ONTARIO COURT OF JUSTICE

COURT FILE No.: Sault Ste. Marie 08-528, 529, 530

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

DEAN SAYERS, GILLES ROBINSON, PHILIP SWANSON AND CLINTON ROBINSON

Before Justice R. Kwolek
Heard on September 21, 2015; May 10 and 16, 2016, October 20, 2016 and November 15, 2016
Reasons for Judgment released on February 13, 2017

Paul Gonsalves & Scott Dunsmuir ..... counsel for the Crown
J. Tremblay-Hall counsel for the accused Dean Sayers, Gilles Robinson & Philip Swanson
M. Bennett ..... counsel for the accused Clinton Robinson

KWOLEK J.:

PRELIMINARY MATTERS

Issues Outstanding

(a) Whether the Crown should be granted leave to withdraw the charges before the court.
(b) If not – how are we to proceed.
(c) The entitlement of the defendants to have all or a portion of their legal costs paid by the Crown.

OVERVIEW

[1] In information 528, Dean Sayers, the Chief of Batchewana First Nation is charged that together with Clinton Robinson, that they did between the 6th day of August, 2008 and the 30th day of September, 2008 unlawfully harvest forest

resources in a Crown forest without the authority of a forest resource license contrary to the *Crown Forest Sustainability Act*, (*CFSA*) s. 64 (1) (a).

[2] In information 529, Dean Sayers is charged with Philip Swanson that between the 11th day of September, 2008 and the 30th day of September, 2008, they did unlawfully harvest forest resources in a Crown forest without the authority of a forest resource license contrary to *CFSA*, s. 64(1)(a).

[3] In information 530, Dean Sayers is charged together with Gilles Robinson, that they did between the 10th day of September, 2007 and the 30th day of September, 2008 unlawfully harvest forest resources in a Crown forest without the authority of a forest resource license, contrary to the *CFSA* s. 64(1)(a).

[4] There has been limited evidence placed before the court, but it appears that the defendants other than Chief Dean Sayers did the actual logging, while the defendant Chief Sayers was alleged to have been a party to the logging. The first court appearance for all matters was November 6, 2008. Many court attendances followed with a number of pre-trials and other procedural and other attendances.

[5] Rather than proceeding before a Justice of the Peace to have the matters dealt with before the Provincial Offences Court, counsel for the parties and the court ultimately consented to an order that the outstanding charges could be disposed of before a Judge of the Ontario Court of Justice.

[6] Pleas of not guilty, to all charges by all accused parties, were entered on September 21, 2015, before myself Justice Kwolek. At that time, the accused named in the three Informations were ordered to be tried together, based on earlier preliminary orders and discussions. Outstanding matters were adjourned for purposes of a two week trial commencing on May 16, 2016.

Background – Relating to Recent Court Attendances

[7] A focus hearing proceeded before me in March 2016. At that time although there appeared to be some discussion about settlement negotiations, the defendants indicated that, short of a withdrawal of charges by the Crown, they were not prepared to proceed to a further pre-trial. Although there was some suggestion of a discussion of settlement negotiations before me, any discussion at that time, before myself as a trial judge would have been inappropriate, and the parties agreed that such discussions should be held before another judge. A pre-trial was offered by the court to be held before another judge. No such pre-trial actually proceeded prior to the date set for the continuation of the trial.

[8] At the focus hearing in March of 2016, the Crown also indicated that their expert's report had not yet been finalized and they expected such report to be completed by the middle of April 2016. The Crown indicated that it would need approximately two weeks to review such report, which report would then be produced, together with source documents to counsel for the defendants for their

review with their own expert. The defendants had prepared an expert report that was provided to counsel for the Crown shortly after its production in May 2014.

[9] The parties acknowledged that it would assist myself, as the trial judge, prior to the resumption of the hearing in May 2016, to read documentation, which I understood would be filed on consent as exhibits, namely "The Robinson Treaties of 1850: a Case Study", which document, dated August 31, 1996, was prepared by James Morrison for the Royal Commission on Aboriginal Peoples, Treaty and Land Research Section. In addition, I was advised that I should read the expert's report entitled: "History of Batchewana Indian Reserve" which was prepared by the same James Morrison for Batchewana First Nation of Ojibways dated May 2014, for this court proceeding. Each of those documents was in excess of 200 pages in length. Both documents were formally entered as exhibits on the scheduled trial date being May 16, 2016 (see Appendix for complete list of documents considered by the court).

[10] It was my further understanding that the expert report that the Crown was preparing was to be provided to the court and the trial itself would largely consist of an agreed statement of facts and the testimony of the two expert witnesses. No "agreed statement of facts" has ever been provided to the court. Apparently, such a draft document was initially drafted by the Crown, but some changes were requested by the defendant Clinton Robinson, and no agreed statement of facts was ever finalized.

[11] This court further anticipated that this Crown expert report would be provided in advance of the trial to the judge in order to assist this tribunal in reaching its ultimate decision. When such report was not provided to the court nor provided to the defendants by early May 2016, this court requested a further focus hearing on Tuesday, May 10 at 2 p.m. to determine the state of these proceedings as the trial was scheduled to continue May 16, 2016 and the court was concerned whether the case was in fact ready to proceed and would be proceeding. Prior to that hearing, on Friday, May 6, 2016, late in the day, the court received a letter from counsel for the Crown indicating that it was the Crown's intention not to proceed with the prosecution, even though, "there was a reasonable prospect of conviction" and that the prosecution would be seeking leave to withdraw outstanding charges on the first day scheduled for continuation of the proceedings on May 16, 2016.

[12] On the May 10, 2016 date set for the focus hearing, counsel for the defendants indicated that they were very much concerned with this late notification by the Crown that they would be withdrawing the charges. Counsel for the defendant Clinton Robinson indicated that he would seek instructions as to whether or not to oppose the application to withdraw the charges. Counsel for the other defendants indicated that she would be seeking costs of the proceeding and would be requiring the production of the expert's report which had been completed, together with source documents. Such report was in the process of being reviewed by the Crown and had not been produced either to the court or to the defendants. In

addition, it was agreed that counsel for the Crown would serve a formal notice of motion to withdraw and that such application would be addressed on May 16, 2016.

[13] The defendants opposed the cessation of these proceedings. Since the not guilty pleas were tendered on September 21, 2015, all parties agreed that the court would have to grant leave for the Crown to withdraw these charges. The Crown had indicated that they would not be pursuing these charges and would either withdraw them or call no evidence and seek the dismissal of the charges. In addition, counsel for the Crown indicated that the Crown could also give direction to the court clerk, pursuant to s. 32 of the *POA,* to stay proceedings.

[14] Normally defendants are more than happy to consent to a withdrawal of charges as that would terminate proceedings against them and they would no longer be in jeopardy of criminal or pseudo-criminal sanctions. However, this prosecution, it was argued by the defendants, had much greater significance to the litigants as they hoped to address issues of treaty and aboriginal rights.

[15] In response to the Crown application to withdraw the charges, another application was brought on behalf of the defendant Clinton Robinson, couched under a constitutional question dated May 13, 2016. In accordance with paragraph 20 of the constitutional question filed on behalf of Clinton Robinson dated May 13, 2016, and the factum filed on behalf of Clinton Robinson dated July 29, 2016, Clinton Robinson did not consent to an unconditional withdrawal of the charges.

