Date: 2014 10 20
Docket: S-1-CV-2008 000178

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMMISSIONER OF THE NORTHWEST TERRITORIES
Plaintiff/Defendant by Counterclaim

-and-

CLEM PAUL, ON HIS OWN BEHALF AND ON BEHALF OF THE TREATY 11 MÉTIS
Defendant/Plaintiff by Counterclaim

-and-

ATTORNEY GENERAL OF CANADA
Defendant by Counterclaim

Application seeking advance payment of costs pursuant to Rule 643 of the *Rules of the Supreme Court of the Northwest Territories*.

Heard at Yellowknife, NT, on February 24 - 26, 2014.

Reasons filed: October 20, 2014.

REASONS FOR JUDGMENT OF THE
HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Commissioner: Sarah Kay
Counsel for Clem Paul and the
Treaty 11 Métis: Kenneth Staroszik
Counsel for the Attorney General
For Canada: Andrew Fox

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REASONS FOR JUDGMENT ON APPLICATION FOR ADVANCE COSTS

[1] The applicants, Clem Paul and the Treaty 11 Métis, seek payment of costs in advance from the other parties to this action, pursuant to Rule 643 of the *Rules of the Supreme Court of the Northwest Territories*. The respondents on this application are the Commissioner of the Northwest Territories ("the Commissioner") and the Attorney General of Canada ("Canada").

[2] Rule 643 provides that the Court has discretion as to awarding costs and the party by whom they are to be paid and costs may be dealt with at any stage of an action or a proceeding before the entry of judgment.

[3] For the reasons that follow, I have decided that the application for advance costs must be dismissed.

Background

[4] This litigation began when the Commissioner brought proceedings in trespass to compel Mr. Paul to remove a cabin he had built without permission on land near Yellowknife which is controlled and administered by the Commissioner pursuant to the *Commissioner's Land Act*, R.S.N.W.T. 1988, c. C-11.

[5] Mr. Paul defends the proceedings by asserting that he has rights to the land in question and is therefore not trespassing. He pleads that the Commissioner's right to control and administer the land is subject to the Treaty 11 rights of the "Treaty 11 Métis". He claims to be a member of the Treaty 11 Métis and to represent them in this action. In their counterclaim against the Commissioner and Canada, Mr. Paul and the Treaty 11 Métis plead that Canada's purported delegation to the Commissioner of the administration and control of lands which include the land the cabin is on, is also subject to the rights of the Treaty 11 Métis. The counterclaim seeks a number of declarations as to the rights, titles and interests of Mr. Paul and the Treaty 11 Métis, including the right to land, and damages for breach of those rights.

[6] The Treaty 11 Métis as described by Mr. Paul are members of French Métis families who settled in the North Slave Region and later signed Treaty 11 at Fort Rae in 1921 and 1922, and their descendants. Mr. Paul claims that the Treaty 11 Métis are a distinct aboriginal society of people.

[7] The Commissioner and Canada take the position that Mr. Paul is precluded from asserting Treaty 11 rights by certain provisions of the *Tłı̨chǫ Land Claims and Self Government Agreement*, a land claim agreement approved and given the force of law by the *Tłı̨chǫ Land Claims and Self-Government Act*, S.C. 2005, c. 1 (the "Tłı̨chǫ Agreement"). In addition, they do not agree that there is a distinct Métis society with Treaty 11 rights. They also say that Treaty 11 did not create any title or right to land for individuals.

[8] Mr. Paul has compiled an extensive and fascinating history of his family, the people he calls the Treaty 11 Métis, and events surrounding the signing of Treaty 11. He has amassed a large library of historical documents and references. The respondents take the position that much of the historical information he has presented is untested and should not simply be accepted as fact.

[9] The Commissioner originally commenced proceedings in 2006 pursuant to the *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25 and the *Commissioner's Land Act*, R.S.N.W.T. 1988, c. C-11, to deal with Mr. Paul's

alleged trespass. Ultimately, those proceedings were discontinued on consent and replaced by the within action in civil trespass in 2008. The parties have not yet had discovery of documents or examinations for discovery. The time has been taken up with pleadings and affidavits and other material in support of an application for trial of an issue, to which I will refer further on, and this application for advance costs.

The test for an award of advance costs

[10] The parties agree that the test that governs in deciding whether to grant advance costs is set out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 and *Little Sisters Book and Art Emporium v. Canada (Commissioners of Customs and Revenue)*, [2007] 1 S.C.R. 38. Pursuant to the test, an applicant for advance costs has the onus of establishing all of the following three elements (paragraph 40, *Okanagan*):

> 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.

[11] The fact that an applicant establishes all three elements does not, however, end the inquiry. The Court retains discretion to determine whether advance costs should be ordered because such an award is exceptional and is to be granted with caution, as a last resort: *Little Sisters*, paragraph 36.

[12] Normally, a successful party only recovers costs from an unsuccessful party after the case has been heard and decided. With advance costs, the party applying for same is asking the court to cause the opposing party to pay before any decision has been made on the merits of the case. This is why the requirements for the exercise of the court's discretion are so strict and such costs are to be awarded only exceptionally. In a case like this one, the need to provide accountability for the use of public funds is another reason to exercise caution.

Positions of the Parties

[13] Mr. Paul submits that this is an exceptional case for which the Court should grant advance costs. He submits that he has satisfied all three branches of the *Okanagan* test on the evidence. One aspect of his submission is that litigation with the Crown is always more costly and he points to certain circumstances which, he says, amount to roadblocks put up by Canada that have delayed or impeded the progress of this case.

[14] The Commissioner and Canada oppose a grant of advance costs. They take the position that Mr. Paul has not satisfied any of the three requirements of the *Okanagan* test. They say that he has significantly expanded the issues in the case beyond what began as a trespass action.

Application of the *Okanagan* Test to this Case

1. Impecuniosity of the Applicants

[15] This branch of the test requires that the party seeking advance costs show that he genuinely cannot afford to pay for the litigation and that no other realistic option exists for bringing the issues to trial.

[16] Mr. Paul submits that the trial in this case is likely to take six to nine months of court time at a cost of $3,000,000.00 to $5,000,000.00. He says that he and those he represents are not able to finance the litigation, nor is it reasonable to think that they could do so at that cost. He asks that advance costs of half the projected amount be awarded. Alternatively, he says that the Court should consider severing issues relating to the applicability of the Tłı̨chǫ Agreement to him and the Treaty 11 Métis and granting advance costs so that those issues can be determined.

