INTERIM COSTS: THE IMPACT OF OKANAGAN INDIAN BAND

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Introduction

It is always gratifying for counsel to see one's argument reflected in judicial reasons. It is less satisfying, however, when the reasons are those of the dissenting minority of the court. Thus it was for counsel for the Attorney General of Canada in the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band.*[1]

The dissenting judgment, written by Major J. (with Iaccobuci and Bastarache JJ. concurring), agreed with the Attorney General of Canada that to award costs in advance on the grounds of the public importance of the issues at stake would be the judicial creation of a legal aid scheme:

> The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.[2]

The majority of the Court, however, ruled otherwise. The Supreme Court upheld the decision of the British Columbia Court of Appeal. The B.C. Court of Appeal had awarded the parties who were claiming aboriginal rights and title their costs of the litigation, in advance of trial. Lebel J., writing for the majority, referred to these as "interim costs."

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1 [2003] 3 S.C.R. 371, 2003 SCC 71 [*"Okanagan Indian Band"*].

2 *Ibid*, at para. 63.

The Aboriginal Context

Okanagan Indian Band can only be understood when placed in context. This decision is one of a series of aboriginal law decisions in which the Supreme Court has been motivated to create new law because of the Court's manifest concern with the slow pace of negotiations to resolve the Indian land question. Examples of the Supreme Court creating new law in the service of resolving land claims are not hard to find:

- In *Guerin*, the Supreme Court expanded the law of fiduciary duty by finding that it applied even where the fiduciary did not have a corrupt or selfish motive.[3]
- In *Sparrow*, the Supreme Court read into section 35 of the *Constitution Act, 1982* a need for governments to justify legislative infringements of aboriginal rights, saying that section 35 "provided a solid constitutional base upon which subsequent negotiations can take place."[4]
- In *Delgamuukw*, Lamer C.J. gave an extensive *obiter* in which he enunciated the modern doctrine of aboriginal title, and closed by exhorting "negotiated settlements ... reinforced by the judgments of this Court..."[5]
- In *Okanagan Indian Band*, Lebel J. broke new ground in the law of costs, and reminded the parties that "negotiation, ... remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown..."[6]
- Most recently, in *Haida*, McLachlin C.J. found for the first time that the honour of the Crown is an independent source of legal obligations, and went on to observe "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims."[7]

As long as the Indian land question remains unresolved, the Supreme Court will continue to search for creative ways to motivate the parties to negotiate. As *Okanagan Indian Band* demonstrates, sometimes there will be consequences that extend beyond aboriginal law.

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[3] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

[4] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1105.

[5] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186.

[6] *Supra*, note 1, at para. 47.

[7] *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, (2004), 245 D.L.R. (4th) 33, 2004 SCC 73, at para. 20.

The Criteria for Interim Costs Awards

In *Okanagan Indian Band*, Lebel J. did not find that all aboriginal parties engaged in aboriginal rights and title litigation should receive interim costs. Rather, he held that the courts have discretion to award interim costs. That discretion is to be exercised on a case-by-case basis.

Having decided that the discretion exists to award interim costs, the Supreme Court outlined the principles upon which that discretion is to be exercised. Interim costs are an extraordinary remedy, and are to be ordered only when there are "special circumstances." The Court held that public law cases are distinguished from ordinary disputes in that the "special circumstances" are related to the public importance of the questions at issue in those cases. The trial judge is to determine "whether a particular case, which might be classified as special due to its very nature as a public interest case, is special enough" to warrant the unusual measure of ordering costs in advance of trial. The Court set out the following criteria (1) the party seeking interim costs cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; (2) the claim is *prima facie* meritorious; and (3) the issues raised are of public importance, and have not been resolved in previous cases.[8]

Meeting these three criteria is necessary but may not be sufficient to warrant an interim costs order. Lebel J. stated that "If all these conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively."[9]

The Court's decision is not an arcane matter of civil procedure. The costs involved in *Okanagan Indian Band* were enormous sums of money. Aboriginal rights and title litigation leads to trials whose life spans are measured in years, not months, and whose costs are measured in the millions of dollars. The decision has been applied in at least one other aboriginal rights and title case in British Columbia, *Tsilhqot'in Nation v. British Columbia*.[10] In the *Tsilhqot'in Nation* case, an interim costs order had been made previous to the Supreme Court decision in *Okanagan Indian Band* under which several million dollars in interim costs had been paid to that date. After *Okanagan Indian Band* was decided, the trial judge reconsidered the *Tsilhqot'in Nation* interim costs order and reaffirmed it.