[16] Counsel for the BFN defendants also confirmed that the remaining defendants did not consent to the withdrawal of charges by the Crown.

[17] On May 16, 2016, all counsel appeared before me and the leave application to withdraw was adjourned to October 20, 2016 while the issue of the costs application was adjourned to November 15, 2016, with timelines set out for the exchange of factums and books of authorities. It appears that the Crown's expert report was in fact subsequently provided to counsel for the defendants. Therefore, the application filed on behalf of three defendants, which sought the production of the Crown's expert report and source documents, appears to have been abandoned.

[18] In response to the application brought by the Crown seeking leave to withdraw their prosecution under the *POA*, paragraph 20 of the Notice of Constitutional Question dated May 13, 2016, filed on behalf of Clinton Robinson reads as follows:

> "It is asserted on behalf of the Defendant Clinton Robinson that the Crown must seek leave to withdraw, that the Crown is obliged to give reasons why leave should be granted, and that the reasons are subject to argument by counsel and to scrutiny by the court."

[19] In his factum, counsel for Clinton Robinson at paragraph 30 requests the following:

(a) That the proceedings against the defendant Clinton Robinson in Information 08-528 be temporarily stayed (pending the happening of certain events which I will not detail here);
(b) That the Crown pay costs to date fixed in the amount of $150,000 forthwith, provided that after such payment is made, any further amounts may be proved on assessment, if not agreed upon, and paid; and,
(c) That this order be made without prejudice to any civil claims of the defendant Clinton Robinson for his losses of income and property as a result of logs he harvested and of other losses due to the interruption of his logging operation in 2008.

[20] In paragraph 31 of his factum, counsel for the defendant Clinton Robinson argues in the alternative, that the application for leave to withdraw, be adjourned to a fixed date:

(a) Pending the payment of his costs in the amount of $150,000 and otherwise as set out above;
(b) Pending settlement of his claims against Ontario for not less than $55,000 for his losses of income and property and the logs seized as a result of this prosecution;
(c) Pending the Crown undertaking contribution to the defendant's advanced costs for defending the proceedings and undertaking to consent to an order in the Superior Court.

[21] Counsel for the defendants Dean Sayers, Gilles Robinson, and Phillip Swanson also opposed the Crown's request to withdraw the charges and presented argument on November 15, 2016, why the Crown should not be granted leave to withdraw. The BFN defendants adopted the submissions raised by counsel for Clinton Robinson and presented their own submissions. They also sought costs that they have incurred to date in these proceedings.

NATURE OF THE CASE

[22] This is not a typical *Provincial Offences Act* prosecution. A total of two weeks was set aside for the purpose of completing this trial. This trial dealt with the prosecution of certain band members of the Batchewana First Nation, including Chief Dean Sayers of the BFN, although he was named in his personal capacity as a defendant, as well as an individual who identified himself as Métis, Clinton Robinson, for logging without the authority of a license, in contravention of s. 64 (1) of the *Crown Forest Sustainability Act*. The charges were laid on October 2, 2008 for logging that occurred between September 2007 and September 2008. Over eight years have passed since the charges were laid.

[23] It seems clear from the material before me and the submissions raised on behalf of the BFN defendants, that for the community at large, being the Batchewana First Nation, this case had far greater significance than the prosecution of these particular charges against the named defendants. Based on their Notice of

Constitutional Question filed (NCQ), the Batchewana First Nation community, initially wished to have their grievances determined relating to access to timber resources, land claims, trust claims and whether or not the Pennefather Treaty of 1859, was a valid and subsisting treaty, insofar as it purported to vary the earlier Huron–Superior Robinson Treaty of 1850, and wished to argue those issues within the context of this prosecution. Those issues also affect non-aboriginal interests in the area.

[24] Batchewana First Nation argued that by terms of the Robinson Treaty of 1850, they continue to have aboriginal title and rights to the lands where the disputed logging occurred. In addition, the defendants argue that they also have the right to harvest timber resources for sustenance, trade or sale. They further argued that the use of their lands is protected by s. 35 of *The Constitution Act*, 1982 and cannot be limited by the provisions of the *Crown Forest Sustainability Act*. In their Notice of Constitutional Question, in the alternative, counsel for the BFN Defendants submitted that the Crown holds the lands in question in trust for the Batchewana First Nation.

[25] Counsel argue that the lands set aside for Batchewana First Nation in 1850 were improperly taken from them by the Pennefather treaty of 1859 which removed the majority of the lands reserved to them in the earlier Huron-Superior Robinson Treaty of 1850.

[26] The Batchewana people saw this case as a means to an end – a process by which wrongs that were committed against them and their lands would finally be righted. Counsel for BFN argues that their people are tired of promises of action followed by inaction. In the words of their counsel, if the matter is to proceed by and through negotiation, they wish to enter into a dialogue, a nation to nation dialogue, between their nation and the provincial and federal governments, as set out in the UN Declaration of the Rights of Indigenous Peoples. They wish the government to draft and propose an appropriate framework for such resolution discussions.

[27] The defendants do not see the offer to withdraw these charges as a concession or as a victory for them. They see the withdrawal as a further stall tactic by the Crown, as a lost opportunity and a delay in excess of eight years in pursuing their rights.

[28] All defendants argue that a dismissal of the charges, even based on a criminal standard, would at least grant them the right to log, which arguably would create some urgency on the part of all parties to move matters forward. Counsel for the Crown acknowledged, in their submissions, that the defendants considered this case as a test case to determine their rights.

[29] The defendant Clinton Robinson raises a constitutional question as described in paragraph nine as follows:

> "More specifically, the constitutional question has its genesis in the historical and continuing failure to reconcile the claims, interests and

> ambitions of non-aboriginal people with those of the Batchewana people in respect of lands and forests under aboriginal tenure prior to European contact. The issues raised are complex. They have political and social dimensions and are important to aboriginal and non-aboriginal persons generally."

[30] This defendant, Clinton Robinson, argues that he is a member of the Batchewana people and has aboriginal rights. It is argued that the category of "Indians" within the meaning of *The Constitution Act*, 1867 is broader than the one imposed by the federal government through the *Indian Act*. (This issue appears to have been confirmed by the recent Supreme Court of Canada decision of *R. v. Daniels,* [2016], S.C.J. No.12, released on April 14, 2016, which established that the definition of Indians within the *Constitution Act* did in fact include Métis and Inuit peoples.) However, counsel for Clinton Robinson submits that s. 88 of the *Indian Act* provides that provincial laws of general application are applicable to Indians, as therein defined, and that definition does not include Inuit and Métis people. Therefore, it is submitted by counsel on behalf of Clinton Robinson that provisions of provincial legislation do not generally apply to his client who is Metis. Counsel argued that there is no federal legislation making provincial laws of general application applicable to the Métis as are specifically set out in the *Indian Act*. In addition, it is argued Métis are further protected from federal or provincial legislative modification by s. 35 of the *Constitution Act* and are subject to exclusive federal jurisdiction.

