COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Tsilhqot'in Nation v. British Columbia,***
2006 BCCA 2

Date: 20060103
Docket: CA032211; CA032213

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Between:

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation

Respondent
(Plaintiff)

And

The Attorney General of Canada

Appellant
(Defendant)

And

Her Majesty the Queen in right of the Province of British Columbia, and the Regional Manager of the Cariboo Forest Region

(Defendants)

– and –

Docket: CA032213

Between:

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation

Respondent
(Plaintiff)

And

Her Majesty the Queen in right of the Province of British Columbia, and the Regional Manager of the Cariboo Forest Region

Appellants
(Defendants)

And

The Attorney General of Canada

(Defendant)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Thackray

J. L. Ott and C. L. Hook	Counsel for the Appellant, Attorney General of Canada
J. E. Gouge, Q.C. and J. I. Thayer	Counsel for the Appellants, Her Majesty the Queen in right of British Columbia and Regional Manager, Cariboo Forest Region
P. S. Rosenberg and D. M. Rosenberg	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 24th and 25th October, 2005
Place and Date of Judgment:	Vancouver, British Columbia 3rd January, 2006

Dissenting and Written Reasons by:
The Honourable Madam Justice Southin (P. 3, para. 1)

Appendix (P. 54)

Written Reasons by:
The Honourable Mr. Justice Hall (P. 64, para.100)

Concurring Reasons by:
The Honourable Mr. Justice Thackray (P. 74, para. 118)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] In the first Chilcotin war (1864), sometimes called the Waddington Massacre, 21 men, of whom 18 were non-aboriginals, died violently. On 26th October of that year, five Chilcotin (whose tribal name is now transliterated as Tsilhqot'in), having been convicted of murder at a trial before Begbie C.J., were publicly hanged at what is now known as Quesnel. The causes of the uprising are not known with any certainty. The 18 non-aboriginal dead may well be thought by some to have deserved their fate. (The fullest account in a standard work available to me is in David R. Williams, *The Man for a New Country* (Sidney, British Columbia: Gray's Publishing, 1977) at pp. 109-116, but see also Rev. R. C. Lundin Brown, *Klatsassan, and other Reminiscences of Missionary Life in British Columbia* (London: Society for Promoting Christian Knowledge, 1873) which is available on the internet at the National Library of Canada's "Early Canadiana on line" site: www.canadiana.org /ECO - search "Klatsassan".)

[2] This appeal is part of long-running hostilities, which might be called the second Chilcotin war, the first shot in which was the issue of a writ on 18th April, 1990, between, as plaintiff, an Indian Band which then called itself The Nemaiah Valley Indian Band but which has now adopted the name of Xeni Gwet'in First Nations Government, and, as defendants, various forest industry companies and the rest of the people of British Columbia, represented here by Her Majesty the Queen. In so stating the parties, I do not overlook that other persons of aboriginal descent may not care to be included in such a phrase as "the rest of the people". The claim was for rights in lands now described in the litigation as the trap line areas. A

second front, the Brittany Triangle action, was opened on 18th December, 1998. The forest industry companies are no longer in the litigation. By various amendments over the years, all the Tsilhqot'in are now represented and the Attorney General of Canada has become a defendant.

[3] In order to ascertain whether these actions, whatever their result, will resolve the issues between the Tsilhqot'in and the rest of the people, I inquired from Mr. Gouge whether the Tsilhqot'in had disclaimed any other claims to any other lands. His answer, as I understood it, was that he did not understand that they had done so although he supposed that the doctrine of ***Henderson v. Henderson*** (1843), 3 Hare 100, 67 E.R. 313, might possibly apply. But as matters now stand, this litigation, even if it lasts for years, may be followed by other Tsilhqot'in claims to other lands in central British Columbia.

[4] As I shall explain hereafter more fully, this appeal from an order of Vickers J. pronounced the 16th July, 2004, is not about the merits of the plaintiff's case, but about the remuneration of the plaintiff's lawyers. Vickers J. has now ordered that the defendants pay "special costs", subject to a 20% "holdback", as "costs in advance". The fundamental question before us is whether that order accords with the judgment of the Supreme Court of Canada in ***British Columbia (Minister of Forests) v. Okanagan Indian Band***, [2003] 3 S.C.R. 371, dismissing the appeal from the judgment of this Court (Prowse, Donald and Newbury JJ.A.), (2001), 95 B.C.L.R. (3d) 273. The reasons of Newbury J.A., speaking for the Court in that appeal, had been pronounced on the 5th November, 2001.

[5] The course of these hostilities, up to the summer of 2002, that is before the trial commenced in late 2002, is fully and, if I may be so presumptuous as to say so, lucidly set out by my colleague, Rowles J.A., in ***Xeni Gwet'in First Nations v. British Columbia*** (2002), 3 B.C.L.R. (4th) 231 (C.A.), in reasons pronounced 19th July, 2002, dismissing an appeal from an order that, "[t]he Plaintiff's interim legal fees shall be paid [by the Crown Defendants in any event of the cause] as [increased costs] at 50% of special costs", which had been pronounced by Vickers J. on 27th November, 2001, that is to say, four years ago, which order was founded on the reasons of Newbury J.A. pronounced three weeks earlier.

[6] The reader who wishes a full understanding of the issues in these actions should first read the reasons of Rowles J.A.

[7] In those reasons, Rowles J.A. did not find it necessary to recount the evidence before Vickers J. as to the then-projected cost of this litigation.

[8] But in support of the application leading to the order of 27th November, 2001, the plaintiff had adduced in evidence the affidavit of Jack Woodward, his solicitor, of the 10th October, 2001, to which was attached as an exhibit a budget which had been submitted as part of an application for funding for this litigation to the Manager, Test Case Funding Program, Department of Indian Affairs and Northern Development, on 22nd August, 2001. That budget contained this, *inter alia*:

> 13. Give estimates of all hours, fees and disbursements to be associated with the action as follows:

FEES

a. Legal Research:	Min. Hours: 100	Max. Hours: 300
b. Drafting of pleading/factum	Min. Hours: 4	Max. Hours: 20
c. Preparation for Trial: Includes witness interviews, exam-for-discovery of the parties, and interlocutory motions	Min. Hours: 360	Max. Hours: 600
d. Court Trial is currently set for 6 months of trial time commencing in March, 2002	Min. Hours: 600	Max. Hours: 1868
e. Counsel's travel time (at one half the set hourly rate): Includes lawyer trips to the Nemaiah Valley and time in Vancouver at discoveries.	Min. Hours: 40 @ 1/2 rate	Max. Hours: 280 @ 1/2 rate
TOTAL	MIN. HOURS: 1084	MAX. HOURS: 2928
TOTAL EXPRESSED IN DOLLARS (X $150)	MIN.: $162,600.00	MAX.: $439,200.00

DISBURSEMENTS

f. Disbursements required or permitted to be made by statute, etc.:	Min: $550.00	Max: $680.00
g. Witness fees and travel expenses (prior approval required) Note: Exam-for-Discovery of Chief Roger William set for 2 weeks in Vancouver. We expect that it may go longer. Also, will need to have Chief and other witnesses attend in Victoria for witness preparation prior to trial.	Min: $9,000.00	Max: $22,000.00
h. Fees payable to a court reporter for a transcript The Court has indicated that real time reporting of this case is desired.	Min: $25,000.00	Max: $60,000.00

i. Lawyer's travel expenses if these exceed one hour's duration or 25 km. Note: One lawyer to attend with Chief Roger in Vancouver for his exam-for-discovery for at least 2 weeks. Another 4 weeks expected for exam-for-discovery of Fed. and Prov. Defendants. Another lawyer is spending approx. one month in Nemaiah interviewing witnesses throughout the valley and taking affidavits. Some of the elders' evidence in this case will likely be heard in Williams Lake.	Min: $25,000.00	Max: $50,000.00
j. Telecommunication, i.e., long distance telephone, telegraph and electronic document transmission	Min: $1,500.00	Max: $3,000.00
k. Fees and out-of-pocket disbursements of out-of-town agents for routine services (prior approval required)	Min: $1,000.00	Max: $3,500.00
l. Postage and reasonable courier charges on shipments of process of documents and exhibits	Min: $2,000.00	Max: $4,000.00
m. Reasonable fees paid for the services of a person entitled by law or practice to give expert or opinion evidence (prior approval required)	Min: $11,000.00	Max: $36,000.00
Outside Photocopying/Binding:	Min: $10,000.00	Max: $30,000.00
TOTAL DISBURSEMENTS:	Min: $85,650.00	Max: $209,980.00
GRAND TOTAL (Fees & Disbursements)	Min: $248,250.00	Max: $649,180.00

[9] Rowles J.A. did mention, at paragraph 46, as Mr. Woodward had deposed, that the projected length of trial was six months.

[10] After the order of 27th November, 2001, was pronounced, the plaintiff took out an appointment "for assessment of the hourly rate ...."

[11] On the 7th August, 2002, the defendants offered to settle in these terms:

OFFER TO SETTLE

To the Plaintiff: RODGER WILLIAM, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation.

The Defendants Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada pursuant to s. 10 of Appendix "B" of the Supreme Court Rules offer to settle the appointment dated March 8, 2002, for assessment of the hourly rate (solely and without reference to any risk factor) applicable as special costs under the Order of Mr. Justice Vickers, November 27, 2001, at the following rates:

Jack Woodward:	$315.00
Pat Hutchings	$270.00
Christopher Devlin	$210.00
Eamon Murphy	$180.00
John W. Galius [sic]	$160.00
Mitchell Couling	$150.00
David Robbins:	$150.00
Gary Campo	$140.00
Murray Browne	$200.00
Articled Students	$105.00

Dated August 7, 2002

[12] The offer appears to have been accepted.

[13] Thus, all parties appear to have thought that "special costs" are costs to be calculated at hourly rates. This is not a proposition which, for reasons I address

hereafter, I accept unreservedly, especially when the hourly rates have not been established to be common in the profession.

[14] The trial, according to the attached appendix, began on 21st November, 2002, was adjourned on 11th December, and recommenced on 9th September, 2003. We were not told what was going on in the litigation in the interim.

[15] An Accounts Administration Agreement was entered into which I do not think it necessary to quote. But, pursuant to it, Woodward & Company submitted monthly accounts of which I give as an example what I infer is for the month of April 2003, as the document immediately preceding it in the appeal book bears date Apr. 1, 2003, and that immediately thereafter, June 1, 2003. The April 1 amount was $123,398.27 and the June 1 amount, $88,740.98.

May 1, 2003

* * *

Statement of Hourly Rates & Fee Calculation
prepared pursuant to
Costs Order of Vickers J., November 27, 2001
and Accounts Administration Agreement dated January 20, 2003

Professional Time Recorded (hours):

Jack Woodward	67.80	@ $315	21,357.00
Travel	6.55	@ $157.50	1,031.63
Pat Hutchings	152.90	@ $270	41,283.00
Travel	7.00	@ $135	945.00
Murray Browne	112.80	@ $200	22,560.00
John W. Gailus	0.30	@ $160	48.00
David Robbins	94.10	@ $150	14,115.00
Gary Campo	138.20	@ $140	19,348.00
Sean Nixon	127.40	@ $140	17,836.00
Anne Foy	36.40	@ $125	4,550.00
Renee Racette	12.80	@ $105	1,344.00
Brent Ellingson	38.30	@ $105	4,021.50
Jay Nelson	87.70	@ $105	9,208.50
Graham Reed	36.30	@ $105	3,811.50

Heather Mahony	134.40	@ $105	14,112.00
Alana Degrave	39.70	@ $105	4,168.50
Scott Waters	118.60	@ $105	12,453.00
Krista Robertson	6.50	@ $105	682.50
			$192,875.13

Total Professional Fees at Regular Hourly Rates: $192,875.13
Rate pursuant to Accounts Administration Agreement: 61%

Total Charged for Professional Fees: $117,653.83

Total G.S.T.: **(Exempt) Nil**

Total P.S.T.: **(Exempt) Nil**

Account Herein: **$117,653.83**

Government of Canada share: $58,826.92

Province of BC share: $58,826.91

Pursuant to paragraphs 2.08 and 7.05 of the Accounts Administration Agreement, I hereby certify the within account.

[16] Unfortunately, the documents put before us do not include any similar statements pertaining to the period from September 2003 forward.

[17] As to what is going on in this trial, I attach as an appendix an extract from a summary prepared by counsel for the Attorney General of British Columbia showing the names of the witnesses and the length of the examinations of each. We have, however, been given no indication as to, for instance, what the Chief could have been saying over 45 days.

[18] The fundamental reason why the defendants are in this courtroom is that the projections of Mr. Woodward in his affidavit of the 10th October, 2001, were, to put it mildly, erroneous:

1. So far the appellants have paid, pursuant to the various orders, beginning with that of the 27th November, 2001, some $10 million as "costs". We were not given any breakdown of the amount between, on the one hand, what might be called "remuneration" and, on the other, disbursements. We were told, however, that in May 2004 Vickers J. was told that to then the costs paid were $6 million of which $1.5 million were disbursements.

2. As of the 20th October, 2005, the trial had lasted 261 days.

3. As to how much longer it will take:

   (a) counsel for the respondent says:

   > 9. The Plaintiff's case is not yet closed. John Dewhirst, an anthropologist, is presently under cross-examination. As matters presently stand the Plaintiff intends to call the following expert witnesses: David Carson, James Fuller, James Hackett, and Edwin Blewett.
   >
   > * * *
   >
   > 11. Although it is difficult to estimate how many days these witnesses will be under cross-examination, the Plaintiff estimates that 30 more trial days will be required to conclude the cross-examination of Mr. Dewhirst and these witnesses. This is based on previous experience in this trial with the length of cross-examination of expert witnesses by the Defendants.
   >
   > * * *
   >
   > 13. The Plaintiff has not received the final list of witnesses from the Defendants, nor has the Plaintiff received all of the Defendants' expert reports. The Plaintiff has no way of estimating the length of the Defendants' cases.

   (b) For his part, counsel for the Crown in right of British Columbia, in his factum filed in June 2005, says: "The trial is currently expected to run a further 18 to 24 months."