[17] Mr. Paul is a welder by trade and owns a company engaged in that business. In recent years he has sustained various injuries which he says have slowed him down. He has not filed income tax returns for the last few years, but estimates his annual personal income to be in the range of $80,000.00 to $110,000.00. The Commissioner takes the position that the figures provided indicate that it is potentially higher than that, possibly $250,000.00. Without tax returns and notices of assessment, the precise figures cannot be ascertained.

[18] Mr. Paul has few assets, consisting of a truck and a recreational vehicle, both of which he still owes money on. In 2013 he had a RRSP balance of approximately $50,000.00.

[19] Counsel for Mr. Paul has been working on this case for years and is said to be owed $200,000.00 for expenses and over $2,000,000.00 in unbilled fees. There is no contingency agreement in place, and counsel for Mr. Paul submitted that such an agreement would not be realistic, because this is not a damages claim. I note, however, that damages are claimed in the counterclaim and that in cross-examination on his affidavit, Mr. Paul indicated that he expects an award of damages at the end of this case, from which he will pay his lawyer (Transcript filed February 14, 2014, pages 12 and 13). Therefore, although there is no contingency agreement in place, the arrangement Mr. Paul has with his counsel is similar to such an agreement. There is no indication that his counsel will cease to act in this lawsuit if advance costs are not granted.

[20] Mr. Paul says that he has also incurred thousands of dollars to travel to meet with his Calgary-based counsel and that he has paid over $25,000.00 from his own pocket, mostly in fees and expenses for historical research.

[21] Almost no information has been provided about the other members of the Treaty 11 Métis. Mr. Paul says that they are approximately 200 people, or 40 heads of households, all of whom are related to him. He refuses to disclose their names and assets at this time because, he says, the Commissioner and Canada will harass them or otherwise discourage them from supporting this lawsuit. He has not, however, provided any evidence to substantiate this assertion, making it nothing more than speculation.

[22] Mr. Paul describes the other Treaty 11 Métis as not wealthy, but says a few have small businesses or good jobs. He has not made efforts to canvass them for funds for this litigation and none have made any financial contribution. He says that some offered him a small number of air mile program points.

[23] Mr. Paul says that some time ago, approximately $12,000.00 to $15,000.00 was raised through fundraising at Yellowknife's Caribou Carnival.

[24] In the earlier years of this dispute, Mr. Paul did seek and obtain some funding. In 2007 the City of Yellowknife provided, from funding it received, just over $200,000.00 to the Yellowknife Métis Council, of which Mr. Paul was then president. It was used for historical research for the litigation. The Yellowknife Métis Council has also contributed about $13,000.00 yearly and Mr. Paul expects

that it will continue to do so. Early on, a donor lent Mr. Paul some money for the case, which he paid back. The donor is said not to be in a position to make any further loans.

[25] Mr. Paul also contacted a number of Métis organizations over the years. He did not submit formal applications to them, but says he was told they had no money available except for their own people. Approximately seven years ago he spoke with someone in the Government of the Northwest Territories about the Aboriginal Rights Court Challenges Program, but was told that it offered only a one time grant of $5000.00 for litigation already in progress. Since this litigation was not in progress at the time, Mr. Paul did not pursue the matter.

[26] Mr. Paul has not applied for a loan from any bank or other institutional lender because, in his words, "Who in their right mind would lend me money for that?".

[27] The first issue relating to impecuniosity is whether Mr. Paul has shown that he genuinely cannot afford to pay for this litigation. Considering his income and assets and what he already owes his counsel, it seems unlikely that he personally can afford the estimated costs of this litigation, or even half that amount. However, he has not provided the amount of detail or material, such as income tax returns, that is needed to satisfy the Court in that regard.

[28] A related and even more significant problem is the lack of detail about the Treaty 11 Métis. Mr. Paul asks the Court to accept his word that none of them can afford to contribute to the litigation, yet refuses to provide any evidence to verify that. I find his explanation for that refusal unpersuasive as it is not supported by any evidence. The refusal to provide information about the members of the Treaty 11 Métis and their assets is particularly of concern because the applicants seek public funds. In this regard, I adopt what was said in *Traverse et al. v. Government of Manitoba and Attorney General of Canada*, 2013 MBQB 150 (especially paragraphs 40 and 53). There must be scrupulous disclosure of the financial position of the party seeking advance costs so that a court's decision to grant those costs from the public purse demonstrates to the public why such an unusual order is necessary. In this case, the Court must not be left to guess in a vacuum or to speculate as to the financial situation of the Treaty 11 Métis members, or how many such members there are. Nor should the Court simply rely on what one individual says about the financial situation of others; it has to decide for itself on evidence and that evidence has not been provided in this case.

[29] Mr. Paul submits, however, that advance costs may be granted even without evidence of impecuniosity. One of the cases he relies on is *Daniels et al. v. Her Majesty the Queen*, 2011 FC 230. In that case, the plaintiffs sought advance costs in an action for a declaration that Métis and non-status Indians are "Indians" for purposes of s. 91 of the *Constitution Act*. There was no evidence of impecuniosity of the four individual plaintiffs, but extensive evidence as to the poor financial condition of the Congress of Aboriginal Peoples, which was also a plaintiff. There were also factors in that case that distinguish it from this one. Substantial government funding had already been granted but was running out and the plaintiffs, on the eve of trial, did not yet have an answer as to whether it would be renewed. The Court noted that the action was like a class action: if the plaintiffs were successful on the merits of the case, 200,000 people could benefit. The amount the plaintiffs were seeking as advance costs was much less than what had already been contributed from the public purse. For these reasons, I find the situation in *Daniels* quite different from the instant case.

[30] Mr. Paul also relies on *Deans v. Tkachuk*, 2005 ABCA 368. In that case, some members of a union sued on behalf of beneficiaries of a pension plan, alleging breach of fiduciary duty on the part of the plan administrator and the trustees. Those who sued sought to have their interim legal costs paid from the pension fund. The trial judge found that they had established personal impecuniosity, but denied interim costs because they had not canvassed all the members of the plan for a financial contribution to the litigation.

[31] On appeal, the Alberta Court of Appeal held that there was no need for the plaintiffs to canvass other members of the plan, because on the evidence, a canvass would be futile as most members of the plan were not dissatisfied with the trustees. The Court also viewed the issue as one of notice to class members in a representative action and found that at the time the proceeding arose, notice was not required. Therefore, responsibility for the costs of the action would fall on the class representatives and since they had established personal impecuniosity, that was sufficient.