[31] The Supreme Court of Canada in *R. v. Daniels*, supra, does not appear to accept the position that provincial laws of general application do not apply to Metis and other aboriginal non-status peoples, not specifically covered by s. 88 of the *Indian Act*. The Supreme Court, at paragraph 51 in *Daniels*, supra stated as follows:

> But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, at para. 3.

[32] The issue remains, from Clinton Robinson's point of view, whether or not this legislation impairs the "core of Aboriginal rights" or whether he has rights to harvest timber as a member of the Batchewana aboriginal community in general, or specifically in the area where lands are in dispute, and whether the provincial Crown has the authority to regulate such logging rights. He invokes the "Honour of the Crown" to reconcile pre-existing Aboriginal rights with the assertion of Crown sovereignty (see *Beckman v. Little Solmon/Carmacks First Nation*, 2010 S.C.C. 53 [2010] 3 S.C.R. 103.

Issue- Granting Leave for Withdrawal of Charges.

[33] Due to the fact that the defendants had entered not guilty pleas in September 2015, it is acknowledged that leave of the court is required before the charges before the court could be withdrawn (see *R. v. Beauchamp*, 2014 ABPC and *R. v. Blasko*, (1975), 29C.C.C.(2nd) 321 (Ont. H.C)). However, s. 32 of the *Provincial Offences Act*, R.S.O. 1990, ch. P -33 as amended, grants the Attorney General, or his or her agent, the right to stay a proceeding at any time before judgment by simple direction, in court, to the clerk of the court. That section reads as follows:

> Stay of proceeding
>
> 32. (1) In addition to his or her right to withdraw a charge, the Attorney General or his or her agent may stay a proceeding at any time before judgment by direction in court to the clerk of the court and thereupon any recognizance relating to the proceeding is vacated. R.S.O. 1990, c. P.33, s. 32 (1); 2006, c. 21, Sched. C, s. 131 (5).
>
> Recommencement
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> (2) A proceeding stayed under subsection (1) may be recommenced by direction of the Attorney General, the Deputy Attorney General or a Crown Attorney to the clerk of the court but a proceeding that is stayed shall not be recommenced,
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> (a) later than one year after the stay; or
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> (b) after the expiration of any limitation period applicable, which shall run as if the proceeding had not been commenced until the recommencement,
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> whichever is the earlier. R.S.O. 1990, c. P.33, s. 32 (2).

[34] Prior to the release of this judgment, there has been no attempt to proceed under s. 32 of the *POA*, although the Crown had indicated in May 2016, that it may be prepared to resort to that provision, if necessary. The use of that section was not argued before me nor has it been resorted to by the Crown to this point.

[35] Instead, the Crown has indicated, for a number of reasons, that it is not in the public interest that this prosecution proceed, and has asked this court to grant the Crown leave to withdraw these charges.

[36] The Crown argues that the Ontario Superior Court of Justice and the Supreme Court of Canada have held that a regulatory prosecution is an inferior forum for adjudicating such issues which relate to complex legal and historical issues involving aboriginal and native rights (see *R. v. Bernard and Marshall*, [2005] 2 S.C.R.220 and *Kelly v. Canada*, 2013 ONSC 1220.)

[37] Those comments by the Supreme Court of Canada in *R. v. Bernard and Marshall*, supra, are dicta but clearly have persuasive authority coming from the highest court in our land.

[38] I concur with comments made by the Crown, that should this matter have

proceeded to trial before me, my decision, due to jurisdiction of this court and the nature of the proceedings, would simply have been to determine whether or not the Crown had proven its case beyond a reasonable doubt. Any decision I would have been able to make would not have been authoritative, nor would I have the jurisdiction to issue binding directions with respect to the factual and legal issues that were being raised. I agree that the possible outcomes at trial would have been either a dismissal of the charges or convictions. This court would not have been able to provide any final resolution as to the key issues raised by the defendants. If the prosecution had proceeded to trial, the defendants had indicated that the result would likely need to be appealed as any decision by the provincial level of court would be limited due to jurisdictional issues on the ability of this court to grant relief.

[39] However, I am mindful that cases initiated under the *Provincial Offences Act* have provided significant direction and assistance to litigants regarding aboriginal issues. *R. v. Powley*, 2003 SCC 43, for example, was a case of a provincial prosecution, dealing with Mr. Powley shooting a moose in contravention of provincial hunting regulations in the Sault Ste. Marie area. That case proceeded to the Supreme Court of Canada and helped establish hunting and other rights for the local Sault Ste. Marie Métis population.

[40] In addition, counsel for the defendants argue that a dismissal of the charges after a trial would have created some urgency for the Crown and put pressure on the Crown to deal with outstanding substantive Treaty and other issues, a result that does not necessarily follow through a withdrawal of charges, where the Crown argues that there was still a "reasonable prospect of conviction".

HISTORICAL BACKGROUND

[41] Historical precedent would appear to support the view that precipitating actions or protest give rise to government action. The initiation of treaty discussions in 1850 were precipitated by a number of events. Prior to 1850, there was a large area of Ontario, where there had been no treaties negotiated. Settlements were established in the Sault Ste. Marie area and mining companies commenced their mineral exploration in the Bruce Mines area for copper and in the Mica Bay area in the absence of treaties negotiated with the local aboriginal peoples. The aboriginal peoples were concerned about the incursion of mining interests and settlements into their traditional areas and wished to enter into treaties. "Raids" by the local aboriginal communities occurred at the Mica Bay location in November 1849, which resulted in Chiefs Shingwakonce and Nebenaigoching and other "ringleaders" being charged criminally and taken into custody in Toronto after a military force was dispatched to the area. Shortly thereafter, with the threat of such criminal proceedings still hanging over the heads of their chiefs, treaty negotiations began (see exhibit number, The Robinson Treaties of 1850: a case study, supra at pages 86-91)

[42] Therefore, for the local Batchewana community, local protests, whether in

the nature of "raids" in Mica Bay in 1849, or "protest logging", or protest hunting , and the subsequent prosecutions under the *Provincial Offences Act*, have helped establish and delineate aboriginal rights. Such prosecutions therefore have great significance to the local aboriginal communities.

RECENT DEVELOPMENTS

[43] Many aboriginal groups perceive the current court system as a continuing example of colonialism which does not adequately meet their needs, especially in criminal or quasi-criminal proceedings, and there has been a call for the recognition and implementation of Aboriginal Justice Systems. (see : "*Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada*", (TRCC) pages 181, 183, and 199 and Calls to action Numbers 42 and 45).

[44] Counsel for the defendants did not provide the court with any reported cases, and to the court's knowledge, there have been no successful court applications that have established the collective right of any Canadian aboriginal community to log commercially on Crown lands. However, every aboriginal case, involving a separate aboriginal community, is different and involves different historical, factual and treaty considerations.

[45] It is suggested by counsel for the Crown that the government of Ontario is committed to the goal of reconciliation in resolving aboriginal claims whenever possible through discussion, and outside of the context of litigation. That is an admirable goal. Litigation and Crown prosecutions can provide a distraction and an impediment to a cooperative and collaborative approach to resolving these long-standing issues and foster mistrust among the parties. However, the Government of Ontario cannot act alone as the issues raised by the defendants deal with questions involving exclusive federal jurisdiction.