THE EVIDENCE BEFORE THE LEARNED JUDGE

[19] I have already noted the principal points of Mr. Woodward's affidavit of 2001, which was the foundation for the first order.

[20] The contest before the learned judge, which led to the order now under appeal, to some extent became a contest as to how much money the Woodward law firm needed and needs to maintain its own estimation of its economic viability. In using the term "economic viability", I would not wish to be misunderstood. Lawyers, like others, are entitled to say: "I want a certain manner of life. To maintain that manner of life, I must earn $XXX per year. Therefore I [cannot] will not work for a client for less than such-and-such an amount per hour or per day. If the client cannot afford such fees, the client must go elsewhere."

[21] A question for us on this appeal is whether this is a permissible demand in publicly financed litigation.

[22] Mr. Woodward adduced an affidavit of his accountant which explains the thinking behind the application for "special costs" rather than 50% thereof:

> I, JAMES R. PRINGLE, Chartered Accountant, of 846 Broughton Street, in the City of Victoria, in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS THAT:
>
> 1. I am a Chartered Accountant, practising with English Seabrook and Pringle, in the City of Victoria, and I have been the accountant for Woodward & Company for more than ten years and as [a] result have personal knowledge of the facts and matters herein deposed to, save and except where stated to be on information and belief, and where so stated I verily believe the same to be true.

2. In the Summer of 2002, I was advised that hourly rates had been agreed to by the parties (leaving aside the issue of a risk factor) for the purposes of assessing special costs. I advised Mr. Woodward that I did not feel that the firm could continue to operate for any significant period of time if the firm was only to be paid 50% of those hourly rates for work on this file. I advised Mr. Woodward that if the firm was only paid the 50% of special costs being recovered by the Plaintiff, the firm could not continue to work on this case unless there was some additional source of funds.

3. I have reviewed the affidavit of Mr. Woodward, affirmed September 9, 2002, and filed in this proceeding on October 17, 2002, and it appears from that affidavit that my predictions were accurate.

4. In the Fall of 2002, I discussed the situation with Jerry Zuk, the accountant appointed by the Defendants, to attempt to determine what the appropriate break even figure would be in order for Woodward and Company to conduct the litigation on behalf of the Plaintiff without some additional source of funds. My analysis at the time was that using an appropriate model to calculate the break even figure, the appropriate percentage of special costs required was 63.6%. Attached hereto as Exhibit "A" to this my affidavit is a letter of November 1, 2002, from Paul Rosenberg to the solicitors for the Defendants outlining the results of my calculations.

5. I met with Mr. Zuk and the various solicitors involved on November 5, 2002 to try and arrive at a consensus for the appropriate break-even figure. I am advised that subsequent to that meeting an agreement was reached with respect to the appropriate level of special costs, and attached hereto as Exhibit "B" to this my affidavit is Schedule A to the Accounts Administration Agreement entered into between the parties, which provides for the Plaintiff to recover 61% of special costs.

6. Until the end of April 2004, costs have been paid pursuant to the Accounts Administration Agreement at 61% of special costs, and I have reviewed the effect of those costs on the finances of the firm. Looking back with hindsight, it appears that 61% has become an inadequate level of special costs, and the effect on the firm has been to require the firm's other work to subsidize this file.

7. I have been asked to calculate what the going forward percentage required by the firm would be taking into account

changes in salaries and overheads, and attached hereto as Exhibit "C" to this my affidavit is my report of May 31, 2004. In that report I conclude that the required percentage to continue conducting this litigation was between 68.7% and 70.7% of special costs, to allow the case to proceed.

8. In calculating the required breakeven percentage, there are a number of factors which I have not presently been able to take into account. A number of the lawyers working on this case are now considerably experienced with the particulars of the case, and as such are indispensable. I have been advised by Mr. Woodward that demands have been made by these lawyers for higher salaries, and for reduced hours to compensate for the previous intensive workload they have been subjected to. If it were necessary to increase their salaries and reduce their hours in the future, that would have an upward pressure on the required percentage.

9. Even more significant, are a number of contingent liabilities that have not been taken into account. As a result of the Nemiah case the expenses of the firm have increased significantly over the expenses prior to taking on the case. The office has been expanded with a considerably more expensive lease. There are a number of staff that have been added to accommodate the case, which would not be required if the case were to end, and there are a number of lawyers employed on the case that would no longer be necessary in the absence of this litigation. These contingent liabilities will be incurred as the case comes to an end.

10. If the contingent liabilities for severance, termination of leases, and downsizing were incurred during the year 2004, there would be a significant expense in the neighbourhood of $200,000.00, which would have to be factored into the required percentage. If that contingent liability were factored in over the next six months, the minimum required percentage would be 85% of special costs, assuming that billings remained fairly consistent over the next six months. If the case were to wind down slowly over the next six months, and billings were reduced, the required percentage would be even higher.

THE GOVERNING PRINCIPLES

[23] The defendants appealed from the order of this Court drawn up consequent upon the reasons of Rowles J.A. and, on 12th January, 2004, the Supreme Court of Canada pronounced this order [[2002] S.C.C.A. 295 ¶ 19 (QL)]:

> This appeal is remanded to the British Columbia Supreme Court to be dealt with in accordance with the reasons of this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band* [[2003] 3 S.C.R. 371], 2003 SCC 71.

[24] For present purposes, the principal passages of the reasons of the Supreme Court of Canada in the ***Okanagan Indian Band*** decision are:

> [40] With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:
>
> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> [41] These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. 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....
>
> [46] Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.
>
> [47] The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.
>
> [Emphasis added.]

[25] The disposition which Newbury J.A. had made, as set out in the concluding passage of her reasons for judgment at paragraph 39, was this:

> I therefore propose to order that the Crown, in any event of the cause, pay such legal costs of the Bands as the Chambers judge orders from time to time in accordance with the following:
>
> 1. This determination is in respect of costs as that term is used in the *Rules* (see para. 10 above), and not in respect of legal fees and disbursements. This is not a determination that counsel is to be appointed by the Province or paid by the Province, as appears to have been the case in *Spracklin v. Kichton*, [2001] A.J. No. 990 (Alta. Q.B.). (To the extent that *Spracklin* diverges from my Reasons, I respectfully disagree with it.)
>
> 2. Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation.

3. Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose.

4. The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way.

5. If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these Reasons.

Subject to the foregoing, I would allow the appeal on the costs issue, but dismiss the appeal from the Chambers judge's ruling that these proceedings be remitted to the trial list.

[Emphasis added.]

[26] The passage referred to in paragraph 1 was this:

[10] In any event, in the balance of these Reasons, I will use the word "costs" in the way it is usually used in the *Supreme Court Rules* and in litigation parlance – i.e., taxable costs described in R. 57. As noted by this court in *Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd.* (1990), 45 B.C.L.R. (2d) 367 (B.C.C.A.), "costs" in British Columbia "have a traditional meaning unless qualified by statute or by agreement of the parties. That traditional meaning is governed by the provisions of Rule 57 of the *Supreme Court Rules*." (at 372.) Rule 57(1) provides that costs "shall be assessed as party and party costs under Appendix B, unless the Court orders that they be assessed as special costs." ([Newbury J.A.'s] emphasis.) I will use the phrase "legal fees" to refer to actual legal fees and disbursements. There is no doubt that the Chambers judge below appreciated the distinction, although he said at para. 7 of his Reasons that he would refer to actual fees and disbursements as "costs in advance" or "interim costs."

[27] Thus, and this is a matter of critical importance, Newbury J.A. drew a sharp distinction between "costs" and "legal fees".

[28] A difficulty which I have had throughout this matter is that I cannot understand why the Supreme Court of Canada thought it necessary to order the remand to the British Columbia Supreme Court, as it appears to me that both Vickers J. and Rowles J.A. applied the criteria which the Supreme Court of Canada later said were the correct criteria.

[29] So what we have is a judgment of this Court pronounced in 2001, applied by another judgment of this Court in 2002, the former judgment being upheld in the Supreme Court of Canada but the second judgment, for some reason, not being so.

[30] It is all very puzzling.

[31] As I have said, Vickers J., on 6th May, 2004, handed down reasons for judgment responding to that remand: 240 D.L.R. (4th) 547, 2004 BCSC 610. He said, in part:

> [11] In this case the Supreme Court of Canada could not, from the record before it, determine whether costs were warranted based upon the principles it had just set out. That is all I take from the remand order.

He then said:

> [12] I think it proper to treat the remand order as a rehearing of the original matter before me, taking into account the new material filed by the parties....

SOME FURTHER BACKGROUND

a) The lands to which title is claimed

[32] The trap line areas, which are the subject of the 1990 action, are two, and comprise, in the one which lies essentially athwart 124 degrees west, 286,996 hectares, and in the other, which lies wholly within 123 west and 124 west, 45,014 hectares.

[33] The Brittany Triangle, which is the subject of the claim in the 1998 action, comprises 141,724 hectares lying to the south of 52 degrees north and to the west of 123 degrees west.

b) The claimants

[34] The plaintiff alleges that there exists a Tsilhqot'in Nation which comprises these groups:

> The number of Registered and non-registered Tsilhqot'in is approximately 4,000. The registered population of the First Nations as at September, 2005 is as follows:
>
> | | |
> |---|---|
> | Xeni Gwet'in | 379 |
> | Alexandria | 160 |
> | Anaham (Tl'etinqox-t'in) | 1397 |
> | Stone (Yunest'in) | 375 |
> | Toosey (Tl'esqox) | 273 |
> | Alexis Creek (Tsi Dei Del (Redstone)) | 609 |

[35] For their part, the defendants agree on the numbers of each band, but assert that some 1600 live off-reserve. Whether some or all of the 1600 live in the environs or in distant places such as Vancouver, I know not.

[36] As the registered population is approximately 3200, the defendants have now paid out somewhat over $3,000 in "costs" for each registered person.

[37] Part of the historic context of these actions may be obtained from the *Report of the Royal Commission on Indian Affairs*" (Victoria, B.C.: Acme Press, 1916).

[38] Under the heading "Williams Lake Agency", in vol. 4 at p. 911, the Commissioners said:

> WILLIAMS LAKE AGENCY
>
> Field work in the Williams Lake Agency continued from the 15th until the 27th July, 1914, the examination of Mr. Agent Ogden occupying the period of October 23rd to 27th of the same year.
>
> In this Agency peculiar conditions present themselves, the Williams Lake (Cariboo) country being a region of immense arid and semi-arid areas, the soil in the main of good quality but partial or entire lack of water rendering its utilization difficult and costly, where at all possible. Irrigation is – until dry farming methods are more generally understood and practised and their possibilities demonstrated – a first necessity, and in the case of the 62,330.77 acres of Indian Reserve lands allotted by former Commissions, only a very small proportion is cultivable within the means of the Indians, while the dry range affords so little sustenance that fifty acres are estimated by the Agent to be, on the average, necessary for the maintenance of each head of stock.
>
> On only two of the 64 established Reserves the Commission found land in excess of the requirements of the Indians, one Reserve being cut off as altogether unused and one reduced in area as being disproportionate in extent to the Indian necessities, a reduction in total of 1,490 acres for the Agency resulting. At the same time the Commission has endeavoured to provide other lands more suitable for agricultural utilization and range purposes, in order that the Williams Lake Agency Indians may become in larger measure self-maintaining, with the result that 29 new Reserves have been created, having an aggregate area of 12,167 acres, or a net increase in acreage for the Agency of 10,677 acres.
>
> The Agency having an Indian population of 1,248 these allowances will give a future per capita of 58.56, in comparison with a

> former Agency per capita of 49.94 acres of land of all classes, which on account of these Indians being chiefly engaged in stock-raising is well within the measure of their reasonable requirement.

[39] In the volume is a most useful map. From it, I infer that the Agency included territory, the inhabitants of which do not appear to be Tsilhqot'in, or at least are not part of this action, who had reserves at, among other places, Quesnel, Soda Creek and Williams Lake. (Whether the unfriendly Indians whom Alexander Mackenzie encountered at Narcosli Creek on the 21st June, 1793, were Tsilhqot'in is an interesting point which perhaps ultimately will be answered by the judgment at trial in this case. See W. Kaye Lamb, ed., *The Journals and Letters of Alexander Mackenzie* (Toronto: Macmillan of Canada, 1970).)

[40] Thus, the general description of the inhabitants of the Williams Lake Agency cannot be exactly correlated to the bands which are participating in this action.

[41] In the accompanying "ANALYSIS OF EVIDENCE – TABLE C – POPULATION, SOCIAL CONDITIONS, ETC." (vol. 4, pp. 921-923), the Commissioners describe the then existing populations of the various bands:

Alexandria	50
Anahim Band (Anaham's Flat)	252
Stone	63
Toosey	50
Alexis Creek (Redstone Flat)	75
Xeni Gwet'in (Chilco Lake)	67 including 14 heads of families

[42] Thus, since 1916, the Tsilhqot'in have increased six or seven fold. Whether that is a natural increase or results from additions to the bands from, for instance, marriage to persons outside the bands, I do not know.

[43] To put these reserves into geographical context, Alexis Creek, the most easterly of the reserves, lies just west of 123 degrees west, and Anaham, the most westerly, west of 125 degrees west.

[44] Although in Table C the Commissioners do not use the designation Nemaiah, by correlating the entries under Chilco Lake, Garden, Fishery, and Meadow, at 922, with the entry at 948, "Williams Lake Agency – Nemaiah Valley Tribe", it becomes clear that Chilco Lake, Garden, Fishery, and Meadow were the reserves of the Nemaiah Valley Tribe, now known as the Xeni Gwet'in.

[45] The per capita allowance in 1916 for these aboriginals was 58.56 acres. The allowance, however, for aboriginals in the area of Treaty 8 for those who chose not to live on reserves was "160 acres to each Indian".

[46] In order to give some further context to the issues in this appeal and the litigation generally, I inquired from counsel for the Attorney General of Canada as to what payments were made to each of the bands for the most recent fiscal year. I quote the affidavit filed in answer to that inquiry:

> 2. I have reviewed INAC funding records pertaining to the Bands listed below. INAC's previous fiscal year encompassed the period April 1, 2004 to March 31, 2005. The following amounts were paid out to each of the following Bands during the 2004/2005 fiscal year:
>
> i) Alexis Creek Band - $2,171,243;
> ii) Toosey Band - $1,151,108;
> iii) Xeni Gwet'in - $2,660,891;
> iv) Stone Band - $1,486,436;
> v) Tl'etinqox-t'in Government Office - $5,712,823; and
> vi) Alexandria Band - $222,364.

