Federal Court  Cour fédérale

Date: 20110325

Docket: T-2172-99

Citation: 2011 FC 230

Ottawa, Ontario, March 25, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**HARRY DANIELS, GABRIEL DANIELS,
LEAH GARDNER, TERRY JOUDREY and
THE CONGRESS OF ABORIGINAL PEOPLES**

Plaintiffs

and

**HER MAJESTY THE QUEEN, as represented
by THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT and
THE ATTORNEY GENERAL OF CANADA**

Defendants

AMENDED REASONS FOR ORDER AND ORDER

I. INTRODUCTION

[1] The Plaintiffs have moved for an advance order for costs in order that the final preparation and trial scheduled to commence May 2, 2011 may be funded. The action has been funded to date under the Test Case Funding Program (TCFP), which funding is about to expire.

[2] The grounds for the motion are that (a) the Plaintiffs cannot afford to pay for the litigation and no other realistic funding option exists; (b) the claim is serious and there is a reasonable possibility of success; (c) it is contrary to the public interest that the case not proceed because of the Plaintiffs' lack of financial means; and (d) the issues raised are of public importance and remain unresolved.

II. BACKGROUND

[3] There are profound differences between the parties as to the nature of this action and the justiciability of the issues which only a trial can settle. Whatever the differences, there is no suggestion that the Plaintiffs have been wasteful or abused the funding arrangement currently in place.

[4] The Plaintiffs have commenced this action for the purposes of securing a declaration that Métis and non-status Indians are "Indians" for purposes of s. 91(24) of the *Constitution Act*. The effect of the end of a finding, it is argued, is profound and critical to the 200,000 or more people who fall within those groups.

[5] This action was commenced in 1999. However, in 2005 there was an agreement between the Plaintiff, The Congress of Aboriginal Peoples (CAP), Andrew Lokan (counsel to the Plaintiffs) and

the Minister of Indian Affairs and Northern Development on behalf of the Government of Canada to put the case under the TCFP under which the Government of Canada paid for the costs from 1999 to 2005 and then ongoing to date.

[6] The TCFP was created to fund important Indian-related test cases that had the potential to create judicial precedent. The TCFP originally had a cap of $1 million for any one case, which cap was later raised to $1.5 million.

[7] The problem which gives rise to this motion is that the Plaintiffs will reach the $1.5 million cap sometime in March - approximately one month before the commencement of trial. There is provision under the TCFP to extend the funding and there is precedent for so doing. The Plaintiffs have requested such an extension but to date the Government has not responded despite the fact that, for this type of complex case, this is the eve of trial.

[8] On this motion the Plaintiffs put in extensive evidence from a representative of CAP as to CAP's financial condition and as to the seriousness of the case. There was no evidence from the individual representative Plaintiffs.

[9] The Defendants have objected, largely on technical grounds, to this evidence of seriousness of the case in that the inclusion as "facts" of the Royal Commission on Aboriginal Peoples and the inclusion of experts' reports is inadmissible. The Defendants have put in no evidence on this motion.

[10] The Court allowed the Royal Commission Report in as an "authority" rather than as fact evidence. The expert evidence was allowed, not for the truth of the content, but more in the nature of a pleading and argument directed at the issue of the seriousness of the case and the reasonable possibility of success. However, the past comments of judges and prothonotaries of this Court on motions in this action are more compelling and relevant to that issue.

[11] There have been several interlocutory motions in this case, some being attempts by the Defendants to strike all or parts of the claim. Commencing with Prothonotary Hargrave in 2002 on the first motion to strike, where he referred to the issues in this case as questions of great importance through to Justice Hugessen's adoption (in the second motion to strike a year later) of Prothonotary Hargrave's reasoning, with considerations along the way of Justice Martineau and Prothonotary Lafrenière, this Court has consistently found the issues in this case to be of public importance and deserving of a hearing.

[12] This case now stands on the cusp of trial with financing in issue. Counsel for the Plaintiffs have been acting for hourly rates very significantly below market rates and are prepared to continue to do so. Numerous experts' reports have been filed and these experts will also be required to testify at trial and be paid. There will be the usual incidental expenses of travel, accommodation, reporting, etc.

[13] The Plaintiffs seek an advance order for costs to enable this case to proceed to trial and through to the end of the 6-8 weeks of trial scheduled. The funding is to compensate counsel, to pay for experts and to cover normal travel, hotel and related costs. The Plaintiffs seek an order in the

range of $475,000. They also suggest but do not demand that rates higher than under the TCFP are in order and are consistent with other precedents.

III. ANALYSIS

[14] The parties agree that this Court, pursuant to Rule 400, has the jurisdiction and wide discretion to make an advance order of costs. They also agree as to the factors to consider although they differ as to emphasis of particular factors and application of the factors to this case. They also agree that it is appropriate for the trial judge to hear this motion, particularly in these circumstances.

[15] Orders for advanced costs are highly unusual and are to be approached with caution. This has been confirmed as late as three weeks ago in *R. v. Caron*, 2011 SCC 5, wherein the Supreme Court of Canada confirmed an advance cost order and reiterated the three factors set out in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (*Okanagan*).

[16] As pointed out in *Caron*, above, each case turns on its own facts but the Court must consider three criteria and even then there is no assurance that a funding order will follow:

> **38** Clearly, this case is not *Okanagan* where the Court viewed the funding issue from the perspective of a proposed civil trial not yet commenced. We are presented with the issue of public interest funding in a different context. Nevertheless, *Okanagan*/*Little Sisters (No. 2)* provide important guidance to the general paradigm of public interest funding. In those cases, as earlier emphasized in the discussion of inherent jurisdiction, the fundamental purpose (and limit) on judicial intervention is to do only what is essential to avoid an injustice.
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> **39** The *Okanagan* criteria governing the discretionary award of interim (or "advanced") costs are three in number, as formulated by LeBel J., at para. 40:

> 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.
>
> Even where these criteria are met there is no "right" to a funding order. As stated by Bastarache and LeBel JJ. for the majority in *Little Sisters (No. 2)*:
>
> > In analysing these requirements, 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. [Emphasis added; para. 37.]
>
> …

A. *Public Importance*

[17] The Defendants do not seriously challenge that the constitutional issue raised in this action is of public importance. It does, however, challenge whether it is properly justiciable and, in the context of an advance cost order, that there are other options (other cases) which will bring the issue to trial. In particular, the Defendants refer to the *Manitoba Métis Federation Inc. v. Canada (Attorney General)* (2010 MBCA 71) case which is proceeding to the Supreme Court of Canada.

[18] In light of the constitutional issue raised, the comments of this Court in earlier proceedings in this case and the fact that this case has been funded to date under a public interest funding program, it is not possible for the Defendants to make out a case that this case lacks public importance.

[19] The question of justiciability is one that has been left for trial despite the Defendants' efforts to have the claim struck on that basis.

[20] On the question of whether other cases will provide the answer to the one framed in this case, to so find would be to speculate on the reasons and results which may be obtained in other cases.

[21] It is instructive that the Manitoba Court of Appeal in the *Manitoba Métis* case dealt with CAP's efforts to be an intervenor by noting that CAP's position on s. 91(24) would expand that case (the Appellants therein specifically denied that they were asking for a determination that Métis are Indians under s. 91(24)) and that CAP's position was being dealt with in this Court. The *Manitoba Métis* case is of little assistance in this motion to the Defendants.

[22] The issues in the present case meet this condition. The public interest condition is closely related to the next condition – *prima facie* merit.

B. Prima Facie *Merit*

[23] It is important to recognize that this condition is not the same as that in a motion to strike or necessarily on a motion for summary judgment. A consideration of this condition is not a trial within a trial and ought not embark the Court in a significant review of merit or otherwise prejudice the outcome (*Caron*, above).

[24] The test has been formulated in terms of seriousness and real possibility of success (*Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development),* 2008 FC 574 (commonly referred to as the "*Joseph*" decision)).

[25] The condition has also been described as "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" (*Okanagan*, above).

[26] While not determinative, the earlier comments of this Court on the importance of the case are persuasive that this is a serious case. So too is the fact that the case has been publicly funded for 11 years. If there was no real possibility (not probability) of success, it is hardly likely that the government would have expended $1.5 million in supporting the case.

[27] The Court cannot see how it could be in the interests of justice to have the case forfeited for lack of funds on the virtual eve of trial.

[28] The Defendants have advanced arguments which include the lack of standing of CAP; the absence of a live dispute thus making this case similar to a reference; a "floodgates" concern; the absence of evidence of prior attempts to raise money.

[29] Issues of standing have been dealt with in the motions to strike as has the issue of reference like proceedings. The courts are more than able to control any sort of "floodgates" threat. The absence of past efforts to raise funds, as occurred in *Caron*, above, is understandable given the representative nature of this proceeding and the fact that a funding arrangement was in place. The Court's priority must be on what lies ahead in the immediate future rather than in the past.

[30] None of these arguments undercut the fact that "but for" funding, this case could not be heard. Even if counsel were ordered to conduct the trial for free (or volunteered to do so consistent with the standards of professional conduct governing a member of the Bar), the need for expert evidence is clear as is the need to cover the expenses of those experts and the related expenses of a trial away from people's homes.

[31] Counsel for the Plaintiffs have been acting at significantly reduced rates and it would be unfair to require them to add an even larger subsidy to their already significant contribution to the case. In the absence of further funding, counsel could face the ethical issue of withdrawal from the case (even if a court would permit it) or the Plaintiffs filing a discontinuance.

[32] A further aspect of the public interest and interest of justice is a consideration of the loss to the public should the case not proceed. In addition to the loss of resolution of this issue is the waste

of money, time and effort. The public has already contributed $1.5 million to the Plaintiffs' costs. In addition, it is reasonable to assume that the Defendants have expended at least that amount and more. Its counsel was not acting for reduced compensation nor should they have been. The point is that somewhere in the neighbourhood of $3 million of public money would be wasted if this case does not proceed; the effort and work product would likely be wasted as well.

[33] The Plaintiffs' case would appear to be not without difficulties. However, as noted by Justice Hugessen in *Joseph*, above, the fact that there may be difficulties does not mean that there is an absence of reasonable possibility of success.

[34] Therefore, on this condition, the Court finds that the Plaintiffs have met their burden.

C. *Impecunity*

[35] The Defendants have noted the absence of any evidence from the personal Plaintiffs who are in positions similar to representative parties; one being Métis, the other non-status Indian. While some evidence would have been helpful, there is no serious suggestion that as "representative" Plaintiffs, they were expected to fund the litigation for the other hundreds of thousands of people who would benefit from a favourable judgment. The parties knew this from the very beginning of the case and throughout it.

[36] These Plaintiffs as "representatives" are in a situation similar to a plaintiff in a class action. Under the Court's Rules, except in unusual circumstances (none of which are applicable), such

plaintiffs are not expected or required to fund or be liable for litigation expenses and costs. Therefore, the absence of financial evidence of these Plaintiffs does not undermine this motion.

[37] The Defendants directed their attention to CAP, its legal capacity and standing. Those arguments have been addressed earlier in this judgment.

[38] The evidence is overwhelming that CAP is in no position to fund this litigation. CAP is in a deficit position and has been for some time. It is hardly in a position to secure bank financing of a piece of litigation, the outcome of which is unknown.

[39] Most importantly, CAP's existence is completely dependant on federal government funding. The programs it administers are funded in this manner. It is a condition of that funding that the money be used for the programs and not for litigation, least of all against the federal government.

[40] The evidence is also that CAP's provincial members are not in any position to contribute to the litigation for the same reason.

[41] Therefore, the Plaintiffs have made out their impecunity in these circumstances.

D. *Other Considerations*

[42] As indicated in both *Okanagan* and *Joseph*, even if an applicant for advanced cost order meets the three conditions, the Court may still refuse to grant such an order.

[43] Whether this latest effort was intended to frustrate this litigation, as this Court had found in respect of motions to strike, need not be decided. Crown counsel vigorously defended her client as she is obliged to do. However, intended or not denying funding now would have the same effect as the previous and unsuccessful efforts to strike the action.

[44] The case is virtually ready for its hearing, court resources have been committed and the amount of money requested, in the scheme of this litigation and litigation of this type, is not staggering or startling.

[45] The Plaintiffs' counsel has suggested rates which are $100 per hour more than was funded under TCFP. There is precedent for such awards.

[46] However, in making an advance cost order, the Court has to be mindful that what is necessary is an amount sufficient to ensure continuance of the action and not impose a penalty on the Defendants. As an advance cost order is, in this case, an interim order, costs are to be dealt with at the end of the trial. The parties are at liberty then to seek further and a higher rate for costs in either or any event of the case.

[47] Consequently, the rates applicable under the TCFP should be adequate for the purposes of ensuring a trial and fair in the context of the history of this litigation.

IV. RELIEF

[48] The Court will grant this motion with costs. By the Court's calculation based on the TCFP rate and using the Plaintiffs' proposed budget, the amount budgeted and thus to be ordered is $345,000. This amount is neither a ceiling nor a floor. The Court would add $30,000 for contingencies.

[49] The parties, having received these reasons, may file written submissions as to the appropriate mechanism for oversight of the use of this amount. The more complicated examples submitted are too elaborate for the short time that this funding will be used. The use of the TCFP mechanism may pose other difficulties. The parties are encouraged to find an agreeable mechanism rather than have the Court impose one. The parties shall have seven (7) days to file submissions.

ORDER

THIS COURT ORDERS that this motion is granted with costs. The Defendants shall pay an amount for costs of $375,000 in such manner and at such time as may be further ordered by the Court after having the parties' submissions thereon.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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