[46] Historically, charges under provincial legislation have provided a forum for aboriginal peoples to air their grievances. However, it is neither fair nor appropriate for such discussions and negotiations to proceed under a threat of criminal or pseudo criminal sanctions.

[47] Proceedings, at least theoretically, relating to native land claims should be resolved, not with the threat of a pseudo-criminal proceeding outstanding hanging over the heads of the defendants, but in a spirit of negotiation and cooperation. Conversely, Counsel for the defendants argue that without an imminent threat or an impending crisis or a judicial decision that opens the door for First Nation commercial logging, such assurances are mere platitudes that do not result in any action.

[48] What has changed that has resulted in the Crown's decision to aggressively seek an alternate forum to seek justice in dealing with First Nation and aboriginal

issues and for the resolution of this case? Why was this not done eight years ago when this prosecution was commenced?

[49] The court questioned all counsel about the effect of recent significant developments in Canada of the treatment of our aboriginal peoples by the federal and provincial governments and how such developments have impacted these proceedings. The court questioned counsel, before they finalized their submissions, on what basis two recent developments informed their decisions in this case. The first development was Canada's acceptance of the United Nations Declaration of the Rights of Indigenous Peoples, adopted by the United Nations on September 13, 2007. In 2010, Canada endorsed the Declaration as a "non-legally binding aspirational document (see Summary of the final Report TRCC, at page 188). Such declaration was only adopted by Canada on May 10, 2016, almost a decade after its formulation by the UN, and just after the decision was made not to proceed with the prosecution of these charges.

[50] Articles 3, 8(2)(b), 26, 28, 32 and 40, of the United Nations Declaration of the Rights of Indigenous Peoples, would appear to have significance within the context of these proceedings. Those provisions are set out below:

> "Article 3
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> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 8
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> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>
> Article 26
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
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> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
>
> Article 28

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been **confiscated, taken, occupied, used or damaged without their free, prior and informed consent**.
>
> Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
>
> Article 32
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.
>
> Article 40
>
> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

[51] In addition to the articles of the UN Declaration as set out above, another recent significant development of aboriginal rights in this country was signaled by the release of the report of the Truth and Reconciliation Commission of Canada in 2015. The summary of the final report of the Commission contains a number of "calls to action". The recommendations, or "calls to action" which are most relevant in the context of this case, include those calls to action set out in paragraphs 42,45, 46, 52 and 92(i) and (ii) of that report which are reproduced below:

> "42. We call upon the federal, provincial and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November, 2012.
>
> "45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and

reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.

ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

v. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

"52. We call up the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:

i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.

ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation."

"92. We call upon the corporate sector in Canada to adopt the United Nations Declaration of the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.

[52] Within the context of the factual matrix in this case, the Crown alleges that the nature of the case changed as a result of the production of evidence as set out in the defendants' expert's report of James Morrison, provided to the Crown in May of 2014. The Crown argues that once it was in possession of this report, the report justified a closer examination of the constitutional issues being raised. It argues that at that point it should have considered whether to withdraw the charges and did not. Once that report was completed and the Crown had time to assess its position and

obtain their own report, completed shortly before the matter was scheduled for trial, the Crown indicates for valid reasons it has decided not to proceed with the current prosecution.

[53] The court makes the following observations:

1) The Crown is a special party in these proceedings and other prosecutorial proceedings. Its role is not about winning or losing cases but to ensure that justice is done. The Crown is not an ordinary litigant but has a high public duty (see comments Sopinka J. *R. v. Stinchcombe,* (1991), 68 C.C.C. (3d) (S.C.C.).
2) In addition, in dealing with aboriginal people and aboriginal land claims and rights, the Crown has a special responsibility and relationship with its indigenous peoples. The Crown must deal with such peoples and related issues fairly and appropriately, especially in light of the recent recommendations as released by the Truth and Reconciliation Commission and Canada's recent adoption of the United Nations Declaration of the Rights of Indigenous Peoples.
3) The Crown alleges that it is seeking to withdraw the charges, notwithstanding that there is a reasonable prospect of conviction, but based on the Crown's view that it is not in the public interest to proceed to trial in these matters for the following reasons:
    (a) The defence raises complex legal and historical issues that would be better addressed outside of the context of a prosecution.(counsel for Clinton Robinson in his Notice of Constitutional Question makes a similar observation.)
    (b) The judiciary has expressed concern with land entitlement issues and aboriginal land claims being raised in the context of a prosecution in a forum that may not result in a full presentation of the issues (see *R. v. Bernard and Marshall*, [2005] 2 S.C. R. 220 (S.C.C.);and *Kelly v. Canada*, 2013 ONSC 1220 (Ont. S. C.)
    (c) Arguments being advanced on behalf of the defendants raise factual and legal issues relevant to other parties who do not have standing in the prosecution (although this was not alluded to in any detail, in seems to refer to potential competing claims of other First Nations as well as companies who have been granted area logging rights, and potential private ownership of land).
    (d) The trial in this forum is simply to determine guilt and innocence on a limited set of facts on the criminal standard of proof beyond a reasonable doubt and may not assist the parties in providing clarity and resolving outstanding issues between the parties.

[54] This court does not dispute, nor did counsel for the defendants dispute, with the possible exception of clause 3(d), the above named factors. Counsel for the defendants, however, are concerned that the Crown will not act honourably or with dispatch to address aboriginal concerns.

[55] The Crown also indicated that it is prepared to concede, in response to the defendants application for costs, that it is appropriate that the defendants be compensated for some of their costs incurred.

Test – Crown's Right to Withdraw Charges

[56] Should leave be granted in this case to allow the charges to be withdrawn?

[57] The Crown cited a number of cases relating to this issue and counsel for the defendants do not dispute that the Crown has placed before the court the appropriate case law relating to whether or not the court should grant leave for the Crown to withdraw the outstanding charges.

[58] Generally speaking, the courts have held that a judge does not have the authority to direct the Crown which crimes it should prosecute or when to prosecute them, nor to interfere with a prosecutor's decision to stop a prosecution (*R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Nixon*, [2011] 2 S.C. R. 566; *R. v. Perks*, [1988] O.J. 421; *R. v. Osborne*, [1975] 25 C.C.C. (2d) 405.

[59] The Ontario Court of Appeal, has in *R. V. McHale*, 2010 ONCA 361, held that when the Crown seeks to withdraw charges prior to plea, the Crown may do so without leave of the court. However, once pleas are entered, and pleas were entered in this case on September 21, 2015, *R. v. McHale*, supra also indicated that "leave of the presiding judge may be required to withdraw an information or charge after plea."

[60] The courts have commented that the Crown may not be permitted to withdraw charges if their decision to withdraw is based on an oblique or inappropriate motive, such as an attempt to circumvent an adverse ruling by the court (see *R. v. Dick*, [1968] 2 O.R. 351; *R. v. Scheller* 32 C.C.C. 273). The Crown denies that it has such an oblique motive and I do not find evidence of an oblique or inappropriate motive.

