Federal Court  Cour fédérale

Date: 20170705

Docket: T-1437-14

Citation: 2017 FC 655

2017 FC 655 (CanLII)

Ottawa, Ontario, July 5, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

CHIEF M. TODD PEIGAN
on behalf of himself and all other members of
The Pasqua First Nation and
THE PASQUA FIRST NATION

Applicants (Plaintiffs)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN

Respondents (Defendants)

ORDER AND REASONS

[1] In their Statement of Claim dated and filed on June 17, 2014, the Plaintiffs [PFN] allege, among other things, that the Defendant, Her Majesty the Queen in right of Canada [Canada], and

the Defendant, Her Majesty the Queen in right of Saskatchewan [Saskatchewan], have failed to fulfil outstanding Treaty obligations and have not properly implemented and fulfilled their obligations under the Pasqua Band Treaty Entitlement Settlement Agreement [*PFN Settlement Agreement*]. In response to this Claim, Saskatchewan initiated a motion on July 22, 2014, for an order striking the Claim as against it on the ground that the Federal Court did not have jurisdiction over Saskatchewan or over the matters raised in the Claim as against Saskatchewan. The Federal Court of Appeal ultimately determined that this Court does possess jurisdiction over those portions of PFN's Claim alleging a breach of Saskatchewan's obligations under the *PFN Settlement Agreement*, but does not have jurisdiction in respect of the alleged violation by Saskatchewan of its duty to consult with the PFN about the grant of a subsurface lease for a mining project (see: *Canada v Peigan*, 2016 FCA 133, [2016 FCJ No 448; leave to appeal denied: [2016] SCCA No 283).

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[2] This litigation has not yet advanced beyond the pleadings stage. Saskatchewan says the next step is for it to bring a strike motion under Rule 221 of the *Federal Courts Rules*, SOR/98-106. In advance of that step though, PFN has brought a motion seeking an Order for legal costs to fund this action in advance and in any event of cause, and also for the Defendants to pay $584,081.83 to the PFN within 60 days of making an order requiring the Defendants to pay all of the PFN's legal fees and related disbursements in the action.

I. Background

[3] PFN initiated its action in the Federal Court under Article 20.19 of the *PFN Settlement Agreement*. Saskatchewan did not file a Statement of Defence after PFN filed its Statement of

Claim but, instead, brought a motion to strike the Claim as against Saskatchewan on the ground that this Court did not have jurisdiction over Saskatchewan since the Federal Court does not have jurisdiction to hear claims made against a province. As case management judge for this proceeding, I denied Saskatchewan's motion in an Order dated January 8, 2015. Saskatchewan then appealed that order to the Federal Court of Appeal. The Court of Appeal determined that, while the Federal Court has exclusive jurisdiction to hear the claims against Saskatchewan pertaining to alleged breaches of the *PFN Settlement Agreement*, it lacks jurisdiction over Saskatchewan's alleged breach of its duty to consult because this was separate from the claims related to the *PFN Settlement Agreement*. As a result, the Court of Appeal struck those portions of the Claim that sought a remedy for Saskatchewan's alleged failure to consult in 2010 with respect to a subsurface lease, with leave to amend. As the Court of Appeal found that success of the appeal was divided, it held that each party should bear its own costs of the Federal Court and Federal Court of Appeal proceedings.

[4] Following receipt of the Court of Appeal's decision, Saskatchewan applied in the Supreme Court of Canada for leave to appeal the Court of Appeal's decision with respect to the Federal Court's jurisdiction to hear claims as against Saskatchewan. PFN filed a response to Saskatchewan's application for leave; it also applied for leave to cross-appeal, seeking leave to challenge the Court of Appeal's decision to effectively bifurcate those portions of the Statement of Claim that allege Saskatchewan failed to consult with respect to awarding mineral rights to third parties. On December 22, 2016, the Supreme Court of Canada dismissed the applications for leave to appeal and for leave to cross-appeal, with costs to PFN.