3. Funding amounts specified in the preceding paragraph for the Xeni-Gwet'in Band and the Tl'etinqox-t'in Government Office (formerly known as the Anahim Band), are inclusive of funding designated for specific capital projects in the amounts of $1,295,780 and $1,789,759, respectively.

Since the hearing of the appeal, the plaintiff, apparently fearful (his fear was without foundation) that the Court might draw an inference that the Tsilhqot'in had the wherewithal to pay for this litigation, has filed an affidavit containing much of great interest as to the management of band finances. I say that his fear was without foundation because the issue of whether the Tsilhqot'in could finance this litigation was not raised before this Court by the appellants.

THE ORDER IN ISSUE AND THE REASONS

[47] The order in issue before us, leave to appeal having been given to both defendants, is this:

> THE APPLICATION of the Plaintiff coming on for hearing the 29th day and 30th day of June 2004, AND ON HEARING Paul S. Rosenberg and Patricia Hutchings, counsel for the Plaintiff, Joyce Thayer, counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region, and Jacqueline Ott, counsel for the Attorney General of Canada: AND UPON READING the materials filed herein and the following affidavits:
>
> 1. Affidavit of EJ Woodward #1, affirmed October 10, 2001;
> 2. Affidavit #2 of EJ Woodward, affirmed September 9, 2002;
> 3. Affidavit #1 of Ruth Sauder, affirmed October 17, 2002;
> 4. Affidavit #2 of Ruth Sauder, affirmed June 22, 2004;
> 5. Affidavit #1 of Jim Pringle, sworn June 1, 2004;
> 6. Affidavit #2 of James R. Pringle, sworn June 18, 2004;
> 7. Affidavit #1 of Jennifer Peck, sworn April 11, 2004;
> 8. Affidavit #1 of Joyce Thayer, sworn April 21, 2004;
> 9. Affidavit #1 of Jerry Zuk, sworn June 14, 2004;

10. Affidavit #2 of Jerry Zuk, sworn June 25, 2004;
11. Affidavit #2 of Jennifer Peck, sworn June 25, 2004;
12. Affidavit #3 of James R. Pringle, sworn June 28, 2004;
13. Affidavit #3 of Jennifer Peck, sworn June 28, 2004; and
14. Affidavit #4 of Jennifer Peck, sworn June 28, 2004.

AND JUDGMENT being reserved to this date:

THIS COURT ORDERS that:

1. Costs in advance be special costs;

2. Accounts are to be submitted on a monthly basis and paid equally by British Columbia and Canada;

3. If the parties are unable to agree upon hourly rates to be paid to those involved on the Plaintiff's litigation team, those rates are to be fixed by the Registrar;

4. There will be a holdback of 20% of all fees billed, pending final agreement on fees or a final taxation by the Registrar;

5. 100% of disbursements billed are to be paid. If there is disagreement concerning a disbursement then such disbursements are to be the subject of an interim taxation before the Registrar; and

6. The Orders sought by the Defendant, Her Majesty the Queen in Right of the Province of British Columbia are dismissed.

[Emphasis added.]

[48] That order, pronounced the 16th July, 2004, superseded the order of May 2004, the principal terms of which were:

THIS COURT ORDERS that:

1. the Plaintiff's application is granted insofar as the Plaintiff applied to have the Crown Defendants henceforth pay the Plaintiff's interim costs in any event of the cause for the conduct of this litigation (the term "costs" being used as it is found in the *Rules of Court*, Rule 58 and Appendix B, s. 7(1)). The Crown Defendants shall share equally in the payment of these interim costs. The Plaintiff's interim legal fees shall be paid as

increased costs at 50% of special costs. The Plaintiff's reasonable disbursements shall be paid in their entirety. The Crown Defendants shall pay these accounts as they are agreed to by the Crown Defendants or as approved on taxation;

2. the Crown Defendants shall share equally in paying the Plaintiff's increased costs on this motion;

3. the parties are directed to make reasonable efforts to jointly state an issue of fact or law, or partly of law and partly of fact, in the form of a special case for the opinion of the Court, in accordance with Rule 33 of the *Rules of Court*, B.C. Reg. 297/2001 (the "*Rules of Court"*), B.C. Reg. 297/2001 (the "*Rules of Court*") [sic];

4. if the parties are unable to agree upon a special case for the opinion of the Court in the manner contemplated by paragraph 3 of this Order, any party may apply to the Court for directions, including whether the Court should order a special case, in accordance with Rule 33 of the *Rules of Court*;

5. in the event a special case is stated for the opinion of the Court in accordance with paragraphs 3 or 4 of this order, the Plaintiff's interim costs, will be limited to apply only in respect of the preparation and hearing of the special case;

6. the trial judge retains jurisdiction to review the application of this Costs Order from time to time and the parties have liberty to apply in that regard;

7. if a new Accounts Administration Agreement is not agreed to by the parties, counsel are at liberty to renew applications for a different method or level of funding; and

8. the Plaintiff's application for disclosure of the amounts paid on account of fees and disbursements by the Defendant's [sic] is dismissed.

[Emphasis added.]

[49] On these orders, there are some points to be noticed:

1. No appeal was brought from the order of 6th May, 2004.

2. In 2002, the Rules of Court had been amended to abolish orders for "increased costs", even in pending litigation. Why the order of 6th May used the term, I do not know, but the point is now only of academic interest.

3. The order now in issue does not contain the words, as did the order of 6th May, "interim costs in any event of the cause".

[50] In his reasons on this application, 2004 BCSC 963, the learned judge said, in part:

> [4] It is convenient to summarize matters leading up to this application by referring to what I said on May 6, 2004. In ***William v. HMTQ*** 2004 BCSC 610 I said the following in paragraphs 2 to 6:
>
> > [2] On November 27, 2001 I made the funding order directing the defendants to share equally in the payment of the plaintiffs' future costs. The order called for the payment of all reasonable disbursements as agreed upon by the defendants or as approved on taxation. Interim legal fees were to be paid as increased costs at 50% of special costs: ***Nemiah Valley Indian Band v. Riverside Forest Products Ltd.***, 2001 BCSC 1641. An appeal to the Court of Appeal was dismissed: ***Xeni Gwet'in First Nations v. British Columbia***, 2002 BCCA 434. An appeal was then filed in the Supreme Court of Canada. That Court remanded the matter on January 12, 2004 in the following terms:
> >
> > > This appeal is remanded to the British Columbia Supreme Court to be dealt with in accordance with the reasons of this Court in ***British Columbia (Minister of Forests) v. Okanagan Indian Band,*** 2003 SCC 71.
> > >
> > > (***Tsilhqot'in Nation v. Canada Attorney General,*** [2002] S.C.C.A. No. 295 (QL))
> >
> > [3] The parties have consented to three other orders relating to the funding order. On February 28, 2002 I made an order directing an interim payment to plaintiffs' counsel from each defendant with liberty to apply for further directions if there was no agreement on the amounts to be paid under the funding order.

> [4] On July 19, 2002 an order was made that the Registrar hearing the assessment of the appropriate hourly rates for work done for the plaintiffs by Woodward & Co. be seized of any further applications required to settle hourly rates for the purpose of calculating advances under the funding order. Finally, on November 3, 2003 an order was made that any party could apply to the court to change the percentage of increased costs ordered at 50 per cent of special costs on the basis that the intent of the funding order was not being met.
>
> [5] As I noted in my reasons for judgment concerning the publication of accounts information, ***William et al v. HMTQ et al*****,** 2004 BCSC 549, in January 2002 the parties entered into Confidentiality Agreements relating to confidential information that would necessarily have to be disclosed prior to the payment of costs pursuant to my order. The Confidentiality Agreements contemplated that the parties would negotiate and enter into an Accounts Administration Agreement setting out procedures for the administration of accounts to be submitted from time to time by counsel for the plaintiffs. Such an agreement was concluded and is currently in operation.
>
> [6] The parties do not agree as to when the Accounts Administration Agreement will expire. It will expire when the maximum funding level is reached (Art. 1.1.01(2)) and therein lies the disagreement. Costs counsel for the defendants estimates that the agreement will expire sometime in May 2004. The defendants have advised they do not intend to renew the agreement.

[5] On November 27, 2001 in ***Roger William v. Riverside Forest Products Ltd.***, 2001 BCSC 1641, at paragraphs 34 and 35 I said:

> [34] The defendants' legal fees and disbursements are fully funded. I must make an order that is fair to the plaintiffs but, at the same time, it must be fair to the defendants against whom the order is made. The order for interim costs must also be realistic, in the sense that it must be sufficient to allow the plaintiffs' solicitors to continue their work on behalf of the plaintiffs.
>
> [35] I conclude that Canada and British Columbia must share equally in the payment of the plaintiffs' future costs. I use that term as it is found in the ***Rules of Court***, Rule 58 and App. B, s. 7(1). I conclude that the taxing of accounts under Scales 1-5 would lead to an unjust result. Accordingly, I order the payment of all reasonable disbursements as agreed to by Canada and

> British Columbia or as approved on taxation. I order that interim legal fees be paid as increased costs at 50% of special costs. These accounts are to be paid as they are agreed to by Canada and British Columbia or as approved on taxation.

[6] On the hearing of this application it became apparent that my use of the words "funding order" may be incorrect. So that there is no confusion, my reference to a funding order is to the order I made in these proceedings, on November 27, 2001, for payment of the plaintiff's costs in advance and to the subsequent orders relating to the original order to which I have just referred.

[7] After the original order was made, the parties agreed to the payment of increased costs to be fixed at 61% of special costs. An agreement was reached on hourly rates and how accounts were to be paid. The AAA has now expired and, for the present, will not be renewed. Counsel for the plaintiff says that rate of 61% earlier agreed to was insufficient. Counsel for the defendants say that if the costs awarded are insufficient, it is because of decisions made by plaintiff's counsel, Mr. Woodward, in the management of his law firm. In their submission, payment of increased costs at a rate of 50% of special costs is at a level that would be profitable to the law firm.

[8] Counsel for the defendants say that the issue of whether the court can order 100% of special costs has already been determined in this case. The original order which I made was upheld by the Court of Appeal (***Xeni Gwet'in First Nations v. British Columbia*****,** 2001 BCSC 1641, aff'd 2003 BCCA 434) and the matter is thus *res judicata*.

* * *

[11] Counsel for the plaintiff says that he cannot survive financially if the order for increased costs fixed at 50% of special costs is not changed. Counsel for the defendants say the order is sufficient and I need only look at the firm's financial information to reach that conclusion.

[12] I must fix an order that will not expose the defendants to "unreasonable or excessive costs": ***Xeni Gwet'in First Nations v. British Columbia*****,** 2002 BCCA 434; ***British Columbia (Minister of Forests) v. Okanagan Indian Band*****,** 2001 BCCA 647 aff'd 2003 SCC 71.

[13] Counsel for British Columbia seeks an order that would allow the parties to argue the need for a litigation work plan to be monitored by the Court. I decline the invitation, as trial judge, to monitor a litigation work plan prepared by counsel for the plaintiff. Counsel have the duty

> to present all of the evidence they consider relevant. They understand the law and the need therefore to present particular evidence to the court. They must take into account the age, infirmity and availability of particular witnesses. It would be wrong for me, as trial judge, to sit in judgment of a litigation work plan and thus become involved in the litigation strategy of plaintiff's counsel. In my view, it would be wrong for the court to become involved in such activities at this stage in the proceedings. I decline to recommend that another judge of the court be appointed for such a purpose. After the trial it is always open to argue that certain activities undertaken were excessive and unnecessary. Until the trial is completed and the judgment rendered, that kind of activity should not be undertaken by the court.
>
> [14] In addition, I am invited to take into account detailed financial information relating to the management of the law firm selected by the plaintiff as his solicitors in these proceedings. The difficulty I have with the submissions made on behalf of the defendants is that they invite me to become involved in the management of a law firm. I am invited to look at financial information concerning a law firm and determine the profitability of particular litigation to that firm.
>
> [15] I have peered into that abyss and I have no difficulty in saying it is a leap I decline to take. I conclude that it would be wrong for me as the trial judge and wrong for the court to look at the economics of a law firm and the profitability of the work it is engaged in. I must find some principled objective way to fix the costs to be paid in advance that will avoid the need to look at the private financial information relating to the law firm representing the plaintiff while at the same time ensuring that the order does not expose the defendants to "unreasonable or excessive costs."
>
> [16] The setting of appropriate costs in advance is a much different task from the fixing of costs after the litigation has concluded. After the event it is open to take issue with particular decisions made by counsel or the time spent in the accomplishment of any particular task. Before the event the task of the court is to fix the costs to be paid in a manner that is fair to all the parties.

[51] The learned judge then referred to the judgment of Bouck J. in ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 B.C.L.R. (2d) 309 (S.C.), aff'd (1992), 73 B.C.L.R. (2d) 212 (C.A.), and having done so, said:

[18] Thus, special costs are "the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill." What then would be the hourly rates that a "reasonable client" would pay a "reasonably competent solicitor" to undertake this litigation claiming aboriginal rights and title to certain lands in central British Columbia? In assessing those rates one must take into account the nature of the litigation and the fact that the court has yet to make a declaration of aboriginal title in this province.

[19] Bouck J. concluded that "in the usual course of events, a bill taxed as special costs will be less than a bill taxed under the Legal Profession Act." Thus, the starting point is that an order for special costs would, "in the usual course of events," result in the payment of costs that would be less than fees a client would pay to his or her own solicitor pursuant to a bill that could be taxed under the ***Legal Profession Act*****,** R.S.B.C. 1998, c. 9.

[20] It seems to me that the checks and balances against the payment of "excessive or unreasonable costs" are already built into the system. Rates to be paid to those persons who are retained to perform work in these proceedings can be agreed upon (as they were in the past) or they can be fixed by the Registrar. She will determine what hourly rates "a reasonable client would pay a reasonably competent solicitor" to undertake the responsibility of completing these proceedings. Bills can be rendered on a monthly basis and, subject to what follows, can be paid within a reasonable period of time after receipt.