[61] Based on the information before me, there is no evidentiary basis for me to conclude that the request by the Crown to stay these proceedings is based on an attempt by the Crown to circumvent any ruling of this court; the Crown has confirmed that it will not be pursuing these charges; that pursuant to the direction of the Supreme Court of Canada in *R. v. Bernard and* Marshall, supra, the Crown wishes to pursue the resolution of the issues raised by the defendants through negotiation; there is another more appropriate and direct forum to deal with these issues rather than within the forum of a prosecution in a court that has no jurisdiction to resolve the issues ultimately sought by all parties to be resolved.

[62] What is the basis, given the existing case law, for a refusal of this court to allow a withdrawal of the charges in these proceedings?

[63] Counsel for Clinton Robinson suggests that a temporary stay of these

proceedings should be granted as suggested by the Supreme Court in *R. v. Bernard and Marshall*, supra and be subject to certain conditions. My reading of the R. *v. Bernard and Marshall* decision above, was the suggestion of imposing a temporary stay, was seen as a means of preserving the Crown's right to proceed with the outstanding charges if the aboriginal claims in any particular case were found to be unsubstantiated, not as a means of raising aboriginal claims in a forum that does not have jurisdiction to adjudicate those claims. The Crown in this case has stated unequivocally that it does not intend to proceed with these charges.

[64] This proceeding is a dated one, with the charges having been laid in 2008, and the defendants have expended much time and expense in defending these proceedings. The defendants question why the charges were not stayed or withdrawn years ago and negotiations commenced in 2008 to resolve issues in dispute. After all, the decision of *R. v. Marshall*, Robinson , supra, was rendered in 2005, three years before this prosecution was commenced.

[65] The Crown has identified the basis for their delay in coming to the conclusion that the case should not proceed, as having its genesis in the report of James Morrison completed in May 2014. The only remedy that this court believes is appropriate and available to it, in this case, is the question of an appropriate award of costs and not the imposition of conditions as proposed by counsel for the defendant Clinton Robinson.

[66] I am satisfied that the Crown has demonstrated that it is in the public interest that the outstanding charges under the *POA* and the *Crown Forest Sustainability Act* should be withdrawn. Based on the existing state of the law, the court is satisfied that it should not interfere with the prosecutorial discretion and should grant leave to withdraw the charges.

[67] In fact, this court finds that the withdrawal of these charges is consistent with the UN Declaration of the Rights of Indigenous Peoples and is consistent with the calls to action as enunciated in the Summary of the Final Report of the TRCC.

[68] With respect to conditions raised in clause 30 of the factum of the defendant Clinton Robinson, I am not prepared to order the conditions as articulated therein, as a precondition to permitting the withdrawal of charges. The Crown has not sought any order relating to any other potential litigation, nor do I have the jurisdiction to make any order binding any of the parties, relating to civil claims being brought or contemplated to be brought in another forum relating to seizure of the logs. The parties are free to bring their application for remedies in the appropriate forum, which is not this court. I do not have the statutory authority to deal with property issues.

[69] In terms of remedies available to me, my jurisdiction appears limited to deal with the issue of costs. I am not prepared, nor can I encumber the discretion of the Crown to proceed with other prosecutions, not directly related to this one. The

provincial court is a statutory court and the relief that the defendant Clinton Robinson seeks that I can grant, I believe, goes beyond the purview of controlling the court process before me and is not an order that I could make.

[70] With respect to conditions raised in clause 31 of the factum of the defendant Clinton Robinson, clauses (b) and (c), I repeat my comments as articulated in the paragraph above that I do not have jurisdiction to make the order as requested.

[71] With respect to the order sought in paragraph 31(a) of the defendant Clinton Robinson's factum, although it has been conceded that some contribution by the Crown to the defendant's costs is warranted, the issue of the quantum of costs is in dispute.

[72] Although this court does not have the jurisdiction, nor the ability to order that the Provincial Crown and the defendants comply with a particular time frame in negotiating the issue of an equitable sharing of the resources of the Algoma forest and in the disputed lands, the court is hopeful, that the withdrawal of these charges will mark the beginning of timely negotiations, in accordance with the "Honour of the Crown". Surely the issue of interim logging in a defined area by aboriginal loggers can be resolved in relatively short order between the Provincial Crown and Batchewana First Nation.

[73] The court also encourages the parties to enter into expedited discussions relating to the outstanding issues involving Treaty Rights and the validity of the Pennefather Treaty which will require the co-operation of both the Federal and Provincial Crowns and others.

[74] Such negotiations should proceed in the absence of outstanding charges under the *Provincial Offences Act*. The threat of criminal sanctions should be replaced with negotiation by both the federal and provincial governments with BFN and other interested parties. In the language of the calls to action in paragraph 45 of the Truth and Reconciliation Commission, and as suggested by counsel for the BFN defendants, this process should:

> **"reaffirm the nation-to-nation relationship between aboriginal peoples and the Crown."**

[75] Therefore, the Crown shall be granted leave to withdraw the outstanding charges in these proceedings, subject to the award of costs as detailed by myself below.

Award of Costs against the Crown

[76] In this particular case, the Crown concedes that an award of costs is appropriate although what is in dispute is the quantum of costs that should be awarded.

[77] Courts have held that costs awards in criminal proceedings are only appropriate where it can be shown that there was a marked and unacceptable departure from reasonable standards expected of the prosecution, (*R. v. 974649 Ontario Inc.*, 2001 SCC 81, at paragraph 87; *R. v. Fercan*, 2016 ONCA 108 (Ont. CA) or "Crown misconduct or exceptional circumstances" (see *R. v Fercan*, supra; *R. v. Singh*, 2016 ONCA 108).

[78] What is it about this case or the circumstances surrounding this case that make it one of those relatively rare cases where costs should be awarded?

[79] The Crown submits that once it was provided with a copy of the Morrison Report in May of 2014, it was arguably in a position to withdraw the charges or to otherwise deal with such charges, and its failure to do so, at that time or shortly thereafter, constituted exceptional circumstances which would justify an award of costs.

[80] It argues that it acted in good faith and in the public interest in arriving in its decision to withdraw the charges despite having a reasonable prospect of conviction. The Crown suggests that neither its decision to withdraw the charges nor the timing of that decision meets the stringent threshold of a marked and unacceptable departure from the reasonable standards expected of the prosecution.

[81] Early on in the proceedings, it became clear that this case involved assertions by the defendants that they sought to challenge the validity of the Pennefather Treaty of 1859, which treaty surrendered the majority of lands that were originally reserved to BFN in the 1850 Robinson Treaty. By April 2009, counsel for three of the defendants, including Chief Dean Sayers, served and filed their notice of Constitutional Question.

[82] Counsel for the defendants placed before me correspondence that had been exchanged with Crown counsel commencing in the summer of 2015. Such correspondence indicated an inclination by the government not to proceed with the current prosecution but to attempt to resolve outstanding issues in another forum.

[83] However, it was not until May 2016, on the eve of the recommencement of trial, that the Crown indicated that it was not proceeding with the charges in this action by letter dated May 6, 2016 addressed to the court and to defendants' counsel.

