispose of the timber in question it necessarily involved the determination of the "larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873 [Treaty 3]"(at pages 52-53). This statement however was made in order to explain why the federal government intervened. It is clear from the decision itself that the court did not embark on an analysis of all of the legal consequences of Treaty 3.

[185] I note however that the court was clearly of the view that the references in Treaty 3 to the Dominion Government were to the federal government; although the court did not consider which level of government would exercise the taking up clause given that beneficial ownership of the land was with Ontario. This aspect of the decision supports the plaintiffs' plain wording interpretation of the treaty.

[186] Counsel for the MNR relies on the observations by the court that expressions referring to public land belonging to the Dominion or the province merely mean the right to its beneficial use and subject to the control of its legislature but that in accordance with the theory of the unity of the Crown, the land itself was vested in the "Crown" (see page 56). This however is not dispositive of the issue before me as it is not suggested that Ontario does not have the beneficial ownership of the lands or the ability to administer those lands..

[187] In the St. Catherine's decision the court rejected the Dominion's argument that the surrender of the land in the North West Angle by the Indians pursuant to the terms of Treaty 3 "to the Government of the Dominion of Canada" was in effect a conveyance of the whole rights of the Indians to the Dominion. The Indian habitants were not owners of the land in fee simple but rather Indian title was a burden on the land that had vested in the Crown. The court found that section 109 of the British North America Act gave to Ontario the entire beneficial interest of the Crown in the lands within its boundaries.

[188] The court rejected the argument advanced by the federal government that section 91(24) of the Act, which conferred upon the Parliament of Canada exclusive jurisdiction to make laws for "Indians, and lands reserved for the Indians" gave the Dominion any patrimonial interest the Crown might have had in the reserved lands and concluded that the power of legislating for Indians, and for lands which are reserved to their use, that has been entrusted to

the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue "whenever the estate of the Crown is disencumbered of the Indian title." Again this speaks to the province's beneficial interest in the lands as a result of their surrender and does not deal with the taking up provision in Treaty 3.

[189] . In my view there is a great deal of merit to the position of the plaintiffs that while St. Catherine's Milling held that the federal government had no jurisdiction to deal with the ownership of timber in the Northwest Angle (and therefore could not grant logging licences for that area), that case does not stand for the proposition that Ontario has the right to interfere with the Treaty 3 Hunting and Trapping Rights. The extent of Ontario's power in that regard, and in particular, its ability to rely on the "taking up" clause, remains to be decided.

[190] This interpretation of St. Catherine's Milling is reinforced by the statement on the last page of the decision that "the fact, that it [referring to the federal government] still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits .. of that beneficial interest in the timber which has now passed to Ontario" This language appears to be a reference to the provision in Treaty 3 that states that it is the Government of the Dominion of Canada that has the power to "regulate" the Indians "avocations of hunting and fishing throughout the tract surrendered" . There is a reasonable argument that by analogy the same applies to the balance of that part of Treaty 3 which uses similar language and that the "taking up" of the land must also be done by the Government of the Dominion of Canada, namely the federal government.

[191] The interpretation of the St. Catherine's Milling case is important because if the position of the defendants is correct, it determines the plaintiffs' interpretation argument and the plaintiffs would not be able to meet the second and third Okanagan requirements. For the reasons set out herein, I do not accept those submissions however. There is significant merit to the position taken by the plaintiffs that this decision does not determine the issue of which level of government can exercise the taking up power. Furthermore I do not accept the proposition that the findings in St. Catherine's Milling by "necessary implication" support the position of the defendants that Ontario and not the federal government can exercise the taking up power.

The impact of the reciprocal legislation

[192] In 1891, two statutes, which have been referred to as reciprocal legislation, were passed, one by the federal government and the other by the Ontario provincial government.[44] There is no dispute between counsel that the effect of section 1 of the provincial statute was that the province of Ontario could exercise the "taking up" power under Treaty 3 with respect to the North West Angle Lands. The ability of the federal government to pass such legislation is not challenged in this case.

[44] An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, 54-55 Victoria, c. 5 and An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, 54 Victoria, c.3

[193] Section 1 is worded in part as follows:

> With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf as in the said Treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered treaty have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the Reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario…..

