



SUPREME COURT OF CANADA

CITATION: Anderson v. Alberta,
2022 SCC 6

APPEAL HEARD: November 4,
2021

JUDGMENT RENDERED: March
18, 2022

DOCKET: 39323

BETWEEN:

**Germaine Anderson on her own behalf and on behalf of all other Beaver Lake
Cree Nation beneficiaries of Treaty No. 6 and of Beaver Lake Cree Nation
Appellant**

and

**Her Majesty The Queen in Right of the Province of Alberta and Attorney
General of Canada
Respondents**

- and -

**Attorney General of British Columbia, Alberta Prison Justice Society, Chiefs
of Ontario, Advocates' Society, Assembly of Manitoba Chiefs, Indigenous Bar
Association in Canada, Treaty 8 First Nations of Alberta, Ecojustice Canada
Society and Anishinabek Nation
Interveners**

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

JOINT REASONS Karakatsanis and Brown JJ. (Wagner C.J. and Moldaver,
FOR JUDGMENT: Côté, Rowe, Martin, Kasirer and Jamal JJ. concurring)
(paras. 1 to 74)

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**Germaine Anderson on her own behalf and on behalf of all other
Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and
of Beaver Lake Cree Nation**

Appellant

v.

**Her Majesty The Queen in Right of the Province of Alberta and
Attorney General of Canada**

Respondents

and

**Attorney General of British Columbia,
Alberta Prison Justice Society,
Chiefs of Ontario,
Advocates' Society,
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Indigenous Bar Association in Canada,
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Indexed as: Anderson v. Alberta

2022 SCC 6

File No.: 39323.

2021: November 4; 2022: March 18.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Civil procedure — Costs — Advance costs — Requirement of impecuniosity — First Nation government applying for advance costs to fund litigation concerning treaty rights — Whether impecuniosity requirement can be met where applicant has access to financial resources that could fund litigation but claims that it must devote resources to other priorities.

Beaver Lake Cree Nation is a First Nation band whose members are beneficiaries of Treaty No. 6. In 2008, Beaver Lake sued the Crown for having improperly allowed its lands to be taken up for industrial and resource development. A 120-day trial is scheduled to begin in January 2024. Beaver Lake says that the cost of litigation — estimated at \$5 million — is well beyond its reach. It therefore brought an application for advance costs to fund its litigation.

Under the impecuniosity branch of the advance costs test, Beaver Lake contends that even though it has access to resources that could potentially fund the litigation, these resources must be applied to address other priorities, such as substantial deficits in housing and infrastructure and high levels of unemployment and social assistance. The case management judge held that Beaver Lake was impecunious and awarded it advance costs. The Court of Appeal set aside the order for advance costs, holding that there was insufficient evidence to support a finding of impecuniosity and that it was an error in principle to conclude that Beaver Lake was impecunious when it had financial resources but chose to spend them on other priorities.

Held: The appeal should be allowed.

A First Nation government that has access to resources that could fund litigation may meet the impecuniosity requirement if it demonstrates that it requires such resources to meet its pressing needs. Pressing needs are not defined by the bare necessities of life. Rather, and in keeping with the imperative of reconciliation, they ought to be understood from the perspective of that First Nation government. Accordingly, in appropriate cases, a First Nation government may succeed in demonstrating impecuniosity despite having access to resources whose value equals or exceeds its litigation costs. In the instant case, the case management judge's findings were insufficient to conclude that Beaver Lake had satisfied the legal test for impecuniosity and the record before her was itself insufficient to support such findings. Beaver Lake's application for advance costs must be remitted for a new hearing.

The test for advance costs is rigorous since courts must be mindful of the constraints of their institutional role. Three absolute requirements must be satisfied: impecuniosity, a *prima facie* meritorious case, and issues of public importance. The concept of necessity is captured by the Court's direction that advance costs are to be ordered as a last resort, where the First Nation government genuinely cannot afford the litigation and where it is impossible to proceed with the litigation without such costs. It is open to a court to decide that a First Nation government is impecunious when its prioritization of pressing needs, properly understood, has left it unable to fund public interest litigation. This approach is sufficiently flexible to account for the realities

facing First Nations governments and the importance of furthering the goal of reconciliation. A court must consider the broader context in which a First Nation government makes financial decisions, including its competing spending commitments, restrictions on the uses of its resources, and fiduciary and good governance obligations. A First Nation government may genuinely need to allocate some or all of its resources to priorities other than litigation.

The court's analysis must be firmly grounded in the evidence and detailed proof may be required to ensure accountability over the expenditure of public funds. The court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation.

The pressing needs of a First Nation should be considered from the perspective of its government that sets its priorities and is best situated to identify its needs. This will always be a fact-specific determination. There can be no question that expenditures on basic necessities of life, including adequate housing, a safe water supply, and basic health and education services, rise to the level of a pressing need. Spending to improve standards of living, for example, to provide enhanced health and education services or to promote cultural survival, may also qualify. A court identifying the pressing needs of a First Nation government may have regard to what that government has prioritized in the past. As well, in the context of the advance costs test, judicial notice may be taken of the systemic and background factors affecting

Indigenous peoples in Canadian society, insofar as they may be relevant to understanding a First Nation government's financial situation and spending priorities.

An applicant should adduce evidence of the costs of meeting its pressing needs and the extent to which it cannot cover those costs. The amount of detail required will depend on the circumstances, including the nature of the unmet needs and any difficulties in estimating the costs of those needs. Where a First Nation government applicant has extensive assets and ongoing revenue, more detailed evidence of its financial resources is required to demonstrate impecuniosity. Conversely, in some cases, a finding of impecuniosity can be made even where the applicant does not adduce detailed evidence, either because the applicant does not have any available financial resources, or because it is obvious that its resources would be outstripped by its pressing needs.

Where an applicant has access to financial resources that could potentially be used to pay for the litigation, it bears the onus of proving that it genuinely cannot afford to pay for the litigation because it must commit those resources to address other pressing needs, and it must demonstrate that those resources are in fact being devoted to addressing those pressing needs. In all cases, because advance costs are a matter of last resort, an applicant must demonstrate that it made sufficient efforts to obtain funding from alternate sources. An applicant must also submit an up-to-date litigation plan so that a court can know, at least approximately, the cost of pursuing the litigation. Ultimately, after assessing the financial resources available to a First Nation

government applicant, the extent to which it must commit those resources to pressing needs in priority to the litigation and the estimated cost of the litigation, a determination can be made regarding whether the applicant has surplus resources with which it may finance the litigation in whole or in part.

Cases Cited

Applied: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; **considered:** *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *Keewatin v. Ontario (Minister of Natural Resources)* (2006), 32 C.P.C. (6th) 258; *Missanabic Cree First Nation v. Ontario*, 2011 ONSC 5196, 38 C.P.C. (7th) 385; *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574, [2008] 3 C.N.L.R. 136; **referred to:** *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *St-Arnaud v. C.L.*, 2009 QCCA 97; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388;

Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam), 2020 SCC 4; *R. v. Desautel*, 2021 SCC 17; *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433; *R. v. Caron*, 2007 ABQB 632, 424 A.R. 377; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Indian Act, R.S.C. 1985, c. I-5.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, Rowbotham and Pentelechuk JJ.A.), 2020 ABCA 238, 448 D.L.R. (4th) 555, [2020] A.J. No. 675 (QL), 2020 CarswellAlta 1082 (WL Can.), setting aside a decision of Browne J., 2019 ABQB 746, [2019] A.J. No. 1300 (QL), 2019 CarswellAlta 2059 (WL Can.). Appeal allowed.

Karey Brooks and Robert Janes, Q.C., for the appellant.

Aldo Argento, Lara Mason and Sunny Mann, for the respondent Her Majesty The Queen in Right of the Province of Alberta.

François Joyal and *John Provar*, for the respondent the Attorney General of Canada.

Heather Cochran and *Jacqueline Hughes, Q.C.*, for the intervener the Attorney General of British Columbia.

Avnish Nanda, for the intervener the Alberta Prison Justice Society.

Senwung Luk and *Julia Brown*, for the intervener the Chiefs of Ontario.

Melanie Gaston and *Kelly Twa*, for the intervener the Advocates' Society.

Carly Fox, for the intervener the Assembly of Manitoba Chiefs.

Alisa Lombard, for the intervener the Indigenous Bar Association in Canada.

Kate Gunn and *Bruce McIvor*, for the intervener the Treaty 8 First Nations of Alberta.

Andhra Azevedo, *David Khan* and *Margot Venton*, for the intervener the Ecojustice Canada Society.

Written submissions only by *Guy Régimbald* and *Alyssa Flaherty-Spence*,
for the intervener the Anishinabek Nation.

The judgment of the Court was delivered by

KARAKATSANIS AND BROWN JJ. —

I. Introduction

[1] In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, this Court established a framework for assessing claims for advance costs to offset the anticipated litigation expenses of public interest litigants. Among its requirements was that an applicant demonstrate *impecuniosity* — meaning, that it “genuinely cannot afford to pay for the litigation” (para. 40).

[2] This appeal concerns an application for advance costs by Beaver Lake Cree Nation to fund its litigation under s. 35 of the *Constitution Act, 1982*. A band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, Beaver Lake has about 1,200 members, approximately 450 of whom live on a reserve located near Lac La Biche, Alberta. In 2008, band chief Germaine Anderson sued on her own behalf and as a representative of all Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and of Beaver Lake Cree Nation (collectively, Beaver Lake).

[3] While contending that it is “impecunious”, Beaver Lake has access to resources — both assets and income — that could potentially be applied to fund this litigation. Beaver Lake says, however, that these resources must be applied to address other priorities. The issue to be decided here, then, is how the requirement of impecuniosity applies in this circumstance. That is, we must consider how a First Nation government applicant may demonstrate impecuniosity where it has access to resources that could fund litigation, but says it must devote those resources to other priorities.

[4] We conclude that a First Nation government that has access to resources may meet the impecuniosity requirement if it demonstrates that it requires such resources to meet its pressing needs. While the impecuniosity requirement is guided by the condition of necessity, pressing needs are not defined by the bare necessities of life. Rather, and in keeping with the imperative of reconciliation, they ought to be understood from the perspective of that First Nation government. A court may therefore consider the broader context in which a First Nation government sets priorities and makes financial decisions, accounting for competing spending commitments, restrictions on the uses of its resources, and fiduciary and good governance obligations. It follows that, in appropriate cases, a First Nation government may succeed in demonstrating impecuniosity despite having access to resources whose value equals or exceeds its litigation costs.

[5] All this said, the threshold of impecuniosity remains high and is not easily met. Bearing in mind the constraints on the judicial role imposed by the separation of powers, the extraordinary nature of the remedy and the importance of accountability for the expenditure of public funds it entails, the court's analysis must be firmly grounded in the evidence. The court must be able to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's financial resources; and (4) identify the estimated costs of funding the litigation. This approach is sufficiently flexible to account for the realities facing First Nations governments and the importance of furthering the goal of reconciliation while adhering to the appropriate judicial role.

[6] Despite finding that Beaver Lake had, at the time of its application, more than \$3 million in unrestricted funds and additional ongoing revenue that could be used to pay for its legal fees, the case management judge held that it was — given the impoverished state of the community and the other needs it was required to meet — impecunious and awarded Beaver Lake advance costs (2019 ABQB 746). The Court of Appeal of Alberta reversed, holding that there was insufficient evidence to support that conclusion (2020 ABCA 238, 448 D.L.R. (4th) 555).

[7] In our respectful view, the case management judge erred in her impecuniosity analysis. While her finding that Beaver Lake is an impoverished community with pressing needs is unassailable, her findings were insufficient to conclude that Beaver Lake had satisfied the legal test for impecuniosity.

[8] The matter of Beaver Lake’s impecuniosity, however, should be reconsidered in light of the reasons that follow, and to account for the passage of time which will likely have altered Beaver Lake’s current financial state. We would therefore allow the appeal and remit the matter to the Court of Queen’s Bench of Alberta.

II. Background

[9] Beaver Lake’s underlying claim, in essence, is that the Crown “improperly allowed lands traditionally used by Beaver Lake Cree Nation to be ‘taken up’ for industrial and resource development” thereby “compromis[ing] [its] ability . . . to pursue its traditional way of life” (C.A. reasons, at para. 2). It seeks various declarations of right, injunctions, and damages or equitable compensation.

[10] In support of its application, Beaver Lake says that the cost of litigation — which it estimated as \$5 million — is well beyond its reach. By the time Beaver Lake’s application was heard, it had already spent approximately \$3 million on legal fees, paid from its own funds and from third party fundraising. A 120-day trial is presently scheduled to begin in January 2024.

[11] Citing *Okanagan and Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, the case management judge correctly stated the test for awarding advance costs — that an applicant must demonstrate impecuniosity, present a *prima facie* meritorious case and

raise issues of public importance — and recognized that her decision is ultimately discretionary. Canada and Alberta conceded for the purposes of this application that Beaver Lake’s case was *prima facie* meritorious. And, the case management judge found that the public importance requirement was satisfied, since Beaver Lake’s case raised a novel issue regarding the interpretation of Aboriginal and treaty rights.

[12] As to impecuniosity, the case management judge found that Beaver Lake’s financial situation had improved in recent years. It was not under any imminent threat of insolvency or third party or co-management, its recent financial statements showed a surplus, and it had been able to spend \$3 million in legal fees for the litigation (averaging \$300,000 each year). After reviewing Beaver Lake’s resources — including government funding for a variety of programs, Impact Benefit Agreements negotiated with industry and miscellaneous revenue streams such as third party fundraising — she determined that Beaver Lake had access to “more than \$3 million” in unrestricted funds that could potentially finance its litigation (para. 60 (CanLII)).

[13] The case management judge also observed, however, that Beaver Lake has “substantial deficits in housing and infrastructure and . . . high levels of unemployment and social assistance” (para. 30). Relying on the evidence of band council and community members, she held that Beaver Lake was an impoverished community with many pressing needs and concluded that it was impecunious because it “cannot fund the litigation at the rate required to bring it to trial” (para. 63). In the result, she found it appropriate to award advance costs. Beaver Lake, she said, should not have “to

choose between pursuing this litigation and attempting to provide for the basic necessities of life” (para. 66). Each of Beaver Lake, Canada and Alberta would therefore contribute \$300,000 annually to the credit of Beaver Lake’s legal fees until the trial was concluded or litigation was otherwise resolved.

[14] The Court of Appeal allowed Canada’s and Alberta’s appeals and set aside the case management judge’s order. The case management judge erred, it held, in concluding that Beaver Lake was impecunious. Her finding that Beaver Lake had more than \$3 million in unrestricted funds alone signified that Beaver Lake “*prima facie* did not meet the legal test” (C.A. reasons, at para. 17). It was an error in principle to conclude that Beaver Lake was impecunious when it had financial resources, but chose to spend them on other priorities. Distinguishing “discretionary spending on desirable improvements to community infrastructure and standards of living” from “spending on basic necessities”, it held that an applicant is impecunious only where its expenditures on matters in the latter category render it genuinely unable to pay for the litigation (para. 28). Here, no evidence supported the case management judge’s finding that Beaver Lake would have to choose between spending on basic necessities and pursuing the litigation.

[15] Before the Court of Appeal, Canada tendered fresh evidence that Beaver Lake had received \$2.97 million in settlement of a specific claim. The Court of Appeal therefore held that, in light of this evidence and of the case management judge’s findings, and accounting for her errors in principle in disregarding certain assets that

were available to Beaver Lake, Beaver Lake had at least \$6 to 7 million to fund the litigation. Further, it said that the advance costs order was “unreasonable”, since it failed to adequately balance the parties’ interests, the quantum of the award was not justified on the record, and the order did not include adequate procedural controls.

III. Analysis

[16] Our analysis proceeds as follows. First, we review the test and underlying principles governing awards for advance costs in public interest litigation. Secondly, we consider the impecuniosity requirement of that test, and how it applies to a First Nation government that has access to financial resources that could potentially pay for its litigation. Finally, we apply the framework to illustrate how, we say respectfully, the case management judge erred in her assessment of impecuniosity in this case.

[17] Beaver Lake submits that whether a First Nation government is impecunious must be informed by broad contextual factors and the unique realities of First Nations, including the government’s obligations to its community and the reasonable financial decisions it makes on matters besides litigation. An approach to impecuniosity that focuses exclusively on an applicant’s available financial resources is contrary to the objective of reconciliation inherent in s. 35 litigation. In any event, spending on Beaver Lake’s housing and infrastructure deficits is not just a reasonable financial decision, but a basic need that should take priority over funding the litigation.

[18] Alberta and Canada each submit that, given Beaver Lake’s access to significant assets and revenues, it was not impecunious. While Alberta agrees that the test for impecuniosity is not one of “unqualified impecuniosity” (C.A. reasons, at para. 25), Beaver Lake did not provide sufficient contextual evidence identifying or costing its basic needs or demonstrating that it was using its unrestricted financial resources to address those needs. Alberta acknowledges that the goal of reconciliation is relevant under certain branches of the advance costs test, but argues that it has no role to play in the impecuniosity analysis. Canada says that the exceptional nature of an advance costs award means that merely having legitimate and reasonable infrastructure or social needs sets the bar too low. Beaver Lake did not satisfy the onus of proving that its proposed alternate uses for its financial resources meet a high threshold of necessity.

A. *Advance Costs*

(1) Guiding Judicial Discretion

[19] We begin with first principles. A court’s equitable jurisdiction over costs confers discretion to decide when, and by whom, costs are to be paid (*Okanagan*, at para. 35). This includes the power to award advance costs (also referred to as “interim costs”) prior to the final disposition of public interest litigation and in any event of the cause (*Okanagan*, at para. 1). Such awards are “meant to provide a basic level of assistance necessary for the case to proceed” (*Little Sisters*, at para. 43).

[20] In *Okanagan*, this Court held that advance costs could be awarded based on the strong public interest in obtaining a ruling on a legal issue of exceptional importance, that not only transcended the interests of the parties but also would, in the absence of public funding, have failed to proceed to a resolution, creating an injustice (para. 34; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 6). Access to justice is an important policy consideration underlying advance costs awards where a litigant seeks a determination of their constitutional rights and other issues of broad public significance, but lacks the financial resources to proceed. It has also been recognized by this Court as “fundamental to the rule of law” (*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 39; see also *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). Further, costs awards can permit litigants of limited means, including vulnerable and historically disadvantaged groups, to have access to the courts in cases of public importance.

[21] But this Court has also emphasized that “*Okanagan* did not establish the access to justice rationale as the paramount consideration in awarding costs” and that “[c]oncerns about access to justice must be considered with and weighed against other important factors” (*Little Sisters*, at para. 35). Indeed, as this Court explained in *Little Sisters*, at para. 5, notwithstanding obstacles to access to justice such as underfunded and overwhelmed legal aid programs and growing instances of self-representation, the Court in *Okanagan* “did not seek to create a parallel system of legal aid or a court-managed comprehensive program”. Rather, *Okanagan* applies to those rare

instances where a court would be “participating in an injustice — against the litigant personally and against the public generally” — by declining to exercise its discretion to order advance costs (*Little Sisters*, at para. 5). To award advance costs outside those instances would amount to “imprudent and inappropriate judicial overreach” (*Little Sisters*, at para. 44).

[22] The root of the concern underlying this narrow scope for an advance costs order is the separation of powers. In *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, this Court affirmed that “our constitutional framework prescribes different roles for the executive, legislative and judicial branches” (para. 27) and that it is “fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other” (para. 29, quoting *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389). And so, in *Caron*, at para. 6, the Court observed that “[a]s a general rule, of course, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown” (see also *St-Arnaud v. C.L.*, 2009 QCCA 97, at para. 29 (CanLII): “. . . the long-lasting solution, if there is one, is to be found in distributive justice and falls within the purview of the legislator, rather than in corrective justice, which involves the intervention of the courts”). Allocating public resources among competing priorities is “a policy and economic question; it is a political decision” (*Criminal Lawyers’ Association*, at para. 43).

[23] Where, therefore, an applicant seeks to have its litigation funded by the public purse, courts must be mindful of the constraints of their institutional role. Those constraints necessarily confine a court’s discretion to grant such an award to narrow circumstances (*Okanagan*, at para. 41). It must be a “last resort” (*Little Sisters*, at paras. 36, 41, 71 and 73), reserved for the “rare and exceptional” case (*Okanagan*, at para. 1) and where, again, to refrain from awarding advance costs would be to participate in an injustice.

[24] In further keeping with these concerns, the test for advance costs is rigorous. *Okanagan* states three “absolute requirements” (*Little Sisters*, at para. 37) that must be satisfied: impecuniosity, a *prima facie* meritorious case, and issues of public importance. Further, while meeting these requirements is necessary, doing so does not automatically entitle an applicant to an advance costs award (*Caron*, at para. 39). Where the requirements are satisfied, a court — having considered all relevant individual circumstances of the case — retains residual discretion to decide whether to award advance costs, or to consider other ways of facilitating the hearing of the case (*Little Sisters*, at para. 37).

(2) Reconciliation

[25] Since *Okanagan*, this Court has decided *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,

2005 SCC 69, [2005] 3 S.C.R. 388. These judgments and others affirmed the Crown’s obligation to consult and accommodate Indigenous groups, and emphasized that the “fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions” (*Mikisew Cree*, at para. 1; see also *Haida Nation*, at para. 32; *Taku River*, at para. 42; *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, at para. 22). In *R. v. Desautel*, 2021 SCC 17, at para. 22, this Court reiterated that “the two purposes of s. 35(1) are to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown’s assertion of sovereignty” and that “[t]he same purposes are reflected in the principle of the honour of the Crown, under which the Crown’s historic assertion of sovereignty over Aboriginal societies gives rise to continuing obligations to their successors as part of an ongoing process of reconciliation.” As the parties and several interveners have invoked reconciliation here, it is worth explaining its significance in the advance costs test, with respect to a First Nation government applicant involved in s. 35 litigation.

[26] Where litigation raises novel issues concerning the interpretation of Aboriginal and treaty rights and the infringement of those rights, this may have significant weight in a court’s analysis of the public importance branch of the advance costs test and the exercise of its residual discretion. Other aspects of the Crown-Aboriginal relationship may be relevant to a court’s exercise of its residual discretion since, at this stage, “the court must remain sensitive to any concerns that did

not arise in its analysis of the test” (*Little Sisters*, at para. 72). For example, a court may be more inclined to exercise its discretion to award advance costs where the Crown has employed tactics to delay the resolution of the applicant’s claim (see *Hagwilget Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 574, [2008] 3 C.N.L.R. 136, at paras. 20-24).

[27] In assessing impecuniosity, a court must respectfully account for the broader context in which First Nations governments such as Beaver Lake make financial decisions. Promoting institutions and processes of Indigenous self-governance fosters a positive, mutually respectful long-term relationship between Indigenous and non-Indigenous communities, thereby furthering the objective of reconciliation (*First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58, [2017] 2 S.C.R. 576, at para. 10; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at paras. 9-10). In the context of the impecuniosity analysis, this means that the pressing needs of a First Nation should be considered from the perspective of its government that sets its priorities and is best situated to identify its needs. We return below to what doing so specifically entails in this case.

(3) The Terms of an Advance Costs Award

[28] Where a court decides that an award of advance costs is justified, the terms of the order must be carefully crafted. They must balance the interests of the parties, and should not impose an unfair burden (*Okanagan*, at para. 41). Accordingly, the order must provide for, or allow for the later provision of, oversight in the form of a “definite

structure . . . imposed or approved by the court itself” that sets limits on the rates and hours of legal services and caps the award at an appropriate global amount (*Little Sisters*, at para. 42). The order should also build in judicial oversight to allow the court to “closely monitor the parties’ adherence to its dictates” (para. 43). In short, an advance costs order is not free rein. Because the public purse is burdened, there must be “scrutiny” of how a litigant spends the opposing party’s money (para. 42).

[29] Other terms of the order will, of course, be informed by a court’s findings in deciding impecuniosity. As outlined below, an applicant pleading impecuniosity must provide a litigation plan and sufficient evidence of its financial resources. While this will obviously be relevant to the quantum of the award, which should represent “a basic level of assistance necessary for the case to proceed” (*Little Sisters*, at para. 43), it will also assist in determining whether, for example, the terms of an advance cost order should include a requirement that the applicant commit to making some contribution to the litigation. It is, therefore, to that requirement of impecuniosity that we now turn.

B. *The Impecuniosity Requirement*

(1) Impecuniosity and First Nations Governments: The Threshold

[30] This Court has stated the requirement of impecuniosity in varying, but strict, terms. In *Okanagan*, it held that an applicant is impecunious if it “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” (para. 40). Likewise, in *Little Sisters*, this Court stated that the impecuniosity requirement “means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered” (para. 71). And these general formulations have proven sufficient to decide the cases which have to date called upon the Court to apply the advance costs test. In *Okanagan*, the applicant bands faced extreme financial difficulty, as they ran deficits to finance day-to-day operations and were close to having outside management of their finances imposed upon them. It was impossible for them to fund the estimated litigation costs (paras. 4-5). In *Caron*, the applicant had exhausted his limited personal funds, incurred debts, sought and received donations, and faced costly lawyer and expert fees (paras. 11-13 and 21). Finally, in *Little Sisters*, this Court did not need to apply the impecuniosity requirement, as the other branches of the advance costs test were not satisfied (para. 67).

[31] What makes this a case of first impression is whether and how, in the context of a claim brought by a First Nation government, it can be said that it “genuinely cannot afford to pay” for, or that it is “impossible to proceed” with, public interest litigation, while having access to financial resources that it says must be otherwise allocated.

[32] The parties agree that, in such circumstances, the assessment of impecuniosity must look beyond the First Nation government’s financial resources in the abstract. A snapshot in time of its resources will be an important part of the analysis.

But to assess whether a First Nation government genuinely cannot afford to pay for litigation, a court must also consider the broader context in which that government makes financial decisions, including its competing spending commitments, restrictions on the uses of its resources, and fiduciary and good governance obligations. A First Nation government may genuinely *need* to allocate some or all of its resources to priorities other than litigation.

[33] The parties and interveners in this appeal presented us with several proposals for modifying or elaborating on the meaning of the impecuniosity requirement to suit the circumstances before us. The intervener the Chiefs of Ontario, submits that where a First Nation government applicant is involved in s. 35 litigation, it should be *presumed* to be impecunious. Beaver Lake, in its factum, and several interveners argue that an applicant is impecunious where it is unable to finance the litigation because it has expended its resources on other “reasonable financial choices” (see, e.g., A.F., at paras. 4, 55, 58 and 61). Another intervener, the Advocates’ Society, proposes that the impecuniosity requirement should ask whether it would be “unduly onerous” for the applicant to be expected to fund the litigation (I.F., at paras. 3, 24-26 and 28).

[34] We would not modify the impecuniosity requirement in these ways.

[35] We recognize that access to justice is of particular importance in the context of s. 35 litigation, and further acknowledge that, in some cases, the dire financial circumstances of a First Nation government applicant may be the very result

of the alleged interference with its constitutional rights at issue in the litigation. None of this, however, warrants a presumption that all First Nations government applicants are impecunious. First, this presumption is inappropriate, as the financial situation of First Nations governments varies throughout Canada. Secondly, the parameters for an award of advance costs and the impecuniosity branch of the test were developed in *Okanagan*, which was itself a s. 35 claim by a First Nation government applicant, and which held that impecuniosity “must be established on the evidence” (para. 36 (emphasis added)). Finally, a class-based presumption of impecuniosity would risk turning the advance costs test into a parallel system of legal aid which, as noted above, would signify imprudent and inappropriate judicial overreach.

[36] That said, judicial notice may be taken of the systemic and background factors affecting Indigenous peoples in Canadian society. As this Court reiterated in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 60, in the context of criminal sentencing, “courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples”. In the context of the advance costs test, courts may also take notice of such matters insofar as they may be relevant to understanding a First Nation government’s financial situation and spending priorities.

[37] Nor can we accept thresholds based on a standard of “reasonableness” or on whether it would be “unduly onerous” for the applicant to fund the litigation. While assessing impecuniosity entails reviewing the evidence of a First Nation government’s expenditures on matters besides litigation, the ultimate determination cannot be reached by applying broad and open-ended standards of reasonableness or undue burdens. These standards would dilute the requirement, repeatedly emphasized in *Little Sisters*, that advance costs awards “must be granted . . . in circumstances where the need for them is clearly established”, as a “last resort” (para. 36; see also paras. 41, 71, 73 and 78), and that “[a] court awarding advance costs must be guided by the condition of necessity” (para. 44 (emphasis added)).

[38] The concept of necessity is captured by this Court’s direction that advance costs are to be ordered as a “last resort”, where the First Nation government “genuinely cannot afford” the litigation and where it is “impossible to proceed”. It follows from this, in our view, that it is open to a court to decide that a First Nation government is impecunious when its prioritization of “pressing needs”, properly understood, has left it unable to fund public interest litigation. Doing so — as opposed, for example, to considering merely whether the First Nation government made a “reasonable” financial choice — is consistent with this Court’s strictures confining grants of advance costs, inasmuch as meeting a *pressing* need connotes *necessity*.

[39] An approach to impecuniosity that allows a First Nation government’s pressing needs to take priority over the litigation has been usefully applied in lower

court decisions. For example, the concept of a First Nation government applicant's "pressing needs" has been applied to determine if it is genuinely unable to pay for the litigation. In *Keewatin v. Ontario (Minister of Natural Resources)* (2006), 32 C.P.C. (6th) 258 (Ont. S.C.J.), Spies J. found that the applicant had access to \$500,000 to \$600,000 annually in trust fund income that could be used to finance the litigation, but concluded that it was nevertheless impecunious because it should use those funds to address "more pressing needs that would take priority over funding this litigation" (para. 83; see also paras. 80-82 and 96). Significantly, this approach also appears to reflect a broadly acceptable threshold for impecuniosity, as it was applied *both* by the case management judge and the Court of Appeal in this case, the latter identifying the central issue before it as "the extent to which the funding of this litigation can be 'weighed against the community's other pressing needs'" (para. 24, quoting the case management judge's reasons, at para. 60).

[40] We are therefore content to affirm that an applicant genuinely cannot afford to pay for the litigation where, and only where, it cannot meet its pressing needs while also funding the litigation. And, as we explain further below, where the applicant is a First Nation government, pressing needs must be understood from the perspective of the First Nation government.

(2) Assessing Pressing Needs

[41] Bearing in mind the extraordinary nature of the remedy, and the constraints of the judicial role in ordering the expenditure of public funds, assessing whether a

First Nation government has sufficient resources to pay for the litigation after meeting its pressing needs requires that a court have a sufficient record to (1) identify the applicant's pressing needs; (2) determine what resources are required to meet those needs; (3) assess the applicant's resources (both assets and income); and (4) identify the estimated cost of funding the litigation. The level of evidential granularity required for a trier of fact to apply the legal test will vary, depending on the circumstances of the applicant. Detailed proof of an applicant's pressing needs and the extent to which they are unfunded, and estimated litigation costs, may be required to ensure accountability over the expenditure of public funds. At the same time, it must not be prohibitively expensive to establish impecuniosity.

(a) *Identifying the Pressing Needs of a First Nation Government*

[42] Where an applicant has access to financial resources that could potentially be used to pay for the litigation, it bears the onus of proving that it genuinely cannot afford to pay for the litigation because it must commit those resources to address other pressing needs. Identifying the pressing needs of a First Nation government will always be a fact-specific determination; different communities may have different governance structures, funding arrangements and priorities, and so the evidence to establish pressing needs will vary from community to community.

[43] There can be no question that expenditures on basic necessities of life, including adequate housing, a safe water supply, and basic health and education services, rise to the level of addressing a pressing need. Spending to improve standards

of living, for example, to provide enhanced health and education services or to promote cultural survival, may also qualify.

[44] Further, and as we have already observed (at para. 25), the goal of reconciling Aboriginal interests with the broader interests of society will inform how a court identifies the pressing needs of a First Nation government. Reconciliation requires a court to consider the pressing needs of a First Nation government applicant from its perspective as a government that sets its own priorities and is best situated to identify its needs. Accordingly, a court identifying the pressing needs of a First Nation government may have regard to what that government has prioritized in the past as indicated, for example, by records of Crown consultation, of negotiations with the Crown for funding, by band council resolutions requesting access to capital and revenue moneys, and in records of internal departmental or other meetings dealing with its budgeting and priorities. Certain prioritized expenditures, such as allocating funds to construct a skating rink or to promote the First Nation's culture, may not appear to a court to address a pressing need on their face. And yet, a community may adduce evidence of how it has prioritized this project because it promotes its Indigenous identity or, for example, an urgent problem of youth in crisis has led it to promote physical health, outdoor activities or traditional cultural practices (*Keewatin*, at para. 59).

(b) *The Extent of Unfunded Pressing Needs*

[45] Identification by a court of needs as truly pressing will not establish impecuniosity. An applicant should also adduce evidence of the costs of meeting those needs and the extent to which it cannot cover those costs. The amount of detail required will depend on the circumstances, including the nature of the unmet needs and any difficulties in estimating the cost of those needs.

[46] Additionally, where the applicant has access to resources that could potentially pay for the litigation but which it says must be devoted to its pressing needs, it must demonstrate that those resources are in fact being devoted to addressing those pressing needs. We concur with the Court of Appeal of Alberta's statement in the present case that "[f]unds that are available to meet infrastructure and services deficits must be used for that purpose before a claim can be made for advance [costs], based on an argument that available funds are needed for those other priorities" (para. 31). In this regard, evidence of an applicant's plan for the use of its financial resources would be relevant.

(c) *Assessing the Applicant's Financial Resources*

[47] It follows from our jurisprudence that in some cases, a finding of impecuniosity can be made even where the applicant does not adduce detailed evidence, either because the applicant does not have any available financial resources, as in *Okanagan*, or because it is obvious that its financial resources would be outstripped by the nature and extent of its pressing needs as compared with its estimated litigation costs.

[48] Lower court cases illustrate how a finding of impecuniosity can find support in the evidence adduced by a First Nation government applicant. In *Missanabic Cree First Nation v. Ontario*, 2011 ONSC 5196, 38 C.P.C. (7th) 385, the First Nation government satisfied the impecuniosity requirement where it adduced years of financial statements disclosing that its liabilities exceeded its assets, that it had significant long-term debt, and that it did not have any unrestricted revenue sources that could be used towards the litigation (paras. 41-47). In *Hagwilget Indian Band*, litigation between the applicant band and Canada had persisted for 20 years, leaving the band “with virtually no resources” (para. 12). It was manifest to the court that the band could not pursue the litigation without advance costs, since its funding was closely controlled by the government, it had been unsuccessful in obtaining other sources of funding, it owed counsel over \$140,000, ran deficits, had no available credit, and had to close its band council offices for over three weeks due to lack of funding (paras. 12-14). In *Keewatin*, the record established that securing funding from individual members was impractical, virtually all funding came from the federal and provincial governments and was earmarked for specific priorities, the band ran deficits in successive years, the majority of its members were unemployed, lacked adequate housing and an adequate water supply, and other sources of funding had been explored but were inadequate to fund the litigation. On this basis, the band was found to be impecunious (para. 108).

[49] Where a First Nation government applicant has extensive assets and ongoing revenue, however, more detailed evidence of its financial resources is required to demonstrate impecuniosity. This may include an account of its assets, liabilities,

income and expenses, information about restrictions on revenue, number of employees and salaries, and evidence of its ability and efforts to obtain funding from alternative sources. And where a responding party challenges an applicant's contention that certain financial resources are unavailable because they have been or are being spent to address pressing needs, the applicant may be required to justify the challenged expenditures.

[50] In all cases, because advance costs are a measure of last resort, an applicant must demonstrate that it made sufficient efforts to obtain funding from alternate sources. Depending on the circumstances, if an applicant requires ministerial permission to access certain funds, it should demonstrate that it sought this permission (and been declined), or justify its choice to refrain from doing so (*Little Sisters*, at para. 68). Similarly, a court should generally consider whether the applicant attempted to obtain private funding through fundraising campaigns or tried to obtain a loan (paras. 40 and 70). What is required in each case will vary depending on the evidence of what funding is realistically available. For example, in *Caron*, this Court deferred to the application judge's finding that it was not "realistically possible" for the applicant to launch a formal fundraising campaign as the litigation unfolded, given the trial schedule and its demands (para. 41, quoting *R. v. Caron*, 2007 ABQB 632, 424 A.R. 377, at para. 30).

(d) *Comparing Estimated Litigation Costs and the Applicant's Surplus Resources*

[51] *Little Sisters* instructs that “cost estimates [for the litigation] form an integral part of the evidence; the court should subject them to scrutiny, and then use them to consider whether the litigant is impecunious” (para. 69). Consistent with this direction, an applicant must submit an up-to-date litigation plan so that a court can know, at least approximately, the cost of pursuing the litigation.

[52] Ultimately, after assessing the financial resources available to a First Nation government applicant, the extent to which it must commit those resources to pressing needs in priority to the litigation and the estimated cost of the litigation, a determination can be made regarding whether the applicant has surplus resources with which it may finance the litigation in whole or in part.

C. *Application of the Framework to This Appeal*

[53] Disturbing the case management judge’s discretionary decision to award advance costs cannot be undertaken lightly (*Little Sisters*, at para. 49). At the same time, in making an exceptional award of advance costs, “trial judges must . . . be careful to stay within recognized boundaries” (para. 49). Even discretionary decisions are not completely insulated from review, and appellate intervention is warranted where a trial judge has misdirected himself or herself as to the applicable law, including the identification of the requisite legal criteria, their definition and their application (*Okanagan*, at paras. 36 and 43).

[54] Here, the case management judge, acting without the benefit of these reasons, made general observations about Beaver Lake's financial resources and pressing needs to find that it was an impoverished community. On the record before her, that finding is unassailable. But with great respect, it is, without more, insufficient. She did not make the particular findings necessary in these circumstances to decide impecuniosity or to determine the amount of advance costs required to enable Beaver Lake to pursue the litigation. Indeed, the record before her was itself insufficient to support such findings. For these reasons, and because Beaver Lake's financial circumstances have changed since its initial application (indeed, the fresh evidence before the Court of Appeal demonstrates that those circumstances are dynamic), this matter must be remitted for a new hearing so that impecuniosity can be decided in accordance with these reasons.

(1) Beaver Lake's Pressing Needs

[55] As we have already recounted, the case management judge found that Beaver Lake has "substantial deficits in housing and infrastructure and . . . high levels of unemployment and social assistance" (para. 30). These findings, too, were fully available on the record before her. Beaver Lake adduced and was cross-examined on extensive affidavit evidence regarding the community's living conditions that spoke of food insecurity and lack of access to lands, social assistance, unemployment, inadequate housing, inadequate infrastructure, insufficient resources for health and education programs, poor water quality and access, health needs, and overall poverty.

Further, the record showed that ameliorating these conditions had been identified as significant priorities by the band.

[56] In light of this evidence, we agree that the case management judge appropriately identified Beaver Lake's pressing needs. Such matters fall within the basic necessities of life which, as such, clearly rise to the level of pressing needs within the circumstances of this applicant. In particular, allocating resources to improve deficits in housing, infrastructure, and basic social programming would, from the perspective of this First Nation government, constitute the addressing of pressing needs. We therefore disagree with the Court of Appeal inasmuch as it suggests that expenditures thereon represent "spending on desirable improvements" rather than spending on pressing needs (para. 28).

(2) The Extent of Beaver Lake's Unfunded Pressing Needs

[57] The case management judge did not make findings regarding the estimated costs of Beaver Lake's pressing needs, or the extent to which those costs are not covered by the financial resources available to Beaver Lake. Nor were the necessary specific findings made to show how those resources were being applied to meet those needs.

[58] Indeed, the case management judge could not have made those findings on the record before her. A constant refrain in the evidence and submissions was that Beaver Lake could not meet its pressing needs because it lacked sufficient funds. Yet,

there was no specific account of how much it would cost to address Beaver Lake's pressing needs, or why no other resources were available to meet those needs. The case management judge should have been told, for example, why federal funding allocated to Beaver Lake's pressing needs falls short of adequately addressing them.

[59] The evidence concerning Beaver Lake's financial resources did not fully answer whether those resources were required to address its pressing needs, and whether any funds would remain that could potentially pay for the litigation. For example, evidence of financial statements, while helpful, were insufficient since they do not identify Beaver Lake's current or future needs, or the extent to which funding has or has not been allocated to meeting them (A.R., vol. XII, at pp. 180-83).

[60] Beaver Lake's band administrator, John Geoffrey Rankin, deposed that, in discharging his responsibility to develop business strategies that align with the community's short- and long-term objectives, he meets weekly with band departmental managers to review progress on priorities, develop and assess departmental budgets, and assist with additional funding requests (A.R., vol. II, at pp. 12-13). However, the content and outcome of those meetings were not before case management judge. Placing this evidence before the court could help it understand not only the community's pressing needs (although, as we have discussed, they were adequately demonstrated in this case), but also how existing and future resources are to be allocated to meet those needs, whether those resources will be sufficient, and whether there are pressing needs that will nonetheless go unmet.

[61] It follows that the court will require evidence that quantifies the financial resources required to meet the First Nation government's pressing needs. Here, for example, it was unclear just how much it would cost to provide adequate housing. Mr. Rankin's affidavit indicated that 50 members are on the waitlist for housing, 20 houses are in need of immediate major repairs, and 8 houses need to be replaced due to health and safety concerns (A.R., vol. II, at pp. 24-25). But it would be difficult for a court to know what resources must be allocated to these needs without estimates of how much that work would cost, coupled with an explanation of why other sources of funds could not cover these costs. While some of these costs may be unpredictable, more information should be provided where possible; if further information is not available at the time of application, Beaver Lake should explain why it is not. Similarly, Beaver Lake's evidence was that repairs were needed for its sewer system and treatment lagoon, but whether its resources, present or future, could be allocated to that expense was not explained. We were told at the hearing that Canada has agreed "to provide the funds and that [it] is costing up to \$8 million" (transcript, at p. 26; see also p. 90). However, a court would need to know whether the funding is conditional, whether those conditions are practically achievable, whether this government funding is sufficient and, if not, whether Beaver Lake proposes to allocate resources to address this need.

(3) Beaver Lake's Financial Resources

[62] The case management judge considered Beaver Lake's resources to arrive at the conclusion that it had more than \$3 million in unrestricted assets potentially available for the litigation. She was entitled to make this finding based on the evidence provided by Beaver Lake, which consisted of financial statements, affidavits from band council and community members, government reports and correspondence, and expert evidence concerning Beaver Lake's assets and sources of revenue.

[63] Additional evidence regarding Beaver Lake's assets and income, including any restrictions on those resources, and its liabilities and expenses could help the court more accurately determine what resources Beaver Lake could access. It would also be helpful if Beaver Lake were to provide a more detailed account of its efforts to obtain funding from alternate sources. The following examples illustrate how the analysis of Beaver Lake's financial resources would have benefitted from further elaboration.

[64] First, Beaver Lake created the Heritage Trust as a vehicle to manage income received from projects carried out on its traditional lands, which Beaver Lake allocates towards community development programs and services according to the terms of the Trust Agreement. Under the Trust's terms, Beaver Lake can draw up to 10 percent once every four years for these community activities, some of which at least, on their face, may correspond to some of Beaver Lake's pressing needs. Beaver Lake explained that the purpose of the restriction on withdrawals from the Trust is to enable it to build capital to start to address its deep deficits; however, more clarity regarding the purposes of the funding and how it is allocated would be helpful. It is unclear on

the current record why the Trust funds are insufficient to meet at least some of Beaver Lake's pressing needs.

[65] Secondly, Beaver Lake has access, under certain conditions, to the Indian Oil and Gas Canada Trust, which consists of funds derived from ongoing revenue from oil and gas extraction on the Beaver Lake Reserve. There are no restrictions on the purposes for which the funds could be used, although accessing funds from the Trust requires ministerial approval. While we note Beaver Lake's explanation that the Trust is an "emergency fund" used for immediate needs such as urgent infrastructure repairs (A.F., at para. 36), knowing more about the binding quality of those restrictions or of Beaver Lake's past use of these funds for emergency purposes, and whether Beaver Lake sought approval to finance the litigation (or if not, why not) would assist the court.

[66] Finally, while Beaver Lake received approval to become a borrowing member of the First Nations Finance Authority (R.R., Alberta, vol. I, at pp. 141 and 143; case management judge's reasons, at para. 58), the evidence does not show that it has sought to obtain a loan to pursue litigation. It would assist the court to know why this is so or, alternatively, if indeed it has applied for a loan, the Authority's response.

[67] In short, the case management judge required a more particularized and comprehensive record in order to consider whether Beaver Lake had made sufficient efforts to obtain funding from alternate sources, and whether other sources of funds are available to be used for the litigation. This is no small consideration: a court must be

satisfied that an applicant has explained with sufficient detail whether its financial resources can be used to finance the litigation, and if not, why not.

(4) Comparing Beaver Lake's Estimated Litigation Costs and Surplus Resources

[68] Consistent with this Court's direction in *Little Sisters*, the case management judge reviewed Beaver Lake's litigation plan and determined the quantum of funds required to pursue the litigation. She accepted Beaver Lake's estimate of \$5 million for the litigation. As part of this exercise, the case management judge was required to determine whether Beaver Lake had any surplus resources to finance the litigation in whole or in part and to assess the funds necessary to advance the litigation. As the matter is being remitted for a new hearing, and given the amount of time that has elapsed from the initial application, and further given that Beaver Lake's litigation plan was dated 2014 and marked "without prejudice", Beaver Lake should submit a current litigation plan to assist the court with this determination. This information, combined with a more detailed record that addresses the questions raised above, would help the court understand the extent to which Beaver Lake must commit its present and future resources to pressing needs instead of the litigation, quantify the estimated cost of the litigation, and determine whether Beaver Lake has any surplus resources to finance the litigation in whole or in part.

(5) The Fresh Evidence

[69] In our view, the evidence of the amount received by Beaver Lake from the resolved specific claim (\$2.97 million) is not conclusive; indeed, it raises more questions. Nor does it speak to Beaver Lake's current financial resources or pressing needs. Chief Anderson deposes that the settlement funds will be applied to various priorities, including another lawsuit, infrastructure and housing, upgrading Beaver Lake's water treatment system, gas lines installation, electricity and sewage, and COVID-19 support payments (A.R., vol. VIII, at pp. 85-86). However, it is unclear whether the funding for "sewage" overlaps with the sewage lagoon and, if so, whether Canada has already covered the cost of meeting that pressing need. Further yet, the amounts to be paid in COVID-19 supports is unspecified, as are the sources from which those payments are to be made. Finally, while Chief Anderson identifies those needs, and while those needs may well qualify as pressing, it is unclear how much those needs cost and what other sources may be applied to cover them.

[70] In any event, the fact of the specific claim settlement should, in our view, have led the Court of Appeal to return the matter to the Court of Queen's Bench for consideration. Indeed, the case management judge's order contemplated precisely that procedure, directing that "if Beaver Lake receives compensation from its outstanding claims or otherwise receives a windfall, then this order shall be revisited" (para. 67).

(6) The Terms of the Advance Costs Order

[71] In the absence of a sufficient record on which the case management judge could make findings regarding the cost of meeting Beaver Lake's pressing needs, the

resources available to fund those needs, and any resources left over for the litigation, it is unclear how the case management judge arrived at the amount of \$300,000 to be paid by each party. Nor is it clear whether this amount was to be paid proportionally or in priority order as expenses were incurred (i.e., Beaver Lake, then Alberta, then Canada). Further, the terms of the order did not provide the “definite structure” which this Court in *Little Sisters* stated was necessary to provide oversight and direction to the award’s administration, or a global cap or limits on legal fees (paras. 42-43).

IV. Disposition

[72] We would allow the appeal and remit the application to the Court of Queen’s Bench of Alberta. We are mindful of the time and resources expended by the parties in the nearly 14 years since this litigation began. This is, however, a case of first impression. Moreover, the matter now requires reconsideration, both in accordance with these reasons and in light of the passage of time since the original hearing.

[73] We would also award solicitor-client costs to Beaver Lake in this Court and in the courts below. Solicitor-client costs, being a form of special costs (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at paras. 67-71), are awardable where the case involves matters of public interest that are truly exceptional, where the applicant shows it has no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, and where it would not have been possible for the litigation to be pursued with private funding (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at

para. 140). The case management judge in the present case found that Beaver Lake's underlying litigation satisfied the public importance branch of the advance costs test. Additionally, in our view, the question of advance costs for a First Nation government claimant possessing resources of its own represents a truly exceptional matter of public interest. As we have explained, this is not only a case of first impression, but one that goes to the heart of the separation of powers.

[74] While Beaver Lake has some personal, proprietary or pecuniary interest in the underlying litigation, it did not initiate proceedings on primarily private or economic grounds. The case management judge found, at para. 26, that a contingency fee arrangement was not practical in this case, in part, because Beaver Lake's "primary claim . . . is for a declaration and the claim for monetary relief is secondary". Finally, in the specific context of an interlocutory application for advance costs, while we cannot say that Beaver Lake has shown that it would not have been possible to pursue this matter with private funding, *the entire point* of this appeal was to explain *what it must show* in order to meet that threshold. These are unique circumstances.

Appeal allowed.

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