[84] The defendants view the actions of the Crown as being egregious. They allege that it was never the Crown's intent, at least not since the summer of 2015, to proceed with the charges and that the Crown has acted unreasonably in electing not to proceed with the prosecution on the eve of the May trial dates. The defendants argue that the "Honour of the Crown" comes in to play and the Crown is not acting reasonably in failing to agree not to proceed with further prosecutions, involving similar claims, if they see fit. The defendants had proposed a stay of the charges

very early in the proceedings to allow the parties to negotiate a resolution of issues relating to logging in the area. The Crown did not accept that proposal and instead proceeded with the prosecution.

Award of Costs Requested for Clinton Robinson

[85] I requested that the parties provide detailed accounts supporting their claim for costs in this matter. Although admittedly, this is not a civil proceeding and different considerations come into play when determining what is a fair and appropriate award for costs, I was not prepared to make a final costs award without some basis for the claim for the award for costs.

[86] Counsel for the defendant Clinton Robinson argues that the actions of the Crown are such that the court should demonstrate its concern about the court process by ordering immediate payment to his client fixed in the amount of $150,000, it appears, as punitive damages.

[87] Counsel for Clinton Robinson initially produced an "estimated bill of costs of the defendant Clinton Robinson", which claimed the following:

> $78, 209.60 for compensation based on an hourly rate of $250, and correspondence of .1 hour per letter; plus
>
> premium re: complexity of the matter, 25% or $20,000 for undocketed hours;
>
> premium re: importance of the issues – 25% or $20,000." In absence of a third party funding agreement;
>
> premium re: experience of the lawyer – 25% or $20,000"- counsel has practiced in the area of aboriginal law since 1986 .

[88] Including the $150,000 claimed in punitive damages, the total fees claimed therefore, amounted to $288,209.60 plus disbursements of $24, 389.85 and HST on all of the above figures for an additional $40,637.93 for a total amount of costs claimed of $353,237.37.

[89] On Nov. 23, 2016 , the defendant Clinton Robinson swore an affidavit confirming that he is not the beneficiary of any third party funding from either Legal Aid Ontario or Batchewana First Nation and that he received a total of three bills from his counsel ,Mr. Bennett which included bills:

Date	Fees	Disbursements	HST/GST
June 7, 2010	$14,924.44	$167.84	$ 754.48
September 7, 2010	$ 2,900.00	$ .11	$ 145.01
November 3, 2016	$60,385.16	$24,221.90	$10,998.92

The total bill submitted would have been $78,209.60 for fees, $24,389.85 for disbursements and $11,898.41 for taxes.

Award of Costs Requested for Remainder of Defendants

[90] Counsel for the remaining defendants provided detailed accounts submitted to the clients based on an hourly rate of $150 per hour.

[91] Total costs claimed on a compensatory basis, included:

1. Legal fees for counsel Ms. Tremblay-Hall from October 2008 to June 28, 2016 in the amount of $244,901.80;
2. Office disbursements of $5,334.21 with HST of $348.13;
3. Agency fees Stacy Tijerina $8,706.75;
4. expert reports totaling $161,178.94;

for a total claim of $420,469.83.

(See amended affidavit of Dorothy Alderson that amended amount of costs claimed from $418,911.34 to $420,469.83)

[92] In addition, in the applicant's reply factum dated January 24, 2017, counsel for these defendants claimed further and additional costs rendered in the amount of $4,595.30 in an account dated October 26, 2016 and a further $5,250 for work done but not yet billed to date.

Crown Position with Respect to Costs Claimed (Claim)

[93] The Crown is not prepared to accept that the costs claimed by the defendants are appropriate. Counsel for the Crown suggests in its factum that the Crown is agreeable to pay reasonable compensatory costs, to be ordered on a partial indemnity basis, to the applicants for costs incurred since May 22, 2014.

[94] The date of May 22, 2014 is suggested as the appropriate starting point as the date that the Crown received the expert report from counsel for the applicants, and it was at that point that the Crown should have considered not proceeding with the charges.

Costs claim of Chief Sayers, Gilles Robinson, and Philip Swanson (Sub-Claim)

[95] The Crown has suggested that the reasonable fees from May 22, 2014 to October 26, 2016 would total $83,592.86 and suggested that there should be a partial indemnity of those costs at 66 percent of fees for a total suggested compensation of $61,313.40, plus reasonable costs related to court appearances on November 15, 2016 and January 30, 2017.

[96] The Crown then suggested that should this court find that the date of May 22, 2014 is not an appropriate date for the calculation of costs then some further deductions should be made from the accounts submitted from October 9, 2008 to May 22, 2014. The Crown calculates those deductions as totaling $159,017.44. Those deductions included unsuccessful applications in the Superior Court of Justice for funding this court application, unsuccessful attempts for intervenor status

in the related Blais prosecution, and costs expended on expert's reports which were not going to be proffered before the trial judge.

The Issue of Costs

[97] The BFN defendants brought an advanced costs application in the Superior Court for funding of the defence of this court application which was ultimately dismissed in the Superior Court of Ontario without costs.

[98] There were various applications relating to joinder of these proceedings and other proceedings. Joinder for the three Informations before this court were ultimately granted.

[99] There was a second application brought for joinder, involving other clients of Mr. Bennett, counsel for Clinton Robinson, who were asserting Metis status and their rights to log in the Algoma Forest. Those other defendants sought to have that matter joined with this proceeding, which application was ultimately dismissed. In addition, there was an application for intervener status brought by the BFN defendants, to be added in those proceedings which was ultimately dismissed as well.

Costs Claims of Clinton Robinson (Sub-Claim)

[100] If the court considers the appropriate date of May 22, 2014 as the starting point for the granting of fees, the Crown seeks to deduct $6,500 claimed for correspondence due to a concern regarding double billing and the lack of certainty regarding the dates that the correspondence was generated plus an additional $450 for duplication or law fees not involving this action.

[101] The Crown accepts that the reasonable costs of Clinton Robinson's counsel, including fees, disbursements and taxes, subsequent to May 22, 2014, totals $25,422.38 and accepting 66 percent of such fees would result in a costs award of $17,850.58.

[102] If this court would find that the appropriate time period would date back to November 3, 2008, then the Crown suggests that further deductions should be made to the account for fees of $15,163.75. The Crown seeks the deduction from the accounts for failure of the joinder application, failed costs, and failed stay applications, as well as the fee to recover costs in the failed Supreme Court application.

[103] In addition, the Crown suggests that the punitive award of $150,000 should not be granted, nor the premiums of 75 percent that appear to be claimed by counsel. It also would appear that the Crown takes the position that the invoice/cost estimate of the disbursement of $23,700 should also not be awarded.

LEGAL ANALYSIS – GENERAL

[104] The Crown has accepted this court's jurisdiction to award costs based on the court's ability to control its own process as set out in the Ontario Court of Appeal decision of *R. v. Fercan*, 2016 ONCA 269. The Supreme Court of Canada has also recognized that a trial justice acting under the *Provincial Offences Act*, has power to award costs against the crown for a Charter breach (see *Ontario v. 974649 Ontario Inc.* [2001] 3 S.C.R. 575 at paragraph 4.)

[105] Although cost awards against the Crown were sparingly used prior to the advent of the Charter, they have "attained more prominence as an effective remedy in criminal cases" (see *Ontario v. 974649 Ontario Inc.* supra, at paragraph 80.)