[194] As set out above, it is conceded by the plaintiffs for the purpose of this motion, that the plaintiffs could not meet the third part of the Okanagan test with respect to the North-West Angle Lands because as a result of this legislation Ontario has the right to "take up" the land for forestry and whether or not the plaintiffs can succeed in their claim will be determined by an application of Misikew.

[195] This legislation does have an impact on how a court might interpret the "taking up" power with respect to the Keewatin Lands. Without considering what evidence there may be surrounding the negotiations between the province and the federal government that led to this legislation, which was not before me, there were two competing submissions as to how the language of section 1 impacts on the plaintiffs' treaty interpretation argument. On the one hand, counsel for the plaintiffs argues that this section establishes that it was the federal government that could exercise the taking up power under Treaty 3 and that that power was in effect delegated to the province by virtue of this section.

[196] The defendants argue however that the language "conceded and declared" is consistent with their position that it was always understood, once the issue of title was settled, that Ontario could exercise the taking up power and that this was therefore characterized as a concession in the legislation. They refer to the title of the statute: "Act for the settlement of certain questions between the Government of Canada and Ontario respecting Indian Lands".

[197] I am not able to accept, solely on the wording of the statute, that the reference to "conceded and declared" on the defendants' interpretation could be treated as an admission by the federal government that applies into the future that it does not have any rights to exercise the taking up clause in the Keewatin Lands. I should also say that I do not consider the reference in the decision of Then J. to the reciprocal legislation "delegating" the taking up power to the province as a specific conclusion that he came to. He was clearly not considering the merits of the issues that have been argued before me.

[198] Unless a court could conclude that there was an admission by the federal government, which in my view is not a conclusion that can be made from the statute alone, what is significant is that there is no comparable legislation for the Keewatin Lands, where there is an

express reference to the province being able to take up the lands for lumbering and other purposes.

The aftermath of St. Catherine's Milling

[199] In the aftermath of St. Catherine's Milling, the province of Ontario resisted efforts by the Dominion of Canada to seek an indemnity for costs incurred in negotiating and administrating Treaty 3. Litigation ensued. In the province's factum filed in that matter, the province argued that Treaty 3 was a contractual arrangement between Canada and the Ojibway and that the treaty was made without the privity or any mandate from the province. It was also submitted that the treaty was entered into by the Dominion for broad national purposes, not the interest of the province and any benefits the province received flowed not from Treaty 3 but from its ownership of land. Again this reinforces the plaintiffs' argument that at the time of the signing of the treaty the reference to the "Dominion Government" was a reference to the federal government.

[200] The Privy Council accepted these arguments and held that in making the treaty the Dominion government acted upon the rights conferred by the Constitution and was motivated in the interests of the Dominion as a whole, not any special benefit to Ontario, that the Dominion government did not act as agent for the province and they neither thought they required not purported to act upon any authority from the provincial government. Accordingly they ruled that Ontario was not responsible for bearing the financial costs of the Treaty.[45]

[201] Counsel for the plaintiffs argues that given Ontario argued that it was not privy to the treaty negotiations and did not have any obligations pursuant to the treaty; it cannot receive the benefit from the "taking up" provision. The aboriginal hunting rights protected by the treaty are part of the consideration flowing to the aboriginal people in exchange for their surrender of the land. [46]

[202] Again the decision is not on point. I do not need to consider the plaintiffs' argument that the province of Ontario should not be able to take a position now, that is contrary to the position taken in that action, but I do find that the conclusions reached in this case are consistent with the plaintiffs argument that the reference in Treaty 3 to "Her Dominion Government" supports the plaintiffs argument that that is a reference to the federal government.

[203] Counsel for the MNR argues however that following St. Catherine's Milling, the federal government accepted that the Keewatin Lands were vested in the Crown and would be administered by the Crown on the advice of the provincial government and that Ontario would enjoy the full benefit of surrendered public lands. Modern development and use of public, non-reserve lands throughout this area, including the development of transportation, power generation and transmission infrastructure, forestry operation and mining, and private settlement of the lands has taken place since the settlement of these issues. This raises issues of estoppel and

[45] . A.G. (Ont.) v. A.G. (Can.), supra at pp. 644- 645 Privy Council)
[46] See for example, Province of Ontario v. Dominion of Canada, [1908] S.C.R. 1(S.C.C) at page 24

how that might impact on the rights of the First Nations people, which were not argued before me.