[32] The lack of evidence as to who the Treaty 11 Métis are distinguishes this case from *Deans*, where the persons the plaintiffs were representing - the members of the pension plan - were readily ascertainable. Another distinguishing factor is that the costs were to come out of the pension fund, not from public funds. In my view, since public funds would be the source of the advance costs if granted in this case, there is an onus on Mr. Paul to canvass those he says are the Treaty 11 Métis to determine not only how much, if anything, they are able to contribute to this litigation, but also to determine whether they are supportive of the litigation. I will

revisit the latter issue further on. The required transparency is not served when Mr. Paul simply asks the Court and the public to accept his word that the Treaty 11 Métis cannot make some contribution to this case and refuses to identify them, with the result that no independent assessment of their ability to contribute can be undertaken.

[33] The kind of evidence that Mr. Paul has not provided was provided in *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418, where advance costs were ordered for the trial of one threshold issue. In that case, sixty registered trappers challenged logging permits issued by the Minister of National Resources, alleging that the permits infringed their treaty rights. They sought advance costs and leave to continue the action on behalf of all trappers from their community. The cost of the litigation was estimated at $2.8 million. The court was presented with detailed and unchallenged evidence that the community as a whole was impecunious as well as detailed disclosure of the assets and means of members of the community who were better off and might have been able to contribute.

[34] Although the judge hearing the application for advance costs in *Keewatin* held that on the evidence only a handful of the members of the community could contribute a modest amount to fund the litigation, and that they should not be expected to exhaust all their assets for the benefit of the entire group before a finding of impecuniosity could be made, she also stated that it might be reasonable to expect some contribution by individual members if a substantial number could, without hardship, make a significant contribution. Of course, a court cannot determine whether that is the case in the absence of evidence such as was provided in *Keewatin*.

[35] In another case where advance costs were sought and granted only for the trial of a threshold issue, extensive financial disclosure was made and there was documentation of efforts to obtain funding: *Chief John Fletcher v. Canada (Attorney General)*, 2011 ONSC 5196.

[36] The Manitoba Court of Appeal overturned an advance costs award on the basis of insufficient evidence of impecuniosity where counsel had simply made the submission that half of the group involved could not contribute financially to the litigation, which is similar to what Mr. Paul has done in this case with regard to the other Treaty 11 Métis: *Re Dominion Bridge (Bankrupt), 2004 MBCA 180.* The point is that the Court must make that determination based on financial disclosure and evidence.

[37] Mr. Paul's admission that none of the Treaty 11 Métis have contributed financially to this litigation and that he has not sought any contribution from them, also raises the concern that he does not have any other support from them for this litigation. The situation is similar to that in *Gitxsan First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 1531; the evidence is as consistent with the inference that the other members of the Treaty 11 Métis are unwilling to contribute to the legal expenses, as with the inference that they are unable to contribute.

[38] Because of the lack of financial disclosure and because Mr. Paul has not satisfied the Court that obtaining assistance from the group he represents is not a realistic option, I am not satisfied that he has shown that he and the other applicants are impecunious. Although that is sufficient to dispose of the application, I will go on to the other considerations required by the *Okanagan* test.

2. Merits of the Case

[39] This branch of the *Okanagan* test requires a finding that the claim to be adjudicated is *prima facie* meritorious, that it is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means: *Okanagan*, paragraph 40.

[40] In *Little Sisters*, the majority described this branch of the test as follows, at paragraph 51:

> ... the test requires something more than mere proof that one's case has sufficient merit not to be dismissed summarily. Rather, an applicant must prove that the interests of justice would not be served if a lack of resources made it necessary to abort the litigation. The very wording of the requirement confirms that the interests of justice will not be jeopardized every time a litigant is forced to withdraw from litigation for financial reasons. The reason for this is that the context in which merit is considered is conditioned by the need to show that the case is exceptional. This does not mean that the case must be shown to have exceptional merit; rather, it must be shown to have sufficient merit to satisfy the court that proceeding with it is in the interests of justice.

[41] The Court has to be wary of pre-judging the case. I understand the focus on the merits of the case to be related to the significance of the issues raised by the case.

[42] I go back to the fact that this case begins with the allegation that Mr. Paul is building a cabin on Commissioner's land without having obtained permission to do so. His defence to that action is that he does not need the Commissioner's

permission because he has a right to that land arising from Treaty 11, and therefore cannot be said to be trespassing on it. He has expanded on that by way of a counterclaim in which he and the group of people he styles as the Treaty 11 Métis claim Treaty 11 rights that they say they still have and that Canada has infringed and has purported to extinguish in certain provisions of the Tłı̨chǫ Agreement.

[43] The Commissioner and Canada say that Treaty 11 did not grant individuals rights to land. They also say that Mr. Paul is precluded from asserting any Treaty 11 rights by certain provisions of the Tłı̨chǫ Agreement. In the absence of any information about individual members of the Treaty 11 Métis, except that they are related to Mr. Paul, they are either in the same situation as Mr. Paul or their situation is unknown and their claims therefore incapable of being assessed.

[44] Mr. Paul has provided a great deal of historical information which, as I have noted above, the respondents point out is untested. Apart from proof of events that occurred long ago, however, the main issues raised by this case are the effect of the Tłı̨chǫ Agreement on any rights held by Mr. Paul; what rights, if any, he has under Treaty 11 that are relevant to his occupation of the land on which he has built his cabin; and what part the honour of the Crown plays in some of the events that have occurred.

[45] The Tłı̨chǫ Agreement was signed on August 25, 2003. The parties to it are the Tłı̨chǫ, who were represented by the Chiefs of the Dogrib Treaty 11 Council, the Dog Rib Rae Band and certain other First Nations Bands; the Government of the Northwest Territories; and the Government of Canada. The Tłı̨chǫ Agreement recites that the parties have negotiated the Agreement in order to define and provide certainty in respect of the rights of the Tłı̨chǫ relating to land, resources and self-government.

[46] The sections of the Tłı̨chǫ Agreement that are most relevant to the issue whether Mr. Paul's Treaty 11 rights have been extinguished or affected are as follows:

> 1.1.1 "Aboriginal people" means an Aboriginal people of Canada within the meaning of section 35 of the *Constitution Act, 1982*.
>
> "Tłı̨chǫ" means the Aboriginal people that,
>
> (a) in 1921, was comprised of the persons represented by Chief Monfwi, along with Headmen Jermain and Beaulieu, at the signing of Treaty 11 at Fort Rae on August 22, 1921;

(b) at the time of the ratification vote referred to in 4.2.1(b) was comprised of every person who

(i) was, at that time, a band member,

(ii) was of Aboriginal ancestry, resided in and used and occupied any part of Môwhì Gogha Dè Nîîåèè on or before August 22, 1921 and received Treaty 11 benefits,

(iii) was adopted as a child ...

