

Huu-ay-aht Tribunal Application Hearings

Huu-ay-aht Tribunal Applications: 2013-002, 2013-005

Hearing Date: June 10-11, 2014

Charlene Kruse Tribunal Applications

RESPONSE ARGUMENT TO SUBMISSIONS WITH RESPECT TO COSTS

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Table of Contents

A. Introduction.....	1
B. Facts	1
C. Law	3
D. Argument	4

A. Introduction

1. The Applicant opposes the Respondents' application for legal costs in respect of Applications 2013-002 and 2013-005 ("**Applications**").
2. The Tribunal exercised its discretion on February 21, 2014 to order the Respondents to pay for the Applicant's legal counsel ("**Funding Order**"). The Tribunal was aware of the Respondents' mootness arguments when it made that Funding Order. The Tribunal did not require the mootness matter to be adjudicated first. Moreover, in its decision ordering that funding for the Applicant, the Tribunal signalled that it perceived value to adjudicating the Applications whether or not they ultimately succeeded. Ms. Kruse would not have proceeded to hearing without the Funding Order. There is no suggestion by the Respondent that the Applicant conducted her litigation improperly, nor would there be any basis for such a suggestion. In light of these circumstances, it would be fundamentally unjust and indeed, perverse, for the same Tribunal that allowed the litigation to proceed without requiring the mootness issue to be decided on a preliminary basis to now make a costs order against the Applicant.

B. Facts

3. By letter of February 5, 2014, Ms. Kruse applied to the Tribunal for an order for funding for legal counsel for her applications, pursuant to s. 15 of the *Tribunal Act*. These applications included Applications 2013-002 and 2013-005 (hereinafter jointly referred to as "**Applications**").¹
4. By the time the Applicant applied for funding for legal counsel, the Huu-ay-aht First Nation ("**HFN**") had already amended the *Human Resources Policy Regulation* to eliminate the position of Director of Finance. The Executive Council had also rescinded its resolution of August 27, 2013, appointing the Executive Director as Economic Development Officer, and was already in the process of searching for a candidate to fill that position.
5. By letter of February 18, 2014, the Respondents opposed Ms. Kruse's application for funding of legal counsel. HFN specifically argued that Application 2013-002 carried no practical significance because the Executive Council had already amended the *Human Resources*

¹ Applicant's letter of February 5, 2015 requesting funding for legal counsel.

Policy Regulation and eliminated the position of Director of Finance. The Respondents also specifically argued that Application 2013-005 carried no significant implications because “[a] hiring process to select a candidate [for the position of Economic Development Officer] is underway.”²

6. In their Amended Responses of February 18, 2014, the Respondents expressly alleged that the Applications were moot.

7. Thus, the straightforward facts supporting the Respondents’ mootness argument had already arisen, and the Respondents brought these facts to the Tribunal’s attention as part of their response to Ms. Kruse’s funding application.

8. On February 21, 2014, the Tribunal made the Funding Order. The Tribunal made this order after expressly acknowledging the Respondent’s mootness arguments.³ The Tribunal did not phase the hearing of the issues so as to require that the preliminary matter of mootness be decided first.

9. In granting the Funding Order, the Tribunal signalled that it considered Ms. Kruse’s applications to be raising important issues, worthy of adjudication on the merits:

These citizens... are raising issues respecting the proper administration of HFN Laws.⁴

...

HFN Laws have been in effect for less than three years....Rulings of the Tribunal on the present Applications could establish precedents for future Tribunal applications.⁵

...

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.⁶

² Respondent’s letter of February 18, 2014 in response to Applicant’s requests for funding for legal counsel.

³ Recommendation to Executive Council (February 21, 2014) [“**Costs Decision**”] at pp. 4-5.

⁴ Costs Decision p. 2

⁵ Costs Decision p. 4.

⁶ Costs Decision p. 5.

10. Prior to the hearing, Ms. Kruse withdrew application 2013-004 and settled applications 2013-003 and 2013-006, and the Respondents' application for legal costs does not concern these other applications.⁷

11. As Ms. Kruse explained in her opening statement at the hearing, she did not bring these Applications for any personal gain or out of any ill motive. Rather, this HFN citizen brought them out of concern for HFN's governance practices, and more specifically, out of a concern that the Respondents were assigning critical public functions and responsibilities to the Executive Director in an unlawful manner.