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[5] After the Supreme Court of Canada denied the leave applications, PFN filed an Amended Statement of Claim on February 14, 2017, in response to which Saskatchewan filed a Demand for Particulars on February 21, 2017. Canada filed an Amended Statement of Defence on March 31, 2017. PFN responded to Saskatchewan's Demand for Particulars on April 11, 2017, and Saskatchewan subsequently filed its Statement of Defence on April 24, 2017.

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[6] PFN has incurred considerable legal expenses in this matter to defend Saskatchewan's motion to strike and its subsequent efforts to appeal the Order denying its motion to strike the Claim for want of jurisdiction in the Federal Court. So far, PFN claims it has incurred $541,029.49 in legal fees and $43,052.34 in disbursements, a total of $584,081.83. PFN further claims that to carry this action through to trial, it expects to incur at least another $154,200 in legal costs and, as stated at the hearing of this motion, possibly more than that amount if Saskatchewan brings its intended motion to strike the Claim.

II. Issues

[7] The main issue raised by PFN's motion is whether it is entitled to not only the costs it has already incurred and paid for, but also to its costs on a going forward basis. This issue breaks down to the following questions:

1. What is the legal test for an award of advance costs?
2. Is PFN genuinely impecunious?
3. Is PFN's Claim as against Canada and Saskatchewan sufficiently meritorious?
4. Are the issues raised in PFN's Claim of public importance?

A. *The test for an award of advance costs*

[8] The parties agree that the test for an award of advance costs is that reiterated by the Supreme Court of Canada in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at para 37, [2007] l SCR 38 [*Little Sisters*], where the Supreme Court noted its earlier decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para 40, [2003] 3 SCR 371 [*Okanagan*] and stated that, in order to obtain an advance award of costs, a litigant must convince the court that three "absolute requirements" are met:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[9] In analyzing these requirements, the Supreme Court in *Little Sisters* provided the following guidance (at para 37): "the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts." The Supreme Court has characterized interim or advance

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costs as being a highly exceptional remedy to be granted only "in rare and exceptional circumstances" and on a high standard of proof (see: *Okanagan* at para 1; *Little Sisters* at para 38). Even if each part of the test has been satisfied, the court retains discretion to refuse granting such costs. In this regard, the Supreme Court stated in *Okanagan*:

> 41 …If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should 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 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. In the context of public interest litigation judges must 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. 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.

B. *Is PFN genuinely impecunious?*

(1) PFN's Submissions

[10] PFN claims it cannot afford the costs of this litigation and cannot expend its very limited cash flow to fund this action because: (1) it cannot rely on its impoverished members to contribute; (2) it has pressing community needs; (3) it is prohibited from spending its government-provided funds on litigation; and (4) it should not have to rely on funding from public sources in this case.

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[11] PFN says it is an impoverished community of 2,250 individuals and canvassing them for financial support would be futile as they could not reasonably be expected to make any financial contribution to this action. According to PFN, a plaintiff seeking interim and advance costs need not canvas every member of the community where "the evidence establishes that such efforts would not bear fruit" (*Keewatin v. Ontario (Minister of Natural Resources)*, [2006] OJ No.3418 at para 46, 152 ACWS (3d) 23 [*Keewatin*]). PFN notes that the most recent available statistics show that the unemployment rate in the PFN is approximately 21 per cent, while Saskatchewan's overall unemployment rate is 5.9 per cent, and that the employment rate for members of the PFN is a mere 36.5 per cent as compared to 65.1 per cent in the rest of the province. PFN further notes that those members of the PFN who earn incomes average a total of $16,056.00 per year, while the average total income of persons in Saskatchewan who earn income is $40,798.00. Additionally, PFN says its members are relatively young, with the median age being 21 years, and this further reduces the likelihood that they could reasonably contribute to the costs of litigation.