(iv) was a descendant of a person described in (ii) or (iii); and

c) after the effective date, is comprised of all Tłı̨chǫ Citizens.

"Tłı̨chǫ Citizen" means a person whose name is on the Register.

"Tłı̨chǫ person" means a person

(a) of Aboriginal ancestry who resided in and used and occupied any part of Môwhì Gogha Dè Nîîåèè on or before August 22, 1921 and who received Treaty 11 benefits, or a descendant of such person;

(b) who is a band member, or a descendant of such person; or

(c) who was adopted as a child, ...

2.6.1 Except as provided in 2.10, the Tłı̨chǫ will not exercise or assert any Aboriginal or treaty rights, other than

(a) any right set out in the Agreement; or

(b) the Treaty 11 rights respecting annual payments to the Indians and payment of the salaries of teachers to instruct the children of the Indians.

2.6.2 A Tłı̨chǫ person who is not a Tłı̨chǫ Citizen will not exercise or assert any Aboriginal or treaty right held by the Tłı̨chǫ.

2.6.3 For greater certainty

(a) 2.6.1 prevents a Tłı̨chǫ Citizen from exercising or asserting any Aboriginal or treaty rights other than those referred to in 2.6.1(a) and (b); and

(b) 2.6.2 does not prevent a Tłı̨chǫ person who is not a Tłı̨chǫ Citizen from exercising or asserting any Aboriginal or treaty right held by another Aboriginal people of which that person is a member.

2.6.4 The purpose of 2.6.1 and 2.6.2 is

(a) to enable Tłı̨chǫ Citizens, the Tłı̨chǫ First Nation and the Tłı̨chǫ Government to exercise and enjoy all their rights, authorities, jurisdictions and privileges that are set out in the Agreement;

(b) to enable all other persons and governments to exercise and enjoy all their rights, authorities, jurisdictions and privileges; and

(c) to release all other persons and government of any obligation,

(i) to the Tłı̨chǫ and Tłı̨chǫ Citizens, in relation to any right that, under 2.6.1, is not exercisable or assertable, and

(ii) to any Tłı̨chǫ person who is not a Tłı̨chǫ Citizen, in relation to any Aboriginal or treaty right held by the Tłı̨chǫ

as if those rights did not continue to exist.

[47] Reference should also be made to s. 35 of the *Constitution Act, 1982*, which provides that "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada.

[48] Mr. Paul traces his Métis ancestry to and through his maternal grandmother, a Métis woman who took treaty at Fort Rae in 1921. He concedes that because of that, he is a "Tłı̨chǫ person" as that term is defined in subsection (a) in section 1.1.1 of the Tłı̨chǫ Agreement. He also comes within that definition for another reason, that being his membership in the Dog Rib Rae band at the time the Tłı̨chǫ Agreement was signed. He does not, however, come within the definition of "Tłı̨chǫ citizen" because his name was and is not on the Register as defined in the Tłı̨chǫ Agreement.

[49] Mr. Paul argues that the definitions in the Tłı̨chǫ Agreement are simply constructs; he argues that the Tłı̨chǫ Agreement is for persons of Dogrib ancestry, not Métis ancestry. He points to predecessor versions of the Agreement and also, for example, the Pronunciation Guide, where Tłı̨chǫ is shown as meaning "Dogrib". I doubt, however, that the Pronunciation Guide, which appears to be a separate document attached to the front of the Tłı̨chǫ Agreement, can be said to have any effect on the definitions section of the Agreement.

[50] Canada and the Commissioner say that unlike some other land claims agreements, the Tłı̨chǫ Agreement is a regional agreement, dealing not solely with a specific people, but with the descendants of people who lived in a certain area and took treaty. They say that the Tłı̨chǫ Agreement created a new treaty relationship for the descendants of all Aboriginal people who took treaty in the relevant region in 1921. The Treaty 11 rights of those descendants were replaced by the rights in the Tłı̨chǫ Agreement, except that pursuant to section 2.6.1(b), Treaty 11 rights respecting annual payments and payments of teachers' salaries may still be exercised or asserted.

[51] Canada and the Commissioner submit that section 2.6.2 of the Tłı̨chǫ Agreement ("A Tłı̨chǫ person who is not a Tłı̨chǫ Citizen will not exercise or assert any Aboriginal or treaty right held by the Tłı̨chǫ") precludes Mr. Paul, a Tłı̨chǫ person who is not a Tłı̨chǫ citizen, from asserting Treaty 11 rights.

[52] In response, Mr. Paul raises three arguments. First, he argues that sections 2.6.1 and 2.6.2 do not extinguish his Treaty 11 rights. He says that 2.6.1 means that the Tłı̨chǫ will not assert or exercise any Aboriginal or treaty rights other than the annual payments and payment of salaries of teachers. Under 2.6.2 he, Mr. Paul, will not exercise the rights just described that are held by the Tłı̨chǫ but can exercise other Treaty 11 rights. However, in my view that argument fails to take into account other provisions of the Tłı̨chǫ Agreement, specifically 2.6.4, which indicates that the rights provided in the Tłı̨chǫ Agreement were meant to replace all Treaty 11 rights except for those specified in 2.6.1. Therefore, the rights that 2.6.2 prevents Mr. Paul from exercising include all rights under Treaty 11.

[53] Another argument made by Mr. Paul is to the effect that the definition of Tłı̨chǫ in the Tłı̨chǫ Agreement is too wide and that other Aboriginal peoples, such as the Slavey, and their land, could be caught by it, although it is not at all clear that is the case because of the geographic aspect of the definition of Tłı̨chǫ. In any event, it is telling, in my view, that there is no indication that any other Aboriginal peoples support this litigation.

[54] The main argument made by Mr. Paul is really the crux of his case. He argues that he can assert Treaty 11 rights because he is Métis and therefore a member of "another Aboriginal people" as referred to in section 2.6.3(b) of the Tłı̨chǫ Agreement. Section 2.6.3(b) says that section 2.6.2 does not prevent a Tłı̨chǫ person who is not a Tłı̨chǫ citizen (therefore, Mr. Paul) from exercising or asserting any Aboriginal or treaty right held by another Aboriginal people of which that person is a member (emphasis added). Therefore, he says that 2.6.2 does not

prevent him from asserting the Treaty 11 rights held by the Métis, including a right to the land upon which he has built his cabin.