[21] What protection can be afforded the defendants against payment for unnecessary work? There will always be a check against such a possibility on the final taxation of accounts before the Registrar. She will determine if the work undertaken was reasonable and necessary and will pass the final accounts against an objective standard. However, to allow payment at 100% of special costs provides no protection to the defendant who will have no means of recovery at the end of these proceedings. Accordingly, it will be necessary for the court to order a holdback to allow for recovery of costs paid where the Registrar, on final taxation, determines that particular work undertaken in the course of the litigation should not be allowed in the final taxation of special costs.

[22] What then would be a reasonable holdback? It is difficult to imagine that on a final taxation the Registrar would determine that more than 20% of the work undertaken on behalf of the plaintiff was unnecessary, unreasonable or excessive. In my view a 20% holdback should adequately protect the defendants from "unreasonable or excessive costs." If public interest litigation is to proceed, it is in the public interest that this litigation be properly financed. It is, in my

> opinion, in the public interest that these proceedings be properly funded so that they can proceed to a conclusion with counsel retained from the outset to advance the plaintiff's claims.
>
> [23] There will be an order that costs in advance be special costs. If the parties are unable to agree upon hourly rates to be paid to those involved on the plaintiff's litigation team these rates are to fixed by the Registrar. Accounts are to be submitted on a monthly basis and paid equally by British Columbia and Canada. There will be a holdback of 20% of all fees billed, pending final agreement on fees or a final taxation by the Registrar. 100% of disbursements billed are to be paid. If there is disagreement concerning a disbursement then such disbursements are to be the subject of an interim taxation before the Registrar.

ERRORS ALLEGED AND ORDERS SOUGHT

[52] The appellant, the Attorney General of Canada, alleges these errors in judgment:

> The learned Trial Judge erred in law in:
>
> (a) increasing the quantum of advance costs to the Plaintiff on the basis of subjective evidence led by the Plaintiff of the financial circumstances of one of the two Plaintiff law firms;
>
> (b) finding that the matter of special costs, heard on successive occasions, including on appeal to this court, was not *res judicata*;
>
> (c) refusing to hear a future application on measures to minimize the costs paid under the advance costs order; and
>
> (d) finding that all measures to minimize costs under an advance costs order are "already built into the system".

[53] British Columbia puts the matter somewhat differently, thus:

> [1.] The learned trial judge misdirected himself or erred in principle or law by ordering payment in full of the Plaintiffs' legal fees:

(a) without any or sufficient consideration of the public interest in ensuring a reasonable minimum expenditure of public money on the case;

(b) on the basis of subjective evidence of the financial circumstances of one of the law firms representing the Plaintiffs, without proper examination of that evidence and without any consideration of rebuttal or other potentially relevant evidence;

(c) when the issues in that regard had already been heard and decided against the Plaintiffs in these proceedings;

(d) by an order for Special Costs, when there was no application for such an order and no facts or evidence to support such an order;

(e) without jurisdiction or, in the alternative, without facts and evidence of a change in circumstances such as to justify an order supplementing the original costs order of November 27, 2001.

[2.] The learned trial judge misdirected himself or erred in principle or law by refusing British Columbia's application for a hearing on appropriate means of active court supervision of the legal fees, disbursements and expenses to be incurred Plaintiffs [sic] over the rest of the case.

[54] British Columbia seeks this order:

THIS COURT ORDERS THAT:

1. this appeal be allowed;

2. the order of the Honourable Mr. Justice Vickers of the Supreme Court of British Columbia, pronounced on July 16, 2004, be set aside;

3. the following matters be remitted to the Supreme Court of British Columbia, to be reconsidered by that Court by reference to the principles stated by this Court in its reasons for judgment on this appeal:

    a. the proper and necessary percentage of special costs to be paid or advanced by the Appellants to the Respondents as advanced costs from and after July 16, 2004;

b. whether the Supreme Court of British Columbia ought to impose measures to control the costs of litigation in this action;

c. the nature of the cost-control measures, if any, to be imposed;

4. the matters referred to in paragraph 3 be decided by the Honourable Mr. Justice Vickers or by another Justice of the Supreme Court of British Columbia, as the Honourable Mr. Justice Vickers may direct.

[55] For its part, Canada seeks an order that:

(a) the appeal be allowed;

(b) the order of Vickers J. made July 16, 2004 be set aside and the application which gave rise to the order appealed from, namely that the percentage of special costs used for the calculation of increased costs be raised, be dismissed;

(c) the matter of whether a litigation plan should be implemented in the present action be referred back to the Court below for consideration; and

(d) costs of the appeal are recoverable in accordance with the agreement of the parties.

RELEVANT ENACTMENTS

[56] Until 1990, British Columbia had what was essentially a fixed tariff system for party and party costs. That system had been developed, if I recall correctly, after the First World War. But the Rules of 1990 introduced a species of costs called "special costs" and abolished inferentially orders for solicitor-client and solicitor and own client costs:

RULE 57
Costs

How costs assessed generally

(1) Where costs are payable to a party under these rules or by order

(a) by another party,

(b) out of a fund of other parties, or

(c) out of a fund in which the party whose costs are being assessed has a common interest with other persons,

they shall be assessed as party and party costs under Appendix B, unless the court orders that they be assessed as special costs.

[57] As I have indicated, Newbury J.A. drew a sharp distinction between "costs" and "legal fees". I therefore set out the criteria for each, as found for the former in Rule 57(3) and for the latter in s. 71 of the ***Legal Profession Act***, S.B.C. 1998, c. 9:

Rule 57(3) **Special Costs**	***Legal Profession Act, s. 71***
	71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).
	(2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services: (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate; (b) those authorized by the client or subsequently approved by the client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
	(3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:

	(a) those reasonably intended by the lawyer to advance the interests of the client at the time the services were provided; (b) those requested by the client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the client.
(3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved, (b) the skill, specialized knowledge and responsibility required of the solicitor, (c) the amount involved in the proceeding, (d) the time reasonably expended in conducting the proceeding, (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding, (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.	(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including (a) the complexity, difficulty or novelty of the issues involved, (b) the skill, specialized knowledge and responsibility required of the lawyer, (c) the lawyer's character and standing in the profession, (d) the amount involved, (e) the time reasonably spent, (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable, (g) the importance of the matter to the client whose bill is being reviewed, and (h) the result obtained.
	(5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[58] As the reader will note, there are some significant differences between "special costs" and the fees allowable under the ***Legal Profession Act***. The principal difference is that, under s. 71 of the ***Legal Profession Act***, a lawyer may be entitled to recover fees for proceedings which were unnecessary for the proper conduct of the business if those fees meet the criteria of subsection (3). Furthermore, while in fixing legal fees, "the lawyer's character and standing in the

profession" is a proper consideration, it is not expressly a proper consideration in "special costs", and the provision as to special costs makes no mention of "a fee rate that is based on an amount per unit of time spent by the lawyer".

[59] To my mind, a serious difficulty with an order for special costs "in advance" is that some of the factors a registrar is to take into account in assessing "special costs" cannot be determined until the proceedings are concluded. For until proceedings are concluded, no one knows:

(a) the amount involved in the proceeding;

(b) whether the plaintiff's conduct "unnecessarily lengthen[ed] ... the proceeding";

(c) the result obtained;

(d) the benefit to the plaintiffs of the services rendered.

[60] I comment that we might have been, but were not, given any idea of the amount involved. As to that, one can ask, how much is land in the Chilcotin worth per hectare?

[61] To put it another way, as the Rule is drafted, "special costs" are hindsight costs.

[62] Also relevant is Appendix B of the Rules, and in particular:

APPENDIX B
PARTY AND PARTY COSTS

* * *

Scale of costs

2 (1) Where a court has made an order for costs, it may fix the scale, from Scale 1 to 5 in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

(2) In fixing the scale of costs the court shall have regard to the following principles:

(a) Scale 1 is for matters of little difficulty;
(b) Scale 2 is for matters of less than ordinary difficulty;
(c) Scale 3 is for matters of ordinary difficulty or importance;
(d) Scale 4 is for matters of more than ordinary difficulty or importance;
(e) Scale 5 is for matters of unusual difficulty or importance.

(3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

(a) whether a difficult issue of law, fact or construction is involved;

(b) whether an issue is of importance to a class or body of persons, or is of general interest;

(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

* * *

Value of units

3 (1) The value for each unit allowed on an assessment conducted after July 1, 1998 is as follows:

* * *

(e) Scale 5 - $120 for each unit.

(2) Where maximum and minimum numbers of units are provided for in an Item in the Tariff, the registrar has the discretion to allow a number within that range of units.

(3) In assessing costs where the Tariff indicates a range of units, the registrar shall have regard to the following principles:

(a) one unit is for matters upon which little time should ordinarily have been spent;

(b) the maximum number of units is for matters upon which a great deal of time should ordinarily have been spent.

* * *

TARIFF

* * *

Item Description Units

* * *

	Trial		
24.	Preparation for trial, if proceeding set down for each day of trial.		5
25.	Attendance at trial of proceeding or of an issue in a proceeding, for each day.		10
26.	Written argument.	Minimum Maximum	1 10

[63] As the reader will note, the maximum at present per day of trial for items 24 and 25 is $1,800 per day. As this trial had lasted, as of the 20th October, 2005, 261 days, the maximum allowable as party and party costs for this trial would be $469,800.00.

DISCUSSION

[64] I do not propose to engage in a dissertation directed to the issue of *res judicata* (Canada's error (b)) or *issue estoppel* (British Columbia's issue (c)), save to say that, in my opinion, to permit either to defeat successive applications for public funding in those cases in which public funding is found to be justified, would not promote the purposes of public funding. It is so that sometimes estimates of money

required can be wrong for some reason that is not within the control of the person to whom interim costs have been granted. As to Canada's assertion in error (a), which is essentially the same as British Columbia's assertion of error in British Columbia's (b), I am inclined to the view that the evidence referred to, that of the law firm's accountant, ought not to have been admitted, but I am by no means satisfied that the learned judge below gave it any weight as such.

[65] Indeed, while I consider that there is error in these proceedings, the error is, as will appear, somewhat different from those which are asserted by the parties.

[66] The underlying problem in this case is that the plaintiff's claim is for aboriginal title and no one knows what that is as yet.

[67] As I said 14 years ago in ***British Columbia (Attorney General) v. Mount Currie Indian Band*** (1991), 54 B.C.L.R. (2d) 156 at 185 (C.A.):

> THE ISSUE OF ABORIGINAL TITLE
>
> In my opinion, it is quite impossible to decide, at this stage of these proceedings, whether the Band or its predecessors had aboriginal title, whatever that may be, to these lands.
>
> As to what it may be, the chain of authority begins with *St. Catherine's Milling and Lumber Company v. R.* (1888), 14 App. Cas. 46 (P.C.) and comes, up to now, to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, ...
>
> But none of the authorities to which we were referred holds that the aboriginal "right of the aboriginal people" is ipso facto the equivalent of a fee simple. Only something akin thereto or akin to an estate derived therefrom could give a right of exclusive possession at common law.
>
> From the mists of the past, there came to be recognized in English law many rights of use, such as piscary, turbary, common and way, all over land or inland waters and of navigation over tidal waters,

> which gave the Sovereign' s subjects the ability to maintain themselves. Some were public rights, others were given by grant or acquired by prescription. I need not attempt to do what I am not qualified to do, namely trace how these rights came about. But they illustrate that English law has long recognized rights either as a private personal or heritable right or as a right in common with others to go upon land the fee simple of which is in another. Those rights are not equivalent to a fee simple, a right which must have its origin at common law in a Crown grant. It seems to me reasonable that there may well be as a matter of aboriginal right, some sort of interest – perhaps equivalent to a copyhold – in a village and a much lesser interest – perhaps equivalent to a profit à prendre – in lands over which the denizens of the village, for their maintenance, hunted and fished and from which they obtained fuel, building materials and foods such as berries. Although Indian interests are sui generis, it ought to be possible to describe them by analogy to common law interests and, therefore, make them understandable to common law lawyers. Whether it is possible to describe them by analogy to interests known to the civil law, I am, through ignorance of the civil law, unable to say.
>
> Thus, in my opinion, it is essential before deciding questions of aboriginal right to determine, as a fact, whether a claimant's ancestors were in possession and occupation of the lands in issue and, if they used the lands, how and for what purpose and to what extent.
>
> Here there is insufficient evidence of the possession, use and occupation of the Pemberton Valley, either immediately before 1858, that is to say, when the Colony was established, or in 1871, that is to say when British Columbia joined Confederation, for this Court on this interlocutory application to even begin to address the issue. I am quite sure that the Chief believes that the Pemberton Tribe exercised full dominion over the Pemberton Valley at one or other of those times. But it does not seem probable, although it is not impossible, that the 200 souls, half of them children, found by Mr. O'Reilly in the Valley in 1882 did any such thing.

[68] There was some thought that the matter might be resolved by the famous case of ***Delgamuukw v. Her Majesty the Queen in right of the Province of British Columbia and The Attorney General of Canada***, [1997] 3 S.C.R. 1010, varying (1993), 104 D.L.R. (4th) 470 (B.C.C.A.). In the appeal to this Court from the judgment of McEachern C.J. dismissing the action, (1991), 79 D.L.R. (4th) 185, the

Court, having heard the appeal for some seven weeks in 1992, delivered on the 25th June, 1993, a judgment saying, in part:

> The plaintiffs are entitled to a declaration that:
>
> (a) all of the plaintiff's aboriginal rights were not extinguished before 1871; and
>
> (b) the plaintiffs, being Gitksan and Wet'suwet'en persons, have unextinguished non-exclusive aboriginal rights, other than a right of ownership or a property right, in an area of the approximate size shown on Map 5, a copy of which is attached to the Reasons for Judgment. Such rights are of a *sui generis* nature. The exact territorial limits within which such rights may be exercised, if not agreed to by the parties, shall be those designated by the trial judge in reference to Map 5. The scope, content and consequences of such non-exclusive aboriginal rights of use and occupation, including the effect of s. 35 of the *Constitution Act*, 1982 on grants or renewals of grants, licences, leases or permits respecting any resources within the area shown on Map 5, are left to be determined in trial proceedings properly framed to deal with such issues;
>
> * * *
>
> The plaintiffs' claim for a declaration that they have a right of ownership of and jurisdiction (self government) over the Territory, and all claims depending upon or said to be included in or subject to such a right of ownership and jurisdiction, are dismissed without costs. ...