[106] The Crown alleges that the basis for an award for costs in this particular case is based on "remarkable or exceptional circumstances" which would, in fairness, dictate that the individual litigant not carry the financial burden flowing from his or her involvement in the litigation. The Crown denies that its conduct represents a marked and unacceptable departure from reasonable standards expected of the prosecution (see *Fercan*, supra at para. 37 and 72; *R. v. Singh, 2016 ONCA 108; 974649 Ontario Inc.*, supra para. 87).

[107] This court finds that the Crown should have at the very least reassessed its position, once it received the expert's report from the applicants, as to whether it should or should not pursue this prosecution. It did not do so within a reasonable period of time. It clearly was considering its options by the summer of 2015, but did not act until the eve of the May 2016 trial dates putting counsel for the applicants to additional time, inconvenience and expense. The total delay in seeking to withdraw the charges from the period of time when it should have reasonably considered to do so was a period of almost two years.

[108] I find that this delay by the Crown in reaching a decision to withdraw the charges in May of 2016 was "a marked and unacceptable departure from the reasonable standards expected of the prosecution." Given the nature of the claims raised by the defence and the history of this matter, I do also find, as suggested by the prosecution, that exceptional circumstances exist in this case which would justify a costs award.

[109] In addition, given that the issues raised in these proceedings were clearly issues of aboriginal title and rights as set out in the Notice of Constitutional Question filed in 2009. I reject the Crown's submissions to limit the timeframe to the consideration of costs. I will not restrict the appropriate time period for the court's consideration of an award of costs to the May 2014 date but will consider the accounts in their entirety. The Crown in *R. v. Fercan*, supra, raised similar arguments and was unsuccessful in having the award of costs calculated from a time period when the Crown claimed it should have discontinued the proceedings. In that case, costs were calculated from the commencement of the forfeiture proceedings.

Although in that case the court found the Crown's case was meritless against innocent third parties, from the very beginning, I find that in this case the Crown knew from the very beginning that significant aboriginal issues were in play and as a result, I will not temporally limit my consideration of costs.

[110] The task before the court is to determine what award of costs is reasonable in the circumstances before me based on the existing case law (see *Fercan*, supra, paragraph 150).

[111] The Ontario Court of Appeal in *Fercan*, supra at paragraph 136, has held that it is in error to rely on the civil costs regime in a criminal proceeding. Justice Laforme in citing Justice Pardu's decision in *Singh*, continued with the following observations:

> In civil proceedings, costs partially indemnify a litigant, encourage settlement, deter frivolous proceedings, and discourage unnecessary steps. Costs against the Crown in criminal proceedings are meant to discipline and deter misconduct. Indemnification, although it remains a valid consideration when quantifying costs, is much less significant: Singh, at para. 66.
>
> Second, when quantifying costs, a judge must keep in mind that costs will be paid out of the public purse: *Singh*, at paragraphs 56 and 57.Therefore the objective must be to provide a "reasonable" portion of the costs incurred by the respondents.
>
> Third, in *Singh*, at para. 57, Pardu J.A. notes that the precise calculation is a task for the judge to undertake while taking into account the following factors: the nature of the case and the legal complexity of the work done; the length of the proceedings; the nature and extent of the Crown's misconduct; the impact of the misconduct on the rights of the innocent third-parties; and the conduct (or lack thereof) of innocent third parties.

[112] Given the nature of the issues raised by the defendants in these proceedings, this prosecution under the *Crown Forest Sustainability Act*, has, the court suggests, not only criminal but also civil aspects and can be described as a hybrid proceeding.

The Conduct of the Crown and the Defendants

[113] The Crown in this case indicates that there was a reasonable prospect of conviction, but elected not to proceed with the prosecution for public policy reasons. One of the reasons suggested for that decision was that this was not the most appropriate forum to deal with the issues of aboriginal claims. I agree. The case law in *Marshall*, supra, however, predated this prosecution. As indicated in my reasons relating to granting the Crown leave to withdraw the charges, recent developments including the ratification by Canada of the UN Declaration of the Rights of Aboriginal Peoples and the release of recommendations of the Truth and Reconciliation Commission have provided greater impetus for discussions between the Crown and First Nations in resolving their disputes rather than resorting to criminal actions.

[114] The proceedings were relatively complex involving issues of aboriginal claims and issues relating to validity of treaties and the extent of treaty rights.

[115] The Crown has conceded that it would be fair and appropriate that there be some award of costs; that is a significant concession. The defendants did not concede that the Crown had a right to withdraw the charges resulting in further time and expense in an unsuccessful application. The major reason for significant delay in this matter was the defendants delay in obtaining an expert report, which delay amounted to a period of approximately five years.

[116] In this case, as is the case with every award of costs against the Crown, it is true that funds will be paid out of the public purse. In this case the legal expenses for Chief Dean Sayers and the other two BFN defendants were paid for by Batchewana First Nation, the "public purse" so to speak of BFN. These were funds paid out of BFN community funds to pursue claims for the community. This third party litigant, it was found was able to fund the costs of this litigation on behalf of BFN. Clinton Robinson was a litigant who funded the litigation on his own without the benefit of third party funding. I have considered the fact that Clinton Robinson has funded his own litigation in determining what is a fair and appropriate award of costs to him.

[117] Given the factual matrix and circumstances of this case, I find that the appropriate approach to ordering legal fees in this case will be one based on denunciation and deterrence as well as considering indemnification when quantifying an appropriate award for costs.

Deductions From the Awards for Costs - Fees

[118] I do find that there are certain fees that should be deducted from the defendant's claims in considering the compensatory aspect of this award.

[119] The fees expended by the parties in an unsuccessful application in the Superior Court for funding in this action, I find should be deducted. I do not see how this court has jurisdiction to award costs for proceedings brought in another forum, as a means of controlling its own process, although admittedly such application had a nexus to this action.

[120] Similarly, with respect to legal fees expended with respect to unsuccessful efforts to intervene in other court proceedings or for joinder in other court proceedings, such amounts should also be deducted from the costs awarded. The advanced costs application fees of $63,533.29 for the Sayers set of defendants should not, at least notionally, be granted by the court.

[121] I find that the hourly rate claimed by counsel for the three defendants is very reasonable. I find the hourly rate claimed by counsel for Clinton Robinson of $250 per hour as being reasonable but disallow any premium sought by his counsel above that hourly rate.

[122] In addition, I find no basis in law to award punitive damages as additional costs in the circumstances of this case. The award of costs in criminal proceedings is, by its very nature, denunciatory and if significant in quantum, serves as a deterrence to the Crown. As a result this court will not grant the $150,000 claimed by Clinton Robinson as additional punitive damages.

Deductions for Award for Costs – Disbursements

[123] In this case there were significant disbursements claimed by all applicants. Counsel for the three defendants proposes disbursements be paid, for expert reports, in the amount of $161,088.94 consisting of:

James Morrison	-	$61,269.49
Leclair Historical	-	$13, 092.80 (research)
Plan Lab Maps	-	$ 3,503.75
Thor Conway	-	$ 8,000.00 (ethnohistorical reports)
Elaine Gray	-	$ 6,000.00 (transcribe elder interviews)
Greg Scheifele	-	$ 69,222.90 (historical logging resource usage in disputed lands).