[55] Canada and the Commissioner say that because Mr. Paul identifies only one ancestor who enrolled in Treaty 11, his maternal grandmother, and because it is through her that he comes within the definition of "Tłı̨chǫ person", he cannot logically also rely on his connection to her to assert Treaty 11 rights as a member of "another Aboriginal people", that is, a member of the Métis. They say that logically, "another Aboriginal people" must be an Aboriginal people other than those defined as Tłı̨chǫ. They argue that the wording of 2.6.3(b) contemplates that a Tłı̨chǫ person may, in addition to being Tłı̨chǫ, be a member of another Aboriginal people; therefore, another Aboriginal people must be an aboriginal people other than the Tłı̨chǫ. Put another way, since Mr. Paul is Tłı̨chǫ for purposes of the Tłı̨chǫ Agreement, he cannot also be a member of another Aboriginal people for purposes of the same Agreement.

[56] Mr. Paul says that the interpretation proposed by Canada and the Commissioner would add words to 2.6.3(b) so that it would say that 2.6.2 does not prevent a Tłı̨chǫ person who is not a Tłı̨chǫ Citizen from exercising or asserting any Aboriginal or treaty right held by another Aboriginal people other than the Tłı̨chǫ of which that person is a member. He submits that to interpret it that way is not reasonable and not consistent with the honour of the Crown because it fails to protect his rights. He says that it is unfair that he is caught by the wide net cast by the definition of Tłı̨chǫ and Tłı̨chǫ person in the Tłı̨chǫ Agreement.

[57] In my view, however, the Tłı̨chǫ Agreement is clear and the only real issue is whether Mr. Paul can situate himself as a member of "another Aboriginal people". Because of the wording of 2.6.3(b), the other Aboriginal people must be one other than the Tłı̨chǫ, whose rights are now governed by the Tłı̨chǫ Agreement.

[58] The issue then becomes whether Mr. Paul cannot show that he is a member of another Aboriginal people because the other Aboriginal people he identifies (the Métis) are traced back to the same ancestor, his grandmother, who also brings him within the definition of "Tłı̨chǫ" under the Tłı̨chǫ Agreement. If that circumstance does not preclude him from relying on 2.6.3(b), the issue is whether he can prove that he is a member of an identifiable Aboriginal people, other than the Tłı̨chǫ, who have Aboriginal or treaty rights. Put another way, are the Treaty 11 Métis, of whom he claims to be a member, an Aboriginal people with Aboriginal or treaty rights?

[59] In relation to this, Mr. Paul raises certain positions or actions taken by the other parties, during and before these proceedings, that he says bring the honour of the Crown into question. He says that interpreting the Tłı̨chǫ Agreement as he proposes it should be interpreted - in such a way that he is not precluded from exercising the Treaty 11 rights he claims to hold as a Métis - would uphold the honour of the Crown.

[60] The honour of the Crown is a factor not to be overlooked or ignored. As stated in *R. v. Badger,* [1996] 1 S.C.R. 771, the honour of the Crown is always at stake in its dealings with Aboriginal people and interpretations of treaties and statutory provisions which have an impact upon treaty and aboriginal rights must be approached in a manner which maintains the integrity of the Crown. The honour of the Crown may be raised in relation to those rights, but also in relation to the conduct of the Crown and its agents in litigation where those rights are at issue: *Joseph et al v. Her Majesty the Queen*, 2008 FC 574, at paragraph 24.

[61] Mr. Paul raised two matters relating to the honour of the Crown. As he placed a great deal of emphasis on them, I will deal with them in some detail. They involve a representation made by Canada in a related case in the Federal Court, and an alleged contradiction in the position taken by Canada and the Commissioner earlier in this action.

(i) Did Canada breach an undertaking that Mr. Paul's rights, as the descendant of a Métis who signed Treaty 11, would be protected?

[62] In *Paul v. Canada*, [2003] 1 C.N.L.R., 107 (F.C.), Mr. Paul together with the North Slave Métis Alliance ("NSMA"), brought an action in the Federal Court against Canada, the Government of the Northwest Territories and the Dogrib First Nation. Paul and the NSMA claimed that they were not Dogrib, nor of Dogrib ancestry, but were instead descendants of historic Métis families, a distinct people with Treaty 11 rights who had occupied the North Slave Region. They claimed that they should be beneficiaries of a land claims settlement but had been excluded from the land claims and self-government negotiations that had led to an Agreement in Principle (a predecessor to the Tłı̨chǫ Agreement). They took the position that the Dogrib had no authority to negotiate on their behalf.

[63] In the Federal Court action, Mr. Paul and the NSMA sought an injunction to restrain the defendants from taking further steps toward completion and implementation of a final agreement.

[64] The defendants in the Federal Court action did not recognize Mr. Paul and the NSMA as a separate and distinct aboriginal people or community with rights to land in the North Slave Region. The defendants took the position that Mr. Paul and the NSMA would have to obtain judicial recognition of their status. It should be noted that the NSMA, according to the material before me, no longer represents those whom Mr. Paul describes as the Treaty 11 Métis, the latter being a smaller group of people.

[65] The draft final agreement that was before the Federal Court included a clause 2.7.1(b), which said that no provision in the agreement shall be construed to affect any treaty right of any aboriginal peoples other than the Dogrib First Nation or any aboriginal rights under s. 35 of the *Constitution Act, 1982* for any aboriginal peoples other than the Dogrib First Nation. The Dogrib First Nation was defined as the Dogrib Citizens who in turn were those band members who apply for citizenship and are placed on the Register.

[66] In dismissing the claim for an injunction, the presiding judge found that the Agreement in Principle and the draft final agreement were substantially the same. He stated (paragraphs 48 and 49):

> ... I accept the representations made to the Court by the counsel for the defendants the current draft will not change in substance and captures best how Canada, GNWT and the Dogrib Nation will structure their relationship. In particular, the clauses related to the protection of the rights of other Aboriginal peoples, will not be diminished in the Final Agreement.
>
> In its written memorandum to the Court Canada says this:
>
> Canada submits that the wording of any final agreement will be no less strong on this point than the wording of the Final Draft Agreement.
>
> This Court considers this statement by Canada as analogous to an undertaking.

[67] The Federal Court also held that the draft final agreement was not about settlement of the rights of the indigenous Métis in the North Slave Region, but rather settlement of the rights of the Dogrib Nation living primarily in the four Dogrib communities in the North Slave Region. It held that the persons represented by Mr. Paul and the NSMA were not forced to participate in the final agreement and were at liberty to pursue their action for recognition of their aboriginal rights and if successful, their rights would be recognized and the final agreement would be adjusted pursuant to section 2.7.1, the non-derogation clause in the draft agreement.