[69] The Supreme Court of Canada, in that case, ordered a new trial and no new trial, so far as I know, has been held. Thus, the precise nature of the rights of any particular Indian tribe within the geographical area of British Columbia has not yet been determined by final authority.

[70] Some day, the Supreme Court of Canada will have to come to some conclusion as to what is aboriginal title, a conclusion which may, depending upon how broad that title is found to be, have a shattering impact upon Confederation.

There can thus be no doubt of the importance of this litigation, not only to British Columbia but also to the whole of Canada.

[71] In my opinion, a fundamental difficulty with the order of the learned judge, when read with his reasons, is that the learned judge, like the parties themselves as I indicated earlier, appears to be of the opinion that "special costs" means hourly costs or fees or rates or whatever word one wishes to use. That is not what the Rule says.

[72] To give effect to what the learned judge had in mind, the order might better not to have used the term "special costs", but said, "The defendant shall pay the solicitors for the plaintiff by way of interim costs in any event of the cause, such amount per hour of time expended by each solicitor engaged in the litigation as may be agreed upon by the parties, or failing agreement, fixed by the Registrar, less 20% thereof."

[73] What is fundamentally the matter with such an order is that there is no incentive to economy. It is an open cheque. Nor does such an order engage the plaintiff himself.

[74] I note that there is nothing in the evidence of Mr. Woodward or any of the other solicitors for the plaintiff to show how it was that Mr. Woodward's estimate was so hopelessly erroneous as to both costs and length of time that the trial would take, or how it is that the disbursements far exceed those which were contained in the original budget.

[75] Apposite, however, are these extracts from the transcript of the hearing before the learned judge on 29th June, 2004:

1. in this colloquy between Mr. Rosenberg, of counsel for the plaintiff, and the learned trial judge, at pages 9-10 of the transcript:

> THE COURT: It's just that the numbers have ballooned.
> MR. P. ROSENBERG: Yes.
> THE COURT: That's the way I read the argument that's going to be made against you. The numbers have ballooned out of proportion as to what was expected.
> MR. P. ROSENBERG: As you'll recall initially when Mr. Woodward brought the funding application on behalf of the plaintiffs, he had anticipated costs of about $600,000 and six counsel. Unfortunately you don't litigate in a vacuum, and what the defendants do in a litigation often drives what the plaintiffs are forced to, and in this case that's what's happened.
> THE COURT: It's called the case of the misplaced zeros, Mr. Rosenberg.
> MR. P. ROSENBERG: It's a case of misplaced trust. One had expected admissions from the defendants and a different method of proceeding from the defendants that didn't materialize.
>
> Now, going to the second aspect of why we say special costs at 100 percent should have been ordered --
> THE COURT: On that point, it's difficult for me sitting as a trial judge to say, right, you're right; I mean, these folks shouldn't have done all the bad things they did to you. It's not only difficult, it's impossible. I can't judge the merits of anybody's case or anybody's defence at this stage in the proceedings, or anybody's strategy for that matter.
> MR. P. ROSENBERG: And you shouldn't be, My Lord.
> THE COURT: Nor should any judge at this stage. You know, it's got to be the way it is. We can't say, well, just a minute now; I want you to do this differently -- well, I mean, perhaps I can say I want you to do it differently, but I can't be critical, it seems to me, of strategy and defences raised and tactics employed, that sort of thing. Anyway. We won't take too --
> MR. P. ROSENBERG: And you shouldn't be, My Lord. The person who would be would be the registrar.
> THE COURT: We -- perhaps.
> MR. P. ROSENBERG: When you get to a taxation at the end of the day that's precisely what the registrar will be looking at, is what

> was done, was it reasonable, why was it necessary, was it prompted by actions of the defendants, and that's what goes into a normal taxation on special costs. But that's for the end of the day when the taxation occurs. The question is, how do you keep things moving ahead as we're going, and barring -- leaving aside a taxation as you go each month, the alternative is an accounts administration agreement so that there can be some review of what's going on by the parties, holdbacks if necessary, and discussions and facilitation, that sort of thing, which we've been doing.

2. and, at page 12:

> Now, paragraph 12 in my outline. The amount of funding necessary to allow a meritorious case to proceed would be the amount that a reasonable client would be required to pay a reasonably competent solicitor for the litigation. This is an objective measure of the amount of funding required as opposed to the subjective measure associated with solicitor-and-own-client costs. Which was the funding order initially sought and dismissed. Special costs are the objective measure of the amount of funding that would be required for the plaintiff to retain counsel.

[76] But the reasonable client for the purpose of litigation such as this is a mythical creature. The reasonable client who is spending his own money asks himself, having been quoted a fee for the necessary work, "Is the game worth the candle?" Sometimes a client with deep pockets will say, "leave no stone unturned", and if that is so, a solicitor can rely upon s. 71(2) and (3) of the ***Legal Profession Act***. Sometimes the nature of the case is such that the client can be offered an economy lawsuit or a first-class lawsuit. Thus, the late Harry Bray, Q.C., a leader of the bar when I was a young lawyer, is reputed to have remarked on more than one occasion to clients in the days when for a few thousand dollars one could buy a building lot in the City of Vancouver, "Do you want a $500 lawsuit or a $5,000 lawsuit?"

[77] Again, if a client is told that he has a good chance of recovering, say $1 million, if he spends $100,000.00, and some chance of recovering $2 million if he spends $500,000.00, a cautious client might well choose the former, but a client with a gambler's soul might choose the latter.

[78] I now pose some questions:

> ***(1) What is the nature of a solicitor's obligation to his client when estimating legal fees?***

[79] In ***Roberts & Muir v. Price*** (1986), 7 B.C.L.R. (2d) 211 (S.C.), aff'd (1987), 19 B.C.L.R. (2d) 375 (C.A.), I was obliged as a trial judge to consider the consequences of a solicitor claiming fees beyond an estimate which he had given his client.

[80] I said, at 216-217 and 220-221 (S.C.), in passages not directly commented upon by McLachlin J.A. when she delivered the judgment of this Court:

> In my view, the learned registrar did not understand the governing principle. He did not ask himself whether there was a contract between the solicitors and the client concerning fees and, if so, what did it mean. I take him to be saying, in effect, that there was no contract for fees or, if there was, it was only as to the hourly rate. He never gives the instrument of 1983 any more status than that of a "communication".
>
> * * *
>
> If the registrar is right, a client is in a most difficult position. If a solicitor tells him his case will cost X dollars, the client, having weighed the fee against the probability of success, may decide to sue when, had he been told the fee would be 2 X, he might have decided that the game would not be worth the candle. A solicitor could deliberately give a low estimate for the purpose of inducing the client to instruct him. Then when the client was part-way through the action and unable to

extricate himself, he might find that he was required to pay a great deal more money.

* * *

There is another way of looking at the matter. The solicitor has a duty of reasonable care and skill. Surely it is part of the reasonable care and skill of a solicitor to estimate accurately the fees which any particular piece of work will entail. Although neither counsel nor I have found any direct authority on solicitors erroneously estimating fees, either as part of or as an inducement to the contract of retainer, there is assistance to be gained from the decision of the Court of Appeal in *Savage v. Alberni Sch. Trustees*, 2 W.W.R. 30, [1951] 3 D.L.R. 39 (B.C.). There, an architect, who had drawn preliminary plans for a school, was asked by the client for an estimate of the cost of construction. That estimate was to be the basis of a money by-law. The estimate was seriously wrong. The school district claimed against the architect for negligence in giving this erroneous estimate. Sidney Smith, J.A., said this at pp. 42-43:

> Architects are bound to possess a reasonable amount of skill in their profession, and to use a reasonable amount of care and diligence in the carrying out of work which they undertake, including the preparation of plans and specifications: 3 Hals., 2nd ed., p. 333. An architect holds himself out as a skilled person. If he furnishes an estimate as part of his contract it must, at his peril, be reasonably near the ultimate cost. And moreover where any deficiency appears on its face to be unreasonable, the burden rests upon the architect to show how it arose and that he was not at fault: *Mills v. Small* (1908), 11 O.W.R. 1041 at p. 1043.

I see no difference in principle between an architect estimating what a contractor will charge to build a building designed by the architect and a solicitor estimating what his own fees will be. The question in each case was whether the estimate showed reasonable care and skill. The burden should lie upon the solicitor to show how the "deficiency", i.e., the error in the estimate arose and that the solicitor was not at fault. I do not think a solicitor can discharge the burden simply by saying, "I underestimated the work involved". Perhaps, he may discharge it by showing that the client gave him misinformation or, if the retainer is to act for a plaintiff, that the defendant or his solicitor was recalcitrant to an extent that could not reasonably be foreseen or something of the sort. But the solicitor is the expert and he is supposed to get things reasonably right.

(2) Does a litigant whose counsel is being paid from the public purse have a right to counsel who demands high fees?

[81] This issue arises on Rowbotham applications and was curiously enough before this Court just two years ago in ***R. v. Ho*** (2003), 21 B.C.L.R. (4th) 83, 2003 BCCA 663, a drug conspiracy case. What had happened was that, in the middle of the trial, counsel who was acting for Ho gave up his brief. Counsel who was asked by Ho to act for him, having declined to undertake the rest of the defence on the fees offered by the Crown, and the Crown declining to meet counsel's demands, the learned trial judge stayed the prosecution. The issue before the Court was whether he was right to do so and the Court said "no".

[82] Part of my own judgment may be of some assistance in pondering the issues. Counsel appearing for Mr. Ho (not the counsel whose fees were in issue) postulated (at para. 44):

> ... as I [understood] him, ... that either Parliament or the Legislature must appropriate all such funds as are necessary to assure to every accused, or at least an accused with no means, a trial which meets the standards of ss. 7 and 11(d) of the *Charter* and that in some cases that may mean that the Crown must be willing to pay a member of the bar who commands high fees, whether deservedly or not is neither here nor there, in such amount as satisfies that counsel.
>
> [45] The question arising on the proceeding below is this: Was it within the power of Cullen J. to stay this indictment on the footing that the respondent, not having the money to retain the counsel of his choice or indeed counsel at all, in the judge's opinion, would not have a fair trial without counsel of choice who declined to accept the brief on legal aid terms?
>
> [46] I have put the question in what to some may seem too narrow terms for two reasons:
>
> 1. Because at no time did the respondent ask the trial judge for an opportunity to seek counsel other than Mr. Wilson, nor did he

> adduce any evidence of unsuccessful attempts to obtain other counsel. To put it another way, there is no evidence from which an inference can be drawn that the financial assistance available was not sufficient for the respondent to obtain counsel.
>
> 2. Because I want to make patent what may be the consequence of answering the question "yes". If an indigent cannot have a fair trial without "expensive" counsel of choice, what of someone who, not being indigent, is ineligible for legal aid and cannot afford counsel of choice but only counsel whose fees are within his reach? Should he not be entitled to "top up" assistance from the public purse? If only expensive counsel can assure a poor man a "fair" trial, why is that not also true of those of modest means?

[83] In the course of the hearing, the Court had been referred to the judgment of the Alberta Court of Appeal in ***R. v. Cai*** (2002), 170 C.C.C. (3d) 1, 2002 ABCA 299, in which that court had said:

> [18] Paragraph 65 found that the $150 per hour which the court imposed on the Crown would be "better suited" to this prosecution than would something unstated. But that is not the test. One can always find resources, persons, or means of higher quality. The "best around" is emphatically not the test. All that is required is a level of legal representation which ensures that the accused's answer to the allegations of his guilt is made available to the adjudicating court. Certainly not matchless Nobel-level privately retained representation.

[84] Later, I remarked, at para. 72:

> 9. The legal profession, as such, has no constitutional status, important though it is generally thought to be to the maintenance of a civil society. Thus, in considering the question of a "fair" trial, the court must give no weight to the economic well-being of the legal profession or any member of it.

[85] Apposite to that proposition was this:

> [76] Underlying my opinion that trial judges have no role in fixing the fees of counsel in criminal cases is my concern that if the judges have

> such a role thrust upon them, it will be perceived, sooner or later and not unreasonably, even if erroneously, by the citizenry which bears the financial burden as being hand in glove with the bar. In this connection, I note that in one application by an accused for a stay pending the Attorney General paying for his two counsel of choice, *R. v. Mitton* (18 October, 2000) Vancouver CC990049 (B.C.S.C.), the affidavit in support set out the grand total of the monies required for the accused to be thus represented at $870,675.00. Part of the evidence adduced by the senior of the two counsel was that his net income was approximately $495,000.00 per year and in order to have a net income of $350,000.00 per year he needed to bill at $207.00 per hour and would work ten hours per day. The application failed. Had it and applications like it succeeded and been reported in the press, would it have been unreasonable for members of the public to think ill of the judiciary? It would not be a good thing for the judiciary, by making such orders, to undermine public confidence in itself.

(3) When and in what circumstances should orders for public funding be "in any event of the cause"?

[86] I appreciate that, so far at least, the orders made in this case do have that result. But, in my opinion, when a variation is sought, which increases in the manner sought here the burden on the public purse, it is proper to revisit the issue to the extent at least of the increase in the burden. One reason is that the possible effect of orders in any event is that the "client", here the plaintiff, has little if any financial incentive to settle. In ordinary litigation, a litigant must, when offers are made to settle, consider all the factors, including his possible recovery if the matter is carried to judgment, the extent to which his legal bill will be defrayed by an order for costs in his favour, and the costs which he may incur if he loses. These are all matters to be balanced by a client who has been properly advised. Beyond that, why should a litigant who is publicly funded at the outset, if he gains a substantial victory, not have to bear, as would an unfunded litigant, some part of his legal bill?

[87] I appreciate that it may be argued that the first question I posed is irrelevant. The court is not a client. But if the learned judge, this Court, or the Supreme Court of Canada had been given not the estimate in the 2001 affidavit, but an estimate of $10 million to $11 million to carry the trial to the end of the plaintiff's case, and an estimate of several millions more to carry the trial to its conclusion, would the result of the first application have been the same? I note that there are no references made in the remand from the Supreme Court of Canada to the Supreme Court of British Columbia in this case of the amount of the estimate but, in the ***Okanagan*** case, there was a reference to a budget of some $800,000. What that case has cost is not before us.