[12] In view of *Keewatin*, PFN contends that, when facing impoverishment, it is not reasonable to expect members of a plaintiff First Nation to divert any of the income they receive to contribute to litigation. That income, PFN says, must be available to address immediate pressing social needs and challenges for members of the PFN community. In PFN's view, the test for interim and advance costs does not require that individual members forfeit any modest government support to fund an action because those funds will be used, or have already been used, to obtain the basic necessities of life. Given the overall state of poverty of the PFN, it can be inferred, according to PFN, that most, if not all, PFN members use their government

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distributions for basic necessities. PFN's legal costs should not be borne solely by a few individuals, PFN says, when dealing with costs in a representative action that concerns the collective rights of a community. Even if some PFN members could contribute a modest sum to fund this litigation, PFN claims it should not be required.

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[13] PFN says it is restricted from spending many of its already limited funds for the purpose of litigation, noting that it receives most of its funding from the federal government and that this funding is earmarked for specific programs, services, and activities including Band employee benefits, elementary, secondary and post-secondary education, income assistance, and community infrastructure. According to PFN, the terms of the Canada-PFN funding agreements prevent PFN from using these earmarked funds to contribute to the costs of this action. Although PFN receives some additional limited funds from other sources, such as the Pasqua First Nation Legacy Trust, the First Nations Trust, Keseechiwan Holdings LP, and the Paskwa Pit Stop, these funds are intended for band development and are insufficient to meet PFN's already considerable deficit. PFN notes that it operated under a deficit of $614,388 in the 2015-2016 fiscal year and a deficit of $360,913 in the 2014-2015 fiscal year, and that it currently runs deficits for the majority of its key operating segments.

[14] To help pay its legal fees until now, PFN says it has taken a loan of $310,000 from the Pasqua First Nation Legacy Trust which is repayable in full with interest. According to PFN, it accessed these trust funds as a last resort in order to advance this litigation and it should not be forced to continue to borrow and encroach upon its trust property. In PFN's view, this action is a final attempt to compel Saskatchewan and Canada to honour their Treaty obligations and is of

great importance to PFN. Equally important, PFN says, is the continued growth and use of the PFN Legacy Trust to fund projects that seek to lift the PFN out of poverty and it should not be placed in a position where it must choose one of these competing objectives and sacrifice the other. PFN is an impoverished community whose members face immediate and pressing housing, infrastructure, and other social needs, and in view of *Keewatin* (at paras 80-84), PFN states that the test for interim and advance costs does not require a First Nation to access trust funds to contribute to the costs of litigation where the community faces "immediate pressing social problems" that take priority over funding this litigation.

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[15] PFN maintains that it does not have the means to advance this case without jeopardizing other pressing community priorities. PFN notes that it has limited cash flow, its financial budget is too limited to fund litigation, and of the funds it has they are earmarked for specific projects and programs intended to improve the lives of the PFN's current and future members. Besides suffering from poor socio-economic conditions, PFN says it lacks adequate housing for its members and many members are living off-Reserve waiting for new housing or in over-crowded homes on Reserve. Many existing homes are, according to PFN, in need of repairs to bring the homes up to provincial housing standards and, because PFN does not have an adequate sanitation system, it must allocate a large share of its funding to repair the existing system.

[16] PFN acknowledges that it has sought and received $203,742.46 in loan funding from the Treaty Rights Protection Fund of the Federation of Sovereign Indigenous Nations to contribute to the costs of this litigation. However, PFN notes, if it is awarded damages in this litigation, this loan will become repayable to the Federation. PFN says it has not been able to apply for or

receive funding from any Legal Aid program and, even if funding were available through Legal Aid Saskatchewan or similar programs, it would be insufficient to cover the ongoing costs of PFN's legal counsel. In PFN's view, this is a complex case requiring the assistance of experienced counsel with specialized knowledge of Aboriginal law who will require payment at standard or close to standard hourly rates. PFN points to *Keewatin* where Justice Spies noted (at para 98) that discounted rates are not an adequate or realistic measure to ensure that a plaintiff's case is advanced in complex Aboriginal litigation. PFN notes that its legal counsel have not been retained using a contingency fee arrangement and it would be inappropriate to deny PFN relief on that basis. According to PFN, this litigation is complex and may span years and it would be unreasonable to expect its legal counsel to bear the additional financial burden of a contingency fee arrangement.