12. Although the Respondents argue that the Applications should not have proceeded to hearing, they do not allege that the Applicant or her legal counsel conducted the litigation in a manner that was improper, vexatious, frivolous or abusive.

13. The Applicant would not have brought her applications all the way to hearing had she not been provided with an order for funding for legal counsel, as she would not have had the capacity to prepare and present the relevant legal arguments on her own. But for the Funding Order, the Applications would not have proceeded to hearing.⁸

C. Law

14. The Applicant agrees with the Respondents that Tribunal's *Rules of Practice and Procedure, Part P*, govern the Tribunal's decisions on legal costs awards:

2. In considering the amount of costs to award, the Tribunal will consider:
 - (a) success of a party on the matter before the Tribunal;
 - (b) success of any party on a significant issue before the Tribunal;
 - (c) conduct which has unduly increased the length or expense of a hearing;
 - (d) conduct which has been improper, vexatious, frivolous or abusive; and
 - (e) other factors which in the opinion of the Tribunal are relevant to the amount of costs ("**Tribunal Cost Principles**").

15. The Tribunal Cost Principles confirm that the award of costs is a discretionary matter. The fact that a party has lost does not necessarily mean that costs should be awarded against

⁷ Tribunal decision for Applications 2013-002 and 2013-005, June 23, 2014, ["**Tribunal Decision**"], para. 97.

⁸ Affidavit #1 of Charlene Kruse.

them. All relevant factors must be considered. This is consistent with the general law on costs in Canadian courts.

16. The Applicant is not aware of any litigation in Canada in which a court provided an advance costs order to a party and then, after the hearing, penalized that same party with legal costs.

17. Section 33 of the *Tribunal Act* provides the Tribunal with broad discretion over its own procedure by incorporating s. 11 of British Columbia's *Administrative Tribunals Act*:

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as follows:

...

(k) respecting procedures for preliminary or interim matters;

18. This too is consistent with the general rule in Canadian administrative law that tribunals are the masters of their own procedure.

D. Argument

19. The Applicant will review each of the considerations the Tribunal Costs Principles in turn.

20. With respect to s. 2(a) and (b), the Respondents correctly note that they were successful on the Applications.

21. With respect to s. 2(c), the Respondents do not suggest that the Applicant unduly increased the length or expense of the June 10-11 hearing. On the contrary, counsel worked cooperatively to ensure that the hearing would run smoothly and as efficiently as possible. The Applicant's opening statement, cross-examinations and closing argument were all of reasonable

length and the Applicant did not extend the length of the hearing by raising any inappropriate or irrelevant issues.

22. Section 2(d) does not ask us to consider whether the party against whom costs are sought proceeded to hearing and lost, as that factor is already covered by sections 2(a) and (b). Rather, “conduct which has been improper, vexatious, frivolous or abusive” refers to inappropriate litigation conduct by the Applicant or her legal counsel, such as conduct that was deliberately or negligently contrary to the rules of procedure, or, in the case of legal counsel, conduct that was lacking in professionalism or dishonourable. The Respondents do not allege any such conduct by the Applicant or her legal counsel, nor would any such allegations have any merit.

23. Section 2(e) enables the Tribunal to exercise broad discretion in deciding whether it would be fair and just to award costs against the Applicant. The Applicant relies on s. 2(e) and submits that in the case at bar, it would be fundamentally unfair to order costs against the Applicant:

