



Huu-ay-aht First Nations Tribunal

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Chair: John R. Rich

Registrar: Deborah Smith

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Recommendation to Executive Council February 21, 2014

**Re: Application Numbers: 2014-001, 2014-002, 2014-003,
2014-004, 2014-005, 2014-006 and 2014-007
Requests for Legal Advice and Representation**

Applicants Charlene Kruse and Sheila Charles have each requested that independent legal counsel be provided pursuant to s.15 of the Tribunal Act.

This recommendation to Executive Council is made pursuant to s.15 of the Act, and applies to both Applicants.

This recommendation is based on the provisions of the Tribunal Act, and the respective Applications and Responses of the parties. The Tribunal has made no assessment of the merits of any of the Applications, nor made any assumptions respecting their probability of success. All consideration of the merits will await the hearings of the Applications, set for March 18, 2014, (Kruse), and March 19-20 (Charles).

TRIBUNAL ACT

Section 15 provides:

Independent advocate

- 15(1) If the chair reasonably believes that a matter before the tribunal is unusually complex or has significant implications for the Huu-ay-aht, the chair may recommend to Executive Council that an individual be provided with independent legal advice and representation for the matter.
- (2) Executive Council must take the steps necessary to pay the cost of independent legal advice for an individual under subsection (1).

Section 1 of the Act is also relevant:

Purpose

- 1 The purpose of this Act is to establish an independent tribunal to
 - (a) ensure government decision-making is lawful and in the best interests of the HUU-AY-AHT, and
 - (b) provide for the just, timely, cost-effective and final resolution of HUU-AY-AHT disputes.

SUBMISSIONS

In separate letters to the Tribunal, each Applicant bases her request on principles of fairness.

The Respondents in all Applications oppose the requests on various grounds, in particular s.15 of the Act, set out above. The submissions of the Respondents are discussed below.

FAIRNESS

Allegations of unlawful conduct on the part of government, or government officials are serious matters. They need to be resolved to the satisfaction of all HUU-AY-AHT First Nations (HFN) citizens. Justice must not only be done, it must be seen to be done. It is unlikely this will be achieved if the process before the Tribunal is not perceived by all to be fair.

In the view of the Tribunal, the requests based on fairness have merit. These citizens, having limited resources and no legal training, are raising issues respecting the proper administration of HFN Laws. Defending these claims, the HFN administration has significant resources, including legal advice and representation. It is clearly "an uneven playing field" as asserted by Ms. Kruse.

However, while fairness is an essential aspect in seeking justice and upholding the Rule of Law, it alone cannot be the basis of a recommendation pursuant to s.15 of the Act.

TRIBUNAL ACT PROVISIONS

The Respondents submit that any recommendation to provide legal representation is governed by s.15 of the Act. I agree.

Pursuant to s.15(1), the matters raised by the Applications must be either unusually complex, or have significant implications for the HFN.

However, the statute must be read as a whole, and the Tribunal must also have regard to s.1, set out above. Ensuring that Government decision making is lawful is fundamental to the establishment of the Tribunal. Ensuring that proceedings are "just, timely and cost effective" must be kept in mind when considering s.15.

COMPLEXITY

The Respondents say that these proceedings are not unusually complex within the meaning of s.15.

The Applications raise issues respecting the adherence of HFN Administration to HFN laws. Generally speaking, resolution of the claims will involve identification of the relevant laws and determining whether they have been breached. While acknowledging that there may be issues of interpretation and potentially conflicting evidence, I cannot conclude that these matters are "unusually complex" as contemplated by the statute.

Other issues, collateral to the substantive claims and defences may be more complex, however. For example, in the present submissions, the Respondents suggest that some applications do not relate to "decisions", within the meaning of the Act. The Respondent states that in Application 2014-04, standing is an issue. The Respondents also say that where actions have been taken and money spent, there cannot be significant implications for the HFN.

These points foreshadow arguments relating to statutory interpretation respecting the requirement for a "decision", and questions of standing and mootness, all of which are complex legal issues, for lawyers, and even more so for laypersons.

Another factor that adds to the complexity in these cases is the fact that these Applications are the first to be brought before the Tribunal by citizens, so that there is no precedent or guidance available to deal with some of these issues.

CONCLUSION ON COMPLEXITY

Thus, it cannot be said that the matters before the Tribunal, including issues likely to arise at the hearings, are not complex. However, the requirement of s.15 is "unusually complex".

On balance, given the record to date, what may be anticipated going forward, and the fact that these are the first citizen Applications before the Tribunal, I consider that legal advice is warranted on the basis of unusual complexity.

IMPLICATIONS - GENERAL

The Respondents also argue that the Applications do not have significant implications for the HFN.

Generally, I disagree.