While there is much that could be written about *Okanagan Indian Band,* we wish to comment on four particular aspects of the Supreme Court's decision.

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[8] *Supra*, note 1, at paras. 39-40.

[9] *Supra*, note 1, at para. 41.

[10] (sub nom. *William v. British Columbia*), [2004] BCSC 963 [*"Tsilhqot'in Nation"*].

1. Not restricted to aboriginal title cases

The first notable aspect of *Okanagan Indian Band* is that the Supreme Court's decision is clearly not restricted to aboriginal title cases or even to cases involving aboriginal persons. Any case of sufficient public interest could qualify for consideration under the test as it now stands. *Charter* cases in particular featured prominently in Lebel J's reasons and he noted that "litigation over matters of public interest has become more common, especially since the advent of the *Charter*."[11]

Likely, many interim costs applications will involve *Charter* claims. Indeed, one of the first cases to apply the Supreme Court's decision, *Little Sisters Book & Art Emporium v. Commissioner of Customs and Revenue*,[12] consists of *Charter*-based challenges to the detention of imported books by the Commissioner of Customs and Revenue and to the definition of obscenity in the *Criminal Code*.

A brief sampling of the cases that have mentioned and/or applied *Okanagan Indian Band* reveals that counsel have already found numerous creative applications for the precedent, little more than a year after it was set.

Okanagan Indian Band has been raised in the immigration context. In *Charkaoui (Re)*,[13] the Federal Court denied an application for interim costs to fund a motion, which, among other things, challenged the constitutionality of certain provisions of the *Immigration and Refugee Act*. Similarly, in *Canada (Minister of Citizenship and Immigration) v. Seifert*,[14] the Federal Court of Appeal upheld a trial judge's decision refusing an interim costs order in proceedings where the Minister sought an order revoking Seifert's citizenship pursuant to s. 18 of the *Citizenship Act*. In both *Charkaoui* and *Seifert*, the court declined to award interim costs because the applicants had failed to prove that they had no means to fund their legal representation, not because the *Okanagan Indian Band* decision did not apply in the circumstances.

In *Broomer v. Ontario (Attorney General)*,[15] the Ontario Superior Court of Justice applied *Okanagan Indian Band* in awarding costs to three former social assistance recipients who challenged their "lifetime ban" from social assistance benefits on the basis that the ban violated ss. 7, 12 and 15 of the *Charter*. While a newly-elected Provincial government repealed the lifetime ban regulations before the matter

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[11] *Supra*, note 1, at para. 27.

[12] [2004] BCSC 823; leave to appeal granted [2004] BCCA 513.

[13] [2004] F.C. 900 [*"Charkaouri"*].

[14] [2004] F.C.A. 343 [*"Seifert"*].

[15] [2004] O.J. No. 2431.

could be heard, the court nevertheless awarded the applicants partial indemnity costs on the basis of *Okanagan Indian Band.*

Aboriginal accused have raised *Okanagan Indian Band* in an attempt to obtain funding for constitutional issues raised in their defences. In *R. v. Fournier*,[16] for example, the Ontario Court of Justice awarded two aboriginal accused charged with the sale of allegedly fraudulent native status cards a specific sum in interim costs in order to argue questions regarding the constitutionality of certain provision of the *Criminal Code.*

Okanagan Indian Band has even been applied in interpreting the costs provisions of Ontario's Family Law Rules.[17] Finally, unsuccessful public interest litigants have cited *Okanagan Indian Band* in arguing that they should be relieved of the obligation to pay costs.[18] To date, these arguments have not proven particularly successful.