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(2) Saskatchewan's Submissions

[17] Saskatchewan says interim costs are intended to allow litigation to proceed, not to reimburse litigants for costs already incurred and paid for, and points to *Okanagan* where the Supreme Court said that: "An award of costs of this nature forestalls the danger that a meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed" (para 31); and that "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" (para 36). Saskatchewan notes that the prospective nature of interim or advance costs was reiterated in *Little Sisters*, where the Supreme Court stated that: "This Court's *ratio* in *Okanagan* applies only to those few situations where a court would be

participating in an injustice - against the litigant personally and against the public generally - if it did not order advanced costs to allow the litigant to proceed" (para 5).

[18] According to Saskatchewan, there is no basis for this Court to order costs against Saskatchewan or Canada in relation to the $584,081.83 in legal fees and disbursements previously incurred by PFN. Saskatchewan notes that those costs have already been paid, and according to Chief Peigan's evidence PFN was able to secure loans and use its own monies to fully pay the $584,081.83. An advance or interim costs order is not available in relation to these previous costs, Saskatchewan says, and it is plain that PFN was not so impecunious that it could not pay these costs.

[19] Saskatchewan further says PFN must establish that it genuinely cannot afford to pay for the next steps of the litigation and, in order to satisfy this requirement, PFN must demonstrate that it has explored all other possible funding options, including private funding through fundraising campaigns, loan applications, contingency fees arrangements and any other available options. Saskatchewan points to *Little Sisters*, where the Supreme Court stated that:

> 40 … the applicant must explore all other possible funding options. These include, but are not limited to, public funding options like legal aid and other programs designed to assist various groups in taking legal action. An advance costs award is neither a substitute for, nor a supplement to, these programs. An applicant must also be able to demonstrate that an attempt, albeit unsuccessful, has been made to obtain private funding through fundraising campaigns, loan applications, contingency fee agreements and any other available options. If the applicant cannot afford all costs of the litigation, but is not impecunious, the applicant must commit to making a contribution to the litigation…

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[20] Saskatchewan draws the Court's attention to the fact that the entirety of PFN's evidence concerning possible contingency fee arrangements is found in one sentence of Chief Peigan's affidavit that merely states PFN's legal counsel have not been retained using a contingency fee arrangement. Because there is no evidence that PFN made any efforts to fund this litigation through a contingency fee arrangement, either with its present counsel or any other law firm, Saskatchewan says this is fatal to PFN's request for advance costs in any event of the cause. Saskatchewan acknowledges that a contingency fee arrangement may not be viable for litigation in which a plaintiff is seeking declaratory relief without damages, as was the case in *Okanagan*, but no such concern arises here since PFN is seeking $200 million in damages. In these circumstances, Saskatchewan says PFN must pursue a contingency fee arrangement, pointing to *Traverse v Manitoba*, 2013 MBQB 150 at para 70, 293 Man R (2d) 151 [*Traverse*], where the Court found that a First Nation's claim for a substantial damages award as part of a flooding claim against Manitoba and Canada was "ideal for a contingency fee arrangement" and that the circumstances of the case required "a more fulsome exploration of a contingency fee agreement." In Saskatchewan's view, since PFN has not demonstrated any attempt to secure a contingency fee arrangement, either with its current lawyers or alternative legal counsel, PFN's motion should be dismissed on this basis alone.

[21] Additionally, Saskatchewan notes that, while PFN has secured two loans to pay its previous legal costs, PFN's evidence discloses no attempt to secure additional funds from the PFN Legacy Trust to pay future costs of this litigation, even though a February 28, 2017, Interim Report of the Trust shows that $659,202 is currently available. On cross-examination, Chief Peigan stated that those monies are available for Band development purposes only and cannot be

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accessed to fund this litigation; yet, Saskatchewan notes, no such restrictions are found in the Trust Agreement and no explanation has been provided as to how $310,000 was previously secured from the Trust to pay for this litigation. Saskatchewan says PFN should be expected to invest in this action out of its trust funds, particularly when it is seeking $200 million in damages to benefit its community, and in this regard references *Pictou Landing First Nation v Nova Scotia (AG)* 2014 NSSC 61 at para 38, 341 NSR (2d) 336 [*Pictou Landing*], where the Nova Scotia Supreme Court found:

> [38] … income from the Boat Harbour Trust Fund has already been accessed to fund this litigation. Apart from the fact that PLFN [Pictou Landing First Nation] has competing priorities for its funds, it is not clear that the trust income and/or capital cannot be accessed to fund the entirety of the lawsuit. If there is merit in the lawsuit - and this remains to be determined - then investing in the action may well be in furtherance of the interest of all the citizens of PLFN.