[88] As to the third question, I do not know, and it is not my place to know if there have been offers of settlement, but if the client knows that rejection of an offer might lead to the client having to pay some part of the costs, might that not be an inducement to settlement? I am not here speaking of offers to settle under the Rules, which have nothing to do with whether a client should have an order for interim "costs" in any event of the cause.

[89] Taking all these matters into account, I am of the opinion that the order of the learned judge, while it may be in the interests of the plainitff's solicitors, is not in the public interest. There is no incentive for economy and there is no incentive for settlement, an outcome which the Supreme Court of Canada says is desirable in cases such as these.

[90] British Columbia proposes that this matter be remitted to the court below (see para. 54 *supra*). Canada does also, but in different terms.

[91] In my opinion, to remand this question of "costs" to the learned judge below is to burden him unnecessarily. His reasons show him to be uncomfortable with some of the arguments put to him. He declined, and in my opinion most properly, to "peer into that abyss".

[92] So what should the order be?

[93] In my opinion, because it is now nearly 18 months since the order in issue was pronounced, it would be unfair to the plaintiff's solicitors to set it aside for the proceedings which have taken place to this date.

[94] I have already referred to the items in the tariff as amounting on Scale 5 to $1,800 per day of trial if the maximum units are applied and that, it seems to me, is quite enough for the remainder of this trial.

[95] I would therefore vary the order to provide:

(1) that from this date forward, for proceedings in the court below, the defendants shall pay to the plaintiff's solicitors as interim costs the amounts specified in Scale 5, the units to be the maximum permitted, plus all proper and reasonable disbursements, together with, if written argument is requested by the trial judge in lieu of or in addition to oral argument, such special allowance in addition to tariff item 26 as to the learned judge seems fit;

(2) that upon judgment in the action, if the plaintiff succeeds, the court shall determine whether, in light of all the circumstances, including, but not necessarily limited to, the amount recovered, or if the judgment is not for money, the value of the recovery, and the ability of the plaintiff, founded upon the recovery, to contribute to his own legal fees, and the conduct of the trial, including whether the plaintiff extended the trial unnecessarily, the plaintiff should repay to the defendants some part of the monies paid out to them pursuant to the various orders for interim costs.

[96] Nothing said in this judgment is intended to take from the plaintiff's solicitors their rights against their client under the ***Legal Profession Act***. What those rights may be depends upon matters which are not before this Court in this proceeding.

[97] I have two further comments which arise on the unusual nature of this litigation. The first is that the learned judge referred to the parties' "strategy". I myself think that in a case of this kind, the importance of "strategy" is illusory, for cases of Indian land claims are in truth an inquiry into history. They do not properly lend themselves to clever tricks and tactics. History, of course, unlike the sciences, does not lend itself to certainty. If it did, very few historians would have anything to write about.

[98] The second is this: When the learned judge has written what will be a treatise on the history of the areas claimed by the plaintiff, and given such remedy as he considers warranted by the law, whatever the law may be, it is probable that one side or the other will be disappointed. Nothing will be accomplished by an appeal to

this Court, save to delay the ultimate resolution of the issues and to add more millions to the legal costs, which means, of course, to the pockets of members of the legal profession engaged in these proceedings. The Legislature of British Columbia should amend the ***Court of Appeal Act*** to prevent an appeal to this Court from the judgment. The disappointed party of course would have the right to apply directly to the Supreme Court of Canada, pursuant to the Act governing that court, for leave to take this case there. That is where it ought to go. I remind the reader that in ***Delgamuukw***, which had occupied 374 days of trial between the 11th May, 1987, and the 30th June, 1990, Chief Justice McEachern delivered judgment on the 8th March, 1991. But judgment in the Supreme Court of Canada was not delivered until the 11th December, 1997, six years and nine months after the trial judgment, and more than ten years from the commencement of the trial. As I noted in another case involving aboriginal rights, "the Second World War lasted not quite six years" (***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*** (2002), 98 B.C.L.R. (3d) 16). The aphorism "the law's delays turn justice sour" is as true today as it was some 400 years ago when Bacon penned it.

[99] For the reasons which I have given, I would allow the appeal and vary the order below in the manner which I have indicated.

“The Honourable Madam Justice Southin”

APPENDIX

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
	Cross – Canada		February 16 and 17, 2004 (2)	
	Redirect		February 17, 2004	
Francis Setah *David Robbins*	Examination in Chief	Elder, tradition and history	November 17-20, 2003 (4) November 24-27, 2003 (4) December 1-3 & 4, 2003 (3)	13
	Cross – BC		December 8, 2003 (1)	
	Cross – Canada		December 9, 2003 (1)	
	Redirect		December 9, 2003	
Minnie Charleyboy *Gary Campo*	Examination in Chief	Elder, tradition and history	March 1-5, 2004 (5) March 8-11, 2004 (9/10 pm) (4) March 22, 24 and 25, 2004 (3) March 26, 29, 2004 (2)	18
	Cross – BC		March 29-31, 2004 (2)	
	Cross – Canada		March 31, 2004 (1) April 1, 2004 (1)	
	No redirect			
Theophile Ubill Lulua *David Robbins*	Examination in Chief	Elder, tradition and history	April 1-2, 2004 (2) April 13, 2004 (1)	5
	Cross – BC		April 13, 2004 (1)	
	Cross – Canada		April 14 & 15 2004 (1)	
	Redirect		April 15, 2004 (after noon recess)	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. R. G. Matson	Examination in Chief	Expert, archeology	May 10, 2004 (1)	3
Paul Rosenberg (Murray Browne)	Cross (on qualifications) – BC		May 10, 2004	
	Cross – BC		May 10, 2004	
	Cross (on qualifications) – Canada		May 10, 2004	
	Cross – Canada		May 11 and 12, 2004 (2)	
	Redirect		May 12, 2004	
Francis William *Gary Campo*	Examination in Chief	Elder, tradition and history	May 25, 2004	2.5
	Cross – BC		May 25 and 26, 2004 (2)	
	Cross – Canada		May 26 and 27, 2004	
	Redirect		May 27, 2004 (.5)	
David Lulua *Sean Nixon*	Examination in Chief	Elder, tradition and history	September 7, 2004	1
	Cross – BC		September 7, 2004	
	Cross – Canada		September 7, 2004	
	Redirect		None	
Doris Lulua *Heather Mahony*	Examination in Chief	Elder, tradition and history	September 8, 2004	2
	Cross – BC		September 8, 2004/September 9, 2004	
	Cross – Canada		September 8, 2004/September 9, 2004 (2)	
	Redirect		September 9, 2004	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. Hudson *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, anthropology	September 16, 2004	4
	Cross – BC		September 16, 2004	
	Cross – Canada		October 5, 2004	
	Cross - Canada		October 6, 2004	
	Cross - Canada		October 7, 2004	
Annie Williams *Gary Campo*	Examination in Chief	Elder, tradition and history	September 20, 2004 (1)	3
	Cross – BC		September 20, 2004	
	Cross – Canada		September 21 & 22, 2004 (2)	
	Redirect		September 22, 2004	
Mabel William *David Robbins*	Examination in Chief	Elder, tradition and history	October 4, 2004	1
	Cross – BC		October 4, 2004	
	Cross – Canada		October 4, 2004	
	Redirect		October 4, 2004	
Harry Setah *Heather Mahony*	Examination in Chief	Elder, tradition and history	October 12-15 2004 (4)	6
	Cross – BC		October 18, 19, 2004 (2)	
	Cross – Canada		October 19, 2004	
	Redirect		October 19, 2004	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Norman George Setah	Examination in Chief	Elder, tradition and history	October 19 – 22, 2004 (3.5)	15
Gary Campo			November 1-2, 2004 (2) November 4 (1/2), 8, 9, 18, 29, 30, 2004 (5.5) December 1, 6, 7, 2004 (3)	
	Cross – BC		December 7, 8, 2004 (1)	
	Cross – Canada		December 8, 2004	
	Redirect		December 8, 2004	
Brian Guy *Murray Browne*	Examination in Chief	Expert, forest hydrology	October 18, 2004	1
	Cross – BC		October 18, 2004	
	Cross – Canada		October 18, 2004	
	Redirect		October 18, 2004	
Clayton Apps *Murray Browne*	Examination in Chief	Expert, wildlife biologist	November 3-4, 2004 (2)	2
	Cross – BC		November 4, 2004	
	Cross – Canada		November 4, 2004	
	Redirect		November 4, 2004	
Julie Quilt *Heather Mahony*	Examination in Chief	Elder, tradition and history	November 5, 2004	1
	Cross – BC		November 5, 2004	
	Cross – Canada		November 5, 2004	
	Redirect			

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. Nancy Turner *Murray Browne*	Examination in Chief	Expert, ethno botany	November 16 - 17, 19, 2004 (3)	4
	Cross – BC		November 17, 2005	
	Cross – Canada		November 17, 19, 2004	
	Redirect		December 9, 2004 (1)	
Dr. David Dinwoodie *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, anthropology	December 14, 2004 – December 15, 2004 (2)	7
	Cross – BC		December 15, 2004 – December 16, 2004 (1)	
	Cross – Canada		December 17, 2004 (1) January 10-12, 2005 (3)	
	Redirect			
Dr. Ken Brealey *Murray Browne*	Examination in Chief	Expert, geography	January 4,5, 7, 2005 (3)	10.5
	Cross – BC		January 31, 2005, February 3, 2005 (2)	
	Cross – Canada		January 13, 14 , 31, 2005 (2.5) March 10, 18, 2005 (2) April 15, 2005 (1)	
	Redirect		April 15, 2005	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
David Setah *Heather Mahony*	Examination in Chief	Councillor, tradition and history, role as community leader	January 17 - 21, 2005 (4.5) February 1, 2, 4, 7, 8, 9 (6)	15.5
	Cross – BC		February 11, 15, 16, 28, 2005 (4)	
	Cross – Canada		March 1, 2005 (1)	
	Redirect		March 1, 2005	
Joseph William *Gary Campo*	Examination in Chief	Elder, tradition and history	February 17, 2005	1
	Cross – BC		February 17, 2005	
	Cross – Canada		February 17, 2005	
	Redirect		February 17, 2005	
Ubil Hunlin *David Robbins*	Examination in Chief	Elder, tradition and history	March 7, 8 , 9, 14, 2005 (4)	4.5
	Cross – BC		March 14, 2005	
	Cross – Canada		March 14, 15, 2005	
	Redirect		March 15, 2005 (.5)	
Gilbert Solomon *Gary Campo*	Examination in Chief	Elder, tradition and history	March 15, 2005 (.5) March 16, 17, 2005 (2) April 5, 6, 2005 (1.5)	6
	Cross – BC		April 6, 7, 8 2005 (2)	
	Cross – Canada		April 8, 2005	
	Redirect		April 8, 2005	
Mike Demarchi *Paul Rosenberg (Murray Browne)*	Examination in Chief	Expert, biology	April 4, 2005	1

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
	Cross – BC		April 4, 2005	
	Cross – Canada		April 4, 2005	
	Redirect		April 4, 2005	
Hamar Foster *Murray Browne*	Examination in Chief	Expert, legal historian	April 11, 12, 2005 (2)	4
	Cross – BC		April 12, 13, 2005	
	Cross – Canada		April 13, 2005 (1)	
	Redirect		April 13, 2005 April 18, 2005 (1)	
Chief Irvin Charleyboy *David Robbins*	Examination in Chief	Elder, tradition and history	April 18, 2005 (.5) April 19, 20, 2005 (2)	7.5
	Cross – BC		April 21, 22, 2005 (2) May 3, 2005	
	Cross – Canada		May 3, 5, 6, 2005 (3)	
	Redirect		May 6, 2005	
Christine Cooper *Gary Campo*	Examination in Chief	Elder, tradition and history	May 2, 2005	1
	Cross – BC		May 2, 2005	
	Cross – Canada		May 2, 2005	
	Redirect		May 2, 2005	
Patricia Guichon *Heather Mahony*	Examination in Chief	Elder, tradition and history	May 9 – 11, 2005 (3)	4
	Cross – BC		May 9, 2005 (Evening)	
	Cross – Canada		May 9, 11, 12, 2005 (Evening)	
	Redirect		May 12, 2005 (1)	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Ken Coates *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, historian	May 16, 2005	12
	Cross – BC		May 16, 17, 18, 19, 2005 (4) June 7, 8, 9,10, 2005 (4)	
	Cross – Canada		June 10, 20, 24, 2005 (2) July 4, 5, 2005 (2)	
	Redirect		July 5, 2005	
Lloyd Myers *Heather Mahony*	Examination in Chief	Elder, tradition and history	May 30, 2005	2
	Cross – BC		May 30, 31, 2005 (2)	
	Cross – Canada		May 31, 2005	
	Redirect			
Thomas Billyboy *Gary Campo*	Examination in Chief	Elder, tradition and history	June 1, 2, 2005 (2)	3.5
	Cross – BC		June 2, 3, 6, 2005 (1.5)	
	Cross – Canada		June 6, 2005	
	Redirect		June 6, 2005	
Elizabeth Jeff *David Robbins*	Examination in Chief	Elder, tradition and history	June 14, 2005	1
	Cross – BC		June 14, 2005	
	Cross – Canada			
	Redirect			
Thomas Billyboy	Cross-Canada	Elder, tradition and history	June 15, 2005	1

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Ken Coates	Cross -Canada	Expert, historian	June 20 and 24, 2005 (2)	4
			July 4 and 5, 2005 (2)	
Ceceilia Quilt *Gary Campo*	Examination in Chief Re-examination	Elder, tradition and history	October 6, 2005 (.5)	.5
	Cross-Canada			
John Dewhirst *Jack Woodward*	Examination in Chief	Expert, anthropology	October 11, 2005	5
Jack Woodward	Cross-Canada Re-Examination		October 12, 2005	
Jack Woodward	Examination in Chief		October 14, 2005	
	Cross-BC		October 18, 2005	
	Cross-BC		October 19, 2005	
			Total Days:	**231.5**

Reasons for Judgment of the Honourable Mr. Justice Hall:

[100] I have read in draft the reasons of Southin J.A. My colleague sets out much of the background factual material in the case, so I need not revisit the facts in great detail. As my colleague notes, there is also a helpful recitation of the background of this litigation contained in the judgment of Rowles J.A. in ***Xeni Gwet'in First Nations v. British Columbia*** (2002), 3 B.C.L.R. (4th) 231, 2002 BCCA 434.