At this stage of the proceedings it is not possible to determine "implications" with precision, since adjudication remains in the future. However, that must always be the case where the Tribunal is considering a recommendation under s.15. The determination here must be based on the Applications, Responses, and various submissions made to date.

HFN Laws have been in effect for less than three years. In that time there have been no citizen applications questioning the adherence to those laws by HFN Administration. Rulings of the Tribunal on the present Applications could establish precedents for future Tribunal applications.

Further, in the event the Applications, or any of them, are determined by the Tribunal to be well founded, the consequences for the HFN Administration are potentially serious.

IMPLICATIONS - RESPONDENTS' SUBMISSIONS

Charles Applications

The Respondent argues that none of the seven Applications by Ms. Charles have significant implications for the HFN.

With respect to three of the Applications, the Respondent bases this argument on the assertion that there has been no decision on which the Application may be brought. However, without deciding this issue, I note that there is case authority to suggest that review of government conduct may proceed regardless of an identified "decision": see e.g. *Huu-ay-aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 and *Krause v. Canada*, [1999] F.C.J. No. 179 (FCA). Thus, I do not agree that the lack of a "decision" is sufficient to conclude that the Application will have no significant implications.

In respect of another three Applications, the Respondent says that money has been spent and work done, so there can be no significant implications. This may be correct, if indeed the complaints have been rendered moot. However, as I have noted above, mootness is a complex legal issue, which will only be determined on hearing the Applications (see e.g. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, *Schlenker v. Torgrimson* 2013 BCCA 9, *Sandhu v. BC (Provincial Court)* 2013 BCCA 88, *Campbell v. British Columbia (Forest and Range)* 2012 BCCA 274).

Respecting the remaining Application, the Respondent says that the hiring of a receptionist has implications only for those involved in the hiring, who are "directly affected". However, that would not be the case if there were improprieties in the process which would affect the confidence of HFN members in the government administration.

I am not persuaded by the Respondents' submissions to alter my view that the Charles Applications have potentially significant implications for the HFN.

Kruse Application

The Respondents argue that none of the matters raised in the Kruse Applications have significant implications for the HFN. They argue strongly that the claims and any potential remedies are insignificant.

As with the arguments in the Charles Applications, issues are raised relating to mootness and the lack of a decision being challenged.

I am not persuaded by these submissions to alter my view, expressed above.

CONCLUSION ON IMPLICATIONS

I find that the potential for serious consequences, together with the importance that all government conduct be lawful, means that these Applications have significant implications for the HFN

S. 1 CONSIDERATIONS

I also find that s.1 of the Act supports my assessment under s.15.

Section 1(a) establishes that the Tribunal is to ensure that government decision making is lawful. This is the issue raised in the Applications. If it is determined that the Applications, or any of them, are without merit, then HFN citizens may be confident in the management of HFN affairs. However, if that should not be the case, implications could be very significant. These important determinations will be best served by having legal counsel on both sides.

Section 1(b) directs that the Tribunal is to ensure that disputes are to be resolved in a manner that is "just, timely and cost-effective". Each of these objectives will be met if all parties have legal representation.

"Just" includes the concept of fairness, discussed above. Legal representation will ensure fairness.

Legal representation will likely result in a timely and cost-effective proceeding. Although there will be the cost of paying for a lawyer for the Applicants, there will be a saving in Tribunal time, and thus expense. If, as suggested by counsel at the Case Management Conference, the Applications have little merit, legal advice will deter the Applicants from wasting time on hopeless causes. On the other hand, if the Applications have merit, legal representation should ensure that evidence and argument are presented efficiently.

Section 1 also bears on the Respondent's argument, in respect of both Applicants, that the question of a s.15 recommendation should be considered separately for each "matter" raised. I disagree. Not only does this suggestion run counter to practicality, it is inconsistent with s.1(b).

PRECEDENT

Given that these are the first citizen Applications before the Tribunal, the recommendation made here should not be taken as a precedent in future applications, which should be considered on their merits.

RECOMMENDATION

The Tribunal recommends that Applicants Charlene Kruse and Sheila Charles be provided with legal advice and representation, pursuant to s.15 of the Tribunal Act.

ONE LAWYER

There is no evident conflict between the claims of the two Applicants, rather their Applications appear to have similar thrust, challenging government procedure and decision making. There would be no disadvantage, and considerable efficiency gained by having one lawyer represent both Applicants. In my view this would be fully in compliance with s.15, having regard to s.1 of the Act.

TRIBUNAL ASSISTANCE

The Tribunal is prepared to assist the parties in obtaining legal representation. In this regard, I suggest that a conference call be arranged with Tribunal counsel, the Applicants, and Respondent's counsel. I will request Tribunal counsel to contact each of the parties in this regard.



John Rich
Tribunal Chair