[22] Saskatchewan says PFN's evidence discloses no attempt to secure any private loans against its business or land holdings to fund this litigation, noting that impecuniosity will not be found where the applicant has failed to exercise such due diligence (*Pictou Landing* at paras 40 and 43). Additionally, Saskatchewan informs the Court that PFN is not so impecunious that it could not afford to hire other legal counsel to initiate a separate claim concerning the *PFN Settlement Agreement* in Federal Court in 2016.

[23] Saskatchewan says the requirement that PFN must fully exhaust alternative sources of funding must be strictly adhered to because it is requesting public funds to finance its litigation. According to Saskatchewan, interim costs are an exception to the general rule that it is for the

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legislatures to determine how public monies will be spent, and in this regard Saskatchewan directs the Court to *Traverse*, where the Manitoba Court of Queen's Bench remarked that:

> [43] In addressing these issues, one cannot be myopic about the consequences of an order for interim costs. The court is extremely mindful of the democratic implications of such an order against the Crown. Normally when monies are sought from government, the legislature decides when public funds will fund litigation against the Crown. … However, in this motion, public monies are being requested without the debate, advice or consent of the legislature(s). While an order for interim costs promotes access to justice for the general public interest, the monies ordered come from the treasury in the form of increasing the public debt or cutting funding to others. Accordingly, a party seeking interim costs must come before the court with complete financial transparency so that the court's decision provides accountability for the use of public monies.

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[24] Saskatchewan contends that public funds are limited and "the Crown should not be treated as an unlimited source of funds" (*Okanagan* at para 28). According to Saskatchewan, the monies requested by PFN would, in part, come out of the Saskatchewan treasury at a time when the province faces a $685 million deficit and spending cuts in such areas as health care, education, and wages for government employees, as detailed in Saskatchewan's most recent budget. Budgetary restraints are, Saskatchewan says, to be taken into account for interim costs applications and in light of Saskatchewan's current financial situation, advance costs ordered against Saskatchewan would come in the form of increasing public debt or cutting funding to other areas.

(3) Canada's Submissions

[25] Canada maintains PFN has not established that it cannot afford the costs of this litigation. According to Canada, considerations of relative ability to pay or any attempts to "level the

playing field" are irrelevant to the Court's consideration of an advance costs order. Canada says attempts to obtain legal representation by an applicant for an advance costs order are relevant to the issue of impecuniosity, and an applicant must provide evidence that it has reasonably exhausted all realistic alternative avenues to fund its case.

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[26] Like Saskatchewan, Canada says an award of advance costs cannot reimburse a litigant for costs already paid to legal counsel, pointing to *Joseph v Canada*, 2008 FC 574 at para 27, 328 FTR 215 [*Joseph*], where this Court found that: "an advance costs order should only be prospective in nature." According to Canada, an order for the costs already incurred by PFN in this action would be inconsistent with the intent and principles which inform orders for advance costs, and even if all three conditions are met, a court may only exercise its discretion to award advance costs on a prospective basis.

[27] In Canada's view, PFN has not provided any evidence that many of the sources of revenue listed in its financial statements are not available to fund litigation. Canada notes Chief Peigan's testimony that PFN took "authorized loans" from the Pasqua Legacy Trust on two occasions and used the monies to pay for the legal expenses incurred in this litigation, and in Canada's view this Trust could provide additional funds to support this litigation. Moreover, Canada claims PFN has assets that it has not disclosed and has not provided a full picture of its financial situation, pointing to the Pasqua First Nation Group of Companies which is wholly owned by PFN and that monies appear to readily flow between PFN and these companies.

(4) Analysis

[28] I agree with Saskatchewan and Canada that an advance or interim costs order is prospective and not retrospective in nature. Consequently, I see no basis to order that the $584,081.83 in legal fees and disbursements previously incurred and paid for by PFN be paid by Canada and Saskatchewan. As the Court in *Joseph* remarked:

> [27] …Although the motion seeks total or partial reimbursement of moneys already paid or committed, it is my view that an advance costs order should only be prospective in nature. This means that, apart from the costs engaged on the present motion which I shall deal with separately, plaintiffs' counsel are de facto, and unwillingly, acting on a contingent fee basis with regard to the large amounts they are owed to date.

[29] As to whether PFN genuinely cannot afford to pay for this litigation in the absence of an advance order for prospective costs, I begin by noting that PFN has not been "thrust into a situation requiring litigation" (*Little Sisters* at para 59) as was the case in *Okanagan* where, in response to proceedings to enforce stop-work orders issued under the *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159, the Bands filed a notice of constitutional question challenging sections of the Act as conflicting with their unresolved aboriginal rights in the lands where they were logging. On the contrary, PFN has initiated this action which seeks $200 million in damages and has managed to fund and pay for its legal costs prior to this motion in an amount of some $580,000.

[30] In *Joseph*, this Court observed that: "To require a defendant, before any finding of legal right on the plaintiffs' part, to fund, on a possibly unrecoverable basis, legal proceedings against itself is a drastic and unusual step to be taken only on the imperative dictates of the interests of

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justice" (para 1). In *Little Sisters*, the Supreme Court noted (at para 36) that "advance costs orders are to remain special and, as a result, exceptional" and stressed that:

> 41 …advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.

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[31] I am not convinced that this litigation will be unable to proceed without an advance costs order, nor am I convinced that such an order is justified in the circumstances of this case. In view of the evidence and the parties' submissions, I am not convinced that PFN has fully exhausted all alternative sources of funding for this litigation. PFN has not established that advance costs are necessary as a "last resort." An order for advance costs must be in the interests of justice, and the fact that PFN has managed to fund and pay for its legal costs prior to this motion in an amount of some $580,000 undermines its claims of impecuniosity. Moreover, this case does not, in my view, rise to the level of "special" or "exceptional circumstances" required to allow the Court to make an order for interim or advance costs. This case is unlike *Daniels v Canada*, 2011 FC 230, 387 FTR 102, where the Court, a few months before the scheduled trial, awarded advance costs to the plaintiffs whose funding under the Test Case Funding Program was about to expire and the overall public investment in the litigation had amounted to approximately $5-6 million.

[32] In short, for the reasons stated above, an award of advance costs is not required because PFN has not established that it is genuinely impecunious or that such an award is necessary in order for this litigation to continue. It is unnecessary to address whether PFN's Claim is *prima*

facie meritorious or raises unresolved issues of public importance because PFN has failed to meet the first requirement for an award of advance costs.

[33] PFN's motion is dismissed.

[34] Although Saskatchewan has requested its costs in its Memorandum of Fact and Law, Canada has made no request for costs. Having regard to the circumstances of this matter, and in view of Rule 400 of the *Federal Courts Rules*, there shall be no award of costs in respect of this motion.

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ORDER

THIS COURT ORDERS that the Plaintiffs' motion for an Order for legal costs to fund this action in advance and in any event of cause, and also for the Defendants to pay $584,081.83 to the PFN, is dismissed.

"Keith M. Boswell"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1437-14
STYLE OF CAUSE:	CHIEF M. TODD PEIGAN on behalf of himself and all other members of The Pasqua First Nation and THE PASQUA FIRST NATION v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and HER MAJESTY THE QUEEN IN RIGHT OF SASKATCHEWAN AS REPRESENTED BY THE ATTORNEY GENERAL OF SASKATCHEWAN
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DATE OF HEARING:	JUNE 5, 2017
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DATED:	JULY 5, 2017

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