[101] By a judgment of this Court delivered on 5 November 2001, ***British Columbia (Minister of Forests) v. Okanagan Indian Band*** (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647, Newbury J.A. ordered interim advance costs be paid on behalf of the applicant appellant Indian band to allow litigation started against them and other bands in the area by the Provincial Government to be defended. The appellant claimed logging rights in certain areas by reason of asserted aboriginal title. When the bands began to log, the Crown provincial sought and was granted injunctions to stop the logging pending a judicial determination of the aboriginal title issue. I understand that no trial has yet commenced involving the bands in the Okanagan. That litigation resembles this litigation in that an assertion of rights arising out of aboriginal title to land is at the heart of both cases. Although the Indian bands in ***Okanagan*** were defendants and the bands here are plaintiffs, I am of the view, as was Vickers J., that that circumstance is not a distinguishing feature between the cases. Newbury J.A. noted in her judgment at para. 10 that when she referred to costs she was using "the word 'costs' in the way it is usually used in the *Supreme Court Rules* and in litigation parlance - i.e., taxable costs described in R. 57." Her conclusion was thus expressed at para. 39:

> …I therefore propose to order that the Crown, in any event of the cause, pay such legal costs of the Bands as the Chambers judge orders from time to time in accordance with the following:
>
> > 1. This determination is in respect of costs as that term is used in the *Rules* (see para. 10 above), and not in respect of legal fees and disbursements. This is not a determination that counsel is to be appointed by the Province or paid by the Province, as appears to have been the case in *Spracklin v. Kichton* [2001] A.J. No. 990 (Q.B.). (To the extent that *Spracklin* diverges from my Reasons, I respectfully disagree with it.)
> >
> > 2. Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation.
> >
> > 3. Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose.
> >
> > 4. The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way.
> >
> > 5. If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these Reasons.

[102] Three weeks later, on 27 November 2001, Vickers J., after referring to the decision of Newbury J.A., made a ruling on costs in this case ((2001), 95 B.C.L.R. (3d) 371, 2001 BCSC 1641). He said:

> [35] I conclude that Canada and British Columbia must share equally in the payment of the plaintiffs' future costs. I use that term as it is

> found in the *Rules of Court*, Rule 58 and App. B, s. 7(1). I conclude that the taxing of accounts under Scales 1-5 would lead to an unjust result. Accordingly, I order the payment of all reasonable disbursements as agreed to by Canada and British Columbia or as approved on taxation. I order that interim legal fees be paid as increased costs at 50% of special costs. These accounts are to be paid as they are agreed to by Canada and British Columbia or as approved on taxation.
>
> [Emphasis added.]

[103] The order of this Court in ***Okanagan*** arising from the reasons of Newbury J.A. was appealed by the Crown provincial to the Supreme Court of Canada. In the Supreme Court of Canada, the case had been argued on 9 June 2003, and judgment was delivered on 12 December 2003, [2003] 3 S.C.R. 371, 2003 SCC 71. The Crown argued it was not appropriate for the Court of Appeal to have ordered interim costs payable in advance to fund the litigation on behalf of the bands. The Supreme Court of Canada, by a majority, sustained the order made by Newbury J.A. The minority considered that what was sought, what it termed an unprecedented order for interim costs, was not appropriate. The majority judgment of LeBel J. held that in certain instances it can be appropriate for a trial court to make an order for interim costs to fund significant litigation. He said at para. 38:

> The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be

> distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances" that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

[104] In the interval between the decision of Newbury J.A. *supra* and the decision of the Supreme Court of Canada in the ***Okanagan*** case, the case of ***Xeni Gwet'in First Nations v. British Columbia*** referred to above came on for hearing in this Court. That case was argued in May 2002 and was decided by this Court in July 2002. The Crown provincial sought in this proceeding to appeal from the aforementioned costs order of Vickers J. pronounced in November 2001. This Court found the legal situation in the case similar to and generally governed by the earlier decision of Newbury J.A. in ***Okanagan***. There was also a cross-appeal by the respondent band seeking a higher level of costs, 100% of special costs. This Court dismissed the appeal. Leave was granted by the Supreme Court of Canada to the Crown to appeal from the dismissal of this appeal on 14 November 2002. It was this appeal which was, on 12 January 2004, remanded by the Supreme Court of Canada to the trial judge to be dealt with in accordance with the decision in the ***Okanagan*** case.

[105] Soon after the dismissal of the ***Okanagan*** appeal, as my colleague notes, the Supreme Court of Canada remitted to the trial judge an appeal from the decision of this Court in the present litigation, the above-noted case of ***Xeni Gwet'in First Nations v. British Columbia***, to be decided in accordance with the decision in the

Okanagan case. Like my colleague, I find this order a bit puzzling because I should think the issue decided by the Supreme Court in ***Okanagan*** dispositive of this issue in the instant case. I should think that the order for remittance of the case was effectively a dismissal by the Court of the appeal by the Province from the judgment of this Court delivered in July 2002.

[106] A cross-appeal by the band in which the band sought a costs order at 100% of special costs, rather than the 50% of special costs ordered by Vickers J., was dismissed by this Court on 27 February 2004 - ***Xeni Gwet'in First Nations Government v. Riverside Forest Products Ltd.*** (2004), 237 D.L.R. (4th) 754 (*sub nom.* ***Xeni Gwet'in First Nations v. British Columbia***), 2004 BCCA 106. This cross-appeal had been argued concurrently with the appeal in May 2002, but was on reserve pending delivery of judgment in the appeal of ***Okanagan*** in the Supreme Court of Canada.

[107] That decision on the cross-appeal was not further appealed. The decision of this Court on the cross-appeal held that neither the provincial or federal governments had violated any constitutional duty to provide funding for the present litigation.

[108] In April 2004, pursuant to the order of remand by the Supreme Court of Canada, the issue of interim costs came on for hearing before Vickers J. On 6 May 2004, Vickers J. delivered reasons for judgment sustaining his original order. He ordered that "the funding order dated November 27, 2001 is continued without variation". Some two months later, in response to a renewed application for costs

which was filed in the trial court in June 2004, the present order sought to be appealed from was made by Vickers J.

[109] The Notice of Motion filed 1 June 2004, which led to the order of 16 July 2004, sought the following relief:

> 1. the percentage of special costs used for the calculation of increased costs be raised; and
>
> 2. until the parties enter into a new Accounts Administration Agreement for the purposes of calculating monthly fees advances prior to taxation, the Plaintiff will provide to the Defendants the number of hours worked multiplied by the appropriate hourly rates previously agreed to by the parties, and multiplied by the appropriate percentage. The Defendants will pay those monthly advances on receipt of the accounting from the Plaintiff, subject to taxation at the end of the case, or at a time agreed to by the parties.

[110] The Order granted by the trial judge on 16 July 2004, granted the following relief to the respondents:

> 1. Costs in advance be special costs;
>
> 2. Accounts are to be submitted on a monthly basis and paid equally by British Columbia and Canada;
>
> 3. If the parties are unable to agree upon hourly rates to be paid to those involved on the Plaintiff's litigation team, those rates are to be fixed by the Registrar;
>
> 4. There will be a holdback of 20% of all fees billed, pending final agreement on fees or a final taxation by the Registrar;
>
> 5. 100% of disbursements billed are to be paid. If there is disagreement concerning a disbursement then such disbursements are to be the subject of an interim taxation before the Registrar; and
>
> 6. The Orders sought by the Defendant, Her Majesty the Queen in Right of the Province of British Columbia are dismissed.

[111] The type of costs order sought before and granted by Vickers J. in November 2001 represents a recent development in the law. As my colleague notes, this type of order is conceptually new because hitherto when a court was being asked to address an issue as to special costs it was usually a retrospective exercise, as was for instance the case in ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 B.C.L.R. (2d) 309, 48 C.P.C. (2d) 74 (S.C.), affirmed as to the costs issue by this court in ***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1992), 73 B.C.L.R. (2d) 212, 8 C.P.C. (3d) 20 (C.A.). When speaking of "special costs" in this new regime, it seems to me that in order for the term to have a definable and most importantly, a workable meaning, it must refer to an estimate of that level of fees that a reasonable client would pay a reasonably competent solicitor for performing the task of conducting the litigation in hand. There are, of course, conceptual difficulties inherent in this novel procedure of interim costs because it is subject to the uncertainty of it being an exercise in prediction as opposed to being an assessment of past events. However, there is now clear authority for this procedure and the courts will have to make orders based on estimates of how matters will unfold in future litigation.

[112] The Supreme Court of Canada made it clear in the ***Okanagan*** case that orders of this type have to be crafted to ensure that concerns about access to justice are balanced against the need to encourage the efficient conduct of the particular litigation. The approach of Newbury J.A. in her judgment in this Court was endorsed by LeBel J. She had stated that all reasonable measures should be utilized to minimize costs and that unless the judge concludes that special costs are warranted,

costs ought to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation. I take it from these comments that she considered the usual order for interim costs would be a scale order. However, she went on to say that if the judge called upon to make such an order considered that it would result in injustice, special costs might be ordered. When she decided the case of ***Okanagan*** in 2001, it was not unusual for trial courts to order increased costs as a percentage of special costs. In this case, the trial judge in November 2001, concluding that setting interim costs at Scales 1-5 would not be just, ordered "that interim legal fees be paid as increased costs at 50% of special costs". That order endured from November 2001 to July 2004, although for a period of that time the parties had an agreement that the defendants would fund all reasonable disbursements and costs at the level of 61% of special costs. As my colleague notes in her reasons, the amount of money estimated in 2001 as necessary to fund the litigation on behalf of the plaintiffs, something under a million dollars, has to date in actual expenditure exceeded $10 million and the end is not nigh.

[113] The Supreme Court of Canada in sustaining the order of this Court in ***Okanagan*** decided that in this class of case, interim costs orders are permissible. However LeBel J. for the majority noted the need for caution and vigilance on the part of trial judges to ensure that spending not get out of hand. I observe that it may be doubtful whether the interim costs order of 16 July 2004, would be effective in this regard. LeBel J. said such orders had to take account of the interests of both plaintiffs and defendants. The latter will normally be a public body funded by taxpayers. This Court in its decision on the cross-appeal in early 2004 did not

interfere with the 50% order, although the decision seems to have chiefly dealt with constitutional considerations. The matter having been remitted to the trial judge, he again in May 2004 concluded that the extant costs order should continue.

[114] Having examined the material filed on the June motion and the transcript of the hearing before Vickers J. that resulted in the order of 16 July 2004, it seems to me that the application of the respondents to vary the order that had been in effect since November 2001 was predicated on the proposition that the amounts being paid to the lawyers for the plaintiff respondents did not suffice to satisfactorily maintain the financial health of the law firm acting for the plaintiffs in the case. The judge, however, expressly declined to consider that matter. He said at para. 15 of his reasons:

> I conclude that it would be wrong for me as the trial judge and wrong for the court to look at the economics of a law firm and the profitability of the work it is engaged in.

[115] With respect, I am in entire agreement with those comments of the learned trial judge. To require a judge hearing a case to undertake an economic analysis of a law firm engaged in the litigation for the purpose of fixing a fit scale of interim costs in this type of case would be both an invidious task and inappropriate. However, notwithstanding the trial judge's entirely reasonable decision to, as he put it, "decline to take such a leap", he went on to vary the long extant order from 50% of special costs as the measure of interim costs to 100% of special costs with a 20% holdback pending final taxation at the conclusion of the case. The basis for relief sought by the respondents hinged on the assertion that the financial viability of the law firm

employed in the litigation was being threatened by continuance of payment of interim costs fixed at the level of 50% of special costs. The trial judge made no finding on that issue since he declined to enter upon such an inquiry. That being so, I fail to see what basis existed in evidence for the trial judge to make the variation he ordered in July 2004.

[116] Having regard to the position the trial judge adopted concerning evidence about the financial circumstances of the law firm, there was nothing of substance different in fact before the judge in June and July than had existed in May of 2004 when, following the remand of the case from the Supreme Court of Canada, he decided to continue in force the interim costs order originally made by him in November 2001.

[117] Having regard to those circumstances, I consider it was an error in law for the trial judge in July 2004 to make the order from which this appeal is taken. Because I consider there was no proper basis established to require any alternation of the order of November 2001, I consider that this appeal should be allowed and that the order made by Vickers J. in November 2001 and confirmed by the order of May 2004 for payment of interim costs at the level of 50% of special costs should be reinstated effective as of the date of delivery of this judgment.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Mr. Justice Thackray:

[118] I have had the opportunity of reading the reasons for judgment of Madam Justice Southin and Mr. Justice Hall. My colleagues, based on different reasoning, are of the opinion that the order under appeal cannot be upheld.

[119] In the reasons for judgment of this Court in ***British Columbia (Minister of Forests) v. Okanagan Indian Band*** (2001), 95 B.C.L.R. (3d) 273 (C.A.), Madam Justice Newbury said at paragraph 39 that the "real challenge ... is to formulate an order that will provide the Bands with concrete assistance but which will not expose the Province to unreasonable or excessive costs." As to who should be asked to make an order for advance costs, she suggested that the case management judge would be the person "to ensure that the public purse is not extended beyond those bounds."

[120] On appeal to the Supreme Court of Canada, [2003] 3 S.C.R. 371, Mr. Justice LeBel for the majority dismissed the appeal, saying at paragraph 1:

> These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls.

Mr. Justice LeBel noted that the British Columbia Court of Appeal held that an order for interim advance costs should be made subject to conditions in the terms stated by Newbury J.A. He then said as follows at paragraph 41:

> ... 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.