[68] How it came to be that the Tłı̨chǫ Agreement, which was signed in 2003, was changed to replace "Dogrib" with "Tłı̨chǫ" is not in the evidence before me. However, as the respondents point out, the definition of "Dogrib" in the various drafts of what would eventually become the Tłı̨chǫ Agreement included references to "Aboriginal ancestry" because it was known that not all members of the Dogrib Indian bands were descended from Dogrib people. In the Federal Court case, the defendants acknowledged that individual Métis settled in the North Slave Region and signed Treaty 11 but took the position that for purposes of land claims negotiations, any rights those Métis had were co-mingled with the rights of other Aboriginal people in that region (paragraph 15, *Paul* v. *Canada*). The draft of the final agreement that was before the Federal Court included a definition of "Dogrib" that was not tied to Dogrib ancestry, but included a person of Aboriginal ancestry who resided in the relevant area at the relevant time, or a descendant of such person (paragraph 51, *Paul* v. *Canada*), thus including Mr. Paul. What does appear to have been added only in the Tłı̨chǫ Agreement, as acknowledged by Canada in its brief, is the qualification "and received Treaty 11 benefits" in the definition of Tłı̨chǫ, which Canada says was done so as to redefine the treaty relationship between Canada and the Aboriginal people who descended from those who enrolled in Treaty 11 at Fort Rae in 1921.

[69] Mr. Paul asserts that he did not become aware of the change of wording to "Tłı̨chǫ" until well after the Tłı̨chǫ Agreement was signed. He submits that in the Federal Court case, Canada gave an undertaking to protect his rights and, if Canada's interpretation of the Tłı̨chǫ Agreement is correct, Canada has breached that undertaking by including him in the expansive definition of Tłı̨chǫ. Canada says that it did not give an undertaking, that instead it made a representation that the judge described as "analogous to" an undertaking, in other words, similar to an undertaking in certain respects (Oxford Concise English Dictionary). Canada says that in any event counsel in that case could not bind Parliament to enact legislation in a way different than it eventually did by way of the *Tłı̨chǫ Land Claims and Self-Government Act*, 2005, c. 1.

[70] Black's Law Dictionary 2014, 10th Edition, defines an undertaking as a promise, pledge or agreement. I conclude that the Federal Court Judge viewed Canada's representation not as a formal undertaking to the court, but as being similar to an undertaking, promise or agreement. The promise, however, was a conditional one. Only if Mr. Paul and the NSMA proved that they have the rights which they assert they have, would there be an effective remedy for the infringement of those rights in the land claim agreement that was close to finalization at the time of the injunction application.

[71] As it turned out, Mr. Paul and the NSMA did not pursue the Federal Court action or prove that they were a distinct group with Treaty 11 rights. They discontinued the action after the injunction application was unsuccessful.

[72] Are Mr. Paul and the Treaty 11 Métis in a materially different position now than they were in 2003? Canada and the Commissioner still do not concede that the Métis who signed Treaty 11 are a distinct group with Treaty 11 rights. They put Mr. Paul to the proof of that, just as they said they would in the Federal Court in 2003. What has changed is that they now say that on the definition of Tłı̨chǫ, Mr. Paul cannot establish that he has Treaty 11 rights because even if he proves that the Métis who signed Treaty 11 and their descendants are a distinct group with Treaty 11 rights, his connection to that group is traced through the same ancestor who brings him within the definition of a Tłı̨chǫ person under the Tłı̨chǫ Agreement. And logic says, according to Canada and the Commissioner, that he cannot be a member of both through the same ancestor. Thus they have added an additional argument to their original argument that Mr. Paul cannot prove his claims.

[73] There is insufficient evidence before me as to the reasons why the Federal Court action was discontinued, why those who negotiated the Tłı̨chǫ Agreement changed the definition of those it applies to from Dogrib to Tłı̨chǫ, and when the decision to do that was made, all of which may be relevant to whether the change in definition amounts to a breach of the representation made by the Crown. It is open to Mr. Paul to make the argument that the honour of the Crown requires, in the circumstances, an interpretation of the Tłı̨chǫ Agreement that does not deprive him of the rights he claims, notwithstanding the emphasis on the actual text that is given to modern treaty agreements, as described in *Moses v. Quebec (Attorney General)*, [2010] 3 C.N.L.R. 90 (S.C.C.). The argument may be weakened by the fact that he and the other plaintiffs in the Federal Court action did not pursue the matter and did not prove who they were or the rights they claim to have. In any event, the success of Mr. Paul's argument will still depend on whether he can prove membership in another Aboriginal people who have distinct rights. In all circumstances, I am not able to conclude that his argument about Canada's undertaking lends strength to the merits of his case.

(ii) <u>Are Canada and the Commissioner now taking a position contrary to that taken earlier in this action?</u>

[74] Mr. Paul submits that Canada and the Commissioner are taking a position on this application which is contrary to a position they took earlier in this action. He

says that the change in position has prolonged and complicated this matter. Canada and the Commissioner say that their position has not changed.

[75] In 2013, in this action, Mr. Paul made an application to have a question of law and some preliminary issues determined. These included the question whether section 2.6.2 of the Tłı̨chǫ Agreement extinguishes his right to assert his treaty and aboriginal rights under Treaty 11 and whether he is entitled to the benefit of the non-derogation clause that was in the 2001 draft Dogrib agreement and whether Canada is bound by the undertaking given in the Federal Court action.

[76] At the time of that application, according to the transcript filed, Canada took the position that the questions raised cannot be properly considered without the Court having the benefit of a full factual context presented through a trial.

[77] Canada did not then make the argument that as a matter of logic Mr. Paul cannot rely on section 2.6.3(b), that being the section of the Tłı̨chǫ Agreement that says that section 2.6.2 does not prevent a Tłı̨chǫ person who is not a Tłı̨chǫ Citizen from exercising or asserting any Aboriginal or treaty right held by another Aboriginal people of which that person is a member. When Mr. Paul's application to determine the preliminary issues came before this Court, the presiding judge sought confirmation from Canada that 2.6.2 would not be a bar to Mr. Paul asserting his rights as a member of another Aboriginal people; it would then become a question of proof as to whether there is another Aboriginal people and whether Mr. Paul is a member of that people. Counsel for Canada confirmed that is Canada's position and added that it would be open to Mr. Paul to show that he is a member of another Aboriginal people as that term is used in the Tłı̨chǫ Agreement and this would be a matter of evidence. Canada also took the view that he would not be able to prove that.