[124] It would appear that based on the Crown's written submissions, if the court was to award costs for the entire time period that they would not take issue with the first three expert reports for James Morrison, Leclair Historical Research and Plan Lab Maps.

[125] The Crown argues that the last three reports were costs incurred for reports that the defence decided not to rely upon after the Crown raised the issue of their relevance and should not be considered in the Crown's cost award.

[126] Counsel for the defendants argues that the areas of research were undertaken by the applicants to assist in their defence, and may very well have been advanced had the trial unfolded. It appears not in dispute that these reports were commissioned by the defendants to assist in their defence. Whether they could in fact have assisted in their defence is in dispute. Under the circumstances, it is fair and reasonable that the Crown and defendants should share the costs of these disputed reports.

Disbursements for the Defendant Clinton Robinson

[127] Attached to the "Estimated Bill of Costs of the Defendant Clinton Robinson", is an "invoice" dated 10-04-23 from Joe Tom Sayers which appears to be a draft proposed bill which includes among other entries: advisory sessions with counsel and his client at $250 per hour and $200 per hour respectively; $2,000 for administrative expenses; $3,000 for testimony at trial and 15 percent or $2,700 for "contingencies".

[128] No up to date "final" bill has been provided regarding that "invoice." What

has been provided is an affidavit of Clinton Robinson dated November 23, 2016 as described above showing disbursements billed of $24,221.90 billed on November 3, 2016. Such a disbursement would appear to include the face amount of the "invoice" provided by Joe Tom Sayers of $23,700.

[129] The Crown notes in their written submissions the following relating to that disbursement: "It is unclear if the costs were incurred or whether the document is a project budget." It did not agree that any of that expense was appropriate. In his reply submissions of the defendant Clinton Robinson, counsel does not specifically respond to the comments made by the Crown regarding its contestation of this disbursement.

[130] The lack of clarity regarding this disbursement is one factor that the court will have to consider in determining what quantum of costs is appropriate.

Summary of Costs Issues

Costs Application of Clinton Robinson

[131] The deductions that the court finds are to be deducted from the claim of costs for Clinton Robinson are as follows:

Punitive costs - $150,000 plus HST
Premiums - $ 60,000 plus HST
Line 145 – Gargantua – oral submissions in a different action $250
Line 180 and line 181 – duplication $200
Lines 91, 94, 97, 98-04,107, 115 relating to a cost application in Superior Court or to another action for a total of $9257.50
Disbursement - $ 23,700, a portion of such claim

[132] Essentially, what remains with respect to these accounts are the actual accounts rendered to Clinton Robinson of $78,209.60 less deductions of $9,707.50 for a total of $68,502.10 plus HST plus disbursements. I am uncertain as to whether or not the disbursement of $23700 was appropriate or not given the lack of full information or provision of an updated invoice.

[133] I will accept for the purposes of this cost award that at least a portion of that invoice was appropriate.

[134] I will also accept as conceded by the Crown that some further cost award is appropriate given subsequent attendances by counsel after the submission of the estimated bill of costs dated November 3 2016.

[135] I accept that a fee for correspondence is an acceptable expense and cost.

[136] Therefore, under the circumstances, I find that a reasonable and appropriate order for costs owing by the Crown to Clinton Robinson is in the amount of $90,000, inclusive of fees, disbursements and taxes. I find that such an award is

appropriate to express the court's denunciation of the Crown's actions in the circumstances of this case while providing reasonable indemnification in accordance with the existing case law.

Costs Application of Gilles Robinson, Chief Dean Sayers and Phillip Swanson

[137] The court finds that the following are appropriate "Deductions" from the total bill submitted:

October 1, 2009	–	cost application to SCJ	-	$ 1,500.00
April 23, 2012	–	motion to intervene Blais case	-	$ 3,442.50
May 16, 2012	–	Blais intervention	-	$ 3,843.75
Advanced cost application to Superior Court			-	$63,533.29

Expert reports – 50 percent of Thor Conway; Susan- Elaine Gray and GWS for a total of $4000 + $3000 + $34811.45= $ 41, 811.45

In addition, added to the initial claim for costs (which is either $418,911.34 or $420,469.83 depending on which version of accounts is accepted) were the additional costs rendered on Oct. 26, 2016 of $4595.30 and an additional $5250.00 is being claimed (see paragraph 2 of applicant's reply factum on costs.)

[138] The starting point as to the total bill before deductions is therefore $430,315.13 less deductions of $114,130.99 for a total of $316,184.14.

[139] Considering all the factors as set earlier in Fercan and Singh, supra, and recognizing my findings that the Crown showed a marked and unacceptable departure from the reasonable standards expected of the prosecution, and the exceptional circumstances of this case, and recognizing the importance that the resolution of this case had to the local Batchewana First nation community, and the effect that his failure to prosecute this matter has on the community, I find that an appropriate and reasonable award of costs payable by the Crown to the group of three defendants Gilles Robinson, Dean Sayers and Philip Swanson is $300,000 including fees, disbursements and HST.

SUMMARY OF ORDERS

[140] In summary the court makes the following orders:

1. The Crown shall be granted leave to withdraw Informations numbered 528, 529, and 530 before the court.
2. The Crown shall be ordered to pay to the defendant Clinton Robinson costs fixed in the amount of $90,000 including fees, disbursements and taxes.
3. The Crown shall be ordered to pay to the three remaining defendants Dean Sayers, Gilles Robinson, and Philip Swanson the sum of $300,000 including fees, disbursements and taxes.
4. Such payment of costs to be made within 30 days of judgment.

Released: February 13, 2017

R. D. Kwolek

Justice R. Kwolek, Ontario Court of Justice

ORIGINAL

APPENDIX

Appendix – for purposes of making my determination on the issue of costs and for leave to withdraw, for the completeness of the court record, I have considered the following evidentiary documentation which was received by the court and provided to all parties:

1) Notice of constitutional Question of the Defendant Clinton Robinson dated May 13, 2016.
2) Affidavit of Claudette Rodway sworn May 13, 2016.
3) Affidavit of Claudette Rodway sworn July 4, 2016.
4) Affidavit of Dorothy Alderson sworn August 2, 2016.
5) Affidavit of Claudette Rodway, sworn Oct. 12, 2016
6) Amended affidavit of Dorothy Alderson sworn October 26 , 2016.
7) Affidavit of Clinton Robinson sworn November 23, 2016.
8) Redacted estimated Bill of Costs of the Defendant Clinton Robinson from Nov. 3, 2008 to Nov. 3, 2016 together with invoice of Joe Tom Sayers dated 10-04 -23.
9) A series of redacted accounts provided by counsel for the three defendants Dean Sayers, Gilles Robinson and Philip Swanson.

I have reviewed and considered Exhibits 1,2, 3, 4a and 4b.
In addition, on the issue of costs, the parties provided factums, responding factums and reply factums and relating to the issue of granting leave of the Crown to withdraw charges, a factum was prepared by the Crown and a responding factum was also provided by counsel for Clinton Robinson.
In addition, I have considered and reviewed the case law provide by counsel for all parties.