SUPREME COURT OF CANADA

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Case in Brief: *Anderson v. Alberta*

Judgment of March 18, 2022 | On appeal from the Court of Appeal of Alberta
Neutral citation: 2022 SCC 6

The Supreme Court rules that an Alberta First Nation could qualify to have its legal fees paid in advance by the government despite having funds of its own.

The question in this case is whether an Alberta First Nation qualifies for "advance costs". Advance costs means a party's legal fees are paid in advance by the government in order to allow the case to continue when it is a matter of public interest.

This case involves the Beaver Lake Cree Nation (Beaver Lake) of northeastern Alberta whose members are beneficiaries of Treaty No. 6, which means they have the right to hunt and fish on their traditional lands. More than a decade ago, Beaver Lake sued the governments of Canada and Alberta for damages due to industrial development on those lands, including oil and gas wells. Since then, there have been many preliminary court proceedings, and the case has yet to go to trial. But Beaver Lake has already paid $3 million in legal fees and says it cannot afford to pay more. As a result, it asked the Court of Queen's Bench of Alberta to award it advance costs.

The Court of Queen's Bench accepted the request and ordered Canada and Alberta to each contribute $300,000 annually to Beaver Lake's legal costs until the trial is over. This was the same amount as Beaver Lake would also contribute annually. The Court of Appeal of Alberta reversed that order because Beaver Lake had not proven it could not afford the ongoing litigation. Beaver Lake then appealed to the Supreme Court of Canada.

The Supreme Court has ruled that Beaver Lake could qualify for advance costs should it not be able to pay its legal fees.

A First Nation could qualify for advance costs despite having funds of its own, if it cannot afford to pay its legal fees nonetheless.

Writing for a unanimous Court, Justices Karakatsanis and Brown explained that advance costs are rarely awarded. However, a party that has funds of its own could still qualify for advance costs if it satisfies the test for "impecuniosity". Impecuniosity means not having enough money to pay. It is one of the three requirements for advance costs set out by the Supreme Court in 2003 in *British Columbia (Minister of Forests) v. Okanagan Indian Band*. The other two requirements are not disputed by the parties in this case.

The Supreme Court said the test for impecuniosity is not easily met. An applicant must demonstrate that it cannot afford to pay its legal fees given its other pressing needs and that the case would therefore not continue. A court's analysis must be based on 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 the litigation. The Supreme Court said that in cases such as this one, pressing needs must be understood in the spirit of reconciliation and from the perspective of a First Nation, because it would have its own spending priorities.

The case has been sent back to the Court of Queen's Bench of Alberta for a new hearing.

The judges of the Supreme Court concluded there was not enough evidence on the record before the Court of Queen's Bench of Alberta to decide Beaver Lake's application for advance costs. As such, the judges decided to send the case back to that court for a new hearing. This will enable the Court of Queen's Bench to consider all relevant evidence, including Beaver Lake's current financial situation.

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Breakdown of the decision: ***Unanimous*****:** Justices Karakatsanis and Brown allowed the appeal (Chief Justice Wagner and Justices Moldaver, Côté, Rowe, Martin, Kasirer and Jamal agreed)

More information (case # 39323): Decision | Case information | Webcast of hearing

Lower court rulings: judgment (Court of Queen's Bench of Alberta) | appeal (Court of Appeal of Alberta)

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