[78] The presiding judge also asked counsel for Canada to confirm that he was not taking the position that Mr. Paul is barred from asserting a claim that he is a member of another Aboriginal people, to which counsel replied that he was not saying that, and that a person can be a member of two different aboriginal peoples. Counsel for the Commissioner agreed with the position taken by counsel for Canada.

[79] On the basis of that discussion between counsel and the presiding judge, Mr. Paul's application for a trial of preliminary issues and a question of law was adjourned *sine die*.

[80] What the presiding judge was trying to do, as he stated, was to establish whether there was a clear cut question of law that could be set down for preliminary determination that would resolve the case. He determined that there was not, "Because Canada and the Commissioner have acknowledged that 2.6.2 would not be a bar if Mr. Paul can establish that he is a member of another Aboriginal people". Counsel for Canada agreed (page 26, Transcript of Proceedings on July 17, 2013).

[81] Now counsel for Canada says that there were many other issues on which evidence should be called and that accounts for the position he took then. But in my view his argument on this application clearly asks the Court to find there is no merit in Mr. Paul's claim because, Canada says, he cannot establish that he is a member of another Aboriginal people when the ancestor through whom he traces that heritage is the same ancestor who brings him within the definition of Tłı̨chǫ.

[82] I agree that there is a contradiction, or at least a change, in the position taken by Canada then and now, in the sense that Canada now makes an argument that may not require any evidence for its resolution, although in oral submissions counsel for Canada stated that he is not saying that Mr. Paul is precluded from trying to prove that he is a member of another Aboriginal people. Whether this invokes the honour of the Crown in a way that should affect interpretation of the Tłı̨chǫ Agreement is not something I need to decide on this application. The change in Canada's position simply highlights the complexity of this case. To what extent the change in position may have delayed these proceedings is unclear; from what I can tell, most of the intervening time has been taken up with preparation for this advance costs application.

[83] On balance, I do not find that the issues raised relating to the honour of the Crown are of much significance on the question whether the merits of this case are such as to satisfy the requirement that the case be of sufficient merit. Clearly, sections 2.6.2 and 2.6.3 of the Tłı̨chǫ Agreement pose a significant challenge to Mr. Paul's case.

[84] I turn now to two other aspects of the case that reflect on its merits. The first is the respondent's argument that even if Mr. Paul can establish that he still has and is entitled to exercise Treaty 11 rights, Treaty 11 does not include a right to land in severalty and therefore does not give Mr. Paul any right to the land his cabin is on.

[85] The land in question is at Prosperous Lake, approximately 15 kilometers north of Yellowknife, within an area that was set aside by the Crown in 1923 as a hunting and trapping preserve for the use of the Dogrib and Métis people of Fort

Rae. That area was known as the Yellowknife Game Preserve. In 1955, the Preserve was cancelled by the Northwest Territories Council, after authority for the preservation of game had been transferred to it. There is no evidence, however, that the setting aside of the Preserve granted any rights to individuals to own, reside or build on the land. Mr. Paul clearly asserts in his affidavit that his intention is to use the cabin he has built as his permanent residence, however that appears to be outside the purpose for which the Preserve was set aside. Furthermore, it is questionable whether the Preserve can be tied to any rights under Treaty 11 since it was created pursuant to the Game Ordinance, O.N.W.T. 1949, c. 12.

[86] Mr. Paul also relies on the provision of Treaty 11 wherein the Crown agreed to set aside reserves for each band that was a party to the Treaty. The reserves were described as not to exceed one square mile of land for each family. Mr. Paul asserts that this entitles the Treaty 11 Métis, assuming that they have Treaty 11 rights that they are not barred from exercising, to 128 acres per person. On that basis, he states that he selects his land at Prosperous Lake where he has built the cabin. However, he provides no legal basis for the assertion that he is entitled under Treaty 11 to select specific land.

[87] Another very significant issue is whether the Métis who took treaty at Fort Rae in 1921 did so as an identifiable group, separate from the Indian or Dogrib people who took treaty. The historical evidence suggests that the Métis received treaty benefits as individuals, or families, because they were, in the words used by the Treaty Commissioner at the time, "living the Indian way of life". At the time, the Métis could take scrip (money) or treaty. If they took treaty, the invitation to do so appears to have been on the basis that they were living as Indians.

[88] In his affidavit, Mr. Paul identifies four Métis persons who signed Treaty 11 in 1921 as individuals but also on behalf of their spouses and/or children, and one such individual who signed in 1922. All of those individuals were members of the same extended family, the Laffertys, and they included Mr. Paul's grandmother. Mr. Paul describes them as descendants of people he identifies as the Mountain Island Métis, which he alleges are a distinct people. It seems clear, however, that only some, but not all, the Mountain Island Métis participated in Treaty 11. Only certain individuals and their families participated. The historical records, for example, the Treaty Commissioner's Memorandum (Exhibit 529 to the Affidavit No. 1 of Clem Paul) and the Order in Council of April 12, 1921 (Exhibit 538), suggest that those individuals and families were invited to sign Treaty 11 as Indians, to obtain the same benefits and give up the same rights to land as Indians, rather than as a separate and identifiable Métis group.

[89] Whether, in those circumstances, the Métis who took treaty can be said to have done so as an identifiable group or collective, rather than individuals or a family, is a challenging question. This case does raise the issue of whether events that occurred reflect individual choices or actions rather than the actions of a distinct people. Mr. Paul acknowledges in his affidavit, for example, that at the time the Tłı̨chǫ Agreement was signed, some of the Treaty 11 Métis (in other words, some of the descendants of the individuals who signed Treaty 11) chose to become Tłı̨chǫ Citizens, thus adhering to the Tłı̨chǫ Agreement, and some chose not to. Similarly, Mr. Paul chose to become a member of the Dogrib Rae Band, even though he disclaims Dogrib heritage. And since he will not reveal the members of the Treaty 11 Métis, it is impossible to determine what effect their own circumstances may have on the determination whether there is or was an identifiable Métis group with Treaty 11 rights.

[90] All of this leads me to the conclusion that although Mr. Paul's case is arguable, there are a number of challenges and hurdles and it has not been shown to have merit or be exceptional in the sense required by *Okanagan* and *Little Sisters*. At the end of the day, what is at stake in this litigation is Mr. Paul's interest in building his cabin where he wishes. The other issues raised by the case are of great interest and may have great historical significance, but in terms of their practical effect they do not rise to the level of merit required for payment of advance costs from the public purse.

3. Public Importance

[91] The criterion that the case be of public importance means that the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. This requires a finding that there would be injustice to both the individual and the public if the case cannot be litigated because of lack of funds.