- a) The Tribunal was aware of the facts giving rise to the Respondents’ mootness arguments and acknowledged the Respondents’ mootness arguments when it made the Funding Order. The Tribunal had the jurisdiction under s. 15 of the *Tribunal Act* to require legal counsel funding for only *some* of Ms. Kruse’s applications, and it could have refused funding to those that it considered moot. Alternatively, the Tribunal could have ordered that the proceedings move forward on a phased basis, with the Respondent’s preliminary arguments of mootness (and any other preliminary objections) being heard first. Indeed, courts hearing advance costs applications in Aboriginal cases regularly phase their funding orders and require certain matters to be adjudicated first: *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418 (Ont. S.C.J.) at paras. 245-246; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2007 BCSC 1014 at para. 92; *Fletcher v. Ontario*, 2011 ONSC 5196 at para. 45. This is what the Tribunal should have done, pursuant to its authority to manage its own proceedings under s. 11 of the *Administrative Tribunals Act*, if it was open to dismissing the Applications on the basis of mootness and concerned about minimizing hearing costs.
- b) As noted above, the Tribunal in its Costs Decision observed that the Applicant was bringing “issues respecting the proper administration of HFN Laws”, that “[r]ulings of the Tribunal on the present Applications could establish precedents for future Tribunal applications” and that if Ms. Kruse’s applications were dismissed, “HFN citizens may be confident in the management of HFN affairs.” The Tribunal thereby signalled that it considered Ms. Kruse

to be raising important issues, even if the Applications ultimately failed on the merits, and that her applications had the potential to set valuable precedents. By making those statements and by providing a Funding Order over and above the Respondents' mootness objections, the Tribunal signalled that it was interested in hearing the Applications on their merits. This signal was significant given that the application of the mootness doctrine lies entirely at the Tribunal's discretion.

- c) Ultimately, the Tribunal dismissed the Applications on the preliminary grounds of mootness, meaning that it did not dismiss the Applications on the merits or deem them "unfounded", as suggested by the Respondents at para. 12(g) of their argument. The Applicant submits that she advanced evidence and reasonable legal arguments to support her positions in both Applications. Preliminary issues such as mootness aside, she had an arguable case on both Applications. They raised legitimate concerns about HFN's approach to governance, namely whether the Respondents had purported to unlawfully amend the *Human Resources Policy Regulation* in June 2013 by eliminating the position of Finance Director and whether the Executive Director could, as a matter of law, appoint himself as Economic Development Officer pursuant to s. 12(2) of the *Economic Development Act*.
- d) The Applicant did not bring her applications for any personal gain or out of any ill motive. Rather, she brought them out of a genuine concern in her capacity as an HFN citizen that the Respondents were not abiding by HFN's governance laws and were concentrating too much responsibility and power in one staff position.
- e) The Applicant would not have proceeded to hearing without the benefit of the Funding Order. The Applicant would not now be facing the risk of a detrimental financial order but for the Tribunal enabling her to bring her applications to hearing with the Funding Order.
- f) The Respondents could have raised mootness as a preliminary issue but, as noted by the Tribunal in its Decision, they did not do so.⁹
- g) The Respondents suggest at para. 12(c) of their argument for legal costs that the Applicant was remiss in refusing to enter into a dispute resolution process in respect of the Applications. However, Ms. Kruse was asked to enter into that process before she had the benefit of legal counsel. More importantly, the dispute resolution process for the Applications would have been futile (and this costs application concerns only the Applications, not Ms. Kruse's other applications). Whereas Ms. Kruse ultimately withdrew one of her applications and settled two of them, no settlement would have been appropriate for the Applications, pursuant to which Ms. Kruse sought official, public confirmation that the Executive Director and Executive Council had failed to follow HFN legislation in the

⁹ Tribunal Decision, para. 21.

way that they assigned important government functions to the Executive Director, and a binding declaration that the Executive Director could not appoint himself as Economic Development Officer.

24. For all of the above reasons, it would be fundamentally unfair to now impose a financial burden on Ms. Kruse for having brought the Applications to hearing. Indeed, given that the Tribunal enabled the Applications to proceed and did not require the mootness issue to be heard first, it would be perverse for the Tribunal to now make an order penalizing Ms. Kruse for having proceeded to hearing on the merits of the Applications and putting her in a worse financial position than she would have been in absent the Funding Order.

25. It is not necessary to order costs against Mr. Kruse in order to send appropriate signals to potential applicants or to protect HFN from unnecessary legal costs. Even without awarding costs to the Respondents in this case, the Tribunal retains full discretion to manage the implications of any future legal funding requests by applicants: for example, the Tribunal may refuse to grant funding orders in future cases, phase hearings to narrow or control scope of future funding orders, or penalize future litigants who benefit from a funding order but then conduct litigation in an improper fashion.

All of which is respectfully submitted this 8th day of July, 2014.



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