[121] Mr. Justice Hall replicated the words of Mr. Justice LeBel in ***Okanagan Indian Band*** that it must be ensured that "ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance." However, as pointed out by my colleague, LeBel J. "made it clear ... that orders of this type have to be crafted to ensure that concerns about access to justice are balanced against the need to encourage the efficient conduct of the particular litigation."

[122] The order under appeal cannot, in my opinion, be said to be in keeping with the principle of "efficient conduct of the particular litigation". I would not presume to be able to ascertain at what level advance costs come into conflict with the principles set forth by the Supreme Court of Canada. However, I have no hesitation in saying that **an order that grants them at the level of "special costs", even with a 20% holdback, throws off the balance struck by *Okanagan Indian Band***. It is not open to this Court on this application to find that the trial is being conducted in less than an efficient manner, but it is not a subjective analysis that is required. Objectively, it cannot be said that to advance to a law firm the full amount of its legal fees in advance, without any requirement that they will be repaid should the client be unsuccessful, can lead to "efficient conduct." That is just not in the nature of human

endeavour. As said by Madam Justice Southin, the fundamental problem with the order under appeal "is that there is no incentive to economy. It is an open cheque."

[123] I would further note that, as said by Mr. Justice LeBel in ***Okanagan Indian Band***, an award of interim costs must not impose an unfair burden on the other party. The fact that in the case at bar it is the public purse that is bearing the burden does not detract from that principle. In ***Little Sisters Book & Art Emporium v. British Columbia (Commissioner of Customs & Revenue)*** (2005), 38 B.C.L.R. (4th) 288 (C.A.), the Court said that while the gay and lesbian communities had other priorities for their funds than the lawsuit in question, "so does the public purse." When the first advance cost order was made, the estimate from counsel for the plaintiff was that the fees and disbursement would range from a low of $410,850 to a high of $1,088,380. As noted by Madam Justice Southin, $6 million had been advanced by May 2004 and as of the hearing date of this appeal it was in excess of $10 million.

[124] The question as to whether this is an "unfair burden" must be considered. In my opinion to continue payments at the level provided for in the order under appeal would be an unfair burden.

[125] Were the case at bar about to be opened at trial, or indeed if it was in its early stages, I would agree with the result adopted by Madam Justice Southin. However, this trial has now been underway for three years and defence costs have been funded through generous court orders and agreements. To at this stage cut this

back to party and party costs would be dramatic and might affect the balance that Mr. Justice LeBel spoke of in ***Okanagan Indian Band***.

[126] Further, as noted by Mr. Justice Hall, while it was said by this Court in ***Okanagan Indian Band*** that the usual order would be a scale order, Mr. Justice Vickers held in 2001 that setting interim advance costs on a party and party scale would not be just.

[127] Therefore, in the circumstances prevailing in the case at bar, I agree with the result suggested by Mr. Justice Hall.

"The Honourable Mr. Justice Thackray"

WILLIAM (XENI GWET'IN FIRST NATIONS GOVERNMENT)
V.
CANADA
WITNESS TESTIMONY

Name of Witness		**Witness, Nature of Evidence**	**Date**	**Number of Days**
Martin Quilt *David Robbins*	Maps done during video deposition By Video Deposition	Elder	November 21 and 26, 2002 (2) November 20, 22, 25, 26, 27, 28, 29, 2002 (7) December 2, 3, 9, 10 & 11, 2002 (5)	14
Chief Roger William *David Rosenberg* *Jack Woodward* *Sean Nixon*	Examination in Chief Cross -Canada	Plaintiff representative	September 9-12, 2003 (4) September 15-19, 2003 (5) September 22-25, 2003 (4) October 7-10, 2003 (4) October 14-16, 2003 (3) October 20-24, 2003 (5) November 3-4, 2003 (2) November 12, 2003 (1) January 5, 2004 (1)	45
	Cross – BC Cross-Canada		January 5-9, 2004 (5) January 13-16, 2004 (4) February 2-3, 2004 (2) February 11-13, 2004 (3)	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
	Cross – Canada		February 16 and 17, 2004 (2)	
	Redirect		February 17, 2004	
Francis Setah *David Robbins*	Examination in Chief	Elder, tradition and history	November 17-20, 2003 (4) November 24-27, 2003 (4) December 1-3 & 4, 2003 (3)	13
	Cross – BC		December 8, 2003 (1)	
	Cross – Canada		December 9, 2003 (1)	
	Redirect		December 9, 2003	
Minnie Charleyboy *Gary Campo*	Examination in Chief	Elder, tradition and history	March 1-5, 2004 (5) March 8-11, 2004 (9/10 pm) (4) March 22, 24 and 25, 2004 (3) March 26, 29, 2004 (2)	18
	Cross – BC		March 29-31, 2004 (2)	
	Cross – Canada		March 31, 2004 (1) April 1, 2004 (1)	
	No redirect			
Theophile Ubill Lulua *David Robbins*	Examination in Chief	Elder, tradition and history	April 1-2, 2004 (2) April 13, 2004 (1)	5
	Cross – BC		April 13, 2004 (1)	
	Cross – Canada		April 14 & 15 2004 (1)	
	Redirect		April 15, 2004 (after noon recess)	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. R. G. Matson	Examination in Chief	Expert, archeology	May 10, 2004 (1)	3
Paul Rosenberg (Murray Browne)	Cross (on qualifications) – BC		May 10, 2004	
	Cross – BC		May 10, 2004	
	Cross (on qualifications) – Canada		May 10, 2004	
	Cross – Canada		May 11 and 12, 2004 (2)	
	Redirect		May 12, 2004	
Francis William *Gary Campo*	Examination in Chief	Elder, tradition and history	May 25, 2004	2.5
	Cross – BC		May 25 and 26, 2004 (2)	
	Cross – Canada		May 26 and 27, 2004	
	Redirect		May 27, 2004 (.5)	
David Lulua *Sean Nixon*	Examination in Chief	Elder, tradition and history	September 7, 2004	1
	Cross – BC		September 7, 2004	
	Cross – Canada		September 7, 2004	
	Redirect		None	
Doris Lulua *Heather Mahony*	Examination in Chief	Elder, tradition and history	September 8, 2004	2
	Cross – BC		September 8, 2004/September 9, 2004	
	Cross – Canada		September 8, 2004/September 9, 2004 (2)	
	Redirect		September 9, 2004	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. Hudson *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, anthropology	September 16, 2004	4
	Cross – BC		September 16, 2004	
	Cross – Canada		October 5, 2004	
	Cross - Canada		October 6, 2004	
	Cross - Canada		October 7, 2004	
Annie Williams *Gary Campo*	Examination in Chief	Elder, tradition and history	September 20, 2004 (1)	3
	Cross – BC		September 20, 2004	
	Cross – Canada		September 21 & 22, 2004 (2)	
	Redirect		September 22, 2004	
Mabel William *David Robbins*	Examination in Chief	Elder, tradition and history	October 4, 2004	1
	Cross – BC		October 4, 2004	
	Cross – Canada		October 4, 2004	
	Redirect		October 4, 2004	
Harry Setah *Heather Mahony*	Examination in Chief	Elder, tradition and history	October 12-15 2004 (4)	6
	Cross – BC		October 18, 19, 2004 (2)	
	Cross – Canada		October 19, 2004	
	Redirect		October 19, 2004	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Norman George Setah	Examination in Chief	Elder, tradition and history	October 19 – 22, 2004 (3.5)	15
Gary Campo			November 1-2, 2004 (2) November 4 (1/2), 8, 9, 18, 29, 30, 2004 (5.5) December 1, 6, 7, 2004 (3)	
	Cross – BC		December 7, 8, 2004 (1)	
	Cross – Canada		December 8, 2004	
	Redirect		December 8, 2004	
Brian Guy *Murray Browne*	Examination in Chief	Expert, forest hydrology	October 18, 2004	1
	Cross – BC		October 18, 2004	
	Cross – Canada		October 18, 2004	
	Redirect		October 18, 2004	
Clayton Apps *Murray Browne*	Examination in Chief	Expert, wildlife biologist	November 3-4, 2004 (2)	2
	Cross – BC		November 4, 2004	
	Cross – Canada		November 4, 2004	
	Redirect		November 4, 2004	
Julie Quilt *Heather Mahony*	Examination in Chief	Elder, tradition and history	November 5, 2004	1
	Cross – BC		November 5, 2004	
	Cross – Canada		November 5, 2004	
	Redirect			

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Dr. Nancy Turner *Murray Browne*	Examination in Chief	Expert, ethno botany	November 16 - 17, 19, 2004 (3)	4
	Cross – BC		November 17, 2005	
	Cross – Canada		November 17, 19, 2004	
	Redirect		December 9, 2004 (1)	
Dr. David Dinwoodie *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, anthropology	December 14, 2004 – December 15, 2004 (2)	7
	Cross – BC		December 15, 2004 – December 16, 2004 (1)	
	Cross – Canada		December 17, 2004 (1) January 10-12, 2005 (3)	
	Redirect			
Dr. Ken Brealey *Murray Browne*	Examination in Chief	Expert, geography	January 4,5, 7, 2005 (3)	10.5
	Cross – BC		January 31, 2005, February 3, 2005 (2)	
	Cross – Canada		January 13, 14 , 31, 2005 (2.5) March 10, 18, 2005 (2) April 15, 2005 (1)	
	Redirect		April 15, 2005	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
David Setah *Heather Mahony*	Examination in Chief	Councillor, tradition and history, role as community leader	January 17 - 21, 2005 (4.5) February 1, 2, 4, 7, 8, 9 (6)	15.5
	Cross – BC		February 11, 15, 16, 28, 2005 (4)	
	Cross – Canada		March 1, 2005 (1)	
	Redirect		March 1, 2005	
Joseph William *Gary Campo*	Examination in Chief	Elder, tradition and history	February 17, 2005	1
	Cross – BC		February 17, 2005	
	Cross – Canada		February 17, 2005	
	Redirect		February 17, 2005	
Ubil Hunlin *David Robbins*	Examination in Chief	Elder, tradition and history	March 7, 8 , 9, 14, 2005 (4)	4.5
	Cross – BC		March 14, 2005	
	Cross – Canada		March 14, 15, 2005	
	Redirect		March 15, 2005 (.5)	
Gilbert Solomon *Gary Campo*	Examination in Chief	Elder, tradition and history	March 15, 2005 (.5) March 16, 17, 2005 (2) April 5, 6, 2005 (1.5)	6
	Cross – BC		April 6, 7, 8 2005 (2)	
	Cross – Canada		April 8, 2005	
	Redirect		April 8, 2005	
Mike Demarchi *Paul Rosenberg (Murray Browne)*	Examination in Chief	Expert, biology	April 4, 2005	1

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
	Cross – BC		April 4, 2005	
	Cross – Canada		April 4, 2005	
	Redirect		April 4, 2005	
Hamar Foster *Murray Browne*	Examination in Chief	Expert, legal historian	April 11, 12, 2005 (2)	4
	Cross – BC		April 12, 13, 2005	
	Cross – Canada		April 13, 2005 (1)	
	Redirect		April 13, 2005 April 18, 2005 (1)	
Chief Irvin Charleyboy *David Robbins*	Examination in Chief	Elder, tradition and history	April 18, 2005 (.5) April 19, 20, 2005 (2)	7.5
	Cross – BC		April 21, 22, 2005 (2) May 3, 2005	
	Cross – Canada		May 3, 5, 6, 2005 (3)	
	Redirect		May 6, 2005	
Christine Cooper *Gary Campo*	Examination in Chief	Elder, tradition and history	May 2, 2005	1
	Cross – BC		May 2, 2005	
	Cross – Canada		May 2, 2005	
	Redirect		May 2, 2005	
Patricia Guichon *Heather Mahony*	Examination in Chief	Elder, tradition and history	May 9 – 11, 2005 (3)	4
	Cross – BC		May 9, 2005 (Evening)	
	Cross – Canada		May 9, 11, 12, 2005 (Evening)	
	Redirect		May 12, 2005 (1)	

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Ken Coates *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, historian	May 16, 2005	12
	Cross – BC		May 16, 17, 18, 19, 2005 (4) June 7, 8, 9,10, 2005 (4)	
	Cross – Canada		June 10, 20, 24, 2005 (2) July 4, 5, 2005 (2)	
	Redirect		July 5, 2005	
Lloyd Myers *Heather Mahony*	Examination in Chief	Elder, tradition and history	May 30, 2005	2
	Cross – BC		May 30, 31, 2005 (2)	
	Cross – Canada		May 31, 2005	
	Redirect			
Thomas Billyboy *Gary Campo*	Examination in Chief	Elder, tradition and history	June 1, 2, 2005 (2)	3.5
	Cross – BC		June 2, 3, 6, 2005 (1.5)	
	Cross – Canada		June 6, 2005	
	Redirect		June 6, 2005	
Elizabeth Jeff *David Robbins*	Examination in Chief	Elder, tradition and history	June 14, 2005	1
	Cross – BC		June 14, 2005	
	Cross – Canada			
	Redirect			
Thomas Billyboy	Cross-Canada	Elder, tradition and history	June 15, 2005	1

Name of Witness		Witness, Nature of Evidence	Date	Number of Days
Ken Coates *David Rosenberg (Murray Browne)*	Examination in Chief	Expert, historian	May 16, 2005	12
	Cross – BC		May 16, 17, 18, 19, 2005 (4) June 7, 8, 9,10, 2005 (4)	
	Cross – Canada		June 10, 20, 24, 2005 (2) July 4, 5, 2005 (2)	
	Redirect		July 5, 2005	
Lloyd Myers *Heather Mahony*	Examination in Chief	Elder, tradition and history	May 30, 2005	2
	Cross – BC		May 30, 31, 2005 (2)	
	Cross – Canada		May 31, 2005	
	Redirect			
Thomas Billyboy *Gary Campo*	Examination in Chief	Elder, tradition and history	June 1, 2, 2005 (2)	3.5
	Cross – BC		June 2, 3, 6, 2005 (1.5)	
	Cross – Canada		June 6, 2005	
	Redirect		June 6, 2005	
Elizabeth Jeff *David Robbins*	Examination in Chief	Elder, tradition and history	June 14, 2005	1
	Cross – BC		June 14, 2005	
	Cross – Canada			
	Redirect			
Thomas Billyboy	Cross-Canada	Elder, tradition and history	June 15, 2005	1