[92] Mr. Paul says that what is at stake in this case are the aboriginal and treaty rights of the group he calls the Treaty 11 Métis, and specifically their right to land. Canada and the Commissioner say that what is at stake is simply Mr. Paul's interest in building a cabin in a certain location. Canada points out that the only harm or prejudice alleged to have been suffered by Mr. Paul as a result of being unable to exercise the Treaty 11 rights he claims, is that he cannot build his cabin where he wants to build it.

[93] For the same reasons I have expressed on the issue of the merits of the case, I am unable to find that this case involves a matter of public importance. In my

view, the absence of independent evidence of any support from those said to be the Treaty 11 Métis casts doubt on whether the case is of public importance. The fact that Mr. Paul has refused to disclose the names and circumstances of the members of the Treaty 11 Métis means that the number of individuals who may be directly affected by this case cannot be verified. Counsel for Canada advised the Court that Canada gave Mr. Paul notice that it would ask the Court to draw an adverse inference regarding the existence of the members of the Treaty 11 Métis, yet he still refuses to disclose their names. Based on that circumstance, together with the fact that none of the members have come forward to support this litigation or make any financial contribution to it, Canada asks the Court to conclude that there is no one other than Mr. Paul who wants this litigation to go forward. That, in my view, is a reasonable inference.

[94] Mr. Paul also submits that there are several reasons why this litigation is of importance not only to the Treaty 11 Métis, but to others. Issues raised in this litigation which fall into this category are, according to Mr. Paul:

> 1. The impact on third parties, including the Tłı̨chǫ, of setting aside land for the Treaty 11 Métis, as described above;
>
> 2. The application of the non-derogation clause and the precedential value of a ruling on that for other land claims agreements with similar non-derogation clauses;
>
> 3. The nature of Métis treaty rights and whether Canada is taking the position that they are different from or inferior to treaty rights given to Indians;
>
> 4. The status of the Yellowknife Game Preserve, which was established in 1923 after Treaty 11 was signed and then unilaterally extinguished by the Territorial Council in 1955, and whether the Preserve created rights for the aboriginal people entitled to use it, as well as how those rights might impact third parties;
>
> 5. The status of Commissioner's Lands and whether they are subject to promises of land made by Canada that were outstanding at the time administration of the lands was transferred to the Commissioner.

[95] These are all issues of interest, historical and otherwise, and it is possible that this litigation would resolve or at least cast light on some of them, but the problem is that there is no evidence upon which the Court can find that their

resolution is of importance to anyone other than Mr. Paul. Canada and the Commissioner point out that Mr. Paul is not claiming that the Tłı̨chǫ Agreement should be set aside, rather he is saying that it does not apply to him and the other Treaty 11 Métis. Since no others have come forward to say how the Tłı̨chǫ Agreement affects them, or to assert a claim to land under Treaty 11, one can conclude that whether the Tłı̨chǫ Agreement does apply is of significance only to Mr. Paul.

[96] The size of the group that Mr. Paul says he represents is also relevant to the issue of public importance. On his evidence, the group is quite small – perhaps 200 people – and consists of individuals related to Mr. Paul.

[97] The number of individuals likely to be affected by resolution of the issues in a case is a relevant consideration in the sense that the more restricted the potential impact of the case, the less likely advance costs will be ordered to be paid from the public purse. In *Roberts v. Her Majesty the Queen*, 2011 TCC 205, advance costs were refused for income tax appeals launched by three individuals where 100 others could potentially be affected.

[98] As was pointed out in *Roberts*, cases where advance costs have been granted involved a much wider impact. The litigation in *Okanagan* involved power over forest resources in British Columbia in the context of materials to be used to build badly needed housing on the bands' reserves. These issues were described by the Court in *Okanagan* as profoundly important to all the people of British Columbia (at paragraph 46). *R. v. Caron*, 2007 ABQB 632 involved an attempted provincial repeal of French language rights and the possible invalidity of the province's statutes. *Daniels v. Her Majesty the Queen*, referred to earlier in these reasons, involved whether 200,000 Métis and non-status Indians are Indians for the purposes of the *Constitution Act*.

[99] Canada takes the position that the Tłı̨chǫ Agreement has not resulted in any injustice to Mr. Paul, the group he calls the Treaty 11 Métis, or the general public. The old Treaty 11 relationship has been largely supplanted by the Tłı̨chǫ Agreement, which represents a new treaty relationship negotiated by Canada, the Government of the Northwest Territories and the Dogrib Treaty 11 Council. Mr. Paul, as a registered member of the Dogrib Rae Band during the period of negotiations, would have been eligible to vote on ratification of the Tłı̨chǫ Agreement. That he did not wish to join in or approve this new treaty relationship that was approved by others is not, Canada says, an injustice, in the face of the majority decision to approve the new treaty.

[100] I think Canada's argument simplifies the issue a little too much. Although I agree that the majority vote in favour of the new treaty relationship represented by the Tłı̨chǫ Agreement is relevant to whether there has been an injustice, I bear in mind that from Mr. Paul's standpoint, the injustice stems from the fact that he does not identify himself as a member of the Dogrib people, notwithstanding that he is or was a member of the Dogrib Rae Band; and that the Métis were not separately represented in negotiation of the Tłı̨chǫ Agreement. Even viewed in that context, however, I am not convinced that there would be an injustice if the litigation could not proceed for lack of funding. Ultimately, as I have already pointed out, the only negative impact claimed by Mr. Paul from the alleged breach of his rights is on his ability to build a cabin where he wishes. It is only a possibility, and not a certainty, that others might be affected in some material way by the outcome of this case.

[101] For the above reasons, I do not find that this is one of those rare and exceptional cases where justice demands that the questions raised be litigated and that advance costs be ordered for that purpose.

[102] Failure to satisfy any one of the *Okanagan* criteria means that the application must be dismissed. Accordingly, the application for payment of advance costs is dismissed.

V.A. Schuler
J.S.C.

Dated in Yellowknife, NT this
20th day of October, 2014

Counsel for the Commissioner:	Sarah Kay
Counsel for Clem Paul and the The Treaty 11 Métis:	Kenneth Staroszik
Counsel for the Attorney General for Canada:	Andrew Fox

S-1-CV-2008 000178

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COMMISSIONER OF THE NORTHWEST TERRITORIES
Plaintiff/Defendant by Counterclaim

-and-

CLEM PAUL, ON HIS OWN BEHALF AND ON BEHALF OF THE TREATY 11 MÉTIS
Defendant/Plaintiff by Counterclaim

-and-

ATTORNEY GENERAL OF CANADA
Defendant by Counterclaim

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE V.A. SCHULER