The impact of the Ontario Boundaries Extension Act.

[204] Section 2(a) of the Ontario Boundaries Extension Act states: "…the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights…"

[205] Counsel for the plaintiffs submits that the reference to "surrender" in section 2(a) of the Act is not a reference to a "taking up" power, which can be exercised unilaterally, but rather a reference to a voluntary transaction whereby rights are given up and a treaty is executed. He relies on an extract from a dissenting judgment from the Supreme Court of Canada, referred to with approval by the court in a much later case, Marshall v. The Queen[47].

[206] Section 2(c) of the Act provides that "the trusteeship of the Indians in the said territory and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament."

[207] The plaintiffs argue that this section, confirming that the federal government remains the trustee, is also consistent with their position that unless expressly conferred in the Act, the performance of the treaty obligations, which the courts have considered involve a trust assumed by the Crown means that the terms and conditions expressed in Treaty 3 must continue to be fulfilled by the federal government.

[208] Counsel for the MNR argues however that during the course of events which lead to the extension of Ontario's boundaries in 1912 the question of jurisdiction over lands and resources was directly considered by federal and provincial officials who were aware of and accepted the principle that Ontario enjoyed the benefits of title to surrendered public lands within its boundaries including control over natural resources such as timber. Debates in the House of Commons and statements by then Prime Minister, Robert Borden are relied upon and it is submitted this is the actual basis on which the extension of Ontario's boundaries has unfolded in practice since 1912.

[209] I am of the view that the submissions by both counsel for the plaintiffs and the MNR have merit although I can not conclude, nor is it argued, that I should interpret the Ontario Boundaries Extension Act as delegating the taking up power for the Keewatin Lands to Ontario. Whether it can be argued that that was not stated expressly because it was previously conceded by the federal government and if so how that impacts the plaintiffs will be for the court determining the merits to decide.

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[47] aupra at para. 50

The relevance of the legislation in the western provinces

[210] Using Saskatchewan as an example, counsel for Abitibi referred me to The Saskatchewan Act[48], which established the province of Saskatchewan. Pursuant to the terms of that statute, the federal government administered the lands vested in the Crown, and the province did not have the beneficial interest in the lands.

[211] In the Constitution Act, 1930[49] that followed, to give effect to certain agreements entered into between the government of the Dominion of Canada and the governments of the provinces of Manitoba, British Columbia, Alberta and Saskatchewan, the interest of the Crown in all Crown lands, mines minerals were transferred to the province. Counsel argued that there was no express delegation of the right to "take up" the lands in that Act because that is not necessary. Treaty 6, which applies to lands in Saskatchewan, has the identical wording of the taking up provision to Treaty 3. Furthermore, in the case of Treaty 6, at the time of the treaty the federal government owned the beneficial interest in the land and could exercise the taking up power. Given that there was no need for the federal government to expressly delegate that power to the province in the Act, counsel argues that this supports his argument that there does not need to be an express delegation of the right to take up the lands by the federal government to the province of Ontario.

[212] In developing his argument counsel for Abitibi referred to R. v. Horseman[50], which dealt with Treaty 8 in Alberta. In that case the court referred to the Transfer Agreement of 1930 between the federal government and the province of Saskatchewan, which was confirmed by the Constitution Act, 1930. As the court noted, paragraph 12 of the Transfer Agreement changed the government authority that would regulate aspects of hunting. Pursuant to paragraph 12 the federal government agreed that the laws respecting game in force in the province would apply to the Indians in the province but that they would have access to all unoccupied Crown lands for hunting for food. There was no express reference to a delegation of the "taking up" power.