2. Not a *"Rowbotham"* order

The second notable aspect we wish to highlight is that the interim cost order in *Okanagan Indian Band* was not a "*Rowbotham*" order.[19] The two may easily be confused because they are similar in effect: the Crown pays all or part of the applicant's legal expenses when he or she cannot afford to do so. However, there are important distinctions between the two types of orders.

An interim costs order is made pursuant to the court's common law jurisdiction or the appropriate provincial statute. On the other hand, a *Rowbotham* order is made under s.24(1) of the *Charter*, as a remedy for a breach of s.7 of the *Charter*, which guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

Two significant consequences flow from this distinction. The first is that the applicant who establishes the breach of s.7 has a right to a *Rowbotham* order, but the applicant for the interim costs order must persuade the judge to exercise his or her discretion.[20] The second is that the *Rowbotham* order is available only in a narrow

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[16] [2004] O.J. No. 1136 (Ont.SCJ); see also, *Ochapowace Indian Band v. Saskatchewan (Minister of Justice)*, [2004] S.K.Q.B. 486.

[17] *Agresti v. Hatcher*, [2004] O.J. No. 910 (Ont.S.C.J.).

[18] See, for example, *Papaschase Indian Band v. Canada (Attorney General)*, [2004] A.B.Q.B. 913.

[19] So called after the leading case of *R. v. Rowbotham et al.* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

[20] *Ibid*, at p. 70.

range of cases, where the state's conduct threatens the applicant's life, liberty or security of the person and he or she cannot have a fair trial without counsel. Life, liberty or security of the person is at stake in criminal prosecutions, but only rarely is implicated in civil cases. One such civil case was *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,[21] in which the Minister applied for an extension of an order of custody of the applicant's children.[22]

Further, a *Rowbotham* order, at least in a criminal case, is not actually an order that the Crown pay the accused's legal costs. It is an order that the court will stay the prosecution until funding is provided to the accused.[23] The distinction is important. It means that the Crown has the option of deciding that the public interest is better served by abandoning the prosecution than by pursuing it at the additional cost of the accused's defence. The Supreme Court of Canada took a different tack in *G.(J.)* when it ruled that the custody proceedings should not be stayed because that would have resulted in the return of the children to the applicant's custody.[24] The Court ordered state-funded counsel but took pains to restrict its decision to child custody proceedings.[25] It also noted the "modest" sums involved, in dealing with the consideration that courts should be reluctant to interfere with government's allocation of limited resources.[26]

3. Not a constitutional right to funding

A third notable aspect of *Okanagan Indian Band* is that the Supreme Court based its decision on the Court's common law jurisdiction, rather than on the basis of a constitutional right under either s. 35 of the *Constitution Act 1982* (aboriginal rights), or s. 15 of the *Charter* (equality rights).

In *Okanagan Indian Band*, the Band initially sought a funding order on the basis of s. 35 and s. 15.[27] They were unsuccessful before the Chambers judge.[28] On

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[21] [1999] 3 S.C.R. 46.

[22] McLachlin C.J. referred to civil committal to a mental institution as another example: *Ibid*, at para. 65.

[23] *Supra*, note 19, at p. 70.

[24] *Supra*, note 21, at para. 101.

[25] *Supra*, note 21, at para. 104.

[26] *Supra*, note 21, at para. 100, 108.

[27] *Okanagan Indian Band* arose in the context of an interlocutory application by the B.C. Crown to have a petition brought by the Okanagan Indian Band remitted to the trial list. In the original application, the Band argued, in effect, that to remit the Band's petition to the trial list, a much more costly proceeding, without an order that the Crown pay the Band's legal costs for the trial would violate s. 35 and s. 15.