[213] Counsel for the plaintiffs replied to this argument and argued that what happened in the western provinces in fact supports his position. In each of the western provinces the federal and provincial governments reached agreements that were confirmed by the Constitution Act, 1930. In R. v. Horseman[51] the court found that the agreement between the federal government and the province of Saskatchewan unilaterally modified the Treaty rights as to hunting and replaced those rights with different rights. As the court noted the ability of the federal government to do this unilaterally was not before the court. Mr. Janes argues that section 12 of the Transfer Agreement simply reflected different wording that replaced the hunting rights in the treaty and that the federal government gave up its rights.

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[48] S.C. 1905, c. 42 (Canada)
[49] 20-21 George V, c. 26(U.K.)
[50] [1990] 1 S.C.R. 901
[51] supra

[214] In my view there is merit to the argument of Mr. Janes that in fact this other legislation supports his position .his is yet another issue that the court will have to consider on the trial of the treaty interpretation issue.

Conclusion of the "merits" part of the Okanagan test

[215] In my opinion, based on the plain wording of the treaty itself, without considering any of the extrinsic evidence and the interpretation arguments based on constitutional grounds, the plaintiffs have a strong argument that the reference to "Her Government of Her Dominion of Canada" at the time the treaty was signed was a reference to the federal government. On its face therefore, there is at least a *prima facie* meritorious argument that based on the language of the treaty only the federal government has the power to take up the lands covered by the treaty for the purpose of lumbering.

[216] The position of the defendants is not so much to challenge the plain wording of the treaty but rather to argue that, given that Ontario in fact is the beneficial owner of the land, the treaty must be interpreted on the basis that the Crown for the lands in question is Her Majesty the Queen in right of Ontario and that Ontario has the power to take up the lands for forestry.

[217] For the reasons stated, in my view this is a serious issue that had not yet been squarely decided or even considered in any case before. There is merit in both positions and in my view the plaintiffs' argument is clearly worthy of pursuit. The plaintiffs have a solid *prima facie* argument that the province is limited in its ability to interfere with the hunting and trapping rights set out in Treaty 3 on account of the division of powers between the federal and provincial government, and that the province is precluded from relying on the "taking-up" provision because that power is specifically assigned in the treaty to the federal government.

[218] On this basis, I conclude that the plaintiffs meet the "merits" requirement of the Okanagan test with respect to the question of the interpretation of the "taking-up" provision of Treaty 3 and if necessary, the plaintiffs' constitutional division of powers argument so that it can be determined, as a threshold issue, whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry.

Do the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases?

The law with respect to this part of the test

[219] With respect to the issue of the "extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court", the Supreme Court of

Canada in Okanagan explained that this means that the "issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases." (at paras. 39-40).

[220] Lebel J. stated that it is for the trial court to determine 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" (at para 38).

[221] In Townsend v. Florentis, G.D. Lane J. stressed the importance of ensuring that this element of the Okanagan test is applied with some rigour:

> recalling that the circumstances must be special, that the class is narrow, and that the exercise of the power is extraordinary, it is clear that there must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required, …The mere "leveling of the playing field", although an admirable objective, would deprive the Third Test [in Okanagan] of any real meaning…(at paras. 57-57)

Analysis

[222] The court in Okanagan found that the circumstances of that case were special, "even extreme" in that the case raised a claim for aboriginal title to certain land in a province where the same claim could be advanced for most of the province's land mass. Counsel for MNR submits that this case is not like that and that the impact of a decision in this case in favour of the plaintiffs would not be as great. In this case there is no issue that the lands in question were surrendered by treaty and the taking up power expressly includes the power to take up the lands for logging.

[223] Counsel for the plaintiffs acknowledges that the Okanagon case will develop the case law in an important area but says it will only in fact decide the rights of one group of First Nations. It is submitted that this case raises a number of novel issues, which are of importance to a wider community of interest than just Grassy Narrows. The question of the proper interpretation of the application of the "taking-up" provision of Treaty 3 is unresolved and significant.

[224] The interpretation of the taking up clause has not been judicially considered before. A determination of this issue will affect the other Treaty 3 First Nations as well as the forestry and possibly other authorizations issued by the province for activities that 'take up" Treaty 3 land. This case will also have implications for the other numbered treaties, which reference "the Government of the Country" either in the "taking-up" or regulation clause.

[225] In considering the plaintiffs application for judicial review, Justice Then held that the determination of the issues raised by the plaintiffs, if decided in their favour, "will have a profound impact on the lives and business of the people living in those areas of Northwestern Ontario subject to Treaty 3, including Abitibi and its employees. The economies of the communities will also be greatly affected". He was also of the view that the constitutional issues raised by the plaintiffs are of "significant importance and interest to the public" (at paras. 60-61).

[226] Given the position taken by the respondents before Then J. they are not in a position to argue before me that this case is not of significant public importance. As counsel for the MNR acknowledged in his factum, apart from the merits, the plaintiffs' central argument that Ontario lacks the jurisdiction to take up lands under Treaty 3, is clearly of "broad significance".

[227] This is consistent with the position taken by the respondents in the application before Then J. In the factum filed by the MNR, counsel stated:

> (4)The determination of the issues raised and relief requested by the Applicants may have very wide ranging and serious effects. This application has the potential to affect all provincially authorized land uses in the …[Keewatin Lands] that are subject to Treaty 3 that might impinge on hunting and fishing by members of First Nations that are signatories to Treaty 3
>
> (8) Furthermore, this application raises constitutional law issues with respect to Ontario's legislative capacity to authorize activities in the ..[Keewatin Lands].

[228] In the factum filed by Abitibi, counsel stated:

> (9) The determination of the issues, if decided in the applicants' favour, will have a profound impact on the lives and businesses of the people living in those areas of northwestern Ontario subject to Treaty 3, including Abitibi and its employees. The economies of the communities will also be greatly affected.
>
> (41) The constitutional issues raised by the applicants are also of significant importance and interest to the public.

[229] The province of Ontario has reaped the benefits of mining, forestry, the development of hydroelectric power and settlement as a result of Treaty 3. The evidence from the MNR is that from the Whiskey Jack Forest alone Ontario reaps important economic benefits valued in the range of $2.3 million per year. The Abitibi mill in Kenora employs almost 1,600 people and there is no doubt that the forest industry is important to the citizens of northwestern Ontario and the province. The stakes in this action are high.

[230] Some of the evidence relied upon by the defendants, focuses on the fact that there are only a few members of Grassy Narrows who actively trap (less than 1%) and that trapping is

a break even proposition in terms of any financial reward. I do not intend to review this evidence in detail as in my view it does not adversely impact on this part of the Okanagan test in this case given that the issues raised by the case are so clearly of public importance. In any event the defendants do not challenge the plaintiffs' position that hunting and trapping is an important part of the culture of the Grassy Narrows people. Hunting and trapping is important to the larger community, not just the people actively involved in hunting and trapping and is important to the cultural identity of the people of Grassy Narrows. The evidence before the court is that the Anishnaabe at Grassy Narrows have maintained their culture, but that culture is in crisis and at risk of dying.

[231] This was acknowledge by Dr. Chartrand on his cross-examination when he stated in part as follows:

> 435. Q. From the perspective of the aboriginal people, their engagement in hunting and fishing practices would be very much a part of their identity in terms of something that defines culturally who they are?
> A. Yes, certainly.
> 436. Q. And in a similar fashion, it's hunting in the lands to which they belong, in a sense, that's an important part of that cultural identity, correct?[52]

> 1111. Q. And as a general matter, will you agree with me that on the basis of what we know, it's clear that an Ojibway culture has survived into the present in northwestern Ontario?
> A. Yes.
> 1113. Q. And also that culture has continued to include subsistence hunting?
> A. Yes.
> 1114. Q. And trapping?
> A. Yes.
> 1115. Q. And those are important parts of the what I'll call the entire cultural package of the Ojibway?
> A. Well, certainly for those individuals who are involved in Ojibway full-time -- you know, I'm using a wage lever (phon.) term for this, but who are intensively involved in conducting traditional activities, yes, these are terribly important. And even for those
> 00279
> Ojibway who might live in an urban environment, the --

[52] Cross-examination of Jean-Philippe Chartrand on December 1, 2005

2 there's a link to identity.
3 1116. Q. Right. And even for the people on
4 reserves, for example, who aren't actively involved,
5 there's also that link to identity knowing that there are
6 people still engaged in the traditional cultural
7 activities associated with trapping and hunting?
8 A. Yes, I would agree with that.[53]

[232] The plaintiffs argue that there is still a chance to save their culture and this case is intended to assist in that goal. Through events beyond their control, the Anishnaabe at Grassy Narrows have experienced significant interference with key elements of their traditional way of life in the last decades. Flooding has disrupted their wild rice gathering, and their fisheries were heavily contaminated by mercury. While the older generation has maintained its connection with the land, the involvement of the community in hunting and trapping has declined in recent years. This is due to many factors, but this action is important to the extent that they wish to assert that industrial logging in the Whiskey Jack Forest has been one of the main causes of the problem.

[233] Counsel for the MNR argued that the significance of this case is much less that the Okanagan case which Lebel J. described as "special, even extreme"(at para. 46). Lebel J. did not find however that extreme circumstances were needed before an order for advance costs could be made. In this case there is no doubt that if the plaintiffs succeed, the outcome of this litigation will have a significant impact on the parties and the citizens of this province. In fact counsel for Abitibi tried to impress on the court how serious the consequences could be.

Conclusion on the "public interest" requirement

[234] I have no difficulty in concluding that the treaty interpretation issue is an issue of great public importance. It will be the first time that the "taking up" provision in Treaty 3 is interpreted on the issue of whether or not Ontario has the power to take up the lands. The significance for forestry alone is great and give that the taking up power is also for mining and settlement, the issue has ramifications for other aspects of the province's powers with respect to the Keewatin Lands.

Is this a rare and exceptional case that warrants my exercising my discretion to grant the order sought?

[235] Notwithstanding the Supreme Court's ruling in Okanagan that advance costs funding is possible in certain limited circumstance, it remains an extraordinary remedy. Only very rarely will it be appropriate to compel a party to fund litigation against itself.

[53] Cross-examination of Jean-Philippe Chartrand, December 2, 2005

[236] In considering the issue of advance costs, Mr. Justice Lebel considered the factor of access to justice, particularly in litigation over matters of public interest. He observed that "[c]oncerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded (at para. 31).

[237] In addition to the public importance of this case, the plaintiffs submit that Grassy Narrows is challenging an economic activity that has imposed and will continue to impose on it high cultural costs and that has provided the community and the vast majority of its members with no economic benefits. It is submitted that, in addition to the three elements of the Okanagan test, an advance costs order is warranted by this particular economic imbalance in that pursuant to an advance costs order, Ontario would be paying a relatively small portion of the revenues it derives from forestry in the Whiskey Jack Forest to have tested, once and for all, the constitutionality of those activities, which are being carried out at the expense of Grassy Narrows.

[238] Although the Grassy Narrows Trappers' Council and Roger Fobister, a member of Grassy Narrows do have contracts with Abitibi, and there appears to be untapped economic opportunities as a result of forestry, that Grassy Narrows has not taken advantage of, there remains a serious economic imbalance, and as I have already stated the stakes in this litigation are high.

[239] In my opinion the public interest is not served if the plaintiffs are required, as a result of lack of funds, to abandon this action. Certainly the public interest is served in ensuring that the treaty interpretation issue is tried.

[240] Counsel for the MNR argues that inevitably, an advance costs order limits or eliminates incentives on plaintiffs to litigate in an efficient and responsible manner, and very considerable sums of public money are in issue. He referred to the Tsilhqot-in v. British Columbia[54] action that followed from the Okanagan ruling, where the plaintiffs' counsel estimated the costs in 2001 as likely being in the neighbourhood of $600,000. The plaintiffs' actual costs of that proceeding have since that time exceeded $10 million and the matter is far from complete. It is argued that in this matter, the plaintiffs' estimates for costs have already dramatically escalated, from "tens of thousands or possibly more than a hundred thousand", to "in excess of 2 million", to 2.8 million or more

[241] Plaintiffs' counsel submitted that it is not in the plaintiffs' interests to protract the litigation given that logging is ongoing. He also argues that the court can control the process to avoid abuse including the phasing of issues.

[242] As the court in Okanagan held, where an order for advance costs is granted, "the order must 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

[54] (2001), 12 C.P.C. (5th) 292 (B.C.S.C.); (2002) 21 C.P.C. (5th) 32 (B.C.C.A.)

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." (at para. 41)

[243] The parties agreed that this hearing would focus on whether such an order should be made, leaving aside the issue of the appropriate terms of such an order, to be dealt with at a later time, if necessary. The issue of the scale of costs, hourly rates and form of any order for advance costs that I might make were not argued before me. Obviously lessons learned from past experiences with these types of orders will need to be applied to avoid these difficulties and ensure that an order for advance costs does not undermine the usual incentive plaintiffs have to conduct litigation in a cost effective manner. I am confident that as the Rule 37.15 judge that I will be able to fashion an order that balances these interest and one that will be reviewed on a regular and ongoing basis to ensure that this litigation is conducted in a reasonable and efficient way.

[244] By dealing first with the question of the proper interpretation of the "taking-up" provision of Treaty 3 and specifically whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry, I will also be able to address the concerns raised by Abitibi that as a private litigant that they not be burdened with great expense which will be unrecoverable. The plaintiffs seek a declaration against Abitibi that the forestry activities carried out by Abitibi pursuant to its forest license violate the plaintiffs' rights to hunt and fish guaranteed by Treaty 3. The plaintiffs have not argued that the issues raised in the claims against Abitibi meet the Okanagan test. The claim against Abitibi will not be dealt with in the first instance and although Abitibi will be indirectly affected by the outcome of the treaty interpretation issue, that is really an issue as between the plaintiffs and the Crown. Abitibi is not caught in that dispute and it will not be necessary for Abitibi to participate in the determination of that issue. If Abitibi chooses to do so it cannot in my view complain that it has been unfairly burdened by irrecoverable costs.

Disposition

[245] Accordingly, I order that the MNR pay the costs of the plaintiffs on a partial indemnity basis, in advance, and in any event of the cause, with respect to the plaintiffs' claim as set out in paragraph 1(b) of the Amended Statement of Claim. The order is limited to the cost of determining the issue of the interpretation of the "taking-up" provision of Treaty 3 and if necessary, the plaintiffs' constitutional division of powers argument, so that it can be determined, as a threshold issue, whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry.

[246] In coming to this conclusion I am of the opinion that this action should proceed first with the determination of the treaty interpretation issue concerning the "taking up" provision of Treaty 3, which I presume is the basis of the declaration sought in paragraph 1(b) of the claim. The argument of the motion proceeded on this basis and this is the issue that in my view meets the requirements of the Okanagan test. I have added the constitutional division of powers

argument advanced by the plaintiffs but as set out above, I am not certain if that aspect of their argument is in dispute. The scope of the issue to be tried can be determined on the next attendance before me.

[247] I ask that counsel consider the best means by which this treaty interpretation issue could be tried as a threshold issue and that the definition of the issue to be tried, the procedure for the determination of this issue and the other terms of this order including hourly rates, budgets and the timing and quantum of payment be brought before me for determination as soon as possible.

[248] I am not satisfied that any of the other claims in the action warrant this extraordinary remedy and so the motion is dismissed with respect to the balance of the action without prejudice to the plaintiffs to bring a further motion if they are successful on the treaty interpretation issue.

_____

SPIES J.

DATE: May 23, 2006

COURT FILE NO.: 05-CV281875 PD
DATE: 2006-05-23

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WILLIE KEEWATIN, ANDREW KEEWATIN JR., and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION, Plaintiffs and MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC. Defendants

COUNSEL: ROBERT J. M. JANES and DOMINIQUE NOUVET, for the Plaintiffs

D. THOMAS H. BELL, MICHAEL STEPHENSON and PETER LEMMOND, for the Defendant MINISTER OF NATURAL RESOURCES, CHRISTOPHER H. MATTHEWS and COLLEEN E. BUTLER for the Defendant Abitibi-Consolidated Inc

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REASONS FOR DECISION

SPIES J.