[28] [2000] B.C.S.C. 1135.

appeal, the Band dropped the s. 15 argument and refined the constitutional argument to argue an entitlement to funding on the basis of a "free-standing constitutional right to access justice in the courts" and/or on the basis of s. 35. The Court of Appeal was not persuaded by the refinement. With respect of the majority decision to the "free-standing constitutional right", Justice Newbury stated the following:

> But I am not aware of any authority for the proposition that the principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit – even one that may be *sui generis*. If the meaning of access to justice is to be extended that far, it is in my view for government to do.[29]

With respect to the s. 35 claim, Justice Newbury stated:

> For similar reasons, I agree with the Chambers judge that s. 35 of the *Constitution Act* does not place an affirmative obligation on the Crown or the courts to provide for the funding of legal fees of an aboriginal band in attempting to prove an asserted right and the infringement thereof, even in defence to an proceeding brought by the government.[30]

On appeal to the Supreme Court, the Band did not advance any argument in support of a constitutional right to funding and the Court made no comment on the validity of such an argument in either the majority decision or the dissent.

In a decision subsequent to the Supreme Court decision in *Okanagan Indian Band*, a different panel of the B.C. Court of Appeal in *Tsilhqot'in Nation v. Canada (Attorney General)*[31] again held that the Crown had no constitutional obligation to fund an aboriginal group's litigation either by reason of s. 35 or s.15. While the B.C. Court of Appeal decision in *Tsilhqot'in Nation* did not add substantially to the B.C. Court of Appeal decision in *Okanagan Indian Band* on the s. 35 claim, the *Tsilhqot'in Nation* decision did directly address the s. 15 claim. The essence of the Court's reasons is contained in the following paragraph:

> The respondent has not challenged an existing government benefit scheme. His fundamental complaint is that governments have failed to establish a funding scheme for the Xeni Gwet'in in particular and aboriginal litigants in general, the equivalent of an affirmative action program for native claimants to aboriginal rights. The failure to establish a funding scheme does not amount to differential

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[29] (2001) 208 D.L.R. (4th) 301, [2001] B.C.C.A. 647, at para. 28.

[30] *Ibid*, at para. 29.

[31] (2004) 237 D.L.R. (4th) 754, [2004] B.C.C.A. 106.

> treatment within the meaning of s. 15(1) of the *Charter*, as explained in *Law, supra*, and is not subject to *Charter* scrutiny.[32]

In remains to be seen whether a constitutional right to funding for litigation – based on s. 35, s. 15 or on a "free-standing right to access justice in the courts" – exists in addition to a judicial discretion to award interim costs in advance. To date, the courts have employed significant restraint in finding that no such constitutional obligation exists. It should be obvious that a finding that the Crown has a constitutional obligation to fund certain litigants would have a dramatic and far-reaching impact.

4. Not a Blank Cheque

A final notable aspect of the *Okanagan Indian Band* decision is the language of restraint that the Court employed when describing how such orders should be crafted.

The Court made it clear that interim cost orders were not intended to be a blank cheque. In this regard, Lebel J. stated:

> 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.[33]

In dismissing the appeal, Lebel J. cited in full and with approval the conditions placed on the interim costs order by Justice Newbury of the British Columbia Court of Appeal, noting that these conditions would ensure that "there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid the appellant."[34]

Since we remain in the early days after the *Okanagan Indian Band* decision, it is not possible to tell how successful courts will prove to be in placing reasonable limits on the amount of costs paid under interim costs orders. At the time of writing this article, the scale and amount of costs to be paid remains a live issue in *Tsilhqot'in Nation*. In that case, an appeal is pending to the British Columbia Court of Appeal. We deliberately refrain from commenting any further on this issue in this article.

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[32] *Ibid*, at para. 16.

[33] *Supra*, note 1, at para 41.

[34] *Supra*, note 1, at para. 47.

Conclusion

The high cost of litigation is a continuing problem. Like the weather, everyone complains about it. Clearly the Supreme Court has decided to do something about it. While the Court's decision in *Okanagan Indian Band* may have been motivated, in part, by the desire to facilitate the resolution of the Indian land question, the Court expressly crafted the decision so that it would apply outside the aboriginal context. Whether the Court's prescribed solution of interim costs in advance is sustainable, or whether elected governments may wish to fashion alternative remedies to this problem, remains to be seen. What appears certain is that litigants will continue to raise *Okanagan Indian Band* where feasible and where necessary to bring matters of